

July 3, 2024

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Re: Aetna Better Health of Kansas Inc.'s Protest of Awards in Request for Proposals, Bid Event No. 0009267

Dear Ms. Bellquist:

Aetna Better Health of Kansas, Inc.'s protest of the KanCare contract award made in response to the Request for Proposal (RFP) issued in Bid Event # 0009267 in accordance with K.S.A. 75-37,102 was received by the Office of Procurement and Contracts on June 5, 2024.

Contracts for Bid Event # 0009267 were solicited through an RFP governed by K.S.A. 75-37,102. This procurement event is a negotiated procurement and responses received are competitive sealed proposals. The RFP documents in Bid Event # 0009267 were posted online at the Office of Procurement and Contracts – Department of Administration's (OPC) website and available to any potential bidder on October 2, 2023. The bid event closed at 2:00 p.m. on January 4, 2024. Aetna was one of seven (7) bidders which timely submitted a sealed competitive proposal for consideration by the State of Kansas.

Contracts in Bid Event # 0009267 were awarded and issued to the vendors and executed by the parties on May 10, 2024. The State of Kansas publicly announced the vendors receiving contracts (United Healthcare of the Midwest, Inc. (United Healthcare), Sunflower State Health Plan, Inc. (Sunflower) and Community Care Health Plan dba Healthy Blue) on May 14, 2024. The State of Kansas notified the vendors who were unsuccessful bidders (Aetna, CareSource Kansas LLC (CareSource), Molina Healthcare of Kansas, Inc. (Molina) and Ucare Kansas, LLC (Ucare)) on May 14, 2024. The awarded KanCare contracts were then posted to the OPC website and were available to the public on May 15, 2024.

As part of the procurement process, the RFP permitted questions to be submitted to OPC prior to the bid closing date. These questions were then provided to the relevant state agencies involved for review and to

provide answers. The closing date for vendors to submit their questions to OPC was October 23, 2023. This date was changed by Amendment 1 to October 27, 2023. Amendment 1 was posted on the OPC website for all vendors to access. The questions and answers were posted online on the OPC website as Amendment 2 to the RFP on November 28, 2023. The amendment with the vendor's questions and the agency answers were available to all potential bidders to be reviewed.

The procurement process involved a scheduled face-to-face mandatory pre-bid conference on October 16, 2023. All vendors wanting to participate in the bid process for the KanCare RFP were required to be present at this pre-bid conference. All seven (7) vendors who submitted bids were present. These seven (7) vendors have been identified earlier in this response. In addition to the vendors attending the pre-bid conference, representatives from the Kansas Department of Health and Environment (KDHE), Department for Children and Families (DCF), Kansas Department for Aging and Disability Services (KDADS), Mercer (State's RFP consultant), Optumas (State's actuarial consultant for the RFP) and OPC were present at this meeting. During the pre-bid conference, information was provided to all the bidders relating to the bid event, including information from Optumas.

After the bid event had closed and the sealed competitive proposals had been received, the State began reviewing all of the proposals. The first step in the review process was to ensure that all mandatory requirements were met and was completed by OPC and KDHE. All bidders met the mandatory requirements. The technical proposal of each sealed competitive proposal received from the seven (7) responding bidders was next reviewed. There were four (4) evaluation committees established for reviewing and evaluating the competitive sealed proposals received in response to the KanCare RFP. A training session for all the evaluators on the agency evaluation teams was held on January 11, 2024. The purpose of this training was to prepare the evaluation committee members on how to understand and conduct their roles and responsibilities during the evaluation process and to ensure consistency in the evaluation process. All individuals involved in the evaluation process signed a Non-Disclosure - Conflict of Interest Agreement stating that they would ensure the confidentiality of the process and attesting that they had no real or apparent conflict of interest regarding the RFP.

