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**VIA HAND DELIVERY AND EMAIL**

Todd Herman, Director of Procurement and Contracts  
Office of Procurement and Contracts  
Kansas Department of Administration  
900 SW Jackson St., Room 451  
Topeka, Kansas 66612  
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LS:2459117

**Re: Aetna Better Health of Kansas Inc.'s Protest of Awards in Request for Proposals  
No. EVT0009267**

Dear Director Herman:

This firm represents Aetna Better Health of Kansas Inc. ("Aetna") in connection with its protest of the awards relating to Request for Proposal No. EVT0009267 ("RFP") issued by the Kansas Department of Administration ("DOA" or "Agency") on behalf of the Kansas Department of Health and Environment ("KDHE") and the Kansas Department for Aging and Disability Services ("KDADS").<sup>1</sup> The RFP sought proposals from managed care organizations to provide statewide managed care for the Kansas Medicaid program and Children's Health Insurance Program, collectively referred to as "KanCare." This letter constitutes Aetna's protest of the decision and award.<sup>2</sup>

The Agency's actions and omissions are serious and merit thorough examination. By clearly outlining the specific instances of misconduct, such as the use of arbitrary unstated evaluation criteria in the tiebreaking process and the failure to disqualify a bidder with an undisclosed history, the proposed remedy of canceling the award to Community Care Health Plan of Kansas, Inc. (dba Healthy Blue or "HB") has strength and coherence. Highlighting the potential conflicts of interest and scoring errors further strengthens the case for a flawed process that disregards established procurement statutes. It is crucial to hold this Agency accountable for its

<sup>1</sup> Aetna's business address is 9401 Indian Creek Parkway, Suite 1300 Overland Park, KS 66210. The identification of the procurement contract numbers are as follows: Healthy Blue: 00000000000000000000000055707; Sunflower: 00000000000000000000000055708 and United: 00000000000000000000000055709.

<sup>2</sup> Pursuant to § 3.2.8. of the RFP, protests are to be filed within thirty (30) calendar days after contract awards. According to DOA's website, contract awards were made on May 7, 2024, resulting in a protest deadline of June 6, 2024. Accordingly, this protest is timely filed.

actions to ensure transparency, fairness, and integrity in future procurement procedures and to allow Kansans the greatest value and highest quality of services because they deserve the same.

In the realm of procurement law, fairness, transparency, and the best interests of the State are paramount. Further, and as you have acknowledged, when awarding contracts of significant size and importance, it is essential to adhere to the clear evaluation criteria outlined in the solicitation and statutory requirements. Unfortunately, in the case at hand, these principles were not upheld. The underlying flawed procurement process raises several critical concerns:

- **Unstated Evaluation Criteria:** The agencies involved in the contract award process wrongfully employed unstated evaluation criteria during the ex post facto tiebreaking procedure. These criteria were developed after bids were already opened and scored, undermining the integrity of the process.
- **Cherry-Picked and Irrational Tiebreaking Criteria:** The utilization of cherry-picked irrational tiebreaking criteria raises suspicions of a pre-determined conclusion. Such arbitrary and capricious decision-making undermines the trust that bidders place in the system.
- **Failure to Disqualify Bidder:** HB was not disqualified despite its failure to disclose its prior underwhelming performance in a previous KanCare contract. HB's predecessor inexplicably abandoned Medicaid beneficiaries in Kansas, leaving millions of dollars in unpaid claims. This omission should have raised red flags during the evaluation process.
- **Conflict of Interest:** An offeror's parent company's hiring of former State employees, including the former director of KDHE, creates an impermissible conflict of interest. Their involvement and notable appearance of impropriety in developing the RFP and guiding HB to prevail in an unprecedented and inequitable tiebreaking procedure compromises the integrity of the entire process.
- **Communication During Blackout Period:** HB's apparent communication with government agencies and individuals involved in the RFP during the blackout period further taints the process. Transparency requires strict adherence to blackout rules.
- **Objective Scoring Errors:** Premised on the scant information provided to date, the Agency committed numerous objective scoring errors during proposal evaluation. These anomalies unfairly impacted Aetna's score and ultimately led to the inequitable tiebreak. Absent these scoring anomalies, Aetna would have received a higher score in accordance with the stated criteria and avoided the necessity for a tiebreak.

As further set forth below, Aetna timely submitted multiple Kansas Open Records Act ("KORA") requests which remain pending as of the date of this Protest. *See* Ex. 22, Aetna KORA Requests. Aetna cannot fully and fairly exercise its protest rights until such time as it receives the documents and information sought in those KORA requests. In addition, on May 31, 2024, Aetna formally requested that it be granted an extension of time to supplement its protest until 14 days after Aetna receives the responses to its KORA requests. *See* Ex. 24, Aetna Request for Extension

of Time to Protest. Aetna will supplement this Protest as warranted upon receipt of responses to those KORA requests. In light of these concerns, Aetna respectfully requests an immediate stay of all procurement activities. The agency should await the resolution of Aetna’s protest and any subsequent judicial appeals. Only through transparent and accountable processes can we ensure fair contract awards that serve the best interests of the State.

For the foregoing reasons and those set forth in detail below, Aetna respectfully submits that the Director should either: (1) cancel the award to HB and issue a new award to Aetna as a prevailing offeror, ensuring fairness and providing a remedy that aligns with the solicitation’s purpose; or (2) issue a new Request for Proposal that will allow all bidders to participate afresh, promoting transparency and equal opportunity. In the alternative, and consistent with the RFP and the stated purpose of the solicitation, the Agency may appropriately issue a fourth award to Aetna to avoid the unnecessary delay and expense of issuing a new RFP which balances efficiency with adherence to the RFP’s intent and what is plainly in the best interests of Kansans.

**I. FACTUAL BACKGROUND**

**A. The RFP**

On October 2, 2023, the State of Kansas (“State”) issued the RFP through DOA to obtain proposals for the KanCare program. *See* Ex. 1, KanCare Request For Proposal No. EVT0009267 (hereinafter the “RFP”). The State determined that continuing to contract with multiple Managed Care Organizations (“MCOs”) results in “high quality, integrated, well-coordinated, and cost-effective services to improve the health outcomes” of Kansans. RFP § 1, p. 1. For that reason, the RFP provides that “[t]he State intends to contract with three (3) MCOs” for the KanCare program. RFP § 6, p. 42. Notably, there is no bar, statutorily or otherwise, from awarding a contract to four (4) MCO’s.

The stated goals for the KanCare program and the RFP include focus on provider experience and encouraging provider participation in Medicaid:

**Partnering together to support Medicaid members in achieving health, wellness, and independence for a healthier Kansas.**

**To advance this vision, the State has identified the following KanCare goals:**

1. Improve member experience and satisfaction.	2. Improve health outcomes by providing holistic care to members that is integrated, evidence-based, and well-coordinated, and that recognizes the impact of social determinants of health (SDOH).	3. Reduce health care disparities.
4. Expand provider network and direct care workforce capacity and skill sets.	5. Improve provider experience and encourage provider participation in Medicaid.	6. Increase the use of cost-effective strategies to improve health outcomes and the service delivery system.
		7. Leverage data to promote continuous quality improvement to achieve the goals of the KanCare program.

*See* RFP § 1.1 at pp. 1-3.

