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Protest Decision

Matter of: Blue Cross and Blue Shield of South Carolina

Case No.: 2019-202

Posting Date: March 20, 2019

Contracting Entity: South Carolina Department of Health and Human Services

Solicitation No.: 5400011606

Description: Services to Support the Adjudication and Payment of Fee-for-Service Medicaid Claims and the Enrollment and Management of Providers (ASO)

DIGEST

Protest alleging successful proposal was non-responsive and flaws in the procurement process is denied. Blue Cross and Blue Shield of South Carolina's (BCBS) amended protest is incorporated by reference. (Attachment 1)

AUTHORITY

The Chief Procurement Officer (CPO) conducted an administrative review pursuant to S.C. Code Ann. §11-35-4210(4). This decision is based on materials in the procurement file and applicable law and precedents.

BACKGROUND

Solicitation Issued	January 31, 2017
Amendment One Issued	February 15, 2017
Amendment Two Issued	June 12, 2017
Amendment Three Issued	July 10, 2017
Amendment Four Issued	July 11, 2017
Proposal Opening	September 20, 2017
Request for Clarification	October 25, 2017
Evaluator Scoring	December 1, 2017
Evaluator Demonstration Scoring	January 10, 2018
Negotiations with Optum	February 20, 2018
Approval to Conduct Discussions	April 6, 2018
Discussions	April 13, 2018
Evaluator Discussions Scoring	May 18, 2018
Record of Negotiations Signed	June 18, 2018
Intent to Award Posted	September 14, 2018
Protest Received	September 24, 2018
Amended Protest Received	October 1, 2018

The South Carolina Department of Health and Human Services (HHS) is in the midst of acquiring a replacement Medicaid Management Information System, or MMIS. MMIS is a collection of interrelated line-of-business applications HHS relies on to carry out part of its core mission. Some components of the legacy application are written in the COBOL programming language and are approaching forty years of age. Both BCBS and Optum acknowledge the lengthy and unusual history of this acquisition. According to Optum's response to this protest, HHS's quest to replace the legacy MMIS began with a request for information it issued in 2010. After several subsequent exchanges with the industry—including at least one failed procurement—HHS formulated an acquisition strategy that gained federal approval through the Centers for Medicare and Medicaid Services (CMS). The Department's vision for the replacement system is a group of discrete subsystems, or modules, for different elements for the MMIS. It seeks hosted services, rather than the monolithic mainframe application currently housed at Clemson University. It has already awarded five contracts for parts of the MMIS, totaling nearly \$187 million. This protest concerns the Medical ASO contract, which will be by far the largest MMIS component to date. The CPO delegated the conduct of this procurement to HHS.

The Department issued this Request for Proposals on January 31, 2017. Its stated scope was “to acquire claims processing via Software-as-a-Service (SaaS) and support services for the state's remaining fee-for-service (FFS) population and any program administered by SCDHHS pursuant to the Individuals with Disabilities Education Act Part C via an Administrative Services Organization (ASO).” [Solicitation, ¶1, p. 7] Proposals were received on September 20, 2017, from Blue Cross and Blue Shield of South Carolina (BCBS), Client Network Services, Inc. (CNSI), and OptumInsight, Inc. (Optum). On October 23, 2018, all three offerors were asked to clarify certain aspects of their proposals under Section 11-35-1520(8) and Regulations 19-445.2080 and -445.2095(E). On October 25, 2018, nine evaluators received the technical proposals and instructions. The proposals were evaluated and scored in two phases. In Phase I, the evaluators scored the proposals against the first two evaluation criteria:

Solution - This criterion evaluates Offeror’s proposed solution in meeting the State’s goals and objectives as demonstrated in Offeror’s entire Proposal and;

Risk - This criterion evaluates the risk of Offeror’s proposed solution and its impact on cost; schedule; system and operations performance, as perceived by the State, throughout Offeror’s entire Proposal. It includes, without limitation, the evaluation of risk due to Offeror’s proposed solution; the proposed staff and organization; past performance and experience; corporate background; financial stability; and the realism of the proposed schedule. This criterion also evaluates the quality of Offeror’s identification and proposed mitigation of risks and issues, as well as Offeror’s introspection on its role as a source of risks and issues.

[Solicitation, Page 95]

On December 1, 2017, each evaluator awarded up to 45 points for the Offeror’s solution and up to 30 points for risk. The procurement officer allocated up to 25 points for price using a standard formula. Optum was the lowest priced proposal at \$178,629,740.44 and received the maximum of 25 points available for Total Cost of Ownership. CNSI submitted the second lowest price of \$215,796,319.46 and received 20.69 points. BCBS was the highest priced proposal at \$236,018,167.53 and received 18.92 points. These points were added to the evaluator’s scores to complete Phase I scoring. At the end of Phase 1, Optum was scored highest in all three categories with a total score of 831. CNSI was second with a total score of 709.31 and BCBS was third with a total score of 595.28.

On January 10, 2018, the evaluators awarded up to 20 points to each offeror for the Phase II criteria published in the solicitation:

Demonstration/Oral Presentation - This criterion evaluates Offeror's proposed solution in meeting the State's goals and objectives as demonstrated in Offeror's entire proposed solution. The demonstration/oral presentation also evaluates the technical capabilities, completeness, robustness and ease of the proposed solution

[Solicitation, Page 96] These scores were added to the Phase I scores. At the end of Phase II, Optum remained the highest scored offeror with 993.5 total points. CNSI, at 846.21, was second. BCBS was last, trailing Optum by over 250 points with a total score of 741.28.

HHS entered into negotiations with Optum on February 20, 2018. On April 9, 2018, HHS requested, and was granted permission, from the CPO to conduct discussions in accordance with Regulation 19-445.2095(I). All three offerors received a communication from the procurement officer identifying issues to be addressed through discussions. With two exceptions, these were the same issues addressed with all three offerors during previous clarifications. One exception was a request of CNSI to identify the location of certain information in its proposal. The second exception was a request of Optum to remove a previously unnoticed footer from its proposal Table of Contents, which it did.

After receipt of discussions responses, HHS reconvened the evaluation committee and provided instructions to conduct a "fresh" evaluation of the proposals. On May 18, 2018 the Evaluation Panel met and submitted their revised scoring. Optum was again the highest ranked offeror with a total score of 988.5. CNSI was second with a total score of 831.21 and BCBS was third with a total score of 776.28. HHS resumed negotiations with Optum. On June 18, 2018, Optum returned an executed record of negotiations. SCDHHS posted an Intent to Award on September 14, 2018. The total potential value of the contract exceeds \$180 million.

BCBS filed its initial letter of protest on September 24, 2018 and amended its protest on October 1, 2018.

ANALYSIS

BCBS raises fifteen numbered issues of protest, most of which are based on its allegation that Optum's proposal was non-responsive. There are two reasons for this claim. First, BCBS points to language in the table of contents footer that it characterizes as a prohibited disclaimer of Optum's offer. Second, it argues that Optum "took exception to and rejected" seventeen of thirty-five submittals included in the Consolidated Deliverables Management List (CDML) that was part of the solicitation. Having alleged that Optum's proposal was non-responsive, BCBS protests that by evaluating the offer, negotiating with Optum, and subsequently attempting to "cure" perceived issues with the proposal, HHS violated the Code and regulations. As an additional ground of protest, BCBS claims that HHS awarded the contract to Ingenix, who was not the offeror.

TABLE OF CONTENTS FOOTER

Optum's proposal is nearly 1500 pages long. On the first page of its table of contents was a footer which included the following:

Optum's response is subject to negotiation and execution of a written agreement, which will supersede the contents of its response. Optum's response does not constitute an agreement and is based on assumptions made from the written information in its possession and provided by you. Optum reserves the right to modify its response if the information upon which the response was based is changed or supplemented. When finalized, the written agreement, which reflects the agreement reached by the parties, will be the controlling document.

[Optum proposal, page i] BCBS argues that the quoted text conditioned Optum's offer upon negotiation of acceptable terms; and that condition rendered the proposal non-responsive. The CPO ordinarily would agree, but not in this case.

The solicitation included a number of standard state contract terms. One of them is Section 2.6:

2.6 BID/PROPOSAL AS OFFER TO CONTRACT (JAN 2004)

By submitting Your Bid or Proposal, You are offering to enter into a contract with the Using Governmental Unit(s). Without further action by either party, a binding

contract shall result upon final award. Any award issued will be issued to, and the contract will be formed with, the entity identified as the Offeror on the Cover Page. An Offer may be submitted by only one legal entity; "joint bids" are not allowed. [02-2A015-1]

[Solicitation, Page 22] Another is Section 2.25, which in pertinent part reads, "Offers which impose conditions that modify material requirements of the Solicitation may be rejected."

[Solicitation, Page 26] For many years the CPOs have applied these clauses together to disqualify offers that are conditioned either on negotiations or on the State's agreement to other terms.

The Code allows withdrawal of an offer only in accordance with regulations. S.C. Code Ann. § 11-35-1520(7). Withdrawing a bid or proposal requires the State's consent, effectively making all bids and proposals "firm offers."¹ S.C. Code Ann. Reg. 19-445.2085A. Typically, the State requires an actual offer to contract. In an RFP, it includes the following clause by default:

DISCUSSIONS AND NEGOTIATIONS – OPTIONAL (FEB 2015)

Submit your best terms from both a price and a technical standpoint. Your proposal may be evaluated and your offer accepted without any discussions, negotiations, or prior notice. Ordinarily, nonresponsive proposals will be rejected outright without prior notice. Nevertheless, the State may elect to conduct discussions, including the possibility of limited proposal revisions, but only for those proposals reasonably susceptible of being selected for award. [11-35-1530(6); R.19-445.2095(I)] If improper revisions are submitted during discussions, the State may elect to consider only your unrevised initial proposal, provided your initial offer is responsive. The State may also elect to conduct negotiations, beginning with the highest ranked offeror, or seek best and final offers, as provided in Section 11-35-1530(8). Negotiations may involve both price and matters affecting the scope of the contract, so long as changes are within the general scope of the request for proposals. If negotiations are conducted, the State may elect to disregard the negotiations and accept your original proposal. [06-6058-1]

¹ The reasons for this are largely rooted in history. Under the common law an offer could be withdrawn at any time prior to its acceptance. Without additional consideration there was no firm or binding offer. The Uniform Commercial Code changed this rule, but only for contracts for the sale of goods. S.C. Code Ann. § 36-2-205(2003). Section 11-35-1520(7) and R. 19-445.2085A are intended to make an offeror's proposal binding for at least thirty days, regardless whether goods or services are involved.

As BCBS points out, responsive offers to contract—not simply a commitment to discuss terms—fosters apples-to-apples comparison. Otherwise, the price and other terms of the offer can be changed at any time. Here the State modified this rule intentionally, by promising that it would not award a contract without providing an opportunity to change the terms of the offer. DHHS did not use the above clause in the RFP and instead included the following clause:

6.4 DISCUSSIONS AND NEGOTIATIONS – REQUIRED (FEB 2015)

No award will be made to an Offeror until after negotiations have been conducted with that Offeror. As provided in Section 11-35-1530, negotiations must begin with the highest ranking Offeror; accordingly, submit your best terms from both a price and a technical standpoint. In addition, make sure your Offer is responsive; the State will not evaluate or negotiate with a non-responsive Offeror, and ordinarily, nonresponsive proposals will be rejected outright without prior notice. The State may elect to conduct discussions, including the possibility of limited proposal revisions, but only for those proposals reasonably susceptible of being selected for award. [11-35-1530(6); R.19-445.2095(I)] If improper revisions are submitted during discussions, the State may elect to consider only your unrevised initial offer, but only if your initial Offer is responsive. If a satisfactory contract cannot be negotiated with the highest ranking Offeror, the State may elect to conduct negotiations with other Offerors. As provided in Section 11-35-1530(8) the State also may elect to make changes within the general scope of the request for proposals and provide all responsive Offerors an opportunity to submit their best and final offers. Negotiations may involve both price and matters affecting the scope of the contract, so long as the changes are within the general scope of the request for proposals. [06-6059-1]

[Solicitation, Page 95, Section 6.4 (emphasis supplied)] Contrary to clause no. 6058, this language committed the State to negotiate in good faith with the highest-ranked offeror. From the vendor's perspective this effectively changed his proposal from an offer to contract, to an offer to negotiate.

By using this atypical instruction, the solicitation stated that no contract would be awarded without negotiations. Consistent with clause 6059, the language in the footer states that no contract will result without negotiation. Optum neither objected to any of the solicitation's

commercial terms, nor demanded any additional terms.² These are unusual circumstances: By including Section 6.4 the State effectively invited negotiations, vice binding offers. Optum's footer did no more than restate the solicitation's promise to negotiate before contract formation. The footer does not render the proposal non-responsive.³

CHANGES TO THE CONSOLIDATED DELIVERABLES MANAGEMENT LIST

The RFP defines "deliverables" to mean

those items identified in the Contract to be delivered by the Contractor including, without limitation, the acquired items, hardware, Services, software, etc., required hereunder. The South Carolina Department of Health and Human Services (SCDHHS) defines a Deliverable as a quantifiable good or service that will be provided or adhered to throughout the project lifecycle. Deliverables can be tangible or intangible, and are most often specified functions or characteristics of the project.

[Solicitation, Section 2.2, page 22] Many deliverables are described in Part 3 of the solicitation. For example, Section 3.10 specifies:

Deliverables shall include:

- A change management plan and related processes.
- A release management plan and related process.

[Solicitation, p. 42] The RFP required each offeror to propose Contract Deliverables via the Contract Deliverables Management List, or CDML. [Solicitation, Section 3.11, page 43] RFP

² While not necessary to this decision, the CPO notes that the Record of Negotiations reflects no changes nor additions to any of the State's business terms, and maintains the order of precedence in the RFP.

³ The CPO is mindful of the Panel's decision in *Appeal by Express Scripts, Inc., et al.*, Panel Case No. 2005-8, approving the removal of similar language as an exercise of the procurement officer's discretion to "clarify" a proposal under S.C. Code Ann. § 11-35-1530(6). For several reasons *Express Scripts* is inapplicable here. Most importantly, and as Optum's counsel acknowledges, regulatory changes promulgated after the decision in *Express Scripts*, essentially negate the Panel's holding. Reg. 19-445.2095E was amended so that clarifications were subject to § 11-35-1520(8)—which allows clarification only with "apparent responsive bidders." Reg. 19-445.2080 was promulgated to define an apparent responsive bidder as one who has submitted an offer that "obviously conforms in all material aspects to the solicitation"—thus effectively mandating that only responsive offers can be clarified. Second, the procurement officer here purported to "cure" the perceived defect in Optum's proposal through discussions, not clarifications. Finally, the solicitation in *Express Scripts* specifically required binding offers, expressly disclaimed any obligation to conduct negotiations, and reserved the State's right to award without, or notwithstanding, negotiations—none of which circumstances obtain here.

Attachment 012 is a baseline CDML. Attachment 012 begins, unsurprisingly, with an introduction. It includes a deliverables template and identifies thirty-five separate deliverables. Each deliverable specifies a due date tied to a contract event. For example, several are “NTP [Notice to Proceed] + X calendar days.” Some, however, are tied to other schedule milestones: “ten business days after successful UAT [user acceptance testing];” “ten business days before the Development Phase begins;” “ten business days before the Design Phase begins.” Section 3.27.1 explains how an offeror may vary from the list in Attachment 12:

Offerors may propose additions to the CDML. All data and documents required for the proper operation and maintenance of Offeror’s solution and supporting operations shall be included in the CDML, and all CDML data items shall be considered Deliverables....

Offerors may also propose that certain CDMLs listed in the Attachments are not relevant for their proposed solution. For each listed CDML that is not applicable for the Offeror’s solution, the Offeror shall mark the N/A box in the Initial options in the Status row of the CDML. The Offeror must also enter a justification as to why it believes the CDML is not applicable.

Contractor may use any format for data items with SCDHHS’ approval.

[Solicitation, p. 58]

Optum proposed twenty-one additional deliverables, describing each one in the template format provided. It also marked eighteen deliverables as not applicable. For each of them Optum included a brief explanation why it had so marked. Optum’s comments further indicated that six of the eighteen were “stricken from the CDML.” BCBS contends that Optum’s proposed CDML “took exception to and rejected mandatory and essential requirements of the RFP,” and was therefore non-responsive.⁴ Optum followed the instructions in Section 3.27.1 for proposing additions to or deletions from the CDML exactly. Any questions HHS had about the adequacy or completeness of the proposed CDML could have been resolved through discussions. There apparently were none. To the extent the proposed CDML was lacking in some way, the

⁴ On pages 225-7 of its proposal Optum presents a table showing all the implementation phase deliverables it proposes to submit for the project. Although portions of the due date column were redacted, the list itself plainly indicates Optum agreed to provide a total of forty-two deliverables, including all but six of those on Attachment 12.

evaluators could have reflected it in their scoring. The CDML itself, though, complied with the instructions in the RFP and was responsive to HHS's stated requirements.

