

STATE OF KANSAS



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GOVERNOR JEFF COLYER, M.D.
SARAH SHIPMAN, SECRETARY

July 30, 2018

Mr. Trevor C. Wohlford
Mr. Will E. Wohlford
Morris, Laing, Evans, Brock & Kennedy, Chtd.
Old Town Square
300 N. Mead, Suite 200
Wichita, Kansas 67202

Dear Messrs. Wolhford:

Amerigroup's protest of the contract award made in response to the Request for Proposal (RFP) issued pursuant to K.S.A. 75-37,102 in Bid Event 0005464 was received on June 29, 2018. Subsequent submissions made by Amerigroup legal counsel were received on July 3, 2018 and July 5, 2018, with a final submission received directly from Amerigroup's President and CEO on July 10, 2018. These were considered supplemental submissions to the original protest.

Contracts in Bid Event # 0005464 were awarded and issued to the vendors on June 18, 2018. The contracts were executed by the State on June 22, 2018. Subsequently, the contracts were posted to the Office of Procurement and Contracts – Department of Administration (OPC) website and were available to the public on June 23, 2018.

The RFP in Bid Event 0005464 was posted and available to any potential bidders on November 2, 2017. The bid event is governed by K.S.A. 75-37,102 and is a negotiated procurement. The bid event closed on January 5, 2018 at 2:00 p.m. Amerigroup was one of six (6) bidders which submitted sealed competitive proposals for consideration by the State of Kansas.

As part of the procurement process, questions were permitted to be submitted by the bidders. The closing date for initial questions to be submitted for the RFP was November 13, 2017. With a second round of questions from bidders to be submitted by December 6, 2017. The questions submitted during both rounds were reviewed and answered. The questions and answers were posted online on the OPC website as amendments to the RFP. These amendments were available to all potential bidders to be reviewed.

During the course of the procurement process, there were several opportunities for face-to-face meetings with the bidders. The first meeting was a non-mandatory pre-bid meeting held on November 20, 2017. Information was provided to the bidders by the State's actuarial, Optumas, and questions were submitted by the attendees. The answers to these questions were posted online as part of the bid event as an amendment to the RFP. Subsequently, there was a mandatory pre-bid telephone conference meeting held on December 15, 2017. All six (6) bidders participated in this meeting.

Information was provided to all the bidders regarding the bid event, to include information from the State's actuarial consultants.

After the bid event had closed and the proposals had been received, there was a face-to-face meeting with all vendors on March 7, 2018. The purpose of this meeting was an opportunity to update all the bidders on the procurement process and to address questions which may have existed with the bidders regarding the Legislature's efforts to pass a separate piece of legislation regarding the bid event. During this period of time, the Procurement Negotiating Committee (PNC) and the agency review teams continued to evaluate the technical proposals submitted by all six (6) bidders.

The technical reviews of all six (6) proposals submitted were completed by the PNC and agency review teams on April 6, 2018. Upon OPC receipt of the technical reviews, the cost proposals for all six (6) proposals were released by OPC to the PNC and agency review teams for evaluation. On April 10, 2018, all bidders were notified by email to submit revised cost proposals by April 20, 2018, with any questions regarding this request to be submitted by April 13, 2018. On April 12, 2018, a mandatory telephone conference call was held with all six (6) bidders. All six (6) bidders participated in the call. Following the conference call on April 12, 2018, all bidders were emailed on April 13, 2018 and told the proposals would be evaluated as they had been submitted. The request for modifications to the originally submitted proposals was stopped and no further information was provided to OPC in response to the email dated April 10, 2017.

The cost proposal review was completed and the evaluations by the PNC and agency review teams were submitted to OPC on April 20, 2018. Individual conference calls were held with each bidder and Optumas, seeking some clarification on the information received with the cost proposals and how each bidder arrived at the information they submitted. Amerigroup's conference call was held on April 26, 2018.