## B. Pre-Proposal Process

Bidders were permitted to submit questions requesting clarification of the RFP to the Agency by October 27, 2023. RFP § 3.1 at p. 10; Ex. 2, Amendment 1 to RFP. Seven (7) prospective bidders submitted questions to the Agency. Ex. 3, Bidder Questions. On November 28, 2023, the Agency issued Amendment 2 to the RFP which contained the Agency's responses to the bidders' questions. Ex. 4, Agency Responses to Bidder Questions. The Agency further conducted pre-bid and actuarial conferences on October 16, 2023. RFP § 3.2.2, p. 11. Bidders were permitted to orally ask questions during those conferences, however the responses were not binding unless reduced to writing. RFP § 3.2.2, p. 11.

The deadline for submitting proposals to the Agency was January 4, 2024. RFP § 3.1, p. 10. Seven (7) bidders submitted proposals to the Agency by said deadline. Ex. 5, Responding Bidders List.

## C. Proposal Evaluation

The proposal evaluation process consisted of three phases: (1) Review of Mandatory Requirements, (2) Review of Technical Proposals, and (3) Review of Cost Proposals. RFP § 5, p. 37. Proposals that met the Phase 1 mandatory requirements went on to receive technical evaluations. RFP § 5.1 and 5.2, p. 37. The Agency found that all seven bidders met the mandatory requirements and each of the seven bidders proceeded to the technical evaluation phase. Ex. 6, Technical Proposal Evaluation Report and Procurement Negotiating Committee's Request for Cost Proposals, p. 5.

The Agency then established four (4) evaluation committees appointed by the Procurement Negotiating Committee ("PNC") to conduct the technical evaluation of the proposals. RFP § 5.2(A), pp. 37-38; Ex. 6 at p. 5. Each committee consisted of five (5) individuals that were staff of KDHE and KDADS. Ex. 6 at p. 5.

The RFP allowed for the use of subject matter experts ("SMEs") to assist the evaluation committees in reviewing responses and providing feedback, but the committees chose not to engage with any SMEs in conducting their reviews. RFP § 5.2(A), p. 38; Ex. 6 at p. 8. The Agency engaged the consulting firm of Mercer Government Human Services Consulting ("Mercer") to provide support, including the facilitation and documentation of the consensus evaluation process. Ex. 6 at p. 4.

The evaluation committees evaluated the response to each technical question and assigned a rating on a scale ranging from one (1) to five (5) for each of the bidders' responses to the technical questions. RFP § 5.2(C), p. 38. The Agency utilized a "consensus review" system whereby each committee member used their individual preliminary ratings and notes to discuss and evaluate responses with the other members of their committee.<sup>3</sup> At the conclusion of those discussions, the committee agreed to a single consensus rating per question, per bidder, with supporting notes. Ex. 6 at p. 6. A scoring system was established to correlate the consensus rating with the number of points available for each question (i.e., rating of 5 = 100% of available points, rating of 4 = 75%

<sup>3</sup> Although timely requested through the KORA, K.S.A. 45-215 *et seq.*, the Agency has yet to produce the individual preliminary ratings or notes of the scoring committee.

of available points, and so on through rating of 1 = 0% of available points). Ex. 6 at p. 6. The evaluation committees also documented the strengths and weaknesses of the responses. RFP § 5.2(C), p. 38.

The bidders' total technical score is the sum of the points given to each of their responses to the technical questions. RFP § 5.2(D), p. 38. The RFP set forth a chart dictating the maximum number of points available for each technical question:

Technical Question Number	Maximum Available Points		
Question 1	47	Question 18	Not Scored
Question 2	28	Question 19	60
Question 3	20	Question 20	25
Question 4	30	Question 21	35
Question 5	25	Question 22	50
Question 6	25	Question 23	25
Question 7	50	Question 24	20
Question 8	25	Question 25	20
Question 9	25	Question 26	30
Question 10	30	Question 27	30
Question 11	30	Question 28	20
Question 12	15	Question 29	30
Question 13	15	Question 30	25
Question 14	30	Question 31	20
Question 15	25	Question 32	20
Question 16	20	Question 33	35
Question 17	15	Question 34	25
		Question 35	20
		Question 36	30
		Question 37	25
		<b>Total</b>	<b>1,000</b>

RFP § 5.2(E), p. 38-39. The Technical scores were broken down by seven (7) topic areas:

- Experience and Qualifications, Questions 1-3 (95 available points);
- Member Experience, Questions 4-6 (80 available points);
- Integrated, Whole Person Care, Questions 7-11 (160 available points);
- Utilization Management and Services, Questions 12-18 (120 available points);
- Quality Assurance, Questions 19-21 (120 available points);
- Provider Network, Questions 22-26 (145 available points); and
- Case Scenarios, Questions 27-37 (280 available points).

RFP § 4.3(I), p. 24-35.

In accordance with the RFP, the results of the Technical Evaluation were published in the Agency's Technical Proposal Evaluation Report and Procurement Negotiating Committee's

Request for Cost Proposals, dated March 27, 2024. See Ex. 6. That report reveals the number of responses by consensus rating score for each bidder:

Bidder	Number of Responses by Consensus Rating				
	5	4	3	2	1
Sunflower	7	18	11	0	0
UnitedHealthCare	4	20	11	1	0
Aetna	0	12	15	8	1
Healthy Blue	0	11	18	7	0
CareSource	2	9	14	11	0
Molina	0	3	17	13	3
UCare	0	1	7	27	1

Ex. 6 at p. 10. The Report also provides each bidder's technical proposal score by topic area:

Topic Area	Sunflower	United Health Care	Aetna	Healthy Blue	Care Source	Molina	UCare	Total Available Points
Experience and Qualifications	69.25	59.50	54.50	59.50	49.50	23.75	23.75	95.00
Member Experience	60.00	60.00	41.25	47.50	46.25	33.75	20.00	80.00
Integrated, Whole Person Care	107.50	118.75	93.75	73.75	73.75	80.00	60.00	160.00
Utilization Management and Services	93.75	76.25	68.75	77.50	65.00	52.50	30.00	120.00
Quality Assurance	75.00	75.00	75.00	51.25	57.50	60.00	36.25	120.00
Provider Network	98.75	90.00	80.00	102.50	48.75	56.25	77.50	145.00
Case Scenarios	225.00	203.75	108.75	110.00	163.75	91.25	61.25	280.00
<b>Total Available Points</b>								<b>1,000.00</b>

Ex. 6 at p. 9. Finally, the Report ranked the bidders by their total technical evaluation score:

Rank	Offeror Name	Score
1	Sunflower	729.25
2	UnitedHealthCare	683.25
3	Aetna	522.00
4	Healthy Blue	522.00
5	CareSource	504.50
6	Molina	397.50
7	UCare	308.75

Ex. 6 at p. 9.