Even if the text of Optum's proposed CDML somehow fell short of the RFP's requirements, though, Optum made clear throughout its proposal that it intended to provide all of the relevant information the State needed in the deliverables. For the benefit of the parties, the CPO addresses each of the perceived shortcomings in the proposed CDML identified in the protest.

Historically, software development projects have followed a "waterfall" approach, where requirements are fully defined and documented in detail before any testing or other customer input. This methodology has suffered a low rate of success. When it does succeed, it often results in a high incidence of paying for features that never are used.⁵ Newer approaches include agile and modular development. Agile describes an iterative and incremental process that requires close collaboration between the customer and software developer, and that focuses on keeping code simple, testing often, and delivering functional bits of an application as soon as they are ready. Modular contracting acquires information systems in successive, interoperable increments to reduce overall risk and support rapid delivery of incremental new functionality. The Centers for Medicare and Medicaid Services (CMS) has updated its Enterprise Certification Toolkit. CMS now encourages and supports modular and agile development.⁶

Optum's proposal explicitly identified an agile, vice waterfall, approach to developing the ASO system. From a high level its plan contemplated a short period of "discovery" followed by several iterations of its "Model Office" implementation. This strategy does not fit neatly into the traditional Design, Development, Testing, and Implementation phases characteristic of waterfall development. In Optum's Integrated Master Schedule, code or system testing, training and

⁵ Less than one-third of waterfall procurements (28%) succeed. CRAIG LARMAN, AGILE AND ITERATIVE DEVELOPMENT: A MANAGER'S GUIDE 101(2001). Only 20% of features are used often, 30% get used only sometimes or infrequently and 50% are almost never, if ever, used. THE STANDISH GROUP, INC., THE CHAOS MANIFESTO 2013, at 2, available at <http://www.immagic.com/eLibrary/ARCHIVES/GENERAL/GENREF/S130301C.pdf> (last viewed March 12, 2019).

⁶ See introduction to the Medicaid Enterprise Certification Toolkit (MECT), available at <https://www.medicaid.gov/medicaid/data-and-systems/mect/index.html> (last viewed March 12, 2019).

documentation, and user acceptance testing either happen concurrently or significantly overlap each other. When HHS structured the CDML published with the solicitation, it included submittal dates tied to traditional waterfall phases. In its proposal Optum annotated many of the deliverables to reflect its methodology did not align with traditional project planning phases. It also proposed a number of additions to the CDML that, presumably, Optum believed better described its approach to implementing the ASO. Finally, Optum's continuous, iterative approach to data conversion is decidedly different from the linear process HHS apparently expected when drafting the CDML. In fact, Optum plans data conversion activities to occur throughout the process, from project initiation to operational "go live."

Optum marked twelve of the CDML deliverables "N/A" and explained each with a variant of the following:

As an OMMS implementation utilizes an Agile Model Office approach to configuration and implementation, traditional PMI project planning phase references are not directly applicable.

Every one of the twelve has a due date tied to either the beginning or the end of the "Design," "Development," "Implementation," or "Testing" phase of the overall project. As Optum's IMS illustrates, it did not simply refuse to provide those deliverables. Rather, it tried to schedule their submittal by reference to its own schedule of concurrent and iterative DDI and testing activities. Each of those deliverables is listed below, along with the proposal section or schedule entry, or both, confirming Optum's agreement to provide them.

System Security Plan, D-015: With specific reference to the RFP section requiring the SSP, on page 757 of its proposal Optum stated:

Optum proposes a System Security Plan (SSP) that mirrors the MARS-E SSP template made available by CMS. The applicable security controls for a moderate baseline security categorization will be included. The implementation statements for each control will define the safeguards that have been implemented to protect SCDHHS data.

On page 19 of its IMS Optum proposed to deliver its initial SSP by June 1, 2018, and the final plan by May 21, 2019.

Information Security Risk Assessment, D-016: With specific reference to the RFP section requiring the assessment, Optum wrote on page 760 of its proposal:

Optum will coordinate an independent assessment of the CMS MARS-E Security and Privacy controls for the ASO solution. This independent assessment will occur prior to our ASO solution processing, storing, or transmitting any SCDHHS data. The independent assessor will attest to our ASO solution's compliance to the current version of CMS MARS-E security and privacy controls, which will be submitted to SCDHHS. Optum will also submit to SCDHHS a POA&M, specifying the actions to be taken to remediate or mitigate any identified risks from the independent assessment. Both the independent assessor's attestation and POA&Ms will be submitted to SCDHHS within 30 days of the assessment's completion for SCDHHS Office of Information Assurance (OIA) review and acceptance.

On page 20 of its IMS Optum proposed to deliver the first version of the ISRA by May 8, 2018, and the final version by May 10, 2019.

Privacy Impact Assessment, D-017: On page 21 of its IMS Optum proposed to deliver the first version of the PIA by April 23, 2018, and the final version by May 2, 2019.

Systems Engineering Management Plan, D-019: Optum checked the "N/A" boxes and also indicated that a portion of the deliverable was "stricken from the CDML." On page 24 of its IMS, however, Optum proposed to deliver the SEMP by July 24, 2018.

High Level Technical Design Document, D-020: On page 25 of its IMS Optum proposed to deliver the first version of the HLTD by February 23, 2018, and the final version by March 19, 2019.

Data Assessment List, D-025: On page 26 of its IMS Optum proposed to deliver the first version of the DAL by April 30, 2018, and quarterly updates thereafter through the end of June 2019.

Section 508 Product Assessment, D-027: On page 28 of its IMS Optum proposed to deliver the first version of the 508 Assessment by March 28, 2018, and the final version by January 24, 2019.

Test Strategy & Plan, D-028: With specific reference to the RFP sections requiring testing, Optum wrote on page 838 of its proposal:

We will work with you, along with the MVI and MESI vendors, to develop and execute a Medicaid Enterprise testing strategy that spans across the testing stages. Working as collaborative partners, we will coordinate testing processes for solutions and integrations with you and the MVI and MESI vendors. We will participate in integrated testing processes as directed.

We will include the testing strategy in the Test Strategy and Plan that describes our testing policies and methodology. The Test Strategy and Plan explains relationships among the testing teams in each testing stage, roles and responsibilities, how defects will be managed, how requirements will be managed, testing environments, acceptance criteria per testing phase, and reporting.

Optum's discussion of testing spans seventeen pages in the proposal. On page 29 of its IMS Optum proposed to deliver the first version of the Test Plan by April 5, 2018, and the final version by September 28, 2018.

Test Summary & Detail Reports, D-029: Optum described its test reporting beginning on page 847 of the proposal. It wrote:

We will also produce a final Test Summary and Detail Report at the end of each release. This report will include a summary of all test cases with their completed status, an exported copy of each test task, and supporting documentation.

On page 30 of its IMS Optum proposed to submit weekly reports to HHS throughout the testing period, from late September 2018 through June 11, 2019.

Implementation/Transition to Operations Plan, D-030: On page 29 of its IMS Optum proposed to deliver the first version of the Plan by January 11, 2019, and the final version by June 14, 2019.

Training Plan and Training Materials, D-032: With specific reference to the RFP sections regarding training, Optum described its implementation phase training strategy beginning on page 204 of the proposal. On page 211 it wrote:

We will create a comprehensive ASO Training Plan deliverable for SCDHHS. The Training Plan will clearly outline the training strategy and serve as our roadmap for developing and implementing ASO solution training. This plan will describe the delivery method, structure, timeline, and evaluation methods.

The Training Plan will describe the users we will train (e.g., ASO end users; SCDHHS, MVI and MESI users; and providers), show the training calendar, and list the training courses....

The proposal describes Optum's training materials beginning on page 556. User training during the operations phase is covered on pages 560-2. On page 32 of its IMS Optum proposed to deliver the final version of the Plan by November 16, 2018.

Help Desk Plan, D-033: With specific reference to the RFP section regarding Help Desk, Optum described its support services on pages 534-5 of the proposal. It wrote:

We will provide help desk services to users via telephone, e-mail and the Web, including:

- Troubleshooting OMMS process and system issues
- Answering general and technical support questions
- Providing guidance to Web portal users
- Resetting passwords
- Supporting application and software usage

We will maintain ownership of incidents from inception to resolution. Our analysts can track to customer specific service level agreements and provide full user support through the TSC for critical business needs.

On page 33 of its IMS Optum proposed to deliver the first version of the Help Desk Plan by February 1, 2019, and the final version by June 4, 2019.

User Manual, D-034: On page 227 of its proposal Optum states it will deliver the User Manual for business users "ten business days prior to the start of the Training and Documentation Phase." With specific reference to the RFP, Optum described its manuals for providers beginning on page 478. On page 481 it listed manuals and guides it would make available for providers:

- Provider manuals and companion guides
- Provider bulletins, newsletters and training schedules
- Provider enrollment and other SCDHHS forms
- Quick reference guides, help guides and frequently asked questions (FAQs)

Optum marked four⁷ deliverables as “stricken from the CDML,” explaining:

Our proposed ASO solution, OMMS, is a COTS and SaaS-based services solution. As such, this information is considered propriety and confidential in nature.

All four of the “stricken” deliverables pertain to Optum’s performance of data conversion obligations, which are described in Sections 3.17.3 [page48-9] and 3.31.2 [page 83] of the RFP. All are intended to inform HHS about various aspects of Optum’s plan for data conversion:

Logical Data Model, D-021: “SCDHHS must validate the Contractor’s (Vendor) understanding and approach to identifying and incorporating all data elements into the actual solution.”

Physical Data Model, D-022: “The Physical Data Model is required for SCDHHS to understand and validate how the Contractor (Vendor) proposes to physically link data elements in the solution.”

Database Design Document, D-024: “The Database Design Document describes the design of a database and the software units used to access or manipulate the data.”

Data Dictionary, D-026: “The data dictionary document outlines all the data elements in the Contractor (Vendor) solution and how they are mapped, translated, decoded from SCDHHS data.

⁷ Optum also marked the System Design Document, D-023, as stricken, but proposed three additional deliverables to replace it. The System Design Document is not among the list of omitted deliverables BCBS claims makes Optum’s proposal non-responsive, so the CPO does not include it in this discussion.

The original effort to map SCDHHS data will be a joint effort between the Contractor (Vendor) and SCDHHS.”

In Part A, page 48 of its proposal Optum included an additional deliverable titled “Data Conversation Strategy.” The stated purpose of the deliverable was to “satisfy the data conversion strategy requirement in RFP Section 3.17.3 and the conversion strategy for provider records requirement in RFP Section 3.31.2.” Optum described the document:

The Optum Data Conversion Strategy deliverable will describe our approach to planning, executing and managing data conversion activities on the ASO Project. The strategy will describe our approach and methodology, as well as the people, processes, and tools used to successfully migrate data from legacy source systems and repositories to the target location in the ASO solution.

On pages 37 and 38 of the IMS, Optum planned to spend three and a half months developing the Data Conversion Strategy document and obtaining HHS approval for it. Optum proposed to deliver the final, approved version by March 30, 2018.

In Part A, page 51, Optum proposed another deliverable, “Interface Specification Documents.” Its description included:

Optum will produce Interface Specification Documents (ISDs) for each external ASO solution interface. *The ISDs will include, for example, the source and target of data, the frequency of data exchange, the interface communication protocol, security/privacy related to the interface, and contact information for interface points of contact....*

[emphasis supplied] On pages 40 and 41 of the IMS, Optum expected to spend better than two months generating this document and proposed to deliver the final version by March 26, 2018.

Optum also devoted an entire section of Part B of the proposal to describing their strategy and methodology for data conversion, including the development of a detailed plan document.

[Proposal, Part B, Section B1.5, pages 185-204] Among the activities included are:

- We will review the active database structures, the source data dictionary, and system layouts to determine the appropriate data elements that should be available to your users with input from subject matter experts (SMEs), users, and staff. We will identify the

historical and active data necessary for data conversion.... Our team will document the mapping required from the source system to new ASO solution....

- After we extract data from the source systems and identify its target location, we will conduct a field-by-field analysis. This approach will help us determine the conversion requirements for each data element, including format, valid values, and source. Optum functional area teams will be primarily responsible for identifying target data requirements. In coordination with Optum, SCDHHS will be responsible for identifying source data requirements. Based on the requirements, we will document the conversion method (conversion rules and specifications) for each field....
- Conversion mapping documents will be central to the data conversion process. Throughout the ASO Project, we will maintain target data information within these documents. We will communicate changes affecting the target data structure to your technical team.

[page 188]

With specific reference to Sections 3.17.3 of the RFP, Optum proposed:

- Optum will work collaboratively with SCDHHS to transform and load the data from your multiple data sources and legacy systems. We will work with the SCDHHS team to perform a thorough analysis before conversion and loading. Both teams will work to confirm the record layouts, data elements, and valid values. We will also work together to verify that the necessary scrubbing and transformation based on the business rules developed jointly with SCDHHS align with the approved conversion plan.
- As the conversion process advances through its various stages, the conversion tools we employ produce the specifications of the source to target mappings. These reports will provide transparency to SCDHHS and Optum while promoting alignment of the source data to the target system's tables and fields.

[page 198]

Finally, Optum included a three-page description of the format and content of its data conversion plan, including

- Crosswalks: These confirm the standardization of values....
- Pre- and post-data conversions—manual and automatic: The conversion process will not affect the integrity of the data received from the source systems. Whenever we apply approved transformations, we will retain the original content and data values using:

- Additional tables or columns within the same table
- Cloned tables
- Archived source files
- Point-in-time table snapshots
- Dependencies—entity relationships: We will identify and document these within the data model.

[page 204] In short, all of the information HHS sought in the four “stricken” CDML deliverables Optum proposed to include in its data conversion plan, the Data Conversion Strategy document, or the Interface Specification Documents.

Having determined that Optum’s proposal was responsive on its face, the CPO turns to the specific grounds of protest BCBS raises.

1. The Evaluation Process was fatally flawed. SCDHHS evaluated, ranked, selected and negotiated with a non-responsive Offeror. The Chief Procurement Officer should cancel the Solicitation and order a re-solicitation.

BCBS argues:

SCDHHS evaluated a non-responsive Proposal and entered into negotiations with a nonresponsive offeror. It then acted to attempt to make the proposal responsive after the evaluation. After that, SCDHHS improperly re-scored the proposals. The "re-scoring" was nothing more than a pretense to endeavor to justify the pre-determined award.

As explained above, neither the previously unnoticed footer nor the proposed CDML caused Optum’s proposal to be non-responsive. Out of an abundance of caution, and absent the benefit of the above analysis, the procurement officer believed the footer created an issue of responsiveness. At the time, HHS had spent literally years to develop and publish this solicitation. Another year passed between publication and the review, evaluation, and initial scoring of the three proposals. The prospect of abandoning all the work, resources, and analysis committed to that point would be devastating to HHS’s overall replacement MMIS strategy. On the other hand, the procurement officer also viewed the risk of a successful protest—based on the

footer in Optum's proposal—as unacceptable. It is perfectly understandable why he chose to proceed as he did.

While the path followed here may seem at odds with CPO and Panel precedent, it is not. The Panel has consistently cautioned against correcting a material nonconformity after evaluation, or evaluating a non-responsive proposal. *Cf. Appeal by Express Scripts, Inc., et al*, Panel Case No. 2005-8 (discussed and distinguished in note 3, *ante*). This case is different. First, Optum's proposal was responsive. Accordingly, the discussions and revaluation last spring were completely unnecessary. Second, there is no allegation the procurement officer was motivated by anything other than a sincere desire to avoid another delay in the acquisition process. Third, there is no indication that Optum manipulated the process—in fact, it ultimately accepted all the State's terms. See note 2, *ante*. Finally, the outcome was unaffected. Optum's proposal remained the highest ranked, and BCBS remained a distant third.

In *Appeal by ACT, Inc., et al.*, Panel Case No.2014-16(II), the Panel adopted the unappealed findings of the CPO. Among them were the following:

4. ACT's proposal was materially non-responsive at the time of scoring and ranking by the evaluation team on August 21, 2015. Under section 11-35-1530(7), an offeror must be responsive to have its proposal scored and ranked.
5. As a non-responsive offeror, ACT necessarily could not have been the highest ranked offeror for the purposes of negotiations under section 11-35-1530(8). Therefore, the negotiations conducted under this section were invalid.

The Panel further wrote:

.... [S]everal evaluators expressed concern about ACT's responsiveness during the evaluation and requested clarification, but ACT's proposal was scored and ranked without benefit of such clarification on August 21, 2014. The negotiation team met with the evaluation team that same day, marking the beginning of negotiations between ACT and the State. Subsequently, the procurement officer sent ACT emails to ACT on August 29th and September 3rd which identified issues of non-responsiveness in ACT's proposal which the State sought to modify through "discussions." As a result of these exchanges, the CPO notes, "ACT's proposal was modified to bring it in compliance with most of the material and essential requirements of the solicitation after evaluation." Nothing in the CPO's

order or in the record before the Panel indicates that ACT's modified proposal was resubmitted to the evaluation team prior to award.