The State used a consensus review process to evaluate and rate all of the questions posed to the vendors and included in their sealed competitive proposals. Arriving at the rating for a specific question involved a two-part process. The first part involved an independent review by members of the evaluation committees. During the period of January 18, to February 12, 2024 evaluators independently read, evaluated and rated the responses to their assigned technical questions. From February 12 to February 28, 2024 each evaluation committee participated in a consensus review. The evaluation of each response to the questions focused on one or more of the following criteria: the bidder's method of approach, experience, and capacity. The result of the review was one consensus rating per technical question based upon the review of all members of the evaluation committee. The consensus rating was then applied to the point valuation available for the question. This consensus rating also contained a narrative of the strengths and weaknesses of each bidder agreed upon by the evaluation committee.

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The technical reviews of all seven (7) competitive sealed proposals received were completed by the PNC and agency review teams on March 27, 2024. Upon receipt of the technical proposal reviews by OPC, the cost proposals for all seven (7) competitive sealed proposals were released by OPC to the PNC and the agency review teams for evaluation on March 28, 2024. The cost proposals were provided by OPC through access to a shared drive where the cost proposals were uploaded. As part of this review, United Healthcare, Sunflower, Aetna, CareSource and Healthy Blue were sent questions on April 2, 2024. The vendors were asked to provide OPC a response to the questions by April 10, 2024.

After all the technical proposal evaluations and cost proposal evaluations were completed, including the responses submitted by the five (5) vendors to the April 2 questions, the PNC requested that four (4) vendors be brought in for face-to-face discussions. These discussions were to take place on April 29 and 30, 2024. This decision eliminated three (3) of the original seven (7) bidders from further consideration. Aetna was not eliminated and was brought forward. Those bidders which were asked to meet with the PNC and evaluators to make presentations were United Healthcare, Sunflower, Healthy Blue and Aetna.

On May 8, 2024, after completion of all the meetings with the four (4) remaining bidders, the PNC's award recommendation was made by the PNC. Contracts were offered to United Healthcare, Sunflower and Healthy Blue. The contracts were executed by the parties on May 10, 2024. A public announcement was made of the successful vendors on May 14, 2024.

On May 15, 2024 OPC began the process of posting the awarded contracts and any releasable information regarding Bid Event # 0009267 in its possession to the OPC website under a special heading for the KanCare Award. This was accessible to anyone by going to the OPC website. This included the original RFP documents and attachments, including all amendments to the RFP posted during the procurement process, competitive sealed proposals from all bidders, the contracts, and the PNC award recommendation. As additional information became available OPC would then post this information in the same location on its website.

Aetna in its protest conclusion requests a stay of all related procurement process activities be instituted as a result of their protest dated June 5, 2024. Paragraph 3 of the OPC Protest procedure 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 Aetna of furthering contracting or the implementation of the contract in this bid event pursuant to Paragraph 3 of the Protest procedure will not be granted.

Contracts in Bid Event # 0009267 were awarded and fully executed by the vendors and the State of Kansas on May 10, 2024. This was before Aetna's protest was filed with OPC. Once the contracts were executed the State is not required to stay the process. In addition, these contracts are to provide services and programs,

which require their implementation to continue to proceed forward in order to allow those citizens of the State of Kansas accessing these services and programs to be able to do so when the contracts take effect on January 1, 2025. The best interest of the State of Kansas and its citizens would necessitate this process moving forward and these contracts being implemented on schedule without delay.

The scores of each of the different competitive sealed proposals received were only one part of the evaluation process used by the PNC and the evaluation committees in making its evaluations and award recommendations. Aetna focuses on their score as though it by itself is the sole basis upon which the PNC made its decision in awarding the KanCare contracts. The focus Aetna has placed on the score it received fails to recognize all the other information gathered, evaluated and reviewed by the evaluation committees and the PNC through the entire procurement process. Aetna is viewing its tie score with Healthy Blue as the last step in the review process of the sealed competitive proposals, it was not.