Only those bidders who passed the technical phase of the evaluation proceeded to Phase 3 of the evaluation whereby bidders' cost proposals were reviewed. RFP § 5.3(F), p. 5. Individual meetings were held with each bidder regarding their cost proposals, capitation rates, and business models. The record demonstrates the final statewide blended rates for the first contract year as follows:

	Current			
	Aetna	Healthy Blue	Sunflower	UHC
<b>Cost Proposal Rate Development Assumptions and Final PMPM</b>				
Base Data				
Trend CY21 to CY22	2.5%	2.0%	2.8%	0.5%
Trend CY22 to CY23	2.6%	2.0%	2.9%	3.0%
Trend CY23 to CY24	2.7%	1.5%	2.9%	3.1%
Trend CY24 to CY25	2.7%	1.0%	2.9%	3.1%
Managed Care/Efficiency Impacts	-4.0%	-1.3%	-4.1%	-0.4%
Hep C Adjustment	0.1%	0.1%	0.1%	0.1%
Generic Dispensing Rate Adjustment	-0.3%	-0.2%	-0.2%	-0.2%
Additional Program Changes	0.0%	0.0%	0.0%	0.0%
NML: General Admin	4.7%	5.1%	5.5%	4.6%
NML: Care Coordination	3.2%	1.9%	3.7%	1.7%
NML: Risk Contingency + Profit	1.0%	1.0%	1.0%	1.0%
NML: Privilege Fee	5.77%	5.77%	5.77%	5.77%
<b>Total Rate, pre-LTC</b>				
Statewide Blended Rate (PMPM)	\$ 913.16	\$ 891.98	\$ 936.00	\$ 921.50
	Aetna	Healthy Blue	Sunflower	UHC
Avg. Annual Trend	2.6%	1.6%	2.9%	2.4%
MCS adj. annualized trend	1.6%	1.3%	1.8%	2.3%

See Ex. 7, Final Cost Proposal Review.

**D. The Award Decision**

On May 8, 2024<sup>4</sup>, the Agency issued its Technical Review and Recommendation for Award. See Ex. 8, Technical Review and Recommendation for Award. The Agency recommended

<sup>4</sup> Curiously, and further raising suspicion that the Agency's decision was predetermined, the record demonstrates that Contract Awards were made on May 7, 2024, a full day before the Technical Review and Recommendation for Award was issued on May 8, 2024. See Ex. 9, Contract Awards; Ex. 8.

awards be made to the two bidders who scored the highest on the technical evaluation (Sunflower State Health Plan, Inc. (“Sunflower”) and UnitedHealthCare of the Midwest, Inc. (“United”)). Ex. 8 at p. 21. As it relates to the third award, Aetna and HB’s cumulative scores were the exact same, ending in a tie with 522 points issued out of 1000. In its flawed determination to issue an award to HB and not the incumbent Aetna despite the tie, the Agency employed an irrational, undisclosed, and unannounced tiebreaking analysis that was not within the RFP, statute, regulation, or other guidance, and which is demonstrably inequitable, unreasonable, and arbitrary. Ex. 8 at p. 21.

This timely protest follows.

## II. LEGAL STANDARD

This purchase is a negotiated procurement under K.S.A. 75-37,102. In accordance with Section 6 of the RFP, contracts are to be awarded based upon the best interests of the State of Kansas. Pursuant to K.S.A. 77-621(c), the Agency’s actions in selecting awardees under the RFP will not stand where any of the following apply:

- (1) The agency action, or the statute or rule and regulation on which the agency action is based, is unconstitutional on its face or as applied;
- (2) the agency has acted beyond the jurisdiction conferred by any provision of law;
- (3) the agency has not decided an issue requiring resolution;
- (4) the agency has erroneously interpreted or applied the law;
- (5) the agency has engaged in an unlawful procedure or has failed to follow prescribed procedure;
- (6) the persons taking the agency action were improperly constituted as a decision-making body or subject to disqualification;
- (7) the agency action is based on a determination of fact, made or implied by the agency, that is not supported by evidence that is substantial when viewed in light of the record as a whole, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this act; or
- (8) the agency action is otherwise unreasonable, arbitrary or capricious.

To avoid overturning an agency action on the basis of K.S.A. 77-621(c)(7), the record must contain evidence “which possesses something of substance and relevant consequence, and which furnishes a substantial basis of fact from which the issues tendered can reasonably be resolved.” *Southwestern Bell Tel. Co. v. Kansas Corporation Commission*, 4 Kan.App.2d 44, 46, 602 P.2d 131 (1979), rev. denied 227 Kan. 927 (1980). With respect to K.S.A. 77-621(c)(7), Kansas courts have defined an “unreasonable action” as “action taken without regard to the benefit or harm of all interested parties.” *Farmland Indus., Inc. v. State Corp. Comm'n of State of Kan.*, 25 Kan. App. 2d



849, 852, 971 P.2d 1213, 1217 (1999). An arbitrary and capricious action is one that is “unreasonable or without foundation in fact.” *Zinke & Trumbo, Ltd. v. Kansas Corporation Comm'n*, 242 Kan. 470, 474-475, 749 P.2d 21 (1988).

As set forth below, the Agency’s decision to issue an award to HB and not to Aetna is the result of numerous acts that are inescapably violations of K.S.A. 77-621(c).

### III. PROTEST GROUNDS

#### A. The Agency’s Tiebreaking Analysis is Unlawful.

The RFP and Kansas law are devoid of any protocol for agencies to employ when offerors’ proposals result in a tie of the technical scoring. Notably, an award to both offerors in this circumstance is not forbidden by the RFP or Kansas law. However, rather than making an award to both bidders, the Agency instead applied unstated and unannounced evaluation criteria and acted arbitrarily and capriciously in creating a tiebreaking analysis randomly out of whole cloth after bids were already opened and scored. The application of the unstated and unannounced evaluation criteria is cause for overturning the award alone. Even worse, the unstated and unannounced criteria utilized by the Agency to break the tie between Aetna and HB was inequitable, unreasonable, arbitrary, capricious and in violation of Kansas procurement law. *See* K.S.A. 77-621(c).

The Agency’s Award Recommendation relies on a tiebreaking procedure that arbitrarily used cherry-picked data within certain criteria to support HB while inexplicably disregarding the corresponding data that supports Aetna. The criteria that the Agency selected post-hoc ignores Aetna’s superiority in a number of areas, including those that the Agency acknowledges were more important than those it chose to use in its tiebreaking analysis. Indeed, Aetna markedly outscored HB by a wide margin in two of the topic areas, including its Integrated, Whole Person Care proposal that was scored far superior to HB’s submission, and scoring one more rating of four (4) on its technical question responses than HB. In breaking the tie, the Agency instead arbitrarily and inequitably chose cherry-picked data points where HB scored higher. In Quality Assurance alone, HB has the second lowest score of all offerors, yet the same is never considered in the tiebreaking analysis itself. In Integrated, Whole Person Care, they were second from last and again, it is not a consideration. The Agency had no choice but to employ such an irrational explanation when an objective analysis would have plainly supported and identified Aetna as a prevailing party. The Agency’s arbitrary and inequitable post hoc tiebreaking analysis does not survive the slightest of scrutiny.