[internal references and footnotes omitted] This case differs from *ACT*. Significantly, as explained above, Optum's proposal was *not* "materially non-responsive at the time of scoring and ranking." Second, no one raised any concern about responsiveness—of any of the offerors—until Mr. Stevens discovered the footer in Optum's table of contents. Third, there were no substantive responsiveness issues at all. That is, unlike *ACT*, Optum did not refuse to perform any of the State's material and essential requirements. Next, the procurement officer addressed the perceived responsiveness issues through discussions, rather than allowing the offeror to modify its proposal during negotiations. Finally, Optum's modified proposal—along with the other two—was in fact resubmitted to the evaluators prior to award.

As to the allegation the re-scoring was a sham, public officials are presumed to act in good faith. John Stevens instructed the evaluators for the re-scoring. He has worked in public procurement for the State for nearly thirty years. He served as State Procurement Officer for ten years with the Division of Procurement Services. He is currently director of procurement and contracts at the State's largest cabinet agency. Other than its disappointment with the result of this procurement, BCBS has offered nothing that would rebut the presumption Mr. Stevens acted in good faith. As to its allegation the award was "pre-determined," Optum's offer was the highest ranked both before and after the discussions. Nothing in BCBS's protest claims the initial evaluation was arbitrary, capricious, or contrary to law. Here, there is no violation of the Code and this issue of protest is denied.

2. As a non-responsive offeror, Optum necessarily could not have been the highest ranked offeror for purposes of negotiations under *S.C. Code Ann. §11-35-1530(8)*. The negotiations conducted were invalid.

BCBS argues:

SCDHHS had an "uh oh" moment in April 2018 when, while engaged in negotiations with Optum, it determined that Optum's initial proposal was non-responsive. Its determination at that time to attempt to correct this non-responsiveness after the evaluation, ranking, and commencement of negotiations was unfair, prejudicial to the other Offerors and in violation of the law.

As explained above, Optum's proposal was responsive. Even if it had not been, the procurement officer's subsequent corrective actions did not violate the Code or Regulations. This issue of protest is denied.

3. SCDHHS violated R. 19-445.2095[I](3) in failing to accord offerors fair and equal treatment with respect to any opportunity for discussions and revisions of proposals. It conducted what amounted to a sham re-scoring after allowing proposal revisions where its preferred vendor submitted a nonresponsive proposal.

Since Optum's proposal was responsive, the discussions conducted after the initial evaluation were unnecessary. There is nothing in the record, however, suggesting the conduct of those discussions violated the regulation. Each offeror was treated the same and given an opportunity to resolve those uncertainties, deficiencies, or suspected mistakes the procurement officer identified. The solicitation alerted offerors that discussions may occur. While discussions "ordinarily" occur before final ranking, this procurement was far from ordinary. As implied by the Panel's comments in ACT, the evaluators were given the opportunity to finally rank the offers after discussions. There was no violation of the Code and this issue of protest is denied.

4. The procurement was fatally flawed where SCDHHS used the same evaluation panel to re-evaluate the proposal when it conducted discussions pursuant to R. 19-445.2095 after the panel had evaluated the proposals and been exposed to the scoring. It was humanly impossible for the same people to perform the required "fresh" scoring. Moreover, it was humanly impossible for panel members not to have been affected by the knowledge of the status of the procurement and the fact that negotiations had already occurred with the original highest ranked offeror.

The rescoring was triggered by the mistaken belief that the unnoticed footer rendered Optum's proposal non-responsive when first evaluated and scored. Nothing in the Code prohibits re-evaluation by the same Panel as reviewed the initial proposals. In *Appeal by Intralot, Inc.*, Panel Case 2017-8, the Panel held:

The Panel finds that nothing in the Procurement Code or its ensuing regulations requires the disqualification of evaluators who have previously served as evaluators on a prior procurement for the same services.... In fact, such a policy could severely limit an agency's ability to seat evaluators with the requisite

expertise to review complex proposals such as the ones submitted here. Absent any specific allegation of wrongdoing such as bias or other conflict of interest, the Panel finds that Intralot has failed to state a claim upon which relief can be granted and dismisses Protest Issue VII (2).

This issue of protest is denied.

5. SCDHHS violated the Procurement requirements when it Amended the Deliverables on January 24, 2018, after the Proposals had been opened.

The solicitation required offerors to include deliverables in a CDML. Optum proposed a CDML that differed in certain respects from the “baseline” attached to the RFP. As discussed above, Optum agreed to provide all the information the State required in deliverables. The “final” CDML is an exhibit to the Record of Negotiations. Except for the numbering, it is nearly indistinguishable from Optum’s proposed deliverables. BCBS argues that the final CDML effectively amended the solicitation after bid opening in violation of Section 2.3 of the RFP, which only allows amendment of the solicitation prior to opening. Section 11-35-1530(8)(a) allows negotiation with the highest ranking offeror on price, on matters affecting the scope of the contract, so long as the changes are within the general scope of the request for proposals, or on both. The changes were within the general scope of this solutions-based solicitation. This issue of protest is denied.

6. SCDHHS violated the Procurement requirements when it altered the Solicitation requirements by changing the CDML information in early 2018 and failed to notify other offerors of what amounted to an Amendment affecting deliverables.

As stated above, the modification of the CDML as part of the negotiation is authorized under the Code and does not require reopening the solicitation process. *Cf. Appeal by Andersen Consulting*, Panel Case No. 1994-1 (Once the State has negotiated changes *that are within the general scope of the RFP*, it need not negotiate the same terms with other offerors.) This issue of protest is denied.

7. Exposing the existing evaluation panel to the changes and modifications of the Proposals created an unfair environment in that the Evaluation Panel Members allowed the changes to have a heavily weighted impact on their

evaluations which would not have occurred had they not already evaluated the proposals and then been advised of the specific changes.

The “changes” to Offerors’ proposals effected through the unnecessary discussions did not modify the substance of the proposals beyond that which was previously clarified. Any changes to a specific offeror’s score can be attributed to the understanding gained through a second reading. In addition, the relative standing of the Offerors did not change as a result of the second scoring. This issue of protest is denied.

8. SCDHHS conducted discussions after the final ranking and commencement of negotiations with a non-responsive offeror which violated S.C. Code Ann. §11-35-30. The subsequent effort to reconstitute the procurement violated reasonable commercial standards of fair dealing.

As stated above, Optum’s proposal was responsive and consequently the subsequent “discussions” were unnecessary. In addition, the “changes” to Offerors’ proposals effected through the unnecessary discussions did not modify the substance of the proposals beyond that which was previously clarified. Finally, the proposals were re-evaluated, and the relative standing of the Offerors did not change as a result of the discussions or the second scoring. It is not enough to show some shortcoming in the process; a protestor must be *aggrieved* by the claimed error. S.C. Code Ann. § 11-35-4210(1)(b). This issue of protest is denied.

9. The totality of the solicitation and the evaluation process violates S.C. Code Ann. 1976 §11-35-20(f) and (g) because it did not ensure fair and equitable treatment of all offerors.

Section 11-35-20 set forth the purpose and policies of the Code. BCBS alleges a violation of sections f and g:

(f) to ensure the fair and equitable treatment of all persons who deal with the procurement system which will promote increased public confidence in the procedures followed in public procurement;

(g) to provide safeguards for the maintenance of a procurement system of quality and integrity with clearly defined rules for ethical behavior on the part of all persons engaged in the public procurement process; and

BCBS offers the following in support of its claim:

- a. SCDHHS evaluated a non-responsive proposal and selected it for award.

As stated above, Optum's proposal was responsive to the material and essential requirements of the solicitation.

- b. SCDHHS conducted negotiations with a non-responsive offeror twice - in February and in April - and before final scoring.

- c. SCDHHS continued negotiations before and after the illegal and improper rescoring where it attempted to fix a fatal error in the process.

The procurement file reflects negotiations with Optum occurred through March 8, 2018. Upon discovering the footer in Optum's proposal, HHS suspended those exchanges and instead embarked on its path through discussions. After the second evaluation resulted in Optum's remaining the highest ranked offeror, HHS finalized negotiations and awarded the contract.

- d. SCDHHS conducted discussions after final rankings without alerting all offerors to the possibility of the exchange, including the limited proposal revisions as required by S.C. Reg. 19-445.2095(3). The other offerors were not accorded fair and equal treatment with respect to the opportunity for discussions and revisions of proposals.

See discussion of protest grounds 3, 5, and 6, *ante*. All three offerors were afforded the opportunity to participate in the April discussions. As the negotiations with Optum were within the general scope of the RFP, HHS was not obligated to request best and final offers from BCBS and CNSI.

- e. SCDHHS sought clarification from Optum on a question of responsiveness after evaluation in violation of S.C. R. 19-445.2080.

HHS's exchanges with Optum after the initial evaluation and scoring were either negotiations or discussions. No clarification exchanges occurred other than those in October 2017.

- f. SCDHHS sought clarification from vendors without required authority from the CPO.

CPO approval is not required for clarifications under Section 11-35-1520(8) and R. 19-445.2095E.

In order for the actions to be unfair, inequitable, or unethical, an offeror must have suffered some harm from the alleged infractions. The negotiated changes to the scope of the solicitation are authorized by the Code. The “changes” to Offerors’ proposals effected through the unnecessary discussions did not modify the substance of the proposals beyond that which was clarified prior to initial evaluation and scoring. Finally, the relative standing of the Offerors did not change as a result of the discussions or the second scoring. There was nothing unfair, inequitable, or unethical, in the referenced conduct. This issue of protest is denied.

10. SCDHHS has issued an award to an entity other than the proposer without following the requirements of S.C. Reg. 19-445.2180 and in apparent violation of the requirements of the Regulation. The CPO should declare the award invalid on that basis.

BCBS argues:

SCDHHS's September 14, 2018, notice reflects that the contract was awarded to Ingenix. However, the proposal was submitted by Optum or "OptumInsight." Ingenix apparently was merged into Optum in 2011. It is unclear why the award was made to Ingenix when the proposal was submitted in Optum's name. There is no evidence that a proper assignment or novation has been prepared and executed as required by the Code and Section 7.1 of the solicitation. This failure reflects another clear flaw in the process and a failure to follow the requirements of the solicitation documents and the Code.

The award statement identifies “INGENIX INC” as the contractor, and notes “No longer using this name. Now using OPTUMINSIGHT (PER VENDOR).” OptumInsight and Ingenix are both registered vendors in the State’s Enterprise Information System. They share the same taxpayer identification number. A search for Ingenix on the Secretary of State’s website defaults to OptumInsight, Inc., a Delaware corporation in good standing. The listing includes “Ingenix, Inc.,” as a former name. the most recent filing listed was an amendment in December 2011. A 2011 article published by American Medical News reports that Ingenix’s parent company United HealthGroup, caused Ingenix’s name to be changed to OptumInsight.⁸ This reporting is

⁸ “Ingenix name retired as United re-brands subsidiaries,” posted April 26, 2011, available at <https://amednews.com/article/20110426/business/304269998/8/> (last viewed March 15, 2019); see also “Ingenix to Change Its Name to OptumInsight,” HealthData Management published April 11, 2011, available at

consistent with the SCEIS listing and the Secretary of State's on-line records, and explains how the contractor is identified on the award statement. A name change alone does not affect the structure or identity of a corporation. The award is to the actual offeror, OptumInsight, Inc., which was formerly known as Ingenix, Inc. There is no violation of the Code and this issue of protest is denied.

11. The CPO should cancel the award before performance under S.C. Reg. 19-445.2085(C) and S.C. Code Ann. §11-35-1530(8)(c) because the final accepted proposal including the record of negotiations reflects a revision in the specifications beyond the scope of the solicitation and materially changed the solicitation. SCDHHS ultimately did not award a contract to buy what it solicited.

The CPO declines to entertain BCBS's request for cancellation. See Appeal by Helena Chemical Company, Panel Case No. 2001-5.

12. The CPO should cancel the Award and require resolicitation because the initial evaluation was improper. The Procurement Officer conducted discussions and sought clarification apparently without the approval of the appropriate chief procurement officer as required by R. 19-445.2095.

BCBS argues:

The initial request for clarifications submitted on October 23 and 24, 2017 were made, and modifications to the proposals accepted without authority from the CPO as required by the regulation. Neither the e-mail transmitting the letter to BCBS nor the letter dated October 23, 2017, reflects that the CPO had provided authority for discussions. When SCDHHS finally sought to conduct discussions in April 2018, it did so without advising the CPO of the true facts - that the proposals had already been evaluated, ranked and negotiations were in process with the highest ranked (non-responsive) offeror. BCBS suggests that had this fact been conveyed to the CPO, it is unlikely that discussions would have been authorized.

The clarifications sought and received on October 23 and 24 were conducted under Regulation 19-445.2095(E) and the provisions of Section 11-35-1520(8) which do not require CPO

approval. The unnecessary discussions conducted in April 2018 were authorized by the CPO. There is no violation of the Code. The CPO declines to entertain BCBS's request for cancellation.

13. SCDHHS improperly sought authority to conduct discussions to remedy Optum's non-responsiveness after the evaluation was complete. Its subsequent efforts to "re-evaluate" after discussions were no more than a sham. This process violated S.C. Code Ann. §§11-35-20(e), 11-35-20(f), 11-35-20(g), 11-35-30, 11-35-1530(2); 11-35-1530(3), 11-35-1530(6), 11-35-1530(7), 11-35-1350(8), 11-35-1530(9), R. 19-445.2095(1)(2), R.19-4452095(1)(3) and R. 19-445.2095(1)(4).

This issue of protest restates the foregoing grounds. For the reasons stated it is denied.

14. The determinations made in the negotiations were arbitrary and capricious and violated the purposes and principles of the Consolidated Procurement Code.

BCBS argues:

As enumerated in the facts outlined in this letter, it is evident that the removal of nearly fifty (50%) percent of the required deliverable information profoundly altered the scope of the solicitation and the potential costs incurred in complying with the solicitation. Before allowing these substantial and material changes to the procurement by way of the negotiated contract, the Procurement Officer should have acted in good faith and given all offerors an opportunity to submit a best and final offer considering these changes to the solicitation outside of the general scope of the request for proposals. Failing to do so violated, inter alia, S. C. Code Ann. § 11-35- 20(f) and other parts of the code in that this conduct "failed to ensure the fair and equitable treatment of all persons who deal with the procurement system which will promote increased public confidence in the procedures followed in public procurement."

As a factual matter, BCBS's assertion that Optum's proposed CDML or the CDML incorporated into the Record of Negotiation deletes nearly half of the required deliverables is flatly wrong. As discussed in detail above, a careful review of Optum's proposal documents plainly reveals that it offered, and ultimately agreed, to provide all the information HHS required in Attachment 012 to the RFP. The negotiated changes were within the general scope of the solicitation and are in keeping with the provisions of the Code. This issue of protest is denied.

15. Optum's proposal after discussions was non-responsive to the essential requirements of the solicitation and, therefore, Optum is not a responsive offeror. Its Proposal took exception to and rejected mandatory and essential requirements of the RFP which were not determined to be minor informalities or irregularities.

BCBS argues:

Optum failed to submit or provide critical information required in the RFP in connection with the following requirements and deliverables: the System Security Plan, Information Security Risk Assessment, Privacy Impact Assessment, Systems Engineering Management Plan, High Level Technical Design Document, Logical Data Model, Physical Data Model, Database Design Document, Data Accession List, Data Dictionary, Section 508 Product Assessment, Test Strategy and Plan, Test Summary and Detail Reports, Implementation /Transition to Operations Plan, Training Plan and Training Materials, Help Desk Plan, and User Manual.

Optum refused to provide 4 of the Deliverables based on an assertion of confidentiality and stated that 13 were not applicable without the appropriate and required explanation. This amounts to Optum's proposal not including 48.5% of the required submission deliverables.

Optum's proposal contained these and other deficiencies that resulted in the Procurement Officer seeking to open discussions after evaluation in an apparent effort to make Optum responsive to the mandatory and essential requirements of the solicitation- which it did not fulfill at that time.

As discussed in detail above, Optum followed precisely the instructions provided in the solicitation for modification of the CDML. Its explanations appear reasonable and were acceptable to HHS. When either CDML—the one Optum included in its proposal or the exhibit to the Record of Negotiations—is read together with its proposal, Optum clearly offered, and ultimately agreed, to provide all the information HHS required in Attachment 012 to the RFP. This issue of protest is denied.