As acknowledged by Aetna in its protest, this bid event is a negotiated procurement pursuant to K.S.A 75-37,102. A negotiated procurement involves competitive sealed proposals and provides the State more flexibility than other types of procurements utilized. This is differentiated from a bid event which solicits competitive sealed bids. When competitive sealed bids are involved the evaluation process is firm and is not subject to any changes once the bid event is closed. In the competitive sealed bid process, the lowest cost bid meeting the specifications put forth in the bid solicitation is awarded the contract. Bid specifications are not subject to change. In the competitive sealed proposal process cost is a factor, but not always the deciding factor. Negotiations with bidders are permitted and proposals from the bidders may be augmented based upon discussions and negotiations with bidders. The review process for a negotiated procurement could lead the State to discuss with the vendors other avenues in arriving at what is in the best interests of the government. This could mean deviating from the specifications in the original posted bid documents. As these discussions continue with the vendors, different factors may present themselves which then creates additional information and opportunities, which then differentiates the competitive sealed proposals received from all the responding bidders.

Kansas Attorney General's Opinion No. 93-28 put forth an explanation of the differences between competitive bidding (see K.S.A. 75-3739), which seeks competitive sealed bids and a negotiated procurement, which seeks competitive sealed proposals.

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.

It is with this understanding of how a negotiated procurement operates, the PNC used the score Aetna received from the review by the evaluation committees and all the other information gathered throughout the procurement process to evaluate the Aetna and all of the other different proposals. This information included but was not limited to the cost proposals of the different vendors, the answers to the questions provided by the vendors and discussions with the vendor about their proposal. All this information together was used to assess Aetna’s proposal against the other competitive sealed proposals the State received, as well as what the PNC viewed was needed to meet the best interests and needs of the State in implementing KanCare. When viewed all together the PNC determined United Healthcare, Sunflower and Healthy Blue presented the best proposals, which met the best interests of the State.

Aetna in its protest cites various legal cases in support of its position challenging the State’s process. These cases are federal in nature. A review of those cases found they involve a challenge to a contract award made against a federal entity involving a federal program. Many of the cases cited by Aetna involved competitive sealed bids, rather than competitive sealed proposals or RFPs. This case law is not precedent for the State’s managed care program for Medicaid. However, these cases do support the standard for review in Kansas of an agency’s action. The burden of proof is on the protesting party to show the procurement process should be overturned. And if there is a reasonable basis for the agency’s decision, the decision of the agency should be upheld.

KanCare is a State operated Managed Care program, not a federal program. KanCare contracts with individual private entities known as Managed Care Organizations (MCOs) to provide services to Kansas residents. The State believes CMS has a limited role in the Managed Care procurement process conducted by the State of Kansas and other individual states. CMS is not involved in the solicitation of contracts, the evaluation of contracts or the awarding of contracts for Managed Care. This is left up to the procurement process of the many individual states operating Managed Care programs. The role of CMS is to ensure the selected contractors meet federal requirements, not to overturn contract awards.

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Aetna asserts in its protest the contract awarded to Healthy Blue is tainted by virtue of individuals who previously worked for the State of Kansas government and are now employed in roles with Blue Cross and Blue Shield of Kansas (BCBSK). BCBSK is part owner of Healthy Blue. Aetna believes this “staff migration” has created conflicts of interest and favoritism in the contract awarded to Healthy Blue. Aetna in its protest identifies four (4) individuals with ties to Kansas state government who have left state government employment in the last three (3) years and now work for BCBSK. Aetna’s position is these past associations require action by the State to disqualify or vacate the contract award to Healthy Blue or modify the contract award in some way favorable to Aetna.

Aetna cites K.S.A. 46-233 (a) in support of its position. K.S.A. 46-233 is the State’s governmental ethics law which places a requirement on a state employee to not seek employment with a vendor with whom the state employee has been substantially involved in the making of the contract for a period of two (2) years. Two of the individuals listed by Aetna, left employment with the State of Kansas in 2021. This places them outside the two (2) year requirement of K.S.A. 46-233. More importantly, Aetna has made no showing these individuals were involved in the development of this KanCare RFP or KanCare contract. Another individual listed by Aetna worked in the Kansas Legislature until he left in February 2024, which is a separate branch of government from the Executive Branch. It is the Executive Branch agencies which are responsible for the day-to-day operations of KanCare and the procurement process for any contract award. There has been no offer of proof presented this individual had any involvement with the development of the KanCare RFP, awarding of the KanCare contract or anything related to KanCare.