#### *i. The Agency Applied Unstated Evaluation Criteria in Its Tiebreaking Analysis.*

The Agency violated procurement law where it applied unstated evaluation criteria in its arbitrary tiebreaking analysis. It is a fundamental principle of both state and federal government

procurement law<sup>5</sup> that a procurement body may not fail “to follow the terms of its own Solicitation” for offerors because such conduct “lacks a rational basis.” *CliniComp Int'l, Inc. v. United States*, 117 Fed. Cl. 722, 741 (2014). An evaluation of an offeror should thus always “be consistent with the factors, subfactors and procedures outlined in the solicitation.” *L-3 Commc'ns EOTech, Inc. v. United States*, 83 Fed. Cl. 643, 653 (2008) “While procuring [entities] have broad discretion in determining the evaluation plan they will use, they do not have the discretion to announce in the solicitation that one plan will be used and then follow another in the actual evaluation.” *Kilgore Corp.*, B-253672, B-253685, B-253686, 93-2 CPD ¶ 220 (Comp. Gen. Oct. 13, 1993). That is precisely what occurred in this procurement.

A procuring entity may not, for example, apply evaluation criteria in its assessment of an offeror if an offeror could not reasonably expect that criteria to be a part of the assessment after a review of the solicitation. See *APEX-MBM, JV*, B-405107.3 (Oct. 3, 2011), 2011 CPD ¶ 263, 2011 WL 6382908 at \*4-5 (the Government Accountability Office sustained a protest of a government procurement where the procuring agency rejected the protester’s proposal because of its failure to address certain details that the solicitation did not require, nor suggest that the agency would evaluate); *Securifense Inc.*, B-421818.2, B- 421818.4 (Oct. 23, 2023), 2023 CPD ¶ 271, 2023 WL 8434021 at \*5-6 (sustaining a protest because of the government’s application of an unstated evaluation criterion in its evaluation).

Such fundamental principles apply, in full, especially in cases where the procuring entity merely seeks to differentiate between two “essentially equal” offers. *Blue Cross & Blue Shield of Maryland, Inc. v. U.S. Dep't of Health & Hum. Servs.*, 718 F. Supp. 80, 87-88 (D.D.C. 1989) (finding the use of a “speculative” factor in an evaluation of bid proposals to be improper even when contemplated as a “tie-breaking” factor”). In this case, the Agency disregarded these equitable obligations. In its efforts to differentiate Aetna’s and HB’s proposals, the Agency admittedly relied only on impermissible unstated evaluation criteria in its tiebreaking. Ex. 8 at p. 22. By doing so, the Agency unreasonably makes certain criteria more important than that of others even though the same is not identified or disclosed within the RFP.

The Agency began its tiebreaking analysis by employing a numerical comparison of the amount of topic areas and consensus ratings where one offeror scored higher than the other. This analysis, however, inescapably has no objective correlation to the evaluation process set forth in the RFP nor does it perform the analysis premised upon what topic is more important or has greater weight from a practical or scoring context. See e.g., RFP § 5.2, pp. 37-39 (discussing the plan to evaluate offerors based on the total points they earn under consensus ratings and omitting any discussion of a comparison of the total topic areas with a higher rating, or of proposals with fewer one (1) and two (2) point scores). This alone is the definition of unstated evaluation criteria, and it is forbidden not only in Kansas, but in every procurement nationally for a reason—fairness. Fairness, as a principle, means the procurement process is free from preference, judgment, self-

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<sup>5</sup> See *Kan. Att'y Gen. Op. No. 2022-5* (Mar. 25, 2022) (“In addition to state control through legislation, regulation, and rulemaking, KanCare is subject to federal regulation and oversight. Federal regulations govern many aspects of KanCare, including administrative matters such as [procuring MCO contracts.]”)

interest, and favoritism. It is also a violation of K.S.A. 77-621(c)(5), which mandates that the Agency follow the process set forth in the RFP.

The remainder of the Agency’s tiebreaking analysis follows the same flawed approach. The Agency dedicates a page-and-a-half of its two-page tiebreaking assessment exclusively to the “Provider Network” factor that it whimsically describes as “one of the most complex and recipient-critical criteria on which the RFP applicants were evaluated” with no support or citation. Ex. 8 at p. 22. The RFP and its follow-up questions have not placed offerors on notice of the newfound significance of this section. In fact, the Agency did the opposite by assigning a greater number of points to two other topic areas (Integrated, Whole Person Care, and Case Scenarios). This is merely another example of how the Agency improperly and impermissibly is making it up as it goes along and evaluated Aetna and HB based on unstated and unannounced evaluation criteria in its tiebreaking analysis. *See Freealliance.com, LLC*, B-419201.3, B-419201.7 (Jan. 19, 2021), 2021 CPD P 56, 2021 WL 619669 at \*8 (finding that the assessment of a weakness to a protester’s quotation for failure to include specific examples of earned value management in its proposed program manager’s resume applied an unstated and unannounced evaluation criterion where the solicitation did not identify the need or reveal the importance of such specificity in the RFP).

The Agency failed to follow the terms of the RFP and applied unstated and unannounced evaluation criteria in violation of K.S.A. 77-621(c)(5). The Agency must therefore cancel the RFP and reopen the procurement and evaluate Aetna’s and HB’s proposals in accordance with the law and the terms of the RFP, or alternatively issue an award to Aetna who tied and did not lose the technical scoring.

***ii. The Agency’s Revisionist Scoring Lacks Substantial Evidence and Is Arbitrary and Capricious.***

Even if the Agency’s tiebreaking analysis did not include impermissible, unstated, and unannounced evaluation criteria, which it did, the criteria was nevertheless chosen arbitrarily and capriciously in violation of K.S.A. 77-621(c)(8). The Agency first cites HB’s misplaced outscoring of Aetna in 5 of 7 topic areas as a benefit to HB’s proposal. However, the application of such a rote and cursory comparison overlooks the differences in value attributed to each of those topic areas. HB’s proposal was not just inferior to Aetna on two major topics, it was significantly so. HB trailed Aetna by a full 20 points on “Integrated, Whole Person Care,” and 23.75 points on “Quality Assurance.” HB was not only significantly inferior to Aetna on those topics, it also woefully trails the other awardees:

<b>Percentage HB's Score Trails Other Proposals</b>			
<b>Topic</b>	<b>Aetna</b>	<b>UnitedHealthcare</b>	<b>Sunflower</b>
Integrated, Whole Person Care	-23.9%	-46.8%	-37.2%
Quality Assurance	-37.6%	-37.6%	-37.6%

In contrast, what is not identified in any detail within the analysis is the fact that Aetna’s proposal is within a mere 9 points of HB on 4 of the 5 topic areas where HB exceeded Aetna. The tiebreaker analysis failed to consider which company offers the greater “high quality, integrated, well-coordinated, and cost-effective services to improve the health outcomes” of Kansans, which is the

stated purpose of the RFP. A more careful analysis reveals the risk and weakness in HB's proposal resulting from its alarmingly lower scores on two of the seven topic areas as compared with Aetna and the other awardees.

The Agency's second tiebreaking criteria fares no better. For this, the Agency notes that on the consensus ratings, HB had one fewer rating of 2 and one fewer rating of 1 than Aetna. However, the Agency entirely disregards the fact that Aetna had one *more* rating of 4 than HB. Interestingly, not all questions are weighted equally and the Agency's analysis is devoid of any consideration regarding the weight or importance of the technical questions where Aetna scored higher or lower than HB. This makes the scoring premised upon numbers and not what is in the best interest of the State. This is a further demonstration that the Agency made a decision and then sought out support for it while ignoring the corresponding factors that favor Aetna. This is, by definition, arbitrary and capricious.