16. SCDHHS negotiated and reached a Contract with Optum which included changes outside the scope of the Request for Proposals without providing the other proposers the opportunity to submit best and final offers under S.C. Code Ann.1976 §11-35-1530(8)(c)

BCBS argues:

The final, executed Record of Negotiation included Optum's March 8, 2018 replacement CDML which marked as "stricken" 11 of the 13 new deliverables and marked as "not applicable" one of the 13 new deliverables -- substantially overhauling the SCDHHS CDML revision by striking out all but one of the new SCDHHS deliverables. In accepting Optum's CDML replacement, including the Optum strike outs, SCDHHS reduced the required scope of work on the contractor in a manner that could dramatically decrease the implementation schedule, providing a considerable cost advantage to Optum. Every vendor has a carrying cost of assigned staff during the project even if they are not directly engaged in producing the specific deliverables. Given that some of these stricken deliverables are recurring or such deletion prohibits regular SCDHHS oversight of performance during the operations phase, similar, although not as high, cost savings are realized during the remainder of the contract.

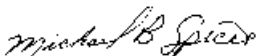
The SCDHHS CDML revision materially and substantially altered the general scope of the Request for Proposals to the extent that the Procurement Officer was obliged to provide all responsive offerors an opportunity to submit best and final offers pursuant to S. C. Code Ann. § 11-35-1530(c) The Procurement Officer's failure to do so resulted in an illegal procurement.

As discussed in detail above, the solicitation anticipated that modifications to the CDML would be necessary depending on the nature of the proposed solution and authorized Offerors to "propose that certain CDMLs listed in the Attachments are not relevant for their proposed solution." Optum proposed modifications to the CDML in accordance with the provisions of the solicitation. The original CDML included 35 deliverables. The negotiated CDML has more than 50 deliverables. The negotiated changes are clearly within the general scope of the RFP. This issue of protest is denied.

DECISION

For the reasons stated above, the protest of Blue Cross Blue Shield of South Carolina is denied.

For the Information Technology Management Office



Michael B. Spicer
Chief Procurement Officer

Attachment 1

MONTGOMERY WILLARD, LLC
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October 1, 2018

BY EMAIL TO protest-mmo@mmo.sc.gov; protest-itmo@itmo.sc.gov
AND HAND DELIVERY

Mr. Michael Spicer
Chief Procurement Officer
Information Technology Management Office
1201 Main Street, Suite 600
Columbia, South Carolina 29201

Re: Amended Protest of Award of Solicitation Number 5400011606
“Services to Support the Adjudication and Payment of Fee-for-Service
Medicaid Claims and the Enrollment and Management of Providers (ASO)”
by Blue Cross and Blue Shield of South Carolina
Date of Notice of Intent to Award: September 14, 2018
Our File No: 2186273

Dear Mr. Spicer:

This firm represents Blue Cross and Blue Shield of South Carolina (“BCBSSC” or “the Company”) in connection with the above matter. Pursuant to *S.C. Code Ann.* §11-35-4210 (2018), on September 24, 2018, BCBSSC filed a timely protest of the award made on Solicitation Number 5400011606 (“the Solicitation”). This letter serves as BCBSSC’s amended protest of that award for the reasons articulated herein pursuant to *S.C. Code Ann.* §11-35-4210(b).

The grounds of this protest are set forth below. In accord with applicable law, this protest letter is intended to provide notice of the issues to be decided. For that reason, it does not purport to set forth all facts and evidence supporting the issues protested. BCBSSC reserves the right and requests that the CPO issue an order providing all parties to the protest a briefing schedule and an opportunity to offer facts, evidence, and argument in support of this protest, as well as a timely administrative hearing. If for any reason the CPO elects not to conduct a hearing on this vital procurement, BCBSSC requests that the CPO advise the undersigned of any deadlines for the submission of evidence and argument in support of this protest.

10/1/2018 10:00 AM
10/1/2018 10:00 AM

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BCBSSC is one of the area's largest employers and supporters of charity throughout South Carolina. The Company has worked in various capacities with the State of South Carolina for many years and has been the contractor for South Carolina Department of Health and Human Services ("SCDHHS") and its predecessor agency providing Medicaid ASO services for more than twenty-eight (28) years. BCBSSC prides itself in supplying the State and its agencies with outstanding products and services delivered by local, South Carolina employees working in South Carolina. The Company's guiding principles include giving back to the communities where it operates. BCBSSC is a major supporter of community and charitable causes in Columbia and throughout the State. It also supports healthcare-related research, education, and services in South Carolina through the Blue Cross and Blue Shield of South Carolina Foundation. Forbes included BCBSSC in Forbes' Americas Best Employers List.

BCBSSC appreciates your willingness to work with the Company in resolving its concerns. It believes that we can reach a resolution that is fair and beneficial to all parties and, most importantly, provides the complete solution and all deliverables sought by the Solicitation. BCBSSC thanks you in advance for your consideration of this protest.

I. SOLICITATION BACKGROUND

The history of this solicitation is lengthy, convoluted and highly unusual. SCDHHS issued the Solicitation on January 31, 2017. SCDHHS posted Amendments to the Solicitation on February 15, 2017, June 12, 2017, July 10, 2017, and July 11, 2017.

Three Offerors submitted proposals responding to the Solicitation. CNSi submitted its ASO proposal on September 18, 2017. BCBSSC and Optum¹ submitted their proposals on September 20, 2017. On October 23 and 24, 2017 SCDHHS sent requests for clarifications to CNSi, BCBSSC, and Optum. The request for clarifications sent to BCBSSC included identical questions to a subsequent request made during the "Discussion" phase described below.

The evaluation panel first met and scored proposals on December 1, 2017. During the evaluation panel meetings, Michele Mahon sent an email to CNSi seeking clarifications. The committee met again on December 4, 2017. During that meeting, Michele Mahon sent e-mails to Optum seeking clarifications. Apparently, Ms. Mahon was communicating with Optum in real time during the evaluation panel meeting.

Demonstration scheduling was also problematic. The Solicitation dictated that all parties invited for demonstrations would be notified at the same time and that slots for the presentations would be awarded "first come – first served." However, due to an alleged error, BCBSSC did not receive a timely notification because SCDHHS sent BCBSSC's notification to an incorrect e-mail address. As a result of this error, the other vendors were notified a day before BCBSSC and selected slots, which were a week or more after the remaining slot left for BCBSSC. Because of

¹ The award is in the name of Ingenix. It appears that the vendor is Optum, Inc.

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the late notification which resulted from SCDHHS error, BCBSSC had eight fewer days' notice and opportunity to prepare for its demonstration. This error was prejudicial.

BCBSSC performed its demonstration on January 10, 2018, Optum and CNSi followed on January 18, 2018, and January 19, 2018. The same set of SCDHHS subject matter experts were not in attendance at all three of the demonstrations.

Just days after the presentations, the revision history for the SCDHHS Consolidated Deliverables Management List (CDML), RFP Attachment 012, shows a January 24, 2018 revision. The revision added a number of material new requirements and modified and/or deleted other requirements. It should be noted that SCDHHS-required deliverables are referenced throughout the RFP and not just within the CDML. In describing its proposed solution, the RFP instructed Offerors, "at a minimum, to satisfy the submission requirements outlined in Section 3 and Section 4.1. Using the numbering as found in this solicitation, Offeror must respond using a requirement-by-requirement description of how every requirement is being met." While SCDHHS claims that the final evaluation took place in May 2018, the RFP was materially revised months beforehand - without a formal RFP amendment, and after opening of proposals. The revised RFP requirements were never provided to any Offeror except the Awardee.

On January 30, 2018, then SCDHHS interim Director Baker submitted his FY 2019 budget request to the General Assembly. In that submission, he stated that the SCDHHS had selected the new ASO vendor.

On February 9, 2018, SCDHHS invited Optum to begin negotiations. A negotiation session took place on February 20, 2018. On February 21, 2018, SCDHHS emailed the revised CDML to Optum and requested that Optum compare the SCDHHS revised CDML to the CDML submitted in Optum's proposal. On March 8, 2018 Optum emailed its 74-page replacement CDML to SCDHHS. At that point, it appears that SCDHHS modified the required deliverables for Optum and renumbered the CDML, materially altering the solicitation. SCDHHS failed to provide this information to the other offerors. On March 8 and March 19, 2018, Optum posted positions for Director level positions and other job postings for the contract.² Curiously, this occurred before both the commencement of the April 6, 2018 negotiations with Optum, and the final review and evaluation of the Proposals which took place between April 25, 2018, and May 18, 2018.

It appears that SCDHHS discovered that Optum's proposal was not responsive on or about April 1, 2018. Rather than rejecting the non-responsive proposal (which it had already evaluated and scored as the highest ranking *responsive* proposal), it appears that SCDHHS manipulated the process to cover up the error and ensure that Optum received the award. Instead of negotiating with the next highest ranked proposer, SCDHHS developed a "process" to fix the mistake and make Optum responsive. Although the Proposers had been ranked, given presentations which

² Documents seem to indicate that the parties expected a March award date. Hence, Optum apparently posted the job advertisements in anticipation of an agreed notice of intent to award, which did not occur.

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were ranked, the evaluation had been completed, and negotiations had commenced with Optum, SCDHHS then sought responses to Matters of Discussion from the three offerors on April 13, 2018. This impermissible exercise allowed Optum to correct one of the issues which made its proposal not responsive. SCDHHS then created a process to re-evaluate and re-score the proposals. Amazingly, SCDHHS conducted these activities while it continued negotiations with Optum.

In contrast, SCDHHS merely sent BCBSSC discussion questions that were identical to the questions BCBSSC had received and addressed during the earlier clarification round. SCDHHS needed nothing further from BCBSSC but was using the purported discussion round as a pretense to allow Optum to amend its proposal to become responsive.

Again -- even after the discovery that Optum's proposal as submitted was non-responsive - ASO negotiations continued with Optum on April 6, 2018. On April 17, 2018, Optum submitted its response to remove the Table of Contents footnote rendering it nonresponsive, and defining Evergreen and replacing the first page of its Table of Contents and pages 340 and 739 of its proposal.

While replacing the first page of the Table of Contents may at first glance appear to be a minor correction, this was the footer on that page that was deleted at SCDHHS direction:

All information provided by Optum in response to this Request for Proposal shall be considered Optum proprietary and/or confidential information. No portion of this information may be reproduced without the prior written consent of Optum. The contents of the material should not be shared or discussed with anyone outside of your organization, including subcontractors or other designees. Optum's response is subject to negotiation and execution of a written agreement, which will supersede the contents of its response. Optum's response does not constitute an agreement and is based on assumptions made from the written information in its possession and provided by you. Optum reserves the right to modify its response if the information upon which the response was based is changed or supplemented. When finalized, the written agreement, which reflects the agreement reached by the parties, will be the controlling document.

Any savings cited in this proposal are based on our average book of business, unless otherwise noted. Individual customer savings can vary significantly as many variables can affect each customer's savings, such as customer-specific demographics, population risk profiles, condition-specific prevalence rates, benefit designs, incentive strategies, communication strategies, geography and/or organizational commitment.

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The footnote was material. It demonstrates that, in blanket fashion, Optum was not making the commitments required by the solicitation. Rather, Optum asserts that its response is subject to negotiation and execution of a written agreement, which will supersede the contents of its response³. Further, Optum asserts its response does not constitute an agreement and is based on assumptions made from the written information in the solicitation. Optum's proposal was non-responsive upon submission and remained that way until after evaluation, ranking and the commencement of negotiations.

The CPO should also note that the "Confidential, Trade Secret and Protected" footer on each proposal page was not removed. RFP section 2.28, Submitting Confidential Information (Feb 2015), clearly states: "Do not mark your entire response (bid, proposal, quote, etc.) as confidential, trade secret, or protected. If your response, or any part thereof, is improperly marked as confidential or trade secret or protected, the State may, in its sole discretion, determine it nonresponsive." Optum's proposal remained non-responsive at the time the Intent to Award was posted on September 14, 2018.

On April 25, 2018, the Evaluation Panel reconvened to "debrief on the process for the additional information received from offerors as a result of Discussions." During that meeting, the Procurement Officer made the following comments reflected in the notes: "While I recognize Phase I scoring was conducted previously since additional information must be considered, we must re-start or "start fresh" the scoring of the "Solution" and "Risk" Evaluation Criteria."⁴ These instructions imposed an almost impossible burden on the Panel Members. Briefing materials require them to "provide an impartial, unbiased evaluation of each and every proposal according to the evaluation criteria contained in the RFP" and specified: "You must arrive at your scores independently, without the influence of any other evaluator. The evaluation panel may meet for the purpose of discussions prior to finalizing scores and making an award. All scoring panel members must attend all meetings of the evaluation committee."

The instructions further provided: "As you were instructed previously, you may consider only those materials provided in each offeror's response, and in their Discussions response materials." It is also significant that while the subject matter experts were available at the first evaluation during the instructions for the "Discussions" evaluation, the instructions noted that "The Subject Matter Experts (SMEs) have not been engaged at this time."

³ Violating not only the letter, but the spirit of the Consolidated Procurement Code. This was an offer to negotiate, not a firm commitment to perform – precisely why the Proposal was (and is) non-responsive and should have been rejected outright from the beginning.

⁴ The Procurement Officer relied on the fact that the evaluators could "start fresh" when they had already decided.

The Procurement Officer allowed the evaluation panel until May 14, 2018, to re-review the proposals.⁵ The Evaluation Panel met on May 18, 2018, to re-score the Proposals. It is evident that SCDHHS exposed the pricing material and the other evaluators' scoring to the evaluation committee before this evaluation. It is also apparent that the only material change in the proposals was the fact that Optum corrected its proposal to remove the deficiencies and exceptions that made it non-responsive.

Optum and SCDHHS completed the Record of Negotiations between June 13 and June 18, 2018. Optum re-submitted its March 8, 2018 replacement CDML on June 15, 2018. On August 6, 2018, Director Baker sent the award approval request to CMS. On September 11, 2018, SCDHHS received the approval letter from CMS. On September 13, 2018, SCDHHS gave notice that it was going to post the Notice of Intent to Award on September 14, 2018.

It is interesting that state offices in Richland County were closed on both September 13 and 14, 2018. Nevertheless, early in the day on September 14, 2018, the contract was posted. SCDHHS finally posted the Notice of Intent to Award at 4:36 PM on September 14, 2018. All of these actions occurred when state offices were closed in Richland County due to Hurricane Florence.⁶

II. KEY DATES AND EVENTS RELEVANT TO THE PROTEST

- 9/20/17 – Optum submits its proposal to SCDHHS
- 10/23/17 – SCDHHS sends Request for Clarifications to Optum. The request is related to “evergreen” terminology in Optum’s technical proposal. There is no clarification request related to the CDML. (Exhibit 1)
- 10/24/17 – Optum sends its “evergreen”-related response to SCDHHS.
- 12/4/17 – Evaluation panel scores Optum’s technical proposal.
- 12/4/17 – Email from SCDHHS with an additional question for clarification related to a typographical error. There is no clarification request related to the CDML. Likewise, there was no clarification request relating to the issues which made Optum’s proposal non-responsive (even though such a request would be improper)

⁵ The Panel comment sheets seem to reflect that they simply looked at the changes and reaffirmed their earlier evaluations rather than engaging in the comprehensive reevaluation that the instructions contemplated. Of course, the original ranking was unchanged.

⁶ This posting schedule epitomizes the departure from fundamental fairness that SCDHHS seems to have employed in this procurement process. The only reason to post the award on a Friday when state offices were closed seems to have been to limit the opportunity for an aggrieved proposer to file an effective protest – eliminating two business days for preparation, and perhaps hoping that the aggrieved proposers’ offices were also closed that day.

- 12/4/17 – Email response from Optum to SCDHHS confirming the typographical error.
- 1/18/18 – Optum makes its oral presentation and demonstration.
- 1/24/18 – SCDHHS revises the CDML included in its RFP without amending the solicitation or complying with requirements to notify all offerors. The CDML revision description reads: “Added additional Requirements, Technical and TCOE Deliverables. Updates to OIA Deliverables; Removed several technical Deliverables that are no longer needed based on changes. Added adherence language for plans, processes, and procedures.” THIS REVISION WAS PROVIDED ONLY TO OPTUM – WHICH WAS A NON-RESPONSIVE PROPOSER AT THAT TIME. (Exhibit 2)
- 1/30/18 – Interim Director Baker submits his FY 2018-2019 budget request to the Legislature. Baker’s PowerPoint indicates the ASO vendor has been selected. (Exhibit 3 is Page 25 of Baker’s PowerPoint)
- 2/9/18 – Email from SCDHHS to Optum scheduling the 2/20/18 negotiations. (Exhibit 4)
- 2/20/18 – Negotiation meeting with Optum. The Record of Negotiations omits the CDML as a discussion topic and as an action item for follow-up.
- 2/21/18 – Email from SCDHHS to Optum related to a follow-up action item from the 2/20/18 meeting. SCDHHS wrote it believed the CDML Optum submitted with its proposal “was editable in your response” and asked Optum to compare the SCDHHS-revised CDML to the Optum CDML submitted with its original proposal. The SCDHHS-revised CDML as of 1/24/18 was attached to the SCDHHS email.
- 3/2/18 – Negotiation meeting (session two) with Optum. This meeting appears to have been a follow-up to the February 20 negotiation session. Optum reviewed its high-level response to each of the SCDHHS requests during the prior meeting and added that it would like to discuss the difference between the CDML in the RFP and the updated version provided at the start of negotiations. Optum noted that the revised CDML contained approximately 16 material changes from the version supplied as an attachment to the solicitation. This appears to be the 1/24/18 SCDHHS CDML revision provided to Optum as an attachment to SCDHHS’ 2/21/18 email. SCDHHS advised Optum to provide its markup to the document and return it to the State, noting as appropriate which portion(s) may not be applicable to the ASO contract. THIS REFLECTS THE SIGNIFICANT MATERIAL CHANGES TO THE SOLICITATION INTERJECTED DURING THE NEGOTIATIONS.