The fourth individual, Sarah Fertig, is the former Kansas Medicaid Director. She notified KDHE in mid-August 2023 she was leaving KDHE and accepting a position with BCBSK. Once she informed KDHE of her decision to leave, she was not permitted to have any further involvement in developing the KanCare RFP or permitted to be involved in the procurement process for KanCare.

Public information available at the time Ms. Fertig left KDHE indicated Ms. Fertig’s position with BCBSK would not have any connection with the KanCare procurement. BCBSK has indicated this original comment indicating Ms. Fertig’s responsibilities at BCBK would not be involved in KanCare has not changed. Aetna provides no evidence Ms. Fertig has engaged in any actions in her new employment which are inconsistent with what was previously stated by BCBSK.

Aetna points to a standard of “appearance of Impropriety”, as a basis for determining the State should take some action against the contract award to Healthy Blue. This standard does not exist in K.S.A. 46-233 or the remainder of the Kansas Governmental Ethics statutes. The State’s governmental ethics laws are specific to the individual. Meaning they prohibit the actions of the individual. They do not require a State contract to be declared invalid or should not be awarded to a specific vendor due to an individual leaving employment with the State of Kansas and going to work for a vendor who becomes a state contractor.

K.S.A. 46-233 does place a requirement on a state employee to not seek employment with a vendor with whom the state employee has been substantially involved in the making of the contract for a period of two (2) years. If Ms. Fertig has violated K.S.A. 46-233, then she can be held accountable through a filing of a complaint with the Kansas Governmental Ethics Commission (KGEC). An investigation will be conducted by the KGEC and the Commission will determine if a sanction is appropriate and should be imposed.

The facts which Aetna point to support its position to take action against Healthy Blue's contract relate to Ms. Fertig performing her job responsibilities while she was the Kansas Medicaid Director. It was her responsibility to attend and speak at public meetings to gather information on the next KanCare contract. It was her responsibility to meet with vendors to become knowledgeable about what opportunities were available in order to properly structure the KanCare RFP and obtain a result which was in the best interest of the State of Kansas and the citizens which are serviced by KanCare. It was her responsibility to meet with the consultants engaged in assisting with the developing of this RFP. If these things had not been done it would have meant she was not doing her job. Finally, at the time Ms. Fertig accepted her position with BCBSK Healthy Blue was not a bidder.

The solicitation for the bid event did not post to the OPC website for approximately six (6) weeks after Ms. Fertig informed KDHE she was leaving her employment with the State. As indicated previously, once she notified KDHE she was leaving she was no longer involved in the KanCare RFP. It would be an additional three (3) months from the time the RFP was posted until the bid event closed. There has been no showing Ms. Fertig was involved in either assisting the State after mid-August 2023 or that she assisted Healthy Blue in any aspect of responding to the KanCare bid event during this time period. Finally, after the bid event closed on January 4, 2024, it was still another four (4) months where Ms. Fertig had no involvement in the review or evaluation of any bid proposal submitted to the State. There has been no evidence presented which indicates Ms. Fertig did anything with the KanCare bid event once she accepted the position with BCBSK.

Again, Aetna provides some federal case law in support of its position action should be taken against the contract that was awarded to Healthy Blue. The instances highlighted by Aetna again deal with federal entities implementing federal programs. They do not involve a state program and are not applicable to the State of Kansas and the KanCare procurement. However, after reviewing the cases cited, neither of the instances cited by Aetna would be applicable. The facts of these cases are wholly different than those involving Ms. Fertig. In one instance, the bids had already been received and the federal employee was actually involved in the review and evaluation of the procurement. In addition, the procurement had been ongoing for over a year and was still ongoing when the federal employee contacted the bidder to inquire about employment opportunities with it. The second instance involves a federal employee who was involved in the procurement had signed an NDA which prohibited them from contacting vendors. The federal employee contacted the vendor anyway and the employee did not inform the government.