Similarly, the third tiebreaking criteria utilized by the Agency is belied by the RFP evaluation scoring metric itself. The Agency goes to great lengths in its analysis to insinuate that the "Provider Network" is the absolute most important criteria upon which offerors were evaluated. The RFP says no such thing. The Agency devotes more than two-thirds of its tiebreaking discussion to the Provider Network criteria, wherein HB outscored Aetna. What the Agency fails to mention is that "Provider Network" was only assigned 145 points in the evaluation scoring metric, whereas "Integrated, Whole Person Care" was assigned 160 points. By the Agency's own admission through the RFP and its scoring metric, "Integrated, Whole Person Care" is deemed more important than "Provider Network." Aetna outscored HB by 20 points in "Integrated, Whole Person Care," but this fact is conspicuously and inexplicably absent from the Agency's tiebreaking analysis.

As further part of that extensive discussion about the "Provider Network," the Agency praises HB's proposal and denigrates Aetna's submission through a listing of supposed weaknesses, the majority of which are entirely unrelated to the "Provider Network" metric itself. The following table demonstrates the numerous alleged strengths and weaknesses that the Agency mischaracterizes as relating to the Provider Network topic area:

<b>Alleged Strength/Weakness</b>	<b>Actual Metric</b>	<b>Reference</b>
An assurance of member access to non-emergency medical transportation and the impact of NEMT on SODH	Utilization Management and Services	RFP Question 15 at p. 28
Demonstrated an understanding of the care team model in the Medicaid program and emphasized in the RFP, of the Community Health Worker	Integrated, Whole Person Care	RFP Question 8 at p. 26

Minimally acceptable responses to ensure member access to non-emergency medical transportation	Utilization Management and Services	RFP Question 15 at p. 28
No information on how feedback would be obtained from members on NEMT or on monitoring the effectiveness	Utilization Management and Services	RFP Question 15 at p. 28
Has a history of having unresolved issues (corrective actions) for extended periods of time	Organization and Experience	RFP Question 1 at p. 24
Had a lack of detail on backup plans for caregivers for the LTSS population	Integrated, Whole Person Care	RFP Question 8 at p. 26
Responses related to provider directory were minimally acceptable; lacked detail in specificity in this area	Member Experience	RFP Question 6 at p. 25
Responded the weakest on the use of Community Health Workers	Integrated, Whole Person Care	RFP Question 8 at p. 26

As demonstrated above, 8 of the 13 alleged strengths and weaknesses that the Agency relies upon to assert that HB's Provider Network response is superior are completely unrelated to the Provider Network topic. Not only is the sudden increased importance the Agency applies to the Provider Network arbitrary and capricious, the Agency fails to support HB's supposed superiority by misattributing the majority of the strengths and weaknesses it cites for that proposition.

"It is a fundamental principle of government procurement that competition must be based on an equal basis; that is, offerors must be treated equally and be provided with a common basis for the preparation of their proposals." *Lockheed Martin Corp.*, B-411365.2, 2015 CPD P 294, 2015 WL 6437426 (Aug. 26, 2015). Here, the Agency violated these fundamental principles by failing to engage in a transparent, open, and fair evaluation in order to make an award in the best interests of Kansans. Instead, the Agency seemingly manufactured a justification to allow the selection of HB over Aetna through unannounced and unsupported criteria while failing to use a rationally based tiebreaking procedure. The cherry-picking of certain criteria while ignoring others in contradiction to the RFP and statutory law runs contrary to foundational principles of procurement in Kansas. This is the very definition of arbitrary and capricious and is a violation of both K.S.A. 77-621(c)(5), (7) and (8). For these independent reasons alone, Aetna's protest must be sustained.

**B. HB Failed to Disclose its Prior Amerigroup Experience in the KanCare Program.**

Conspicuously absent from HB's proposal is disclosure of its troubled past providing managed care in the State of Kansas, despite the RFP requiring the disclosure of the same. The State leveraged "Negotiated Procurement" procedures to "consider many factors in the evaluation of bid responses beyond cost, including vendor qualifications, *past performance*, methodology, among others." Ex. 10, RFP Overview (emphasis added); K.S.A. 75-37,102.

Relative to ascertaining a bidder's past performance, the RFP required bidders to disclose in Section 4 of the RFP, "Medicaid Managed Care experience in the past five (5) years...." RFP § 4.3(I)(1), pg. 24. All proposals "*must* meet all RFP submission requirements...." RFP §3.2.4(A), p. 12 (emphasis added)). "Failure of the bidder to conform to these requirements [in Section 4 of the RFP] may, at the State's sole discretion, result in the disqualification of the proposal." RFP § 4, p. 18.

HB's proposal omits the required disclosure of its contract experience with the State of Kansas. Ex. 11, HB's Proposal, PDF p. 1251. To effectively unveil this history, it is necessary to start at the beginning. In 2011, Amerigroup Kansas, Inc. ("Amerigroup") was formed as a domestic entity with the Kansas Secretary of State. Ex. 12, Amerigroup Kansas, Inc. Articles of Incorporation. Amerigroup was a wholly owned subsidiary of Anthem, Inc. Ex. 13, Amerigroup 2018 Proposal Excerpt.<sup>6</sup> The following year, Amerigroup was named a successful bidder for the KanCare 1.0 contract effective January 1, 2013 and expiring December 31, 2018. Ex. 14, Amerigroup 2013 Contract.

In 2018, the office of procurement within the DOA requested proposals for KanCare 2.0 contracts. Amerigroup was a bidder that was invited for a face to face meeting during the bid selection process. "At the conclusion of the meetings, KDHE and KDADS Leadership were unanimous in the decision to not continue bid award discussions with Amerigroup," and in fact the decision on Amerigroup was "an emphatic no from everyone." Ex. 15, 2018 Bid Protest Record Excerpt. Amerigroup was a disappointed bidder.

The KanCare program has legislative oversight by the Robert G. Bethell Joint Committee on Home and Community Based Services and KanCare Oversight ("Bethell Committee"). See K.S.A. 39-7,160. The Bethell Committee is tasked with overseeing and monitoring the operations of programs including the KanCare program. *Id.* The Kansas Legislative Research Department publishes this information tracking such issues and the status of resolution.

In February 2019, it was reported to the Bethell Committee that Amerigroup still owed providers thousands in claims and ceased providing Explanations of Payments. By June 2019, the Kansas Hospital Association reported over \$14.3 million in outstanding payments owed to Kansas

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<sup>6</sup> An error within the document prevented saving the entire proposal. The relevant excerpt is enclosed, with the entirety of the proposal incorporated by reference to its online location at: <https://admin.ks.gov/offices/procurement-contracts/bidding--contracts/contracts/important-awardscontracts/kancare-award>

hospitals from Amerigroup. KDHE staff worked to assist individual providers with the claims' appeal processes. By December 2020, the Kansas Hospital Association reported that amounts had only slightly reduced to \$4.1 million in outstanding payments. Ex. 16, Bethell General Issues Resolution Spreadsheet. In April 2021, the Bethell Committee closed the issue at KDHE's request with no further update. Ex. 17, Bethell April 2021 Meeting Minutes. During a Bethell Committee meeting held in October 2023, Representative Carpenter noted that Amerigroup failed to pay approximately \$7 million owed to providers which was in excess of its surety bond, leaving providers with little recourse, and having the State increase the surety bond for KanCare 3.0.<sup>7</sup>

Creating a fiction that it was not involved in prior KanCare programs and separating itself from the financial responsibility it ignored, Amerigroup creatively embarked upon a brand relaunch. In June 2021, Amerigroup Kansas, Inc. legally changed its name to Community Care Health Plan of Kansas, Inc. Ex. 18, Amerigroup Name Change Amendment. At some point later, Anthem sold a 5% ownership interest of this subsidiary to Blue Cross Blue Shield of Kansas, Inc. ("BCBS Kansas") and another 5% to Blue Cross Blue Shield Kansas City, Inc. ("BCBS KC"). Ex. 11 at PDF p. 71. In September 2021, a joint venture was formed between Anthem Partnership Holding Company, LLC, BCBS Kansas, and BCBS KC to form Healthy Blue (HB). *Id.* In June 2022, Community Care Health Plan of Kansas Inc.'s parent company formerly known as Anthem changed its name to Elevance. Ex. 19, Anthem, Inc. Certificate of Amendment.

