



## Department of Transformation and Shared Services

Governor Sarah Huckabee Sanders

Secretary Leslie Fiskin

Director Edward Armstrong

January 10, 2024

Mr. Mark. W. Hodge  
Barber Law Firm, PLLC  
425 West Capitol Avenue  
Suite 3400  
Little Rock, Arkansas 72201

Re: Protest of Award in Connection with DHS Solicitation 710-23-0081 (the "RFP")

Dear Mr. Hodge,

On December 22, 2023, Delta Dental Plan of Arkansas, Inc. ("Delta Dental") protested the Department of Human Service's (DHS) anticipated award of four dental managed care contracts instead of two or three, as DHS indicated it had planned to do in the introduction of the RFP. Secretary Putnam, as the head of DHS, asked me to determine whether the protest should be sustained or dismissed.

Because Delta Dental is not "aggrieved in connection with the award of a contract," as that term is defined in OSP Rule R1:19-11-244.1, and the introductory language relied upon is not a "rule" of the procurement, as set forth more fully below, the protest is dismissed.

### I. THRESHOLD CONSIDERATIONS

As a threshold matter, I note that the right to protest a contract award is limited to an "actual bidder, offeror, or contractor who is aggrieved in connection with the award of a contract."<sup>1</sup> Such a protest must be submitted in writing to the State Procurement Director or the head of the agency conducting the procurement within fourteen calendar days after the calendar day on which the contract is awarded or the notice of anticipation to award ("ATA") the contract is posted, whichever is first.<sup>2</sup> A protest so submitted must raise one or more statutory grounds.<sup>3</sup>

Delta Dental is an actual offeror. It is also a "contractor"<sup>4</sup> for purposes of Arkansas Procurement Law because it is currently one of two incumbent dental managed care organizations ("DMCOs") DHS contracts with to serve the approximately 630,000 enrolled Medicaid and Child Health Insurance Program ("CHIP") members. Delta Dental timely submitted

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<sup>1</sup> Ark. Code Ann. § 19-11-244(a)(2).

<sup>2</sup> See Ark. Code Ann. § 19-11-244(a)(3).

<sup>3</sup> See Ark. Code Ann. § 19-11-244(a)(4)(A).

<sup>4</sup> See Ark. Code Ann. § 19-11-203(7) ("Contractor" means any person having a contract with a state agency.).

its protest within the fourteen-calendar day period provided in Ark. Code Ann. § 19-11-244(a)(3). However, as an anticipated awardee of a contract, it is not a party “[a]ggrieved in connection with the award of a contract” as that term is defined at OSP Rule R1:19-11-244.1, which provides:

“Aggrieved in connection with the award of a contract is the condition of being an actual bidder, offeror, or contractor who has been denied the award of a contract as the result of the improper or unlawful award of the contract.”

Here, Delta Dental has been named as an awardee, so it doesn’t fall within the regulatory definition. However, Delta Dental contends that it is an “aggrieved” party as that term has been understood by Arkansas courts.<sup>5</sup> It cites to two cases, *Arkansas State Highway Comm’n v. Perrin*, 240 Ark. 302, 306, 399 S.W.2d 287, 290 (1966) and *Forrest Constr., Inc. v. Milam*, 345 Ark. 1, 7, 43 S.W.3d 140, 144 (2001), as authority for the proposition that to be aggrieved means to suffer an adverse financial consequence.<sup>6</sup> Delta Dental argues that it was aggrieved in this sense of the word.

This argument ignores the fact that the term “aggrieved in connection with the award of a contract” is specifically defined by administrative rule, and Delta Dental does not meet the definition as it has not been *denied* the award of a contract. OSP Rule R1:19-11-244.1 (emphasis added). Indeed, it is an awardee. Consequently, it has not been “aggrieved in connection with the award of a contract” as that term is now administratively defined.<sup>7</sup> Under a broader definition of what it means to be “aggrieved,” Delta Dental makes a colorable case that it would be better off economically as one of two rather than four DMCOs. But being aggrieved in that broader sense would not be sufficient unless it was in connection with one or more protest grounds.<sup>8</sup> Although Delta Dental asserts that it has grounds under Ark. Code Ann. § 19-11-244(a)(4)(A), the RFP introduction that Delta Dental relies on does not state any “rules of the procurement,” as explained more fully below.