The KanCare procurement was still being developed and had not been posted when Ms. Fertig was offered employment by BCBSK. At that point Healthy Blue was not a bidder. Ms. Fertig was no longer employed by the State and involved with KanCare by the time the bid solicitation was posted by OPC. She had left State employment at least three (3) months before any competitive sealed proposals were submitted to the State in response to the bid solicitation and she had no opportunity to be involved in any review or evaluation of those proposals. Ms. Fertig was not subject to any Non-Disclosure – Conflict of Interest Agreement at the time she left employment with the State, because there was no bid solicitation posted.

Aetna asserts Healthy Blue did not meet the requirements of the RFP for Bid Event # 0009267. Aetna claims Healthy Blue did not properly respond to RFP section 4.3 I (1), which required a bidder to disclose its Medicaid Managed Care experience in the last five (5) years. The question as structured could be interpreted in different ways and still be accurate. Healthy Blue, which was the entity that submitted the competitive sealed proposal in response to the bid solicitation, did not have Medicaid Managed Care experience in the State of Kansas in the previous five (5) years. Therefore, there was no prior contract experience to report. If you agree with Aetna that Healthy Blue had some basis based upon one of the different corporate entities involved previously held a state contract, the fact is the contract with the entity, Amerigroup, expired on December 31, 2018. The current bid from Healthy Blue was received in January 2024. This later date is the operative date which was used. This is over five (5) years since the contract expired with Amerigroup and the State of Kansas.

In reviewing the technical proposal received as part of Healthy Blue's proposal, the information provided in answering the State's questions did not hide anything from the State's review and evaluation. The review conducted of Healthy Blue's competitive sealed proposal provided sufficient information to the State to understand the relationship of the entities involved in the Healthy Blue proposal. The State does not agree action should be taken to vacate the contract awarded to the vendor Healthy Blue based upon this claim by Aetna.

Aetna challenges the scoring analysis used on its proposal as part of the procurement process. They assert the PNC was arbitrary and capricious in its scoring process. Aetna questions the point totals it received and believes those point totals are inaccurate based upon their view of the questions and answers. They believe the process for scoring is vague and lacks transparency. The RFP document provided Aetna with the value assigned to each question. Therefore, a vendor would know which question would potentially carry a greater value based upon the vendor's answer.

Information on how scoring was conducted was provided to all vendors as part of the RFP process. The rating of the question and the score for each question Aetna has focused on in the protest, if changed in accordance with their views, could give them a higher score. This change could create a circumstance where their competitive sealed proposal, as they believe, would produce a higher score than a competitor. However,

scoring is only one part of the KanCare RFP process. Contract awards were not based on one cumulative score. The PNC made its decisions based upon a totality of the information received through the entire procurement process.

As part of the procurement process each vendor was evaluated on their technical proposal, cost proposal and other information gathered through the process to determine the strengths and weaknesses of the bids reviewed. All of this information was evaluated. A list of examples of Aetna's strengths and weaknesses are set forth in the PNC award recommendation. Aetna's weaknesses in the PNC award recommendation are listed here:

- Did not adequately describe how the MCO would improve the provider directory, including limited information on the strategies and timeline for improving the accuracy of the information and the usability of the online directory and on strategies to reduce provider burden associated with providing information.
- Did not fully describe strategies for ensuring member access to NEMT.
- Did not fully describe strategies for ensuring timely access to quality dental care in all areas of the State.
- Did not provide sufficient detail to determine whether the presenting needs of the member/family were fully identified and addressed in the case scenarios involving the pregnant member, adult member on the IDD HCBS waiver, member with traumatic brain injury (TBI), child member in foster care, and child member with IDD and behavioral health needs.
- Did not provide sufficient detail to determine whether the needs of the member were fully identified and addressed in the case scenario involving the incarcerated member, and in some areas reflected an approach that is not consistent with RFP requirements/expectations.

Aetna spends a portion of their protest pointing to individual scores on specific questions. However, Aetna spends little time addressing the weaknesses of their competitive sealed proposal. These weaknesses were a part of the decision not to award them a contract.