Community Care Health Plan of Kansas, Inc. d/b/a HB submitted a proposal to the State's RFP. New names, new brand, and a new day are not enough to cloak HB's shameful past MCO experience with the State that was not reported or identified in its submission. The RFP requested a five year look back period for disclosure of "Medicaid Managed Care experience..." Calculating the five year look back from the date of the RFP release (October 2, 2023) is the most sensical.<sup>8</sup> Thus, the five year look back period dates back to October 2, 2018 – before the expiration of HB's prior contract. Yet, HB omits this required information. In the interest of fairness and in accordance with the mandatory requirements of the RFP, this material deficiency from the request for proposal requires the bid be disqualified during the Phase 1 evaluation stage as HB should not be able to hide behind its veil when it comes to disclosure of its contract experience with the State of Kansas and Medicaid. There is an obvious difference between inadvertent oversight of a mundane matter remote in time (which this is not), and entirely omitting the performance with respect to a prior contract with the State where HB left behind unpaid claims for beneficiaries and increased the surety bond requirements for this RFP. Because HB was not transparent and the Agency was not provided with this omitted information or the benefit of evaluating it, the Agency and the other offerors have been prejudiced.

Further to this end, this information would undoubtedly have swung favorably for Aetna, especially in this tiebreaker scenario where the Agency's determination as to the best interests of

<sup>7</sup> See Bethell Committee on October 12, 2023, from time mark 26:39 through 27:08: <https://youtu.be/mDFlOXeTVtY?t=1598>. For purposes of the record, an electronic copy of the video excerpt accompanies this Protest.

<sup>8</sup> Even assuming *arguendo*, if the look back period ran from January 4, 2019 - January 4, 2024, HB's experience with the State Medicaid contract included the processing of claims and appeals for payment under the contract with providers well into 2019 and beyond, bringing this experience undisputedly within the five (5) year look back period.

the State could not be fully addressed or considered when HB withheld information. This material omission undeniably results in competitive prejudice while also preventing the state from achieving the most advantageous combination of cost, quality, and sustainability for many of its disadvantaged population and the agencies that oversee the same.

For these reasons, HB's proposal should have been disqualified from consideration, and Aetna's protest should be sustained on this ground alone.

### **C. Staff Migrations**

In the intricate world of public procurement, trust, integrity, and the absence of an appearance of impropriety are paramount. Public employees and bidders must have and follow the standards of conduct to create the highest degree of public trust. However, in this case, there is a grave conflict of interest and appearance of favoritism in the selection of HB for the KanCare award stemming from the recent transition of several key individuals formerly with Kansas state government who are now working with HB and/or its parent company. As such, the Director should reasonably use this opportunity to restore trust and serve the State's best interests.

K.S.A. 46-233(a)(1) states in pertinent part:

“[n]o state officer or employee shall in the capacity as such officer or employee be substantially involved in the preparation of or participate in the making of a contract with any person or business by which such officer or employee is employed ... has a substantial interest and no such person or business shall enter into any contract where any state officer or employee, acting in such capacity, is a signatory to, has been substantially involved in the preparation of or is a participant in the making of such contract and is employed by such person or business or such officer or employee or any member of such officer's or employee's immediate family has a substantial interest in such person or business.”

Within the last three years, the following former State employees have gained employment with HB or a related entity of the offeror:

#### **1. Sarah Fertig:**

- a. Previously the State Medicaid Director at KDHE from 2020 – 2023.<sup>9</sup>
- b. As of September 2023, Director of Government Relations at BCBS Kansas. Ex. 20, Sunee Mickle August 30, 2023, Email.

#### **2. Ashley Jones Wisner:**

- a. Previously the Senior Director of Public Affairs at KDHE from March 2019 – June 2021.<sup>10</sup>

<sup>9</sup> See Ex. 25, [August 15, 2023, Sunflower State Journal Article](#).

<sup>10</sup> See Ex. 26, [Ashley Jones Wisner LinkedIn Profile](#).



b. As of May 2023, Director of Corporate Communications at BCBS Kansas.<sup>11</sup>

### 3. Clay Britton:

a. Previously Chief Counsel for Governor Kelly from 2019 – 2021.<sup>12</sup>

b. As of December 2021, VP and General Counsel for BCBS Kansas.<sup>13</sup>

### 4. RJ Wilson:

a. Previously the Minority House Leader’s Chief of Staff from 2023 – 2024<sup>14</sup>

b. As of February 2024, Director of Government Relations at Elevance<sup>15</sup>

First and perhaps foremost, Sarah Fertig was formerly the State Medicaid Director for Kansas. She not only had direct access to the RFP through her role as State Medicaid Director, but she was overall responsible for its development and implementation of the RFP when it launched. In her job duties, she was tasked to ensure the integration and alignment of health-focused activities through KDHE and oversaw all aspects of the Medicaid Program and the Children’s Health Insurance Program. In reviewing the timeline for the RFP and the recorded public meetings, it is clear Ms. Fertig was involved in its creation and planning.

On April 11, 2023, the Office of Procurement and Contracts issued “Anatomy of an RFP” with an overview of the process. Two public meetings were held on April 11, 2023, and on April 13, 2023.<sup>16</sup> During the April 13<sup>th</sup> meeting, Fertig herself gave the welcome speech and an overview of KanCare and Medicaid. She unambiguously advised that it was her intention that “the best bids will be given contracts in 2025.” Later, she explains the RFP process began in 2022 because it was originally meant to be re-bid in fall 2022. Due to a law passed by the legislature, she had to wait until 2023 to start the bidding process. However, they had already initiated public comment in 2022 and had to pause it and then resume it again in January of 2023. She states they are seeking as much input as possible from members, stakeholders, and providers to finalize the RFP, indicating the draft was already in progress. It is inescapable that the public’s confidence in this procurement is jeopardized by BCBS’s hiring the former Director of Medicaid, who was intimately familiar with what the department and the RFP by virtue of her position.

BCBS Kansas was highly aware of Ms. Fertig’s involvement with the RFP. In an August 30, 2023, internal email from Sunee Mickle, Vice President of Government and Community Relations with BCBS Kansas, she advises the community relations division that Ms. Fertig will join their team on September 18, 2023. Ex. 20, Sunee Mickle August 30, 2023, Email. The email

<sup>11</sup> *Id.*

<sup>12</sup> See Ex. 27, [November 30, 2021, Sunflower State Journal Article](#); See Ex. 28, [Clay Britton LinkedIn Experience Profile](#).