- 3/4/18 – Optum email to SCDHHS indicating that revised pricing and Optum’s comments on the new CDML would be provided on March 8.
- 3/8/18 – Optum emails its revised pricing tables and its 74-page replacement CDML to SCDHHS. The introduction to the Optum CDML is copied below:

Optum response to revised CDML March 8, 2018:

Per the SCDHHS’ request, Optum has marked up this revised CDML based on the overall assumption that the revised CDML dated March 8, 2018, and Optum’s response noted herein shall supersede and replace the original CDML contained in the RFP and Optum’s proposed deletions, additions and modifications contained in Optum’s Technical Proposal.

Optum has followed the following principles in providing a markup of this revised CDML:

1. Same Deliverables: If the Revised CDML contains the same deliverable as was contained in the original CDML from the RFP, Optum’s response with respect to such deliverable remains the same; namely:

(a) For those deliverables where Optum made no revisions in its original Technical Proposal, Optum has made no changes in this revised CDML; and

(b) For those deliverables where Optum made modifications in its original Technical Proposal, Optum has made the same modifications (and noted them in red), in some cases the same modification is to modify only portions of the Deliverable and in other cases, the modification is to mark the N/A box and either detailed certain or all SCDHHS language, along with a justification in the Notes section as to why Optum believes the revised CDML for that deliverable is either in whole or in part not applicable, all consistent with the language in Section 3.27.1 of the SC ASO RFP.

2. New Deliverables: If the Revised CDML contains new deliverables that were not in the original CDML from the RFP, Optum’s response with respect to such deliverables is one of the following:

(a) For those new deliverables that Optum can accept, Optum has left the new deliverable blank;

(b) For those deliverables where Optum proposes modifications, Optum has noted them in red font, yellow highlighting, where the modifications to such new deliverables may consist of either modifying only portions of the new deliverable or marking the N/A box and entering a detailed justification in the Notes section as to why Optum believes the revised CDML for that new deliverable is either in whole or in part not applicable, all consistent with the language in Section 3.27.1 of the SC ASO RFP

3. Missing Deliverables: If the Revised CDML did not include a deliverable that Optum had added as part of its Technical Proposal responding to the original CDML, Optum has added such missing deliverable to the revised CDML by noting such missing deliverable in red."

- 3/8/18 and 3/19/18 – Optum posts ASO position openings
- Between 4/1/18 and 4/5/18 – SCDHHS discovers a procurement issue requiring a re-evaluation of the technical proposals
- 4/6/18 – Negotiations with Optum.
- 4/6/18 – SCDHHS sends an email to the CPO to enter into discussions. CPO responds with approval. This e-mail does not advise the CPO that evaluation and ranking have already occurred and that negotiations are ongoing. (Exhibit 5)
- 4/13/18 – SCDHHS Request for Discussions sent to the 3 Offerors. Optum's request does not include a discussion question related to the CDML.
- 4/17/18 – Optum submits its response, including the removal of the substantial Table of Contents footnote.
- 4/25/18 – SCDHHS reconvenes the procurement panel and provides instructions to conduct a "fresh" evaluation of the proposals and submit evaluation sheets by 5/14/18. (Exhibit 6)
- 5/18/18 – Evaluation panel meets, and evaluators confirm their scoring. (Exhibit 7)
- 6/13/18 – Optum sends revised pricing and resubmits its replacement CDML to SCDHHS.
- 6/15/18 – SCDHHS sends the Record of Negotiations to Optum for execution.
- 6/18/18 – Optum returns the executed record of negotiations to SCDHHS.
- 8/6/18 – Director Baker sends the award approval request to CMS
- 9/11/18 – CMS sends its approval to Director Baker
- 9/13/18 – SCDHHS notifies Offerors that the Intent to Award will be posted on 9/14/18
- 9/14/18 – SCDHHS posts its Intent to Award to Ingenix.

III. PURPOSE OF THE SOLICITATION

The purpose of the Solicitation is to seek Claims processing via Software-as-a-Service (SaaS) and Support Services for the State's fee-for-service ("FFS") population. SCDHHS sought a flexible and extensible solution that can support existing Medicaid-funded health benefit programs under the purview of SCDHHS, as well as existing health benefit programs assigned to SCDHHS, or similar future State-funded or administered health benefit programs requiring the same or substantially similar work. The Solicitation seeks a contractor to provide claims processing functions and other services to include prior authorizations (PAs), provider enrollment and recovery management support, provider contact center and reference data.

The Solicitation incorporates specific required goals and deliverables that every responsive offeror must provide. The Solicitation defines deliverable as follows: "those items identified in the Contract to be delivered by the Contractor including, without limitation, the acquired items, hardware, Services, software, etc., required hereunder. . . . a quantifiable good or service that will be provided or adhered to throughout the project lifecycle. Deliverables can be tangible or intangible, and are most often specified functions or characteristics of the project."⁷ The Solicitation's goals include the use of information technology to improve efficiency, to increase the effectiveness of SCDHHS operations, and to reduce the occurrence of fraud.

The Deliverable requirements encompass a variety of material factors which are necessary for the State to obtain certification from the Centers for Medicare and Medicaid Services ("CMS"), protect the security and privacy of the data maintained about participants, providers, and claims processed by the system; and to ensure that the information is available to the State for management, continuity, and other purposes.

IV. RELEVANT SOLICITATION PROVISIONS

2.25 RESPONSIVENESS/IMPROPER OFFERS

(c) Responsiveness. Any Offer which fails to conform to the material requirements of the Solicitation may be rejected as nonresponsive. Offers which impose conditions that modify material requirements of the Solicitation may be rejected.

2.28 2.28 SUBMITTING CONFIDENTIAL INFORMATION (FEB 2015)

(An overview is available at www.procurement.sc.gov) For every document Offeror submits in response to or with regard to this solicitation or request, Offeror must separately mark with the word "CONFIDENTIAL" every page, or portion thereof, that Offeror contends contains information that is exempt from public disclosure because it is either (a) a trade secret as defined in Section 30-4-40(a)(1), or (b) privileged and confidential, as that phrase is used in Section 11-35-410. For every document Offeror submits in response to or with regard to this solicitation or request, Offeror must separately mark with the words "TRADE SECRET" every page, or portion

⁷ Solicitation §2.2m p.22

thereof, that Offeror contends contains a trade secret as that term is defined by Section 39-8-20 of the to or Trade Secrets Act. For every document Offeror submits in response with regard to this solicitation or request, Offeror must separately mark with the word "PROTECTED" every page, or portion thereof, that Offeror contends is protected by Section 11-35-1810. All markings must be conspicuous; use color, bold, underlining, or some other method in order to conspicuously distinguish the mark from the other text. Do not mark your entire response (bid, proposal, quote, etc.) as confidential, trade secret, or protected. If your response, or any part thereof, is improperly marked as confidential or trade secret or protected, the State may, in its sole discretion, determine it nonresponsive. If only portions of a page are subject to some protection, do not mark the entire page. By submitting a response to this solicitation or request, Offeror (1) agrees to the public disclosure of every page of every document regarding this solicitation or request that was submitted at any time prior to entering into a contract (including, but not limited to, documents contained in a response, documents submitted to clarify a response, and documents submitted during negotiations), unless the page is conspicuously marked "TRADE SECRET" or "CONFIDENTIAL" or "PROTECTED", (2) agrees that any information not marked, as required by these bidding instructions, as a "Trade Secret" is not a trade secret as defined by the Trade Secrets Act, and (3) agrees that, notwithstanding any claims or markings otherwise, any prices, commissions, discounts, or other financial figures used to determine the award, as well as the final contract amount, are subject to public disclosure. In determining whether to release documents, the State will detrimentally rely on Offeror's marking of documents, as required by these bidding instructions, as being either "Confidential" or "Trade Secret" or "PROTECTED". By submitting a response, Offeror agrees to defend, indemnify and hold harmless the State of South Carolina, its agencies, officers and employees, from every claim, demand, loss, expense, cost, damage or injury, including attorney's fees, arising out of or resulting from withholding information by the State of South Carolina or any of its agencies, that Offeror marked as "confidential" or "trade secret" or "PROTECTED". (All references to S.C. Code of Laws.) [02-2A125-2]

2.3 AMENDMENTS TO SOLICITATION

2.35 CLARIFICATION

Pursuant to Section 11-35-1520(8), the Procurement Officer may elect to communicate with you after opening for the purpose of clarifying either your Offer or the requirements of the solicitation. Such communications may be conducted only with Offerors who have submitted an Offer which obviously conforms in all material aspects to the solicitation. Clarification of an Offer must be documented in writing and included with the Offer. Clarifications may not be used to revise an Offer or the solicitation.

3.11 DELIVERABLES

6.4 DISCUSSIONS AND NEGOTIATIONS – REQUIRED

No award will be made to an Offeror until after negotiations have been conducted with that Offeror. As provided in Section 11-35-1530, negotiations must begin with the highest ranking Offeror; accordingly, submit your best terms from both a price and a technical standpoint. In

addition, make sure your offer is responsive; the State will not evaluate or negotiate with a non-responsive Offeror, and ordinarily, nonresponsive proposals will be rejected outright without prior notice. The state may elect to conduct discussions, including the possibility of limited proposal revisions, but only for those proposals reasonably susceptible of being selected for award. [11-35-1530(6); R. 19-445.2095(l)]. If improper revisions are submitted during discussions, the State may elect to consider only your unrevised initial offer, but only if your initial Offer is responsive. If a satisfactory contract can not be negotiated with the highest ranking Offeror, the State may elect to conduct negotiations with other Offerors. As provided in Section 11-35-1530(8) the State also may elect to make changes within the general scope of the request for proposals and provide all responsive Offerors an opportunity to submit their best and final offers. Negotiations may involve both price and matters affecting the scope of the contract, so long as the changes are within the general scope of the request for proposals.

7.1 ASSIGNMENT, NOVATION, AND CHANGE OF NAME, IDENTITY, OR STRUCTURE

(a) Contractor shall not assign this Contract, or its rights, obligations, or any other interest arising from this contract, or delegate any of its performance obligations, without the express written consent of the responsible procurement officer.

V. REQUIRED SUBMISSIONS

The Solicitation defines Responsiveness in §2.25(c). That definition states “Any Offer which fails to conform to the material requirements of the Solicitation may be rejected as nonresponsive. Offers which impose conditions that modify material requirements of the Solicitation may be rejected. If a fixed price is required, an Offer will not be rejected if the total possible cost to the State cannot be determined. **Offerors will not be given an opportunity to correct any material nonconformity.** Any deficiency resulting from a minor informality may be cured or waived at the sole discretion of the Procurement Officer. [citations omitted] [emphasis added].”

The Solicitation also included requirements for seeking a Clarification in §2.35. There the Solicitation stated: “[T]he Procurement Officer may elect to communicate with you after opening for the purpose of clarifying either your Offer or the requirements of the solicitation. Such communications may be conducted **only with Offerors who have submitted an Offer which obviously conforms in all material aspects to the solicitation.** Clarification of an Offer must be documented in writing and included with the Offer. Clarifications may not be used to revise an Offer or the solicitation. [citations omitted] [emphasis added].”

As part of the procurement process, offerors were required to agree to provide specific deliverables which included, among other items:

Requirement	No.
System Security Plan (SSP)	D-015
Information Security Risk Assessment (ISRA)	D-016
Privacy Impact Assessment (PIA)	D-017
Disaster Recovery/Business Continuity (DR/BC) Plan	D-018
Systems Engineering Management Plan (SEMP)	D-019
High-Level Technical Design Document	D-020
Logical Data Model	D-021
Physical Data Model	D-022
System Design Document	D-023
Database Design Document	D-024
Data Accession List (DAL)	D-025
Data Dictionary	D-026
Section 508 Product Assessment	D-027
Test Strategy and Plan	D-028
Test Summary and Detail Report(s)	D-029
Implementation/Transition to Operations Plan	D-030
System Utilization/Performance Report(s)	D-031
Training Plan and Training Materials	D-032
Help Desk Plan	D-033
User Manual	D-034
Turnover Plan	D-035

These and other deliverables are essential to the proposal, as CMS requires the State to obtain federal approval and the matching funding which follows that approval.

While Section 3.27.1 of the Solicitation allows offerors to propose “that certain CDMLs listed in the Attachments are not relevant for their proposed solution,” that section also requires the offeror to enter a justification as to why it believes that the CDML is not applicable. Moreover, it is clear that the offeror must include required functions in the Solution.⁸ Sections 3.9 through 3.31 in the solicitation, among other sections, enumerate requirements relating to deliverables.

IV. TIMELINESS OF PROTEST

This amended protest is timely within the deadline set by *S.C. Code Ann.* § 11-35-4210(1)(b). MMO posted the Intent to Award on September 14, 2018. BCBSSC counsel emailed and hand-delivered BCBSSC’s protest letter to the Chief Procurement Office on September 24, 2018. The Amended Protest Letter is timely provided on the next day that State offices are open after the fifth day after the initial protest.

V. GROUNDS OF PROTEST

1. The Evaluation Process was fatally flawed. SCDHHS evaluated, ranked, selected and negotiated with a non-responsive Offeror. The Chief Procurement Officer should cancel the Solicitation and order a re-solicitation.

SCDHHS evaluated a non-responsive Proposal and entered into negotiations with a nonresponsive offeror. It then acted to attempt to make the proposal responsive after the evaluation. After that, SCDHHS improperly re-scored the proposals. The “re-scoring” was nothing more than a pretense to endeavor to justify the pre-determined award.

While the instructions given for reevaluation were for a fresh evaluation,⁹ evaluator comments confirm that this evaluation was anything but “fresh.” The table below reflects the Evaluator Comments which document this fact:

Eval #	Proposer	Comments
1	Optum	The Offeror proposal demonstrated, even with the additional information, . . . The additional information did not pose any additional risk for the innovative OMMS approach to the MMIS solution. . .

⁸ Section 3.11 of the Solicitation provides for the rules governing deliverables, among them “Acceptance of a deliverable shall not change a contractual obligation. Even if a Change to a contract requirement is embedded in a Deliverable, it will require an approved Change Order to enact that Change”

⁹ A so called “fresh” evaluation would suggest an evaluation void of prior influence, knowledge of the prior proposal submissions, price information and the evaluation of Phase II – all of which were necessarily present in this circumstance. As a practical matter, the only way that a “fresh” evaluation could have taken place would have been with a new evaluation panel. This would have necessitated re-scoring the proposals, and new presentations. Obviously, no fresh evaluation took place in scoring this procurement.

2	Optum	See comments from previous score sheet. Optum removed and updated the footnote; they clarified the meaning of "Evergreen," they updated the sentence to include "not." The additional changes posed no more risk than previous score.
4	Optum	The comments provided on my original scoring still apply and my opinion of the solution has not changed due to additional information.
5	Optum	There was nothing in the revision that effected (sic) my original opinion. There was nothing in the revision that effected (sic) my original opinion. No significant risk.
6	Optum	The additional information provided after the initial round of evaluation did not change my opinion of the proposal.
7	Optum	Based on the response from the matters for discussion submitted by the offeror my original opinion still stands. Based on the vendor's response to the matters for discussion my original opinion remains the same.
8	Optum	Revisions to original did not change my opinion. The changes made to original proposal did not increase the risks in my opinion.
9	Optum	Additional information had no impact on original score.
1	BCBS	The offeror additional submitted information did not change my opinion regarding their ability to meet the stated goals and objectives The offeror additional time to configure customization, due to an administrative error, increased significantly, thus may pose a risk to the realism of the proposed scheduled timeline.
2	BCBS	I have no change for comments on technical solution, except the change in hours. The change in hours, to twice the amount of the original, will impact timelines. The increased hours will cause timelines to increase the increasing risk of project not completing on time.
4	BCBS	All comments provided on my original scoring still apply. The additional information provided did not change my opinion of the solution. The comments provided on my previous scoring still apply. Based on the additional information provided, there appears to be a lot more customization required than originally anticipated.
5	BCBS	Noting in the revisions significantly change previous comments.