After all the technical proposal evaluations and cost proposal evaluations were completed, the PNC requested that four (4) vendors be brought in for face-to-face presentations and discussion on May 10 and 11, 2018. This decision eliminated two (2) bidders from further consideration. Those bidders which were asked to make presentations were Amerigroup, UnitedHealth Midwest, Sunflower and Aetna.

Amerigroup appeared before the PNC and agency review teams on May 10, 2018. On May 11, 2018, after completion of all the presentations by the four (4) remaining bidders, the PNC and agency review teams discussed the remaining bidders and their proposals. On May 16, 2018 an award recommendation was made by the PNC to offer contracts to UnitedHealth Midwest, Sunflower and Aetna.

On June 28, 2018, all releasable information regarding Bid Event # 0005464 was posted on the OPC website under KanCare Award. This included the original RFP and attachments, including all amendments posted during the procurement process, proposals from all bidders, the contracts, electronic correspondence and the evaluation documents.

Amerigroup requests a stay of the procurement process and contract execution be instituted as a result of their protest filed on June 29, 2018. Paragraph 3 of the Protest procedure, upon which they rely states:

3. If a protest has been filed before an award or renewal has been made, no contract shall be awarded or renewed until the protest has been heard, unless the Director of Purchases determines that the immediate award of the contract is necessary to protect State interest.

The Request for Stay by Amerigroup of the implementation of the contract pursuant to Paragraph 3 of the Protest procedure will not be granted.

Contracts in Bid Event # 0005464 were awarded and subsequently fully executed by the parties on June 22, 2018. This was a full week prior to Amerigroup's protest being filed. The contracts for the vendors who received a contract award were loaded into the State's financial management system and were available to the public and Amerigroup on June 23, 2018. Again, well in advance of the protest being filed. Therefore, the protest was not filed before a contract award had been made to the vendors.

Subsequent submissions by Amerigroup have requested a stay based on the clause being self-executing and mandatory under the Protest procedure, once their protest was filed. The facts as indicated previously do not support this position. Further, Paragraph 3 of the Protest procedure provides the State the additional ability to make a determination on whether a stay should be permitted or an immediate award of the contract is necessary to protect the State interest.

In this instance, such a determination is not necessary due to the timeline presented. However, the State could deny a stay if it was determined that it was in the State's interest the contracts needed to move forward. The nature of these contracts and the programs they involve would require the State to award these contracts and to continue moving forward with implementing the contracts in order to insure the citizens of the State of Kansas were able to properly access those services to which they are entitled when the contracts take effect on January 1, 2019.

Amerigroup has also asserted that a Stay should be permitted as a result of the State not making an Intent to award notification to the bidders. Amerigroup believes this was required and had it been followed Amerigroup would have been able to file its protest before any contract award was made and before contracts could have been executed with the successful vendors.

The relevant language of the Scope of Work and the terms and conditions of this bid event are contained on pages 243 and 244. The language in the bid solicitation sets forth the State may issue an Intent to Award notification. Making the intent to award discretionary. It also indicates that the State upon reviewing and evaluating the proposals may make an award without any other indication. In this instance, upon completion of the evaluation process and meetings with bidders the State made a decision to award contracts to three of the bidders and went forward with executing the contracts with those companies. This was permissible under the terms and conditions of the RFP. This eventuality was discussed with all vendors at various times during the meetings and conference calls conducted during the procurement process.

Additionally, Amerigroup requests that if a stay were not granted pursuant to paragraph 3 of the protest procedure, then the State should still grant a stay based upon K.S.A. 77-528. This statute is part of the Kansas Administrative Procedure Act (KAPA) and applies to actions which are governed by KAPA. In this instance, KAPA has no application to this process and therefore, the statute has no authority. In

accordance with K.S.A. 77-503 (a), KAPA would only apply to the extent the governing statute indicated it applied.

77-503. Application and construction; computing period of time. (a) This act applies only to the extent that other statutes expressly provide that the provisions of this act govern proceedings under those statutes.