<sup>13</sup> See Ex. 29, [Clay Britton BCBSKS Profile](#).

<sup>14</sup> See Ex. 30, [February 13, 2024, Sunflower State Journal Article](#).

<sup>15</sup> See Ex. 31, [RJ Wilson LinkedIn Profile](#).

<sup>16</sup> See Ex. 32, [KanCare 2025 Request for Proposal Website](#). For purposes of the record, an electronic copy of the video excerpt accompanies this Protest.

suggests that Sarah will not engage in any work related to the Medicaid Managed Care Organization affiliate, HB—recognizing the conflict at issue. However, information regarding HB was designated to go to Mickle, who Ms. Fertig reported directly. There is at a minimum the appearance of a conflict of interest, if not an actual conflict.

The mere appearance of impropriety presents “**a certain aroma that is hard to purify.**” *NKF Engineering, Inc. v. United States*, 805 F.2d 372 (Fed. Cir. 1986)(holding that regardless of whether inside information was passed to NKF, the appearance of impropriety was enough for the contracting officer to disqualify NKF, and that decision was not irrational, arbitrary, or capricious.) The finding in *NKF* was reaffirmed as recently as this year in *Raytheon Company v. United States*, 170 Fed.Cl. 561 (2024). Similar to *NKF*, Raytheon was disqualified in a bid procurement due to the employment of a retired technical expert, which gave rise to the appearance of impropriety. The court in Raytheon discussed several Federal Acquisition Regulations relevant to this issue, with one stating “[t]ransactions relating to the expenditure of public funds require the highest degree of public trust and an impeccable standard of conduct. The general rule is to avoid strictly any conflict of interest or even the appearance of a conflict of interest in Government-contractor relationships.” FAR 3.101-1 (emphasis added). There is not a requirement that an agency find evidence of an actual impact to the procurement. As long as the finding of an appearance of impropriety is rational, then it must be upheld, and here it is.

Much like *NKF* and its progeny, Fertig’s involvement with this RFP as a state actor coupled with her subsequent employment with BCBS Kansas, and an award of the contract to HB, creates the appearance of impropriety and questions the integrity of the entire bid procurement process. Because these processes demand the highest degree of public trust and forbid the appearance of impropriety, HB must be disqualified from the KanCare award and its contract rescinded. See *Michael Stapleton Assocs., Ltd. v. United States*, 163 Fed. Cl. 297, 359-60 (2022) (explaining that an agency must reasonably mitigate conflicts of interest in procurement).

#### **D. Blackout Violations**

Communications between an agency and offerors after the RFP is issued and before awards are made are subject to strict rules, and are often prohibited. Nevertheless, in November 2023, after the release of the RFP, the Governor’s Office requested meetings with different industries across the state to discuss Medicaid Expansion. Ex. 21, Governor’s Office Medicaid Expansion Agenda. Aetna declined the invitation out of concern for potentially violating the blackout rules in the RFP. Aetna, through legal counsel, has submitted open records requests to further evaluate any additional communications between HB and certain state officials. Ex. 22, Aetna KORA Requests. These requests have not been fully responded to at the time of filing this protest. Aetna reserves the right to supplement this protest if additional relevant information is subsequently produced.

The RFP provides for a “blackout” of communications as follows: “[a]ll contacts and inquiries concerning this RFP, written or verbal, shall be directed only to the Procurement Officer designated below.” It further states, “[u]pon issuance of this RFP, other State staff, the State’s contractors, and representatives of the agencies identified in the RFP will not answer questions or otherwise discuss the contents of this RFP with any potential bidders or their representatives.” RFP § 2.3, p. 8. In Amendment 2 to the RFP, it was clarified “[t]his prohibition applies to all State of

Kansas staff; it is not limited to staff of particular State agencies such as KDHE or KDADS.” Ex. 4 at p. 21. “Attempts by potential bidders to discuss the contents of this RFP with such individuals may result in the disqualification of the bidders’ proposals. This restriction does not preclude discussions for the purpose of conducting business unrelated to this procurement.” RFP § 2.3, p. 8.

In furtherance of a fair, competitive process, the RFP mandates, “a proposal shall not be considered for award if the proposal was not arrived at independently and without collusion, consultation, communication, or agreement as to any matter related to the proposal with any other bidder, competitor, or public officer/employee.” RFP §3.3.2(B), p. 15. “A deviation from competitive bidding will not be countenanced even where there is no evidence of fraud or favoritism.” *Hanisco v. Township of Warminster*, 41 A.3d 116, 123 (Pa. Cmwlth. 2012). The bidding process is supposed to be fair and just, foreclosing favoritism or more nefarious selection. *Id.* “When competitive bidding is used and the procedures followed emasculate the benefits of such bidding, we believe judicial intervention is proper.” *Am. Totalisator Co. v. Seligman*, 489 Pa. 568, 576, 414 A.2d 1037, 1041 (1980).

In an on-point case, a Pennsylvania appellate court reversed a Department of Human Services (“DHS”) order denying United Healthcare of Pennsylvania’s bid protests after a violation of the blackout rule. *See generally UnitedHealthcare of Pennsylvania, Inc. v. Dep’t of Hum. Servs.*, No. 790 C.D. 2017, 2018 WL 1722664 (Pa. Commw. Ct. Apr. 10, 2018). On November 18, 2016, the Project Officer notified United that its “proposals were not among those proposals determined to be the most advantageous to the Commonwealth,” and United filed a bid protest based on DHS’s November Selection Memorandum. On December 19, 2016, DHS’ Deputy Secretary for the Office of Medical Assistance Programs and the Deputy Chief Counsel in the Department’s Office of General Counsel, met with the Chairman/CEO and Executive Vice President and the Chief Business Development Officer of another bidder, Pennsylvania Health & Wellness, Inc. (“PHW”). The Deputy Secretary requested the meeting with PHW to discuss PHW’s operational readiness to operate as an MCO on a statewide basis.

United filed a protest arguing that the December 19th meeting violated the state laws and guidance discussing “equal treatment”; the “blackout period”; and the automatic stay provisions. United also claimed that DHS violated state law by unfairly favoring PHW. The DHS Director determined that the December 19th meeting did not violate state law.

Ultimately, the appellate court agreed with United and reversed DHS’ Final Agency Determination. Specifically, the court held the December 19th meeting, which occurred before PHW was found to be a “responsible offeror” and before its proposal was determined to be responsive or the most advantageous, was not authorized by the RFP thereby violating the Procurement Code and the Procurement Handbook.

Where HB engaged in communications involving Medicaid expansion that relates to the RFP, or where any other discussions were had relating to the RFP between HB and state officials during the blackout period for the procurement of the KanCare award, it renders HB’s proposal ineligible for award. Transparency and adherence to the blackout rules are essential to maintain the integrity of the procurement process.