## II. ANALYSIS OF GROUNDS

Each protest must show facts substantiating one or more statutory grounds.<sup>9</sup> Delta Dental asserts its protest rests on the grounds that, “[t]he director or the procurement agency failed to adhere to the rules of the procurement as stated in the solicitation, and the failure to adhere to the rules of the procurement materially affected the contract award.”<sup>10</sup> The term “rules of the procurement” comes from Ark. Code Ann. § 19-11-244(a)(4)(A)(iii), which identifies one of the statutorily permissible grounds of a protest. This term is not given a special definition in Arkansas Procurement Law, so I allow the words to have their ordinary, everyday meaning.<sup>11</sup> A principal meaning of the word “rule” is a “prescribed guide for conduct or action,”<sup>12</sup> and I understand the phrase “rules of a procurement as stated in the solicitation” to mean statements made in a solicitation that prescribe conduct or action for bidders or offerors as well as

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<sup>5</sup> Protest, 5.

<sup>6</sup> *Id.*

<sup>7</sup> I previously relied on the cases cited by Delta Dental to illustrate what it means to be “aggrieved.” However, that was prior to the promulgation of OSP Rule R1:19-11-244.1.

<sup>8</sup> See Ark. Code Ann. § 19-11-244(a)(4)(A).

<sup>9</sup> *Id.*

<sup>10</sup> Protest, 3.

<sup>11</sup> See *Williams v. Little Rock School District*, 347 Ark. 637, 66 S.W.3d 590 (2002) (holding that the general rule is to give the words of a statute their ordinary and accepted meaning in common language).

<sup>12</sup> See [Rule, Definition & Meaning - Merriam-Webster Dictionary](#).

statements made in the solicitation that prescribe conduct or action for the procurement agency.

In this case, the RFP's introductory statement is more akin to a statement of intent or recitals in a contract than a statement prescribing required conduct or action for either the offerors or DHS. Although the statement DHS made about its intended plans may have provided a basis for an offeror to assume that DHS planned to act in accordance with its statement, the statement is aspirational and DHS does not unambiguously bind itself to a course of conduct as it would have if the RFP had stated, for example, "DHS shall award contracts to no more than three responsible offerors." Therefore, I conclude that the RFP's introductory statement that DHS planned to award contracts to two or three DMCOs is not a "rule" of the RFP.

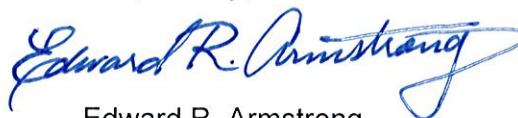
### III. CONCLUSION

I cannot sustain the protest because: (1) Delta Dental is not "aggrieved in connection with the award of a contract," as that term is administratively defined in OSP Rule R1:19-11-244.1; and (2) even if it is "aggrieved" in the broader sense of the term, it has not been aggrieved by DHS violating a "rule" of the procurement as stated in the solicitation. However, because Delta Dental suggests that it would have modified the technical and operational design of its proposal if a four-vendor contract were a stated possibility under the RFP, DHS may want to seek affirmations from offerors that their submitted proposals are actuarially sound and not based on a mistaken understanding of material facts regarding the number of members enrolled in the dental managed care program they would likely be serving.

Outside of the scope of the protest, but directly implicated in any award to multiple vendors, are the requirements of Ark. Code. Ann. § 19-11-262. Before DHS awards any contract or contracts under this RFP, it will have to ensure that these requirements of Arkansas Procurement Law are satisfied if they have not already been.

WHEREFORE, Delta Dental's protest is dismissed for the reasons set forth above. DHS may move forward consistent with Arkansas Procurement Law including, specifically, Ark. Code Ann. § 19-11-262. This determination is final and conclusive.

Respectfully,



Edward R. Armstrong  
State Procurement Director

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