

July 3, 2024

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Re: Bid Protest – KanCare Medicaid & CHIP capitated Managed Care request for Proposal, Bid event No. 0009267

Dear Ms. Griffin:

CareSource Kansas LLC's (CareSource) 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 4, 2024. A supplemental submission was made on June 12, 2024.

Contracts for Bid Event # 0009267 were solicited through a Request for Proposal (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. CareSource 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 Better Health of Kansas LLC (Aetna), 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.

As part of the procurement process, there was 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 nor 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 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, including CareSource. 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.

CareSource requests a stay of the procurement process, contract execution and implementation be instituted as a result of their protest dated June 4, 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 CareSource of further 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 CareSource'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

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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.

CareSource asserts the State's RFP did not follow proper procurement procedures in conducting this bid event and it challenges the award of this contract claiming the State has improperly awarded a contract which is different than the specifications advertised. CareSource in its protest focuses on the requirements the State should utilize in a situation which calls for a competitive sealed bid. The arguments put forth and case law cited by CareSource indicating the State acted improperly in conducting this bid solicitation and contract award focus primarily on situations which involve governmental entities seeking competitive sealed bids for public works or construction projects. In those instances, the statutory authority which governs the bid solicitations made by the public entity are unique to those types of projects and not the underlying authority upon which the present bid solicitation was conducted.

The State of Kansas and its political subdivisions have many different statutory authorities which can be utilized in conducting public procurements. Most public works projects conducted by city and county governments are contained in different statutes and are unique to those political subdivisions. Similarly, the agencies of the State of Kansas utilize several different statutes when engaging in public procurement depending upon the type of procurement involved. A few examples, but not all, are K.S.A. 75-3739 – 75-3741 which governs sealed competitive bidding, K.S.A. 75-37,102 which governs the use of negotiated procurements or competitive sealed proposals, also referred to as an RFP. K.S.A. 76-769 which governs state universities operating under the Kansas Board of Regents. As set forth previously in this response, Bid Event # 0009267 is a negotiated procurement seeking a competitive sealed proposal and is governed by K.S.A. 75-37,102.

CareSource's argument in support of its protest views all governmental procurements offered by the State of Kansas through OPC as being from one source. Viewing all state public procurements together under the same umbrella. The protest does not differentiate between the different types of public procurement options available. Therefore, in doing so CareSource has not recognized the different types of bid solicitations and statutory authority utilized by OPC when engaging in the public procurement process. More specifically, not recognizing the statutory authority utilized in this specific bid solicitation to conduct a negotiated procurement requesting competitive sealed proposals.

The discussion in support of the protest uses the terms competitive bidding and RFP interchangeably as though these terms have the same meaning. They do not. CareSource does not acknowledge that the process permitted by statute and utilized by the State of Kansas in this bid solicitation is not competitive bidding or a sealed competitive bid. Pursuant to the Bid Event Details in the RFP document this is a negotiated procurement pursuant to K.S.A. 75-37,102 requiring a sealed competitive proposal be submitted by the responding bidders. This is recognized as a negotiated procurement.

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As a negotiated procurement, the State sought competitive sealed proposals in response to the bid solicitation posted on October 2, 2023. These proposals and the statutory authority involved in Bid Event # 0009267 are different from the competitive sealed bidding requirements of K.S.A. 75-3739. Under KSA 75-3739 competitive sealed bids seek the low bidder meeting the specifications of the bid event to be awarded the contract. If Bid Event # 0009267 were governed by KSA 75-3739, CareSource could be correct when claiming that changing the bid specifications or the scope of work after the closing of the bid event would be improper. However, under K.S.A. 75-37,102 the State is permitted to engage the responding bidders in negotiations and information gathering, which could lead to changes in what the State agrees to acquire when entering into a final contract. K.S.A. 75-3739 is not applicable to this bid event. K.S.A. 75-37,102 (e) specifically exempts contracts being entered into pursuant to K.S.A. 75-37,102 from the requirements of K.S.A. 75-3739. Therefore, the sealed competitive bid process and its requirements are not the standard which should be applied in this instance.

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

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

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

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

The premise upon which CareSource has asserted the State engaged in a process which may have in CareSource's view taken into account other factors or changed requirements after the bid closing is inaccurate. The State through its authority to conduct a negotiated procurement has the authority and

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flexibility to look at the proposal being offered by CareSource, as well as the other responding bidders, and to discuss with them their respective proposals and what steps the State could take to find a better solution and arrive at a decision the State found to be in the government's best interest. This permits the State the opportunity to address issues which it may not have been aware of in seeking competitive sealed proposals for the goods and/or services involved. This in turn may lead to the deleting of goods and/or services sought in the original RFP or discussing with the bidder other potential solutions or efficiencies which could be achieved. Further, the State has flexibility in how it gathers the additional information from the different vendor or vendors it may need to consider and arrive at a determination in awarding a contract through the negotiated procurement process to a vendor which is in the best interest of the State. (See KanCare Medicaid & CHIP Capitated Managed Care Request for Proposal, Sections 3.2.6 and 3.3.1)

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.