		Risk factors increased based on response in regard to customization hours. This increase was significant.
7	BCBS	Based on the response from the offeror to the matters for discussion in solution concerned me when the LOE numbers changed significantly. Based on the response from the offeror to the matters for discussion on risk concerned me due to the LOE changes and the impacts it has on the scheduling, staffing & costs that may be incurred would increase the risks.
8	BCBS	The second response to questions did not change my opinions from the first scoring. The level of effort increase changed dramatically from the first proposal. This causes concern to me on how the time schedule, cost & system performance will be affected. Logically, an increase in LOE will have an equal & proportionate increase for these as well.
9	BCBS	Some concern with the revised Level of Effort provided to support customization.

These comments illuminate issues of paramount importance and fundamental fairness. First, there was no true re-evaluation. The evaluation panel members almost universally confirmed their prior decisions – not looking at the proposals anew, but instead merely purporting to address the new information.¹⁰

Moreover, some of the evaluator comments demonstrate that far too much information was in their purview so that a “fresh” re-evaluation would have been impossible. Evaluator 2 demonstrated the truth of the matter. That evaluator identified the areas of non-responsiveness, said that they were fixed and affirmed the previous evaluation. Likewise, it is apparent that during the re-evaluation, the panel was already subject to price knowledge as well as an unavoidable influence from the other members of the panel – they knew the outcome in advance, had discussed it among themselves, seen the vendor presentations, pricing data and other information which made it impossible for a fresh, impartial evaluation. Finally, the process utilized gave the Panel members inadequate information and unsurprisingly there was no reason to change the predetermined outcome.

There is no way that these numerous evaluation flaws could have or can be corrected aside from a resolicitation of the procurement. Most importantly, the evaluation of a non-responsive offeror and ranking thereof tainted the entire process beyond redemption.

¹⁰ The only “new” information was the information provided by Optum to make its non-responsive proposal responsive. The information provided by BCBSSC and CNSi was apparently exactly that which was included in the clarifications – information that had been available during the initial evaluation. Only Optum’s revision to make its proposal responsive was truly “new” information.

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SCDHHS issued this Request for Proposals under *S.C. Code Ann. §11-35-1530 Regulation 19-445.2095*. In competitive sealed proposals, only proposals from responsive offerors are evaluated, ranked, and considered for award. The Procurement Code provides:

Once evaluation is complete, all responsive offerors must be ranked from most advantageous to least advantageous to the State, considering only the evaluation factors stated in the request for proposals.

S.C. Code Ann. § 11-35-1530(7) (2018). The Code defines a "responsive offeror" as "a person who has submitted a bid or offer which conforms in all material aspects to the invitation for bids or request for proposals." *S.C. Code Ann. § 11-35-1410(7) (2018)*. Responsiveness is determined at the time an offer is opened, and, unless discussions are conducted under § 11-35-1530(6), is based on the information included in the proposal. *Appeal by Excent Corporation*, Panel Case No. 2013-2; *Appeal by Heritage Community Services*, Panel Case No. 2013-1.

Regulation 19-445.2095(E) makes applicable to competitive sealed proposals the provisions of §§ 11-35-1520(8) and (13). The former section allows limited communications with "apparent responsive bidders." The latter provides for the correction- or waiver of "minor informalities and irregularities in bids:"

A minor informality or irregularity is one which is merely a matter of form or is some immaterial variation from the exact requirements of the invitation for bids having no effect or merely a trivial or negligible effect on total bid price, quality, quantity, or delivery of the supplies or performance of the contract, and the correction or waiver of which would not be prejudicial to bidders.

§ 11-35-1520(13).

Discussions under § 11-35-1520(8) are limited to persons whose offers "obviously conform in all material aspects to the solicitation." Reg. 19-445.2080. These discussions can only be used to resolve ambiguities in an offer that has been determined to be responsive or to provide an opportunity to cure or waive minor informalities under § 11-35-1520(13).

The Procurement Review Panel has recognized the Code affords additional flexibility to requests for proposals:

The current statutory and regulatory scheme governing competitive sealed proposals expressly allows discussions with offerors "for the purpose of clarification to assure full understanding of, and responsiveness to, the solicitation requirements." *S.C. Code Ann. § 11-35-1530(6)*.

Appeal by Qualis Health, Panel Case No. 2010-4, note 8. In other words, discussions under § 11-35-1530(6) --unlike those conducted under § 11-35-1520(8) --may be used to cure issues of non-responsiveness.

There are limits to this flexibility. First, discussions may only be conducted if authorized by the chief procurement officer, Reg. 19-445.2095(I)(4), and only if the solicitation documents alert offerors to the possibility of discussions, Reg. 19-445.2095(I)(3).

Second, discussions may only be conducted with "offerors who submit proposals determined to be reasonably susceptible of being selected for award," § 11-35-1530(6). Regulation 19-445.2095(I)(1) requires, for purposes of conducting discussions, that the procurement officer classify each proposal in writing as:

(a) acceptable (i.e., reasonably susceptible of being selected for award);

(b) potentially acceptable (i.e., reasonably susceptible of being made acceptable through discussions); or

(c) unacceptable.

Third, all offerors whose proposals are classified as acceptable or potentially acceptable must be treated fairly and equally, Reg. 19-445.2095(I)(3). For each such offeror, the procurement officer must:

(a) Control all exchanges;

(b) Advise in writing every offeror of all deficiencies in its proposal, if any, that will result in rejection as non-responsive;

(c) Attempt in writing to resolve uncertainties concerning the cost or price, technical proposal, and other terms and conditions of the proposal, if any;

(d) Resolve in writing suspected mistakes, if any, by calling them to the offeror's attention.

(e) Provide the offeror a reasonable opportunity to submit any cost or price, technical, or other revisions to its proposal, but only to the extent such revisions are necessary to resolve any matter raised by the procurement officer during discussions under items (2)(b) through (2)(d) above.

Reg. 19-445.2095(I)(2).

Finally, since only responsive proposals can be ranked, discussions "to assure...responsiveness to the solicitation requirements" must occur prior to final ranking. "[O]nce the proposals have been evaluated and ranked, it is too late for such clarification, and allowing it

after those stages would be unfair to the other offerors." *Qualis Health, ante*, Panel Case No. 2010-4, note 8. This timing is critical. In this case, SCDHHS failed to adhere to this "crucial" timing requirement. The effort to circumvent the requirement by "re-evaluating" was nothing more than an effort to circumvent the law.

Responsiveness ensures comparability. That is, it allows the State to compare offers fairly. If an offer is not responsive, it does not meet the State's requirements and it cannot be compared with the criteria in the solicitation or to other offers. If the State cannot compare, there is no meaningful competition. And without competition, there is no way to determine if the State is accepting the most advantageous offer. Responsiveness is the baseline. By evaluating only responsive offers, the State can be sure it is fairly comparing proposals, each of which meets its mandatory and essential requirements.

While Regulation 19-445.2095(I)(3) states that "Ordinarily, discussions are conducted prior to final ranking," only responsive offers are evaluated and ranked which precludes any post-final-ranking discussions to correct issues of responsiveness. Generally, communications after final ranking are limited to clarifying the language of the highest ranked offer or negotiations. Section 11-35-1530(8) authorizes the procurement officer, after final ranking, to "negotiate with...offeror [s] on price, on matters affecting the scope of the contract, so long as the changes are within the general scope of the request for proposals, or on both."

Here, the CPO should adopt the *Qualis* analysis and determine that because the evaluation and ranking took place before the discussions, Optum was improperly evaluated and scored. The long duration of this procurement process makes reevaluation both unfair and not likely advantageous to the State. As a result, the only proper remedy for this glaring and unlawful defect is starting over with a fresh solicitation.

Moreover, unlike in *IN RE: Appeal by ACT, Inc.*, and *Appeal by South Carolina Budget and Control Board* (Panel Cases 2014-16 and 2014-17), there is no basis for allowing the award to move forward. Performance has not commenced; the solicitation has a nineteen-month implementation as it stands and there is no federal or other deadline creating a special circumstance requiring relief other than re-solicitation. Here, the State evaluated, ranked and negotiated with an offeror who submitted a materially non-responsive offer. The intent to award here violates the law.

2. As a non-responsive offeror, Optum necessarily could not have been the highest ranked offeror for purposes of negotiations under S.C. Code Ann. §11-358-1530(8). The negotiations conducted were invalid.

SCDHHS had an "uh oh" moment in April 2018 when, while engaged in negotiations with Optum, it determined that Optum's initial proposal was non-responsive. Its determination at that time to attempt to correct this non-responsiveness after the evaluation, ranking, and commencement of negotiations was unfair, prejudicial to the other Offerors and in violation of the

law. The Panel determined this to be the case in IN RE: Appeal by ACT, Inc. (Case No. 2014-16). In that case, the Panel notes “negotiations should only take place with the highest ranked offeror – that is, the offeror whose proposal is responsive at the time of final ranking” (Note 5). Here, negotiations were in process before the attempted re-ranking – and there is no evidence that they started anew after that. The procurement record reflects, instead, that they continued as if the re-ranking never took place. That manifests the fatal flaws in SCDHHS’s efforts to cure Optum’s initial non-responsive proposal. The ONLY appropriate remedy for this violation is resolicitation.

3. SCDHHS violated R. 19-445.2095(3) in failing to accord offerors fair and equal treatment with respect to any opportunity for discussions and revisions of proposals. It conducted what amounted to a sham re-scoring after allowing proposal revisions where its preferred vendor submitted a nonresponsive proposal.

While it might be argued that Optum’s non-responsiveness could have been corrected before scoring, the general rule requiring that to occur was not followed. The Panel has held that such conduct violates the law. In this instance, after scoring, the discussion was too late. SCDHHS scored a non-responsive proposal and conveyed its selection to the General Assembly. The “discussion” items were a sham except as they related to Optum. SCDHHS had already changed the CDML requirements and yet purports to have reevaluated the proposals without the other offerors even having the change to review and accept the amended deliverables. That fact alone demonstrates the fallacy of the purported “re-evaluation”. Moreover, it demonstrates the lack of fair treatment to the other proposers. Here, SCDHHS improperly allowed Optum so much latitude in amending its deficient response that it was effectively allowed to submit an “amended” proposal more than a year after the required submission deadline. This process obviously and intentionally failed to accord the other offerors fair and equal treatment as required by the Regulation. The only proper remedy in this instance is re-solicitation of the entire procurement.

4. The procurement was fatally flawed where SCDHHS used the same evaluation panel to re-evaluate the proposal when it conducted discussions pursuant to R. 19-445.2095 after the panel had evaluated the proposals and been exposed to the scoring. It was humanly impossible for the same people to perform the required “fresh” scoring. Moreover, it was humanly impossible for panel members not to have been affected by the knowledge of the status of the procurement and the fact that negotiations had already occurred with the original highest ranked offeror.

As described above, the panel’s score sheets demonstrate conclusively that it was impossible for them to complete the re-scoring without prejudice and pre-conception based upon the prior evaluation, the fact that the same evaluators had also completed the evaluation of the respective vendors’ presentations and the evaluators’ exposure to both the pricing and the clear disclosure of the fact that Optum’s exceptions in its proposal made it a non-responsive offeror. The re-evaluation at this late stage was biased and inappropriate in any event even if a new panel had been commissioned, but the use of the same panel exacerbated the problems and was explicitly prohibited.

5. SCDHHS violated the Procurement requirements when it Amended the Deliverables on January 24, 2018, after the Proposals had been opened.

SCDHHS amended the solicitation on January 24, 2018, when SCDHHS revised the deliverables. These revisions to deliverables materially altered the solicitation. The revisions occurred after opening in violation of Section 2.3 of the Solicitation which provides, among other things, (a) The Solicitation may be amended at any time **prior to opening**. [emphasis added]. At the point that this revision was made, the proposals had been opened, reviewed and scored, and vendor presentations had been given and scored. Although it was a non-responsive offeror at this point, Optum had been identified as the highest ranked Offeror.

6. SCDHHS violated the Procurement requirements when it altered the Solicitation requirements by changing the CDML information in early 2018 and failed to notify other offerors of what amounted to an Amendment affecting deliverables.

The Solicitation requires that all amendments be posted at www.procurement.sc.gov. SCDHHS issued an amendment which materially affected the solicitation by dramatically altering the Consolidated Deliverables Management List and failed to post the same as required. This further demonstrates the fact that the purported re-evaluation was nothing more than a sham effort to attempt to circumvent the legal requirements. Likewise, this "amendment" was only provided to a single offeror – not all offerors; and the "re-evaluation" was conducted without any offeror other than Optum having had the opportunity to respond to this new requirement.

7. Exposing the existing evaluation panel to the changes and modifications of the Proposals created an unfair environment in that the Evaluation Panel Members allowed the changes to have a heavily weighted impact on their evaluations which would not have occurred had they not already evaluated the proposals and then been advised of the specific changes.

The error and misapprehension caused by the method used are evident in the comments of the evaluators about BCBSSC's discussion items. Even though this information was identical to that provided in the clarifications before the second evaluation, the evaluators mistakenly interpreted that there had been a change in the hours proposed by BCBSSC and commented negatively on this factor. Likewise, at least one evaluator noted by title the exact modifications to Optum's proposal which had been made to remove the exceptions that had been determined to make the proposal non-responsive. Obviously, BCBSSC believes that the other items enumerated in this protest letter reveal that even as awarded the Optum proposal was non-responsive. Nevertheless, these and other evaluator comments show the extent of prejudice created in the process in violation of the Code and Regulations.

Moreover, SCDHHS submitted the proposals for "re-evaluation" without updating the solicitation and without even informing two of the three offerors of material changes to

deliverables by way of the CDML requirements in the solicitation. How could a fair evaluation take place when two of the three offerors were unaware of and had not had the opportunity to amend their proposals to conform to the materially altered deliverable requirements?

The circumstances created here resulted in scoring that was arbitrary and capricious based upon the prejudice introduced, the material changes to the requirements without notice, the improper information before the evaluation panel, the apparent influence on the panel members as reflected by their eerily consistent scoring and the fact that the subsequent scoring was unquestionably affected by the prior scoring.

8. SCDHHS conducted discussions after the final ranking and commencement of negotiations with a non-responsive offeror which violated S.C. Code Ann. §11-35-30. The subsequent effort to reconstitute the procurement violated reasonable commercial standards of fair dealing.

The record suggests that SCDHHS realized that it was too far in the process to fix its mistakes in this procurement, but endeavored to repair its errors by manufacturing discussion items which were nothing but requests for identical information already provided by all offerors save Optum. The information provided by Optum was designed to cure its non-responsiveness. The manner in which this information was solicited and obtained was misleading and in bad faith as it related to the other offerors and the process in general. These egregious process errors can be corrected only by a cancellation of the award and resolicitation.

9. The totality of the solicitation and the evaluation process violates S.C. Code Ann. 1976 §11-35-20(f) and (g) because it did not ensure fair and equitable treatment of all offerors.

- a. SCDHHS evaluated a non-responsive proposal and selected it for award.
- b. SCDHHS conducted negotiations with a non-responsive offeror twice – in February and in April – and before final scoring.
- c. SCDHHS continued negotiations before and after the illegal and improper rescoring where it attempted to fix a fatal error in the process.
- d. SCDHHS conducted discussions after final rankings without alerting all offerors to the possibility of the exchange, including the limited proposal revisions as required by S.C. Reg. 19-445.2095(3). The other offerors were not accorded fair and equal treatment with respect to the opportunity for discussions and revisions of proposals.
- e. SCDHHS sought clarification from Optum on a question of responsiveness after evaluation in violation of S.C. R. 19-445.2080.
- f. SCDHHS sought clarification from vendors without required authority from the CPO.

10. SCDHHS has issued an award to an entity other than the proposer without following the requirements of S.C. Reg. 19-445.2180 and in apparent violation of the requirements of the Regulation. The CPO should declare the award invalid on that basis.

SCDHHS's September 14, 2018, notice reflects that the contract was awarded to Ingenix. However, the proposal was submitted by Optum or "OptumInsight." Ingenix apparently was merged into Optum in 2011. It is unclear why the award was made to Ingenix when the proposal was submitted in Optum's name. There is no evidence that a proper assignment or novation has been prepared and executed as required by the Code and Section 7.1 of the solicitation. This failure reflects another clear flaw in the process and a failure to follow the requirements of the solicitation documents and the Code.

11. The CPO should cancel the award before performance under S.C. Reg. 19-445.2085(C) and S.C. Code Ann. §11-35-1530(8)(c) because the final accepted proposal including the record of negotiations reflects a revision in the specifications beyond the scope of the solicitation and materially changed the solicitation. SCDHHS ultimately did not award a contract to buy what it solicited.