### E. Scoring Analysis

To date, the Agency has only publicly disclosed the bidders' total consensus scores, strengths and weaknesses for each broad topic area. The Agency has not revealed how bidders were scored on each of the 37 individual technical questions, nor the committee members' notes in support of the same. Aetna immediately submitted KORA requests to DOA, KDADS, and KDHE requesting additional information not yet disclosed regarding the Agency's scoring evaluations, but has yet to receive the same. Upon review of the requested information, Aetna will promptly supplement this protest with additional errors and discrepancies as warranted and therefore respectfully reserves the opportunity to supplement the record and its Protest herein.

Regardless, the credible record evidence demonstrates that Aetna would have received an award under the RFP but for errors committed in the evaluations of Aetna and HB's proposals. These errors are especially vital here, where the evaluation resulted in a tie. Crucially, the Agency's Technical Evaluation Report reveals that while subject matter experts were made available to the evaluation committees during the evaluations, "[n]o SMEs were requested or used during the consensus evaluation sessions." Ex. 6 at p.8. Unfortunately, the committee's refusal to utilize the state's SMEs is readily apparent when reviewing the inconsistent scoring evaluations.

The evaluations of Aetna and HB's proposals contain numerous errors and discrepancies, as set forth in the following table:

RFP Item	Alleged Strength/Weakness	Error
Question No. 6	Aetna was assessed a "weakness" for an alleged failure to "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 usability of the online directory and on strategies to reduce provider burden associated with providing information."	HB's proposal was entirely devoid of an outlined strategy or timelines for improving data accuracy or reducing provider burden, yet HB did not receive a weakness.
Question No. 15	Aetna was assessed a "weakness" for allegedly failing to "fully describe strategies for ensuring member access to NEMT."	The RFP did not ask for "strategies," it required an "approach," which Aetna supplied. <i>See</i> Ex. 23, Aetna Proposal at p. 1323. HB's proposal similarly discusses an "approach" and does not mention strategies in response to Technical Question No. 15, yet HB did not receive a weakness.

Question No. 24	Aetna was assessed a “weakness” for allegedly failing to “fully describe strategies for ensuring timely access to quality dental care in all areas of the state.”	
Question No. 24	HB was assessed a "strength" for supplying "multiple strategies to ensure timely access to quality dental care in all areas of the State, including rural and frontier areas."	Both Aetna and HB proposed using SKYGEN as their dental care subcontractor. HB’s “strategy” to ensuring timely access to quality dental care largely focused on increasing member engagement. The issue facing members is gaps in the dental network, not having timely access. Without available dentists, member engagement is futile. Had the Agency utilized a SME, it would have recognized that Aetna's approach to filling gaps is also the solution to timely access and, when combined with Aetna's multiple topics for ensuring timely access, demanded a "strength. "

See Ex. 23, Aetna Proposal; Ex. 11. These errors are not simply subjective disagreements, they are objectively incorrect evaluations. There is no rational explanation for awarding strengths or weaknesses in one instance but not the other when the content is, for all intents and purposes, identical. Such ratings are inherently unreasonable, arbitrary, and capricious in violation of K.S.A. 77-621(c)(8).

Any single one of these scoring errors, if evaluated correctly, would have resulted in Aetna receiving an award over HB. Thus, in order for the Agency to justify and support its award, it must rebut these errors. The Agency cannot do that, because these objective scoring errors and discrepancies are irrefutable and favor Aetna.

#### **F. Aetna Should Receive a Fourth Award**

The protest is robust with valid grounds for success at this level and beyond. The call for reconsideration aligns with the need for fairness and adherence to the RFP terms, and with stakeholders who respectfully submit that it is in the best interests of the State.<sup>17</sup> Furthermore, presenting an alternative solution of a separate award to Aetna underscores its merit as a bidder and emphasizes the importance of serving the best interests of the Medicaid beneficiaries and the citizens Kansas. Through a combination of legal challenge and a focus on what is most beneficial for the stakeholders involved, a more equitable resolution to the procurement process is appropriate.

The RFP provides that the State of Kansas “intends to contract with three (3) MCOs...” RFP § 6, p. 42. Neither statute nor language in the RFP limits Kansas to making only these three awards. The RFP’s stated goals of improving Member experience and satisfaction, health outcomes, reducing health care disparities, expanding provider network and direct care workforce capacity and skill sets, improving provider experience and encouraging provider participation, increasing the use of cost-effective strategies, and promoting continuous quality improvement

<sup>17</sup> As demonstrated by the resounding support offered by providers throughout Kansas, an award to Aetna is in the best interest of the State and Kansans. See Ex. 33, Support Letters.

align with issuing a fourth award to Aetna. The Director’s decision will ultimately shape the landscape of Kansas’ future and we are respectfully requesting a resolution that balances fairness, efficiency and the well-being of all Kansans—at the very least, with the tie on technical scoring, a fourth award should be issued.

#### **G. Reservation of Right to Supplement**

On May 19, 2024, Aetna submitted separate open records requests to the DOA, KDHE, KDADS, and the Governor’s Office. Ex. 23. On May 20, 2024, a second open records request was submitted to the DOA. *Id.* To date, responses to most of these requests remain outstanding, significantly prejudicing Aetna’s Protest herein.<sup>18</sup> Accordingly, Aetna reserves its right to amend and/or supplement this protest based on any new information that comes to light subsequent to the submission of this protest. Aetna is not able to provide a date certain for expected availability of the potentially relevant documents because there is no mandated production deadline and the control over the process lies with the respective state agencies, but Aetna reasonably anticipates supplementing its protest once all KORA responses are provided.<sup>19</sup>

#### **IV. CONCLUSION**

For the reasons set forth above, including the numerous violations of procurement law and Agency’s failure to follow the RFP, the Agency should respectfully rescind the award issued to HB and re-issue an award to Aetna. In the alternative, the Agency should exercise its discretion and issue a fourth award to Aetna as permitted by the RFP and balancing efficiency with fairness and the hallmarks of procurement in the State of Kansas.

In addition, the Agency should stay all procurement-related activities, including contract readiness reviews and implementation activities until a final resolution of this protest. K.S.A. 77-616(a); *Sierra Club v. Mosier*, 305 Kan. 1090, 1110, 391 P.3d 667 (2017). The RFP explicitly provides that the period for readiness review runs from the “[e]nd of bid protest to December 31, 2024.” RFP at 10. A stay is therefore necessary, reasonable, required, and in the best interests of Kansans currently receiving managed care services. If the readiness reviews and contract implementation efforts proceed and a decision favorable to Aetna’s bid protest is issued, the State and its Medicaid beneficiaries will suffer irreversible damages and confusion, and Aetna will also

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<sup>18</sup> For instance, (1) Aetna has not yet received KORA responses regarding how bidders were scored on each of the 37 individual technical questions or the scoring committee members’ notes supporting the scores to determine their propriety, (2) Aetna has not received information as to whether HB requested an exception to the HIDE D-SNP requirements of the RFP (having inquired about the same during the Q&A phase of the procurement), or (3) whether HB has represented that it will meet these requirements necessary to accomplish mandatory compliance.

<sup>19</sup> For purposes of the record, Aetna hereby further incorporates Exhibits 34 through 55, as well as any and all documents now or later uploaded to the DOA KanCare Award website, as well as any documents produced to Aetna in response to its KORA Requests.

be similarly irreparably harmed. Maintaining the *status quo* is prudent and does not harm any party to the proceedings or those Kansans who are or will be participating in the KanCare program.

Sincerely,

/s/ Diane L. Bellquist

Encls.