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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 evaluation committees was to reduce the number of bidders going forward into the individual bidder discussion process to four (4) bidders. Those bidders moving forward did not include CareSource. 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)

CareSource's believes its cost proposal was required to be reviewed by the PNC and it was not reviewed by the PNC. This is not accurate. The PNC had the discretion to review CareSource's cost proposal and meet with them. The facts are all cost proposals from the seven (7) vendors were forwarded to the PNC for review. After the cost proposal was reviewed, the PNC had additional questions regarding the CareSource proposal. As indicated previously, CareSource was provided additional questions about its proposal on April 2, 2024. CareSource responded with answers to these questions. Additionally, CareSource believes the cost proposals of Aetna and Healthy Blue will lead to underfunding of KanCare. The cost proposals of Aetna and Healthy Blue were reviewed by the Optumas. It was determined that both vendor's cost proposals were within the range prescribed by CMS and were acceptable.

The PNC determined based upon the all the information available to them through the procurement process they did not want to bring CareSource forward for any additional discussions. This permitted the PNC to narrow down its discussions to the four (4) remaining vendors.

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

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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.

CareSource asserts in its protest 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, CareSource 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, CareSource 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.

CareSource asserts in its protest the PNC improperly inserted an additional step in the evaluation process. The claim from CareSource is the PNC should not have been able to ask them questions post review of the technical proposal and the cost proposal. The PNC has the authority to ask questions and seek information from bidders to determine if the proposal being put forward by a bidder meets the needs of the State of Kansas and ultimately is in the best interest of the State. (See KanCare Medicaid & CHIP Capitated Managed Care Request for Proposal sections 3.2.6 and 3.3.1)

In a negotiated procurement pursuant to K.S.A. 75-37,102 the State has flexibility, once the bid posting has closed, in how it determines which vendors should be contacted. The statute permits the government the ability to determine which and how many vendors will be negotiated with to determine who will be awarded a contract. This permits the State to obtain the information it needs from those vendors to evaluate their proposals and award a contract which is in the best interest of the State.



From the State's perspective it believes it has been transparent with the information it has provided during the procurement process. It ensured each potential bidder had the same information upon which to put together the submission of their competitive sealed proposal. No information was hidden from the potential vendors. All the vendors had the opportunity to submit questions and receive answers to those questions. All of the questions and answers were posted on the OPC website, so each vendor would have the same information available to them. All the vendors were provided the same questions for the technical proposal and were provided the valuation for each of the questions. It is the sum of all this information and any additional information obtained during the procurement process which permits the PNC to make a determination of which vendors can provide the appropriate and necessary services to meet the requirements of KanCare. It is this totality of information which permits the PNC to determine what vendors can perform to a level which is in the best interest of the State.

CareSource challenges the score it received as part of the procurement process. They assert the PNC was arbitrary and capricious in its scoring process. CareSource 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 CareSource 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 CareSource 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 CareSource's strengths and weaknesses are set forth in the PNC award recommendation. CareSource's weaknesses in the PNC award recommendation are listed here:

- Very limited information and details regarding the MCO's approach to being an effective partner with the State and other stakeholders to achieve the State's vision and goals.
- Limited information, detail, and examples of the MCO's approach to advancing integrated, whole -person care.
- Did not fully describe and explain how the MCO would ensure appropriate utilization of services while reducing provider administrative burden.

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- Lacked detail on how the MCO would meet NEMT access and service delivery standards.
- Did not provide sufficient detail to demonstrate how the MCO would identify and address HCBS service gaps.
- Did not demonstrate a comprehensive understanding of Kansas-specific network gaps.
- Did not clarify that using telehealth would not be appropriate for all populations, and did not provide sufficient information regarding the timeline for provider recruiting and contracting.
- Lacked detail and did not provide detailed solutions for HCBS and behavioral health workforce issues in rural and frontier areas.
- Did not demonstrate a comprehensive understanding of Kansas-specific network gaps and provided limited details on how the MCO would close identified dental network gaps to ensure timely access to quality dental care.
- Lacked detail and did not fully address identifying, coordinating, and addressing member/family needs in response to the case scenarios involving the adult member on the IDD HCBS waiver and the American Indian member.
- Lacked detail and did not sufficiently address the case scenario involving the hospital executive's concern about psychiatric boarding.

