

**STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND**

BEFORE THE CHIEF PROCUREMENT OFFICER

DECISION

In the Matter of Protests of:

CASE NO's.: 2013-128 & 129

MedImpact Healthcare Systems

Express Scripts Holding Company

POSTING DATE: September 16, 2013

MAILING DATE: September 16, 2013

Public Employee Benefit Authority
Request for Proposals for Pharmacy
Benefit Management Services For the
State Health Plan

This matter is before the Chief Procurement Officer (CPO) pursuant to two protests filed by MedImpact Healthcare Systems (MedImpact) and Express Scripts Holding Company (Express Scripts) under authority of South Carolina Code Section 11-35-4210. With this request for proposals (RFP), the Public Employee Benefit Authority (PEBA) attempts to procure Pharmacy Benefit Management (PBM) Services for the State Health Plan. After evaluating the proposals received, on August 13, 2013, PEBA posted its intent to award to Catamaran PBM of Illinois, Inc. (Catamaran). On August 23, 2013, MedImpact and Express Scripts filed protests, alleging: (1) Catamaran's offer was nonresponsive, (2) Catamaran is a non-responsible offeror, (3) Catamaran's price offer was materially unbalance, (4) the evaluation and scoring was erroneous, arbitrary and capricious, (5) the evaluation was conducted improperly because it impermissibly injected price into the evaluation of the technical proposals, and (6) PEBA's dissemination of information was not fair and equal. The protests were filed in a timely manner. Both protestants also timely filed amended letters August 28, 2013.

In order to resolve the matter, the CPO conducted a hearing September 5 and 6, 2013. Appearing before the CPO were Express Scripts, represented by Melissa J. Copeland, Esquire; MedImpact, represented by C. Allen Gibson, Jr. and Kevin Hall, Esquires; Catamaran, represented by M. Elizabeth Crum, Esquire; and PEBA, represented by Craig K. Davis, Esquire.

NATURE OF PROTEST

The letters of protest and the amended letters are attached and incorporated herein by reference.

FINDINGS OF FACT

The following dates are relevant to the protest:

1. On May 13, 2013, PEBA published the RFP.¹ [Ex. 1]
2. On May 21, 2013, PEBA conducted a pre-proposal conference.
3. On May 31, 2013, PEBA issued Amendment #1. [Ex. 2]
4. On June 6, 2013, PEB issued Amendment #2. [Ex. 3]
5. On June 11, 2013, PEBA issued Amendment #3. [Ex. 4]
6. On June 14, 2013, PEBA opened proposals received from:

Catamaran
Express Scripts
MedImpact
Magellan
Envision
7. On July 1, 2013, following approval by the CPO, David Quiat of PEBA engaged in discussions with all five offerors. [S.C. Reg. 19-445.2095] [See Ex. 6 for PEBA's letter to Catamaran]
8. On July 9, 2013, Mr. Quiat sent follow-up discussion letters to three offerors.
9. On July 18, 2013, Mr. Quiat sent follow-up discussion letters to all five offerors.
10. On July 25, 2013, Mr. Quiat sent follow-up discussion letters to two offerors.
11. On July 31, 2013, following their independent evaluations, Mr. Quiat held the panel selection meeting with the evaluators. The evaluators completed their evaluation of the proposals scoring the offers as follows:

<u>Offeror</u>	<u>Total Score</u>
Catamaran	256.10

¹ This solicitation followed a first solicitation that was cancelled. The first solicitation is not at issue.

<u>Offeror</u>	<u>Total Score</u>
Express Scripts	250.86
MedImpact	242.06
Magellan	235.76
Envision	233.55

[Ex. 17]

12. On August 13, 2013, PEBA and Catamaran concluded negotiations. [Ex. 18] Mr. Quiat prepared a written Determination and Finding declaring Catamaran’s proposal “most advantageous to the State.” [Ex. 23] PEBA posted its intent to award to Catamaran. [Ex. 19]
13. On August 23, 2013, Express Scripts and MedImpact filed