Bid Event # 0005464 is a negotiated procurement governed by K.S.A. 75-37,102. This statute does not contain any language which would provide for KAPA to have jurisdiction in this process. Therefore, a stay under KAPA, and specifically K.S.A. 77-528 is not available to Amerigroup. The request for stay is not available and will not be authorized, as KAPA is not applicable.

Therefore, OPC will not be granting either of Amerigroup's Request for Stay as sought in its protest of bid event # 0005464.

Moving on to the substance of Amerigroup's bid protest, it challenges the award of this contract claiming the State has improperly changed the bid event after the bid closing. Amerigroup focuses on the requirements the State should utilize in a competitive sealed bid situation. The arguments put forth and case law cited by Amerigroup indicating the State acted improperly in conducting this bid solicitation and contract award focus primarily on situations which involve governmental entities seeking competitive bids for public works or construction projects. In those instances, the statutory authority which governs these bid solicitations made by the public entity are unique to those types of projects and not the underlying authority upon which the present bid solicitation was conducted.

The State of Kansas has different statutory authorities which it utilizes in conducting public procurements. K.S.A. 75-3739 – 75-3741 governs sealed competitive bidding. K.S.A. 75-37,102 governs the use of negotiated procurements or competitive sealed proposals. State universities governed by the Kansas Board of Regents operate under K.S.A. 76-769. As previously indicated, bid event # 0005464 is governed by K.S.A. 75-37,102.

Amerigroup through this protest seeks to lump all governmental procurements offered by the State of Kansas through OPC under the same umbrella and does not differentiate between the different types of public procurement options available. Therefore, in doing so has not taken into account the different types of bid solicitations and statutory authority utilized by OPC when engaging in the public procurement process. More specifically, not recognizing the statutory authority utilized in this bid solicitation.

Amerigroup continually uses the term competitive bidding when it references the current bid solicitation. It states numerous times that the competitive bidding process does not permit the State to change or deviate from the posted bid solicitation after the bid responses are received and the bid event has closed. However, Amerigroup has not recognized that the process permitted by statute and utilized by the State of Kansas in this bid solicitation is not competitive bidding, but is instead a negotiated procurement under K.S.A. 75-37,102 requiring a sealed competitive proposal be submitted.

As a negotiated procurement, the State seeks competitive sealed proposals in response to the bid solicitation. These proposals and the statutory authority involved are different from competitive sealed bidding. K.S.A. 75-3739 permits the State to engage in competitive sealed bidding. Under this statutory authority, Amerigroup is correct when claiming that changing the bid specifications or the scope of the work after the closing of the bid event would be improper. However, under K.S.A. 75-

37,102 the State is able to engage the bidders in negotiations, which could lead to changes in what the State agrees to when entering into a contract.

Kansas Attorney General's Opinion No. 93-28 put forth an explanation of the differences between the two statutes and the respective bidding processes covered through their application. It states in relevant part the following, on page 2 of the opinion:

K.S.A. 75-3739 and K.S.A. 75-37,102 provide two methods of source selection for public contract procurement but differ in the following ways:

"1. Under competitive sealed bidding, judgmental factors may be used only to determine if the supply or service bid meets the purchase description. Under competitive sealed proposals judgmental factors may be used not only to determine if the items being offered meet the purchase description, but also to evaluate competitive proposals. The effect of this different use of judgmental evaluation is that under competitive sealed bidding, once judgmental evaluation is completed, award is made on a purely objective basis to lowest responsive bidder. Under competitive sealed proposals, the quality of competing products or services may be compared and trade-offs made between price and quality of the products or services offered. Award under competitive sealed proposals is made to the responsible offeror whose proposal is most advantageous to the government.