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

CareSource'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 CareSource 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 asked to move forward in the process and to whom a contract was awarded. 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.

CareSource 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.

Additionally, CareSource asserts, with no evidence in support of their claim, some level of bias by Mercer, the State's consultant, was involved and manifested itself to the detriment of CareSource. CareSource argues as the State's consultant, Mercer possessed a conflict of interest or bias by virtue of their work with other states.

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Further, they brought that bias to bear in this process. Again, this assertion is made with no evidence. Mercer's involvement with reviewing the proposals submitted by the vendors was limited. The PNC Award Recommendation dated May 8, 2024 at page 4 states the following:

The consulting firm Mercer Government Human Services Consulting (Mercer), part of Mercer Health & Benefits LLC, under contract with the Kansas Department of Health and Environment (KDHE), provided support to the State throughout the KanCare procurement, including in the evaluation process to facilitate and document the consensus evaluation process. Mercer's supportive role in the evaluation process did not include the evaluation of the bidders' proposals (i.e., including whether proposals met mandatory requirements, the review and rating/scoring of technical proposals, and the review and evaluation of cost proposals). Mercer did not review or have access to any of the bidders' proposals.

There has been no evidence of bias or conflict of interest by Mercer which would require this contract award to be changed.

CareSource asserts in its protest that Healthy Blue is conflicted from being able to be awarded a contract as a result of this RFP. CareSource believes the departure of Sarah Fertig from her position as the Kansas Medicaid Director and her subsequent employment with Blue Cross and Blue Shield of Kansas (BCBSK) creates a conflict which disqualifies Healthy Blue. BCBSK is part owner of Healthy Blue. CareSource cites K.S.A. 46-233 in support of its position.

Public information available indicates 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 BCBSK would not involve in KanCare has not changed. CareSource provides no evidence Ms. Fertig has engaged in any actions in her new employment which are inconsistent with what was previously stated by BCBSK. CareSource points to a standard of "appearance of Impropriety", as a basis for determining this contract award should be declared invalid. This standard does not exist in the statute. The State's 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 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 CareSource point to in support of its position relate to Ms. Fertig performing her job responsibilities while she was the Kansas Medicaid Director. It was her responsibility to attend and speak at

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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 bid event did not post to the OPC website for approximately six (6) weeks after she informed KDHE she was leaving State employment. Once she notified KDHE that she was taking a position with BCBSK, 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 either assisting the State or Healthy Blue in any aspect of the KanCare bid event. Finally, after the bid closed it was still another four (4) months where Ms. Fertig had no involvement in the review of any bid proposal submitted. There has been no evidence presented which indicates Ms. Fertig did any of the actions CareSource suggests may have occurred, after she had accepted employment with BCBSK. CareSource engages in mere speculation. Once Ms. Fertig accepted the position with BCBSK she was no longer involved. The remedy CareSource seeks is inconsistent with the facts.

In a supplemental protest filing received June 12, 2024, CareSource pointed to a second individual's involvement in the procurement process as a basis for bias in this contract award. This individual identified by CareSource was Ms. Mandy Jump. CareSource only asserts Ms. Jump was employed by BCBSK for seventeen (17) years. The implication was any review Ms. Jump was involved with which favored Healthy Blue was due to this period of employment.

As a result of this information being provided by CareSource, an inquiry was made regarding Ms. Jump and her employment status with the State of Kansas. What CareSource did not provide is the additional context regarding her employment. Ms. Jump has been a state employee for the last ten (10) years. Again, an allegation of some of improper actions on the part of state employee, but no evidence provided.

CareSource asserts the PNC engaged in some level of bias and favoritism for incumbent vendors over new vendors in arriving at its decisions in awarding KanCare contracts. Much of the information put forth by CareSource in support of this claim has been dealt with earlier and does not support the relief CareSource seeks. The consensus rating review of CareSource's proposal has been explained. The score was only one aspect of the review conducted by the evaluation committees and the PNC. All the information gathered through the procurement process was reviewed. This included the cost proposal submitted by CareSource. It was after this review of everything available to the PNC, that CareSource was no longer in consideration and not brought forward in the process. Ms. Fertig was no longer involved in the procurement process once she notified KDHE she had accepted a position with BCBSK. There has been no evidence to the contrary presented. Therefore, I find no evidence of bias or favoritism existed in this procurement,

In conclusion, the standards utilized, and the arguments put forth by CareSource to challenge this contract award are insufficient to warrant the remedies being sought by CareSource. For the actions of the State in

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making these contract awards to be considered arbitrary and capricious the agency's decisions have to be unreasonable and not supported by the evidence.

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, CareSource's protest will not be granted. The Stay requested by CareSource 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

TD:th