The evidence in the record reflects that SCDHHS and Optum removed almost half of the required deliverables included in the solicitation. Optum explains that it uses an "Agile Model Office approach to configuration and implementation" and that approach eliminates the need for the deliverables. However, no explanation is provided as to how SCDHHS obtains the required information enumerated in the deliverable so that it might have that information to utilize in managing the multi-vendor related projects outlined in the solicitation or for certification purposes. The changes made as reflected by the Award and Record of Negotiations are outside the general scope of the RFP. If these deliverables were going to be removed, every proposer should have been afforded the opportunity to present a best and final offer.

12. The CPO should cancel the Award and require resolicitation because the initial evaluation was improper. The Procurement Officer conducted discussions and sought clarification apparently without the approval of the appropriate chief procurement officer as required by R. 19-445.2095.

The initial request for clarifications submitted on October 23 and 24, 2017 were made, and modifications to the proposals accepted without authority from the CPO as required by the regulation. Neither the e-mail transmitting the letter to BCBSSC nor the letter dated October 23, 2017, reflects that the CPO had provided authority for discussions. When SCDHHS finally sought to conduct discussions in April 2018, it did so without advising the CPO of the true facts – that the proposals had already been evaluated, ranked and negotiations were in process with the highest ranked (non-responsive) offeror. BCBSSC suggests that had this fact been conveyed to the CPO, it is unlikely that discussions would have been authorized.

Here, the items sought from BCBSSC both in the request for clarifications and the “discussions” were precisely the same. On the other hand, it appears that the questions addressed to Optum were an effort to make Optum’s non-responsive proposal, which had already been ranked and upon which negotiations had commenced, responsive.

It seems that both these authorized discussions and the subsequent rescoring of Part I that resulted were merely an effort to avoid what should have occurred, which was withdrawing the solicitation and re-soliciting the procurement based upon the SCDHHS’s egregious process errors.

13. SCDHHS improperly sought authority to conduct discussions to remedy Optum’s non-responsiveness after the evaluation was complete. Its subsequent efforts to “re-evaluate” after discussions were no more than a sham. This process violated S.C. Code Ann. §§11-35-20(e), 11-35-20(f), 11-35-20(g), 11-35-30, 11-35-1530(2); 11-35-1530(3), 11-35-1530(6), 11-35-1530(7), 11-35-1350(8), 11-35-1530(9), R. 19-445.2095(I)(2), R.19-4452095(I)(3) and R. 19-445.2095(I)(4).

SCDHHS sought authority for discussions after it discovered during contract negotiations that Optum’s proposal was non-responsive. This effort violated the Panel’s decision in *Qualis* and the procurement goals and rules enumerated in the statutes and regulations. At the point that SCDHHS learned this (late March or early April 2018), the proper course was to cancel the solicitation and reissue a corrected solicitation. SCDHHS failed to cancel the solicitation and proceeded in violation of the law. The CPO should issue its Order to remedy these fatal flaws in the process.

14. The determinations made in the negotiations were arbitrary and capricious and violated the purposes and principles of the Consolidated Procurement Code.

As enumerated in the facts outlined in this letter, it is evident that the removal of nearly fifty (50%) percent of the required deliverable information profoundly altered the scope of the solicitation and the potential costs incurred in complying with the solicitation. Before allowing these substantial and material changes to the procurement by way of the negotiated contract, the Procurement Officer should have acted in good faith and given all offerors an opportunity to submit a best and final offer considering these changes to the solicitation outside of the general scope of the request for proposals. Failing to do so violated, *inter alia*, S.C. Code Ann. §11-35-20(f) and other parts of the code in that this conduct “failed to ensure the fair and equitable treatment of all persons who deal with the procurement system which will promote increased public confidence in the procedures followed in public procurement.”

15. Optum’s proposal after discussions was non-responsive to the essential requirements of the solicitation and, therefore, Optum is not a responsive offeror. Its Proposal took exception to and rejected mandatory and essential requirements of the RFP which were not determined to be minor informalities or irregularities.

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Optum failed to submit or provide critical information required in the RFP in connection with the following requirements and deliverables: the System Security Plan, Information Security Risk Assessment, Privacy Impact Assessment, Systems Engineering Management Plan, High Level Technical Design Document, Logical Data Model, Physical Data Model, Database Design Document, Data Accession List, Data Dictionary, Section 508 Product Assessment, Test Strategy and Plan, Test Summary and Detail Reports, Implementation /Transition to Operations Plan, Training Plan and Training Materials, Help Desk Plan, and User Manual.

Optum refused to provide 4 of the Deliverables based on an assertion of confidentiality and stated that 13 were not applicable without the appropriate and required explanation. This amounts to Optum's proposal not including 48.5% of the required submission deliverables.

Optum's proposal contained these and other deficiencies that resulted in the Procurement Officer seeking to open discussions after evaluation in an apparent effort to make Optum responsive to the mandatory and essential requirements of the solicitation – which it did not fulfill at that time.

The Table below details the issues presented by these non-responsive items in Optum's proposal. Clearly, these items are key to the performance of the contract requirements and key to the State's ability to manage and oversee the performance of its contractor. SCDHHS's acceptance of these serious and material deviations from the essential requirements further evidences a flawed, biased procurement process.

[TABLE STARTS ON FOLLOWING PAGE]

Deliverable #	Name	Optim Proposed	SCDHHS Description (for deviations or non-substitutions)	SCDHHS CDML Requirements
D-015	System Security Plan (SSP)	N/A	The SSP documents the description of managerial, technical, and operational security controls. Contractor (Vendor) must document system security and operating controls to ensure that the design and implementation of the services delivered contain such controls, processes and procedures that meet or exceed federal standards and guidance.	NTP + ninety (90) calendar days, the Contractor (Vendor) will provide preliminary SSP or update to an existing SSP to SCDHHS for review. The final version is due ten (10) business days after successful user acceptance testing (UAT). SCDHHS needs to review and approve prior to the Contractor (Vendor) commencing the Implementation Phase. Updates will occur minimally on an annual basis.
D-016	Information Security Risk Assessment (ISRA)	N/A	The ISRA contains a list of threats and vulnerabilities, an evaluation of current security controls, their resulting risk levels, and any recommended safeguards to reduce risk exposure.	NTP + sixty (60) calendar days, the Contractor (Vendor) will provide preliminary ISRA to SCDHHS for review. The final version is due ten (10) business days after successful

				UAT. SCDHHS needs to review and approve prior to the Contractor (Vendor) commencing the Implementation Phase.
D-017	Privacy Impact Assessment (PIA)	N/A	The PIA ensures there's no collection, storage, access, use or dissemination of identifiable respondent information unless it is needed and permitted.	NTP + sixty (60) calendar days, the Contractor (Vendor) will provide preliminary PIA to SCDHHS for review. The final version is due ten (10) business days after successful UAT. SCDHHS needs to review and approve prior to the Contractor (Vendor) commencing the implementation Phase.
D-018	Systems Engineering Management Plan (SEMP)	N/A	The Contractor (Vendor) shall document its technical processes in a Systems Engineering Management Plan (SEMP). The SEMP shall describe the Contractor's (Vendor) proposed efforts for planning, controlling and conducting a fully integrated engineering effort. This plan will be used to understand and evaluate the Contractor (vendor)'s engineering work efforts as part of the contract monitoring process. Contractor (Vendor) must propose the methods and artifacts needed to accurately and adequately document the system and operations architecture and design with respect to this contract and shall maintain this documentation for the life of the contract. The Contractor (Vendor) shall provide to the State the database schema, data dictionaries, entity-relationship diagrams, and interface standards for the entire system, including those supporting Proprietary Contractor Material.	NTP + ninety (90) calendar days, Contractor (Vendor) will provide preliminary SEMP to SCDHHS for review. SCDHHS needs to review and approve prior to the Contractor (Vendor) commencing the Design Phase.

D-020	High-Level Technical Design Document	N/A	<p>The high-level technical design document should be a complete view of the entire system breaking it down into smaller components that are more easily understood.</p> <p>The high-level design needs to provide an overview of and describe all solutions, platforms, systems, products, services or processes. This document includes a high-level architecture diagram depicting the structure of the system, such as the database architecture, application architecture (layers), application flow (navigation), security architecture and technology architecture.</p>	<p>NTP + thirty (30) calendar days, the Contractor (Vendor) will provide preliminary High-level Technical Design document to SCDHHS for review. The final version is due ten (10) business days before the Development Phase begins. SCDHHS needs to review and approve prior to the Contractor (Vendor) commencing the Development Phase.</p>
D-021	Logical Data Model	Refused	<p>Describes the data in as much detail as possible without regard to how they will be physically implemented in the database. SCDHHS must validate the Contractor's (Vendor) understanding and approach to identifying and incorporating all data elements into the actual solution.</p> <p>The Logical Data Model includes:</p> <ul style="list-style-type: none"> - All entities and relationships among them. - All attributes for each entity are specified. - The primary key for each entity is specified. - Foreign keys (keys identifying the relationship between different entities). 	<p>NTP + thirty (30) calendar days, the Contractor (Vendor) will provide preliminary Logical Data Model to SCDHHS for review. The final version is due ten (10) business days prior to the conclusion of the Requirements Analysis Phase. SCDHHS needs to review and approve prior to the Contractor (Vendor) commencing the Design Phase.</p>

D-022	Physical Data Model	Refused	<p>The Physical Data Model is required for SCDHHS to understand and validate how the Contractor (Vendor) proposes to physically link data elements in the solution.</p> <p>This model shows all table structures, including column name, column data type, column constraints, primary key, foreign key, and relationships between tables.</p>	<p>NTP + thirty (30) calendar days, the Contractor (Vendor) will provide preliminary Physical Data Model to SCDHHS for review. The final version is due ten (10) business days before the Design Phase begins. SCDHHS needs to review and approve prior to the Contractor (Vendor) commencing the Design Phase.</p>
D-024	Database Design Document	Refused	<p>The Database Design Document describes the design of a database and the software units used to access or manipulate the data. The Contractor (Vendor)-proposed document should provide standard System Development Lifecycle (SDLC) Database Design Document information to include: System Overview; Database Design Decisions; Database Administrative Functions; Database Interfaces; Reporting; Data Access; Implementation Considerations; Non-Functional Design; Backups and Recovery; Archiving</p>	<p>Ten (10) business days after the beginning of the Design Phase, the Contractor (Vendor) will provide preliminary Database Design Document to SCDHHS for review. The final version is due ten (10) business days before the Development Phase begins. SCDHHS needs to review and approve prior to the Contractor (Vendor) commencing the Development Phase</p>

D-025	Data Accession List (DAL)	N/A	<p>The Data Accession List (DAL) shall provide management, configuration and engineering documents which includes software, not part of other deliverables contained within this CDML that are created under this Contract.</p> <p>The DAL shall include the data or document title, a reasonable description, the in-house release date, the project to which the document applies, and the data rights associated with the item.</p> <p>The documents included on the DAL should be limited to those directly related to the management, configuration or engineering of the project. It is not intended to capture every record, e-mail, note, or letter created during the Term of the Contract. Examples include documents such as system performance analysis reports, schedule risk analyses, software test drivers that are not needed to maintain the system, etc. Examples of documents that would not be part of the DAL are internal e-mails, personal daily or meeting notes, drafts of documents, etc.</p> <p>Note: Any data required for proper operation, configuration parameters and maintenance of the system and for proper conduct of operations shall be identified in other CDML deliverables rather than the DAL.</p>	<p>Ninety (90) calendar days from the contract start date, the Contractor (Vendor) will provide preliminary DAL to SCDHHS for review. SCDHHS needs to review and approve prior to commencing the Design Phase. The recurring list updates are due each quarter on the last business day.</p>
D-026	Data Dictionary	Refused	<p>The data dictionary document outlines all the data elements in the Contractor (Vendor) solution and how they are mapped, translated, decoded from SCDHHS data. The original effort to map SCDHHS data will be a joint effort between the Contractor (Vendor) and SCDHHS.</p> <p>For all Contractor (Vendor)-created measures and data elements, describe how they are derived, including:</p> <ul style="list-style-type: none"> - Source SCDHHS data element - Formula - Known risks or limitations 	<p>Ten (10) business days prior to the conclusion of the Requirements Analysis Phase, the Contractor (Vendor) will provide preliminary Data Dictionary to SCDHHS for review. The final version is due ten (10) business days before the Development Phase begins. SCDHHS needs to review and approve prior to the Contractor (Vendor) commencing the</p>

				Development Phase. The recurring updates are due each quarter on the last business day.
D-027	Section 508 Product Assessment	N/A	The Section 508 Product Assessment provides information is to assist in making preliminary assessments regarding the availability of Electronic and Information Technology (EIT) products and services with features that support accessibility. The format of this assessment can be proposed by the Contractor (Vendor). The information that is included in the Section 508 Product Assessment should follow the CMS guidance at the following link: https://www.cms.gov/Research-Statistics-Data-and-Systems/CMS-Information-Technology/XLC/Downloads/Sect508ProdAssessmentL.doc	NTP + sixty (60) calendar days, the Contractor (Vendor) will provide preliminary Section 508 Product Assessment to SCDHHS for review. The final version is due ten (10) business days prior to concluding the Testing Phase. SCDHHS needs to review and approve prior to the Contractor (Vendor) concluding the Testing Phase. After go-live, updates need to be delivered three (3) months prior to any major software release.

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D-028	Test Strategy and Plan	N/A	<p>The Contractor's (Vendor) Test Plan, at a minimum, will describe the overall scope, technical and management approach and methodology, tools, resources, reporting and key performance indicators (KPIs) [Reference D-029 Test Summary and Detail Report(s)], and high-level schedule for all intended test activities associated with all phases of testing including unit testing, systems integrated testing, user acceptance testing, validation testing, performance testing, regression testing, etc. The Contractor's (vendor) Test Plan also needs also to provide information related to test case-to-requirements traceability, defect management, reporting, progression, and quality strategy and methodology.</p>	<p>Ten (10) business days prior to the conclusion of the Requirements Analysis Phase, the Contractor (Vendor) will provide the preliminary Test Plan to SCDHHS for review. The final version is due ten (10) business days prior to the conclusion of the Development Phase. SCDHHS needs to review and approve prior to the Contractor (Vendor) commencing the Testing Phase.</p>
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D-029	Test Summary and Detail Report(s)	N/A	<p>An overall assessment of the build or release tested and testing process employed with a summary of the test results, including test incidents summarized by impact/severity level. If test results are maintained in an automated tool, the information may be exported or printed and submitted from the tool for inclusion within the Test Summary Report.</p> <p>Summarize what testing activities took place, include the version(s) or release(s) of the software, environment, etc. Identify test function(s) performed, test period(s), test location(s), test participants and their roles in the testing process. Test report numbers need to balance (e.g., the number of test cases passed plus the number of test cases failed must match the total number of test cases reviewed). At a minimum, the report must contain the following information:</p> <p>Summary</p> <ul style="list-style-type: none"> - Test Cases Planned: Number of test cases planned to execute for the release - Test Cases Run: Actual number of planned test cases executed - Test Cases Passed: Actual number of reviewed test cases that met the expected result - Test Cases Failed: Actual number of reviewed test cases that failed to meet the expected result - Test Cases To Be Run: Number of planned test cases remaining to be executed - Test Cases Held: Number of planned test cases on hold/not applicable/postponed at this point in time - Comments / Explanation <p>Details Test Case-to-Requirement</p> <ul style="list-style-type: none"> - Test Description - Date Tested - Required Inputs and Expected Results - Step-by-Step Procedures for Executing the Test - Pass/Fail Criteria for Acceptance - Pass/Fail Result - Comments <p>Incidents or Defects</p> <ul style="list-style-type: none"> - Root Cause/Impact Analysis - Total Reported - Total Resolved - Total Unresolved <p>Comments / Status / Corrective Action Plan</p>	<p>Ten (10) business days prior to the conclusion of the Design Phase, the Contractor (Vendor) will provide the preliminary Test Summary and Detail Reports to SCDHHS for review. The final version is due ten (10) business days prior to the conclusion of the Development Phase. SCDHHS needs to review and approve prior to the Contractor (Vendor) commencing the Testing Phase. This recurring deliverable is due weekly once the Testing Phase begins throughout the life of the contract.</p>
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D-030	Implementation/Transition to Operations Plan	N/A	<p>The Implementation/Transition to Operations Plan describes how the automated system/application or IT solution will be installed, deployed and transitioned into an operational system or situation. The Contractor (Vendor) will provide a brief description of each major task required for the implementation and the subsequent transition to operations of the system or situation, e.g., the tasks required to install hardware and software, prepare data, verify the system or situation, and prepare for transition to operations, etc. Include the following information for the description of each major task in the plan, as appropriate: Major Tasks: What the task will accomplish; Resources required to accomplish the task; Assumptions and constraints associated with the task; Identified risks and planned mitigations associated with the task; Reference documents applicable to the task; Criteria for successful completion of the task; Miscellaneous notes and comments. Implementation Schedule- Task Description- Start Date- End Date- Responsible Person- Dependencies- Milestones Go/No-Go Criteria</p>	<p>Ten (10) business days prior concluding the Design Phase, the Contractor (Vendor) will provide preliminary Implementation Plan to SCDHHS for review. The final version is due ten (10) business days after the beginning of the Implementation Phase. SCDHHS needs to review and approve prior to the Contractor (Vendor) before Go-Live.</p>
D-031	System Utilization/Performance Report(s)	Accept		
D-032	Training Plan and Training Materials	N/A	<p>The Training Plan describes the overall goals, learning objectives, and activities that are to be performed to develop, conduct, monitor, control, and evaluate instruction. Describe the work products required to satisfy the training plan which may include, web-based instruction, instructor guides, student guides, exercise materials, and training records.</p>	<p>Ten (10) business days after beginning the Development Phase, the Contractor (Vendor) will provide preliminary Training Plan to SCDHHS for review. SCDHHS needs to review and</p>

				approve prior to commencing the Testing Phase. Ongoing training materials/records will be submitted weekly by COB Thursday
D-033	Help Desk Plan	N/A	<p>This document defines how all the help desk related activities are executed, monitored, measured and controlled. This document describes the processes for ensuring adherence to the Help Desk requirement.</p> <p>The major elements of the Help Desk Plan are at a minimum;</p> <ul style="list-style-type: none"> - Help Desk Service Level schedule - Problem response and resolution process - Help desk performance analysis report template(s) and process(es) - Problem escalation process - Implementation process of a customer self-help database and portal <p>The Contractor (Vendor) is requested to submit additional information and report templates for SCDHHS consideration.</p>	<p>Ten (10) business days after beginning the Testing Phase, the Contractor (Vendor) will provide preliminary Help Desk Plan to SCDHHS for review. SCDHHS needs to review and approve prior to commencing the Implementation Phase.</p>
D-034	User Manual	N/A	<p>Explains how a novice business user is to use the automated system or application from a business function perspective.</p>	<p>Ten (10) business days after beginning the Development Phase, the Contractor (Vendor) will provide preliminary User Manual to SCDHHS for review. SCDHHS needs to review and approve prior to commencing the Implementation Phase. Updates to be submitted to SCDHHS minimally on an annual basis.</p>