Aetna's argument in support of this protest seeks to substitute their view of their bid, for that of the evaluation teams and PNC, to arrive at a calculation which leads to an increase in their score. Based upon this view Aetna then uses their view to propel them to a higher score, with the belief this is all they need to be awarded a contract. But again, the score alone is not determinative of which vendors were awarded a KanCare contract. All information available to the PNC was reviewed in making decisions, including the expertise, experience, innovative strategies, methods of approach, and capabilities of each bidder necessary to advance the State's vision and goals for KanCare.

Aetna asserts Subject Matter Experts (SMEs) were not utilized by the PNC. They contend the result of this omission taints the process used for scoring the technical proposal. Such is not the case. The individuals involved in evaluating the technical proposals were all individuals from the respective agencies who are involved in the implementation of the KanCare program. These individuals have more knowledge as to the needs of KanCare than those they are evaluating. With this type of knowledge available to the State there was no need to bring in individuals who are not familiar with the needs and best interests of the State and the KanCare program.

Aetna believes there was a violation of the blackout provisions of the RFP. The basis for this assertion is the Governor's public policy agenda to expand Medicaid within the State of Kansas in the months leading up to the 2024 Kansas Legislative Session. During the Governor's effort to change current Kansas policy, she engaged in different avenues to develop public support for an expansion of Medicaid.

A Blackout period is an effort to make sure one vendor is not receiving information, which other vendors are not receiving. The Governor's efforts to motivate support to expand Medicaid were very public and available to anyone to see. There was no hiding of any information. However, the Blackout period would not apply here as this policy agenda effort was not part of the RFP.

The Governor was not part of the procurement process for Bid Event # 0009267. The Governor and her staff did not provide any review of the competitive sealed proposals offered by the different responding vendors. The Governor had no contact with the evaluation committees as they reviewed the proposals received by the responding bidders. The Governor's actions were solely in the political realm and were an effort to seek public and legislative support for an initiative she had very publicly campaigned on and for during her time in office over the many years before this RFP was ever posted. Had the Governor been successful in her efforts to expand Medicaid opportunities in the State, this could have led to additional resources being made available by the Kansas Legislature for those individuals being provided services through KanCare.

For Aetna to use the effort by the Governor to expand Medicaid in the State of Kansas to claim a violation of the KanCare RFP is just not supported by the facts.

Aetna has asserted in its protest and through public comment a concern Healthy Blue cannot fulfill the terms of the contract. This is based upon a belief that Healthy Blue cannot meet a deadline for obtaining a contract with the Centers for Medicare and Medicaid Services (CMS). Specifically, Aetna believes Healthy Blue cannot have a D-SNP plan in place upon implementation of the KanCare contract on January 1, 2025.

A review of the Healthy Blue technical proposal finds the following information in the technical response of Healthy Blue - 2022 Audited Financial Statements - Elevance Health, Inc., at page 349.

“Government Business

Medicare Plans. We offer a wide variety of plans, products and options to individuals age 65 and older such as Medicare Advantage, including Special Needs Plans (“SNPs”), dual-eligible programs through Medicare-Medicaid Plans (“MMPs”), Medicare Supplement plans and Medicare Part D Prescription Drug Plans (“Medicare Part D”).”

Based upon this information the PNC believes Healthy Blue is in compliance with the requirement and will be able to provide these types of plans when the contract goes live on January 1, 2025. In addition, contracts for D-SNP plans for KanCare have been forwarded to CMS for review and approval. Out of an abundance of caution, Aetna has been invited to submit a contract for D-SNP plans for KanCare. Their contract has also been forwarded to CMS for review and approval.

The record of this procurement shows throughout this bid solicitation the State consistently 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 until the bid event closed and the competitive sealed proposals were submitted by the respective bidders. The answers to all questions posed to the State were shared with all potential bidders during the response period through an amendment to the bid solicitation. 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.

Additionally, the RFP, which totaled 453 pages, contained section 4.3 (H) which had all of the questions a responding vendor would need to answer and submit as part of the technical proposal contained in the submitted bid document. This permitted all vendors to have the same information at the same time and have the same amount of time to prepare their responses. In addition, RFP section 5.2 (E) contained a breakdown of the value available for each of these questions and the total value for all the questions. This permitted the responding vendors to know these values as part of their process for developing their bid, develop a strategy for answering these questions and structure their answers accordingly.

This allowed all bidders to have access to the same information until the bid event closed on January 4, 2024. Nothing was being hidden from any vendor. The process was fair and open to all who were participating. The bidders controlled the information it submitted in their answers. All bidders were included in all pre-bid meetings and post submission meetings, until a decision was made to reduce the bidder pool for discussions, negotiations or presentations and contract awards. This ability to reduce the number of vendors involved was within the discretion of the PNC. (See KanCare Medicaid & CHIP Capitated Managed Care Request for Proposal section 3.2.6)

All of the proposals submitted by the seven (7) 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. In addition, the cost proposals were reviewed by the State's actuarial consultant.

To further ensure the process used by the State was secure and fair, as noted earlier, all employees of the State of Kansas involved in reviewing the proposals 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 process for the entire course of the procurement process, to include not being able to have discussions with the bidders. All contact and correspondence from bidders went through a single point of contact, which was OPC, to ensure the information was consistent and no unauthorized communication was taking place.

This process did not change until the evaluations of the proposals from each of the responding bidders was completed. At which time, there were instances where specific requests for additional information was submitted to some of the bidders. The information obtained from the specific bidder in response to questions regarding the bidder's proposal, to include the bidder's cost proposal, was used to determine which bidders would continue in the process and which vendor would be awarded a contract. Until that point, no information regarding the bid solicitation or involving the procurement process was shared unless all potential bidders were involved.

The decision of the PNC after consultation with the agency evaluation committees was to reduce the number of bidders going forward into the individual bidder discussion process to four (4) bidders. This included Aetna, United Healthcare, Sunflower and Healthy Blue. This is consistent with the procurement process and information provided to the bidders. Even though the PNC met with vendors, it was not required to meet with all vendors or any specific vendor regarding their proposal. The PNC had the discretion to meet with the bidders they determined to move forward and discuss the proposals to gain clarity and understanding. (See KanCare Medicaid & CHIP Capitated Managed Care Request for Proposal section 3.2.6)

OPC contacted the remaining four (4) vendors and set up additional meetings to explore the possibility of awarding contracts to them. These meetings were held on April 29 and 30, 2024. At the meetings, the PNC received additional input from those vendors involved. After reviewing this information and all the other information gathered to include the technical proposals, cost proposals, questions and answers received, and the strengths and weaknesses of the bidder's responses to the questions, the PNC arrived at a decision as to which bidders demonstrated and provided the expertise, experience, innovative strategies, methods of approach, and capabilities necessary to advance the State's vision and goals for KanCare, and would best be able to provide a solution that was in the best interest of the State of Kansas. Those vendors were United Healthcare, Sunflower and Healthy Blue.

In conclusion, the standards utilized, and the arguments put forth by Aetna to challenge this contract award are insufficient to warrant the remedies being sought by Aetna. For the actions of the State in making these contract awards to be considered arbitrary and capricious the agency's decisions have to be unreasonable and not supported by the evidence.

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The State of Kansas followed the negotiated procurement process permitted by state statute. The awarding of a contract to United Healthcare, Sunflower and Healthy Blue in bid event # 0009267 is supported by the facts. The contracts awarded are consistent with the RFP. The contracts awarded were done based upon the best interests of the State and those awards are supported by the information gathered through the process of evaluating the competitive sealed proposals submitted by the different bidders.

Therefore, Aetna's protest will not be granted. The Stay requested by Aetna will not be granted. The contracts issued will not be vacated and the award to the three vendors, United Healthcare, Sunflower and Healthy Blue, will remain in place and will continue forward to be implemented and take effect January 1, 2025.

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 "Todd Herman", written in a cursive style.

Todd Herman, Director
Office of Procurement & Contracts

TH:TD