"2. Competitive Sealed bidding and competitive sealed proposals also differ in that, under competitive sealed bidding, no change in bids is allowed once they have been opened, except for correction of errors in limited circumstances. The competitive sealed proposal method permits discussions to allow clarification to assure responsiveness to the solicitation and ultimately to negotiate an agreement, price and other factors considered." Intermediate Public Purchasing and Materials Management." National Institute of Governmental Purchasing, Inc., Falls Church, Virginia (1983) p. 1935

The premise upon which Amerigroup has claimed the State improperly took into account factors after the bid closing is inaccurate. The State through its authority to conduct a negotiated procurement has the flexibility to look at the proposals being offered by Amerigroup, as well as the other bidders, and to discuss with them their proposals and what steps the State could take to find a better solution and arrive at a decision the State found to be in the government's best interest. This permits the State the opportunity to address issues which it may not have been aware of in seeking proposals for the services involved. This in turn may lead to the deleting of services in the original RFP or discussing with the bidder other potential solutions or efficiencies which could be achieved, including seeking to lower any costs involved.

The record of this procurement shows the State consistently throughout this bid solicitation sought to maintain the integrity of the procurement process. All potential bidders were provided the same information and the same opportunities to ask questions and have them answered. Those answers were shared with all potential bidders through amendments to the bid solicitation. This allowed all bidders to have the same information. All bidders were included in all pre-bid meetings and post submission meetings, until a decision was made to reduce the bidder pool for presentations and contract awards. In addition, all bidders were provided access to a bidder's library, where they could review information provided by the agency which was relevant to the bid solicitation.

All of the proposals submitted by the six (6) bidders were evaluated first on their technical merit and only after that process was complete were the cost proposals released to the PNC and agency review teams for the cost proposals to be evaluated. To further insure the process, all employees of the State of Kansas were required to sign a Non-Disclosure agreement requiring them to not divulge, discuss or provide any information they received through their review of these proposals with anyone outside of those involved in the review for the course of the procurement process, to include the bidders. All contact and correspondence from bidders went through a single point of contact to insure the information was consistent and no unauthorized communication was taking place.

The State included all potential bidders in updates as the procurement process moved forward. Specifically, there were multiple face-to-face meetings and telephone conferences with all potential bidders having to be present. This did not change until the evaluations of the bidder proposals were completed. At which time there were instances where specific conference calls were held with a specific bidder to gather information on their specific cost proposals. Until that point, no information regarding the bid solicitation or involving the procurement process was shared unless all potential bidders were present. This included discussions with all six (6) bidders regarding the Legislative process. OPC and the agency were open in all discussions with the bidders and related all information it had available.

The decision of the PNC after consultation with the agency was to reduce the number of bidders going forward into the presentation process to four (4) bidders. Those bidders moving forward included Amerigroup. They had an opportunity to make a presentation to the PNC and the review team. At which time, Amerigroup was able to discuss their specific proposal and answer specific questions about their proposal. Amerigroup also had the opportunity during this time with the PNC to ask and have answered any questions it had regarding the bid solicitation, including issues which it has now raised in their protest. This opportunity allowed the State and Amerigroup to address the issues raised by the Kansas Legislature, but did not require it to do so.

Upon completion of the presentations, the PNC received input from those involved in reviewing the proposals and who were involved in the in-person presentations by the bidders. This information along with the evaluation of the technical and cost proposals were sufficient for the PNC to determine which bidder or bidders would be best able to provide a solution that was in the best interest of the State of Kansas. It was determined that Amerigroup would not be one of the vendors who would be offered a contract. The PNC knew Amerigroup was an incumbent vendor, but it determined that it was not in the best interest of the State to offer Amerigroup a contract.

The contracts that were awarded to UnitedHealth Midwest, Sunflower and Aetna and executed on June 22, 2018 were reviewed in consultation with the State agencies involved in utilizing these contracts. This review and consultation with OPC found the contracts awarded in Bid Event # 0005464 are consistent with the RFP initiated by the OPC and the requirements outlined in House Substitute for Senate Bill No. 109, Section 118 found at Exhibit C of Amerigroup's protest. The contracts with the three (3) successful vendors are for the required period of time. An initial three (3) year term with the option for two (2) one-year renewals. The contract does not provide for implementation of new program features which are different than those available on January 1, 2018, when the new contract takes effect on January 1, 2019.