Examples of the material effects of Optum's "Not Applicable" and "Refused" CDML markings in its proposal and summarized in the table above are best described below:

a. Security & Compliance Deliverables

Security & Compliance Deliverables
D-015 System Security Plan (SSP)
D-016 Information Security Risk Assessment (ISRA)
D-017 Privacy Impact Assessment (PIA)
D-027 Section 508 Product Assessment

- The completed Information Security Risk Assessment after user acceptance test (UAT) contains a list of threats and vulnerabilities, an evaluation of current security controls, their resulting risk levels, and any recommended safeguards to reduce risk exposure. The ISRA, SSP, and the PIA are all aimed at enabling SCDHHS to protect South Carolinian's PII, and PHI entrusted to SCDHHS. SCDHHS cannot outsource the responsibility for protecting this data. The requirement for the ongoing SSP is to provide an overview of the security requirements of the system and describe the controls in place or planned for meeting those requirements. The SSP also delineates responsibilities and expected behavior of all individuals who access the system, which is critical in the RFP required Multi-Vendor modular future for SCDHHS. The system security plan should be viewed as documentation of the structured process of planning adequate, cost-effective security protection for the system.
- The PIA ensures there is no collection, storage, access, use or dissemination of identifiable respondent information unless it is needed and permitted and fully compliant with HIPAA. Protecting beneficiary data is critical to the State and allowing deviations from the strict requirements in this area is inexplicable and unreasonable. Other offerors were not afforded the same leniency.
- Removal of these deliverables results in a loss of the ability to assess required 508 compliance as required by the RFP & the Department of Health & Human Services.
- Allowing the removal of these required deliverables is likely to result in SCDHHS not being able to meet the Agency's obligations to ensure the Medicaid data and systems are adequately protected and meeting State and Federal government requirements.
- Removing these material deliverables from the requirements dramatically changes the Solicitation.

b. Data Deliverables

Data Deliverables

- D-021 Logical Data Model
- D-022 Physical Data Model
- D-024 Database Design Document
- D-025 Data Accession List (DAL)
- D-026 Data Dictionary

- All of these deliverables support SCDHHS's efforts to improve overall data governance and data stewardship. They also enable and support the management and exchange of data across the State's Medicaid Enterprise and with external systems in ways that are automated and that minimize potential errors with data accuracy. (stated goals in the RFP)
- While some of these could reasonably be considered proprietary for offerors (Data Dictionary & Physical Data Model), SCDHHS has the authority and ability as the State to protect bidder's IP making Optum's purported justification to not provide them due to proprietary concerns completely unjustified. Both other bidders offered SaaS-based solutions and agreed to supply these deliverables in their proposals.
- SCDHHS may not achieve 1) their vision for source of truth and system of record interaction 2) a data model that is consistent with SCDHHS' business processes and MITA business processes without the methods and artifacts needed to accurately and adequately document the system and operations architecture and design with respect to its Offer, and how this documentation will be maintained for the term of the Contract. Meeting these goals and requirements inherent in the solicitation requires the information contemplated by and in these deliverables.
- By forfeiting its rights to these deliverables, SCDHHS loses its ability to provide data governance and stewardship and is also inhibiting the information necessary to improve data accuracy and MITA maturity continually. SCDHHS is also failing to document the system and operations architecture, dramatically increasing the risk to the State.

c. User Deliverables

- D-032 Training Plan and Training Materials
- D-033 Help Desk Plan
- D-034 User Manual

- The removal of these user-focused deliverables is inexplicable. SCDHHS's ultimate acceptance of the elimination of testing, the help desk plan, user manual, the oversight deliverables group and one-time delivery of training related deliverables essentially makes use of the system far more difficult if not impossible for the 500 expected State system users identified in the RFP.
- All of these user-focused RFP contractor responsibility requirements are effectively deleted without the deliverables to provide the evidence and auditability of performance. From a practical perspective, these are all routine deliverables for any product or service delivery. Proprietary methodologies or new-to-Medicaid approaches do not remove the need for users to be trained, have access to a user manual, and to understand how to access help resources when things go wrong.
- When combined with the other deleted deliverables, SCDHHS is allowing a massive black box where SCDHHS does not have a complete view of the security posture of the solution, the underlying data structures and use, the processes to manage the solution implementation nor the solution itself, and ill-equipped users to use the system or seek assistance from a help desk.

These practices result in an entirely different solicitation. Had these deliverables not been included in the original solicitation, other offerors proposals would likely have been materially changed in content and price. The CPO should not allow SCDHHS to make these changes during negotiations which violate §11-35-1530 as these do.

d. Oversight Deliverables

- D-019 Systems Engineering Management Plan (SEMP)
- D-020 High-Level Technical Design Document
- D-028 Test Strategy and Plan
- D-029 Test Summary and Detail Report(s)
- D-030 Implementation/Transition to Operations Plan

- At the highest level, the deletion of the oversight deliverables cedes direct project control to the contractor and removes SCDHHS's ability to assess project progress and vendor performance continually and dramatically limits SCDHHS ability to control risk by imposing realism into the planning process rather than assuming the best possible outcome will always occur.
- SCDHHS will be unable to achieve the MITA technical goals and objectives that provide the best value to the State (standards, security, interoperability, adaptability, extensibility, etc.) without appropriate transparency.

- The entire shared risk equation between SCDHHS and the Contractor is altered in that the change limits SCDHHS' flexibility and removes disciplined project controls for the implementation and transition to subsequent operations.
- The elimination of the SEMP and High-level technical design specifically removes SCDHHS' ability to understand the ASO module, document the system and operations architecture, and the associated documentation for the term of the Contract.
- Testing is an investigation conducted to provide stakeholders with information about the quality of the software product or service under test. Testing can also provide an objective, independent view of the software to allow the business to appreciate and understand the risks of the implementation. In terms of testing, deleting the referenced deliverables invalidates virtually all of the contractor responsibilities included in section 3.32 of the RFP.

In summary, the State accepted a proposal that impermissibly deviated from the requirements of the Solicitation . . . so much so that it will be virtually impossible for the State to oversee and meet its own needs as well as CMS requirements. This issue requires a resolicitation.

16. SCDHHS negotiated and reached a Contract with Optum which included changes outside the scope of the Request for Proposals without providing the other proposers the opportunity to submit best and final offers under S.C. Code Ann. 1976 §11-35-1530(8)(c)

The final, executed Record of Negotiation included Optum's March 8, 2018 replacement CDML which marked as "stricken" 11 of the 13 new deliverables and marked as "not applicable" one of the 13 new deliverables -- substantially overhauling the SCDHHS CDML revision by striking out all but one of the new SCDHHS deliverables. In accepting Optum's CDML replacement, including the Optum strike outs, SCDHHS reduced the required scope of work on the contractor in a manner that could dramatically decrease the implementation schedule, providing a considerable cost advantage to Optum. Every vendor has a carrying cost of assigned staff during the project even if they are not directly engaged in producing the specific deliverables. Given that some of these stricken deliverables are recurring or such deletion prohibits regular SCDHHS oversight of performance during the operations phase, similar, although not as high, cost savings are realized during the remainder of the contract.

The SCDHHS CDML revision materially and substantially altered the general scope of the Request for Proposals to the extent that the Procurement Officer was obliged to provide all responsive offerors an opportunity to submit best and final offers pursuant to *S.C. Code Ann. §11-35-1530(c)* The Procurement Officer's failure to do so resulted in an illegal procurement.

VI. RELIEF REQUESTED

In light of the arguments raised herein, BCBSSC requests the following relief:

- That the CPO continue suspension of the award in accordance with the statutory stay.
- That because of the size of the record, complexity of the issues and profound impact of this procurement on the citizens of the state, the CPO convene and conduct a hearing to allow the examination of the Procurement Officers, evaluation panel members and the opportunity for the Protestant to provide a detailed explanation of the issues presented, particularly as it relates to the contract deliverable items and their impact on performance, approvals by federal authorities and the ability of the State to manage and transition the contract.
- That the CPO issue an Order finding Optum's proposal non-responsive to the essential requirements of the solicitation.
- That the CPO issue an Order finding that the evaluation process was fundamentally unfair and violated legal requirements enumerated in the Code and Regulations as set forth herein and compelling SCDHHS to re-issue the Solicitation to seek new proposals and conduct a proper legal evaluation.
- That the CPO find that SCDHHS illegally and improperly entered negotiations with a non-responsive offeror as prohibited by law and panel decisions. That the CPO further find that the award resulting from these negotiations is illegal and that the only proper remedy to correct this defect is the resolicitation of the entire procurement.
- That the CPO issue its Order granting Protestant such other and further relief as the CPO deems just and proper.

VII. CONCLUSION

The process employed by SCDHHS in conducting discussions, evaluating and re-evaluating proposals violated South Carolina Procurement law, regulations, Procurement Review Panel Decisions, and state procurement policies. The process that resulted in this award was fundamentally unfair in the multiple ways that it deviated from appropriate procurement practices. Allowing this procurement to stand constitutes an obviation of the policies implicit in the Consolidated Procurement Code and *S.C. Code Ann.* §§11-35-20 and 11-35-30.

During the process, SCDHHS not only improperly conducted negotiations with a non-responsive offeror, but it also improperly made material changes to the solicitation requirements after the opening and evaluation of the proposals, then allowed only the ultimate awardee to replace 74 pages of its proposal in response to these material changes. SCDHHS then held what amounts to a sham re-evaluation of the proposals by the same evaluation panel.

Mr. Michael Spicer
Chief Procurement Officer
October 1, 2018
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Moreover, the Award contemplates a solution where so many requirements of the Solicitation have been compromised that it does not resemble what the Solicitation purportedly sought. The outcome unacceptably compromises the State's rights and ability to fulfill the obligations for which the solicitation sought services.

BCBSSC appreciates the CPO's consideration of this protest. We respectfully request that the CPO conduct an administrative review and that as a part of that review the CPO grant BCBSSC a hearing. The entire picture cannot be understood absent an opportunity to examine the panel members, procurement officer, and other witnesses to inform and educate the CPO about the solicitation, the material requirements and the process employed in evaluating this Solicitation. After the hearing, we would request that the CPO issue an Order granting BCBSSC the relief requested.

If the CPO determines not to conduct a hearing, BCBSSC respectfully requests an opportunity to present additional detail as to Optum's non-responsiveness, the failure of the evaluation process, evidence to support the grounds of this protest and legal argument by way of a briefing.

Upon completion of the Administrative review, BCBSSC requests that the CPO cancel the award and order SCDHHS to re-solicit the entire procurement because of the myriad flaws and violations of the Code and Panel Decisions implicit in this process.

Sincerely,

MONTGOMERY WILLARD, LLC

A handwritten signature in black ink, appearing to read "Michael H. Montgomery", with a long, sweeping tail extending to the right.

Michael H. Montgomery

STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW

Protest Appeal Notice (Revised June 2018)

The South Carolina Procurement Code, in Section 11-35-4210, subsection 6, states:

(6) Finality of Decision. A decision pursuant to subsection (4) is final and conclusive, unless fraudulent or unless a person adversely affected by the decision requests a further administrative review by the Procurement Review Panel pursuant to Section 11-35-4410(1) within ten days of posting of the decision in accordance with subsection (5). The request for review must be directed to the appropriate chief procurement officer, who shall forward the request to the panel or to the Procurement Review Panel, and must be in writing, setting forth the reasons for disagreement with the decision of the appropriate chief procurement officer. The person also may request a hearing before the Procurement Review Panel. The appropriate chief procurement officer and an affected governmental body shall have the opportunity to participate fully in a later review or appeal, administrative or judicial.

Copies of the Panel's decisions and other additional information regarding the protest process is available on the internet at the following web site: <http://procurement.sc.gov>

FILE BY CLOSE OF BUSINESS: Appeals must be filed by 5:00 PM, the close of business. *Protest of Palmetto Unilect, LLC*, Case No. 2004-6 (dismissing as untimely an appeal emailed prior to 5:00 PM but not received until after 5:00 PM); *Appeal of Pee Dee Regional Transportation Services, et al.*, Case No. 2007-1 (dismissing as untimely an appeal faxed to the CPO at 6:59 PM).

FILING FEE: Pursuant to Proviso 111.1 of the 2018 General Appropriations Act, "[r]equests for administrative review before the South Carolina Procurement Review Panel shall be accompanied by a filing fee of two hundred and fifty dollars (\$250.00), payable to the SC Procurement Review Panel. The panel is authorized to charge the party requesting an administrative review under the South Carolina Code Sections 11-35-4210(6), 11-35-4220(5), 11-35-4230(6) and/or 11-35-4410...Withdrawal of an appeal will result in the filing fee being forfeited to the panel. If a party desiring to file an appeal is unable to pay the filing fee because of financial hardship, the party shall submit a completed Request for Filing Fee Waiver form at the same time the request for review is filed. [The Request for Filing Fee Waiver form is attached to this Decision.] If the filing fee is not waived, the party must pay the filing fee within fifteen days of the date of receipt of the order denying waiver of the filing fee. Requests for administrative review will not be accepted unless accompanied by the filing fee or a completed Request for Filing Fee Waiver form at the time of filing." PLEASE MAKE YOUR CHECK PAYABLE TO THE "SC PROCUREMENT REVIEW PANEL."

LEGAL REPRESENTATION: In order to prosecute an appeal before the Panel, business entities organized and registered as corporations, limited liability companies, and limited partnerships must be represented by a lawyer. Failure to obtain counsel will result in dismissal of your appeal. *Protest of Lighting Services*, Case No. 2002-10 (Proc. Rev. Panel Nov. 6, 2002) and *Protest of The Kardon Corporation*, Case No. 2002-13 (Proc. Rev. Panel Jan. 31, 2003); and *Protest of PC&C Enterprises, LLC*, Case No. 2012-1 (Proc. Rev. Panel April 2, 2012). However, individuals and those operating as an individual doing business under a trade name may proceed without counsel, if desired.

**South Carolina Procurement Review Panel
Request for Filing Fee Waiver
1205 Pendleton Street, Suite 367, Columbia, SC 29201**

Name of Requestor

Address

City

State

Zip

Business Phone

-
1. What is your/your company's monthly income? _____
 2. What are your/your company's monthly expenses? _____
 3. List any other circumstances which you think affect your/your company's ability to pay the filing fee:

To the best of my knowledge, the information above is true and accurate. I have made no attempt to misrepresent my/my company's financial condition. I hereby request that the filing fee for requesting administrative review be waived.

Sworn to before me this
_____ day of _____, 20_____

Notary Public of South Carolina

Requestor/Appellant

My Commission expires: _____

For official use only: _____ Fee Waived _____ Waiver Denied

Chairman or Vice Chairman, SC Procurement Review Panel

This _____ day of _____, 20_____
Columbia, South Carolina

NOTE: If your filing fee request is denied, you will be expected to pay the filing fee within fifteen (15) days of the date of receipt of the order denying the waiver.