All the potential bidders were informed orally and in writing during a presentation by Optumas, on December 15, 2017 of programs not to be included in their proposals. These instructions were to not include programs referred to as MediKan initiative, TransMed initiative, Enhanced Care Coordination, work Requirements and no new eligibility requirements in their cost proposals as part of the response to the RFP. These changes would not have had an effect on the technical proposal requested from each potential bidder as part of the RFP. At the time the bid event closed on January 5, 2018, the proviso contained in Section 118 had not been introduced. Subsequently, the proviso approved by the Kansas Legislature would only apply to Fiscal Years 2018 and 2019.

As the review process for the proposals moved forward, all of the bidders were included in updates and discussions regarding the Legislative process. On March 7, 2018, there was a face-to-face meeting with all bidders who had submitted a proposal in response to the bid solicitation. It was reinforced at this meeting, the procurement process would continue forward and would not change. This was done to keep everything consistent for all bidders who had responded to the bid solicitation.

On April 12, 2018 a telephone conference call with all bidders participating was held. The purpose was to discuss the possibility of updating and re-submitting their cost proposals. During the discussion with the different vendors participating, it was reiterated by the State agency those costs for the programs being addressed by the Legislature were not included in the cost proposals submitted, as discussed previously through the direction of Optumas. It was the decision of the State to not have the vendors expend the resources needed to accommodate a short turn-around to update their proposals. The State reiterated to all of the bidders the evaluation of the proposals would continue based upon the proposals that had been submitted. No bidder was put at a disadvantage by this determination. This was communicated to all six (6) bidders on April 13, 2018. This included Amerigroup. All bidders were at the same point in the process and their proposals were the same as had been submitted in response to the original bid solicitation. At no time thereafter did Amerigroup or any of the other bidders raise any issue that the proposals were incomplete, improper or in violation of any legislative direction. Amerigroup's claim the contracts awarded are improper or inconsistent with any legislative intent or violative of any law is not accurate.

Finally, although the State through the procurement process sought to address issues raised by the Legislature once they became known, there is some concern the proviso would not apply to this procurement. The language of the proviso was included in the State Omnibus budget bill. The proviso represents language which was originally offered as a piece of stand-alone legislation. The legislation was voted on by the Kansas Legislature during the 2018 Legislative session and did not pass. It was then inserted into the State's budget bill.

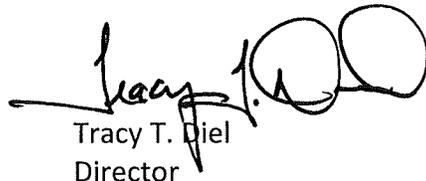
The language of the proviso appears to be directional in nature as to the procurement process. The proviso does not appear to specifically address funding and could be inconsistent with the Constitutional requirement of the only one subject rule in legislation. Kansas case law addresses this issue in State Ex Rel Stephan v. Carlin, 230 Kan. 252 631 P.2d 668 (1981), as well as Kansas Attorney General's Opinion 2009-2.

In conclusion, the standards utilized, and the arguments put forth by Amerigroup to challenge this contract award are insufficient to warrant the remedies being sought by Amerigroup. The State of Kansas followed the negotiated procurement process permitted by state

statute. The award of contracts to UnitedHealth Midwest, Sunflower and Aetna in bid event #0005464 is supported by the facts. The terms and conditions of the RFP publicized by the State were followed. The contracts awarded are consistent with the RFP and the legislative intent set forth by the Kansas Legislature. The contracts awarded were done based upon the best interests of the State and those awards are supported by the evaluations of the proposals. Therefore, the contracts issued will not be vacated and the award to the three vendors, UnitedHealth Midwest, Sunflower and Aetna, will remain in place and will continue forward to be implemented and take effect January 1, 2019.

The Director of Procurement and Contracts is the state agency officer to receive service of any petition for judicial review on behalf of the Kansas Department of Administration, Procurement and Contracts.

Sincerely,

A handwritten signature in black ink, appearing to read "Tracy T. Diel", with a stylized flourish at the end consisting of two large, overlapping loops.

Tracy T. Diel
Director
Procurement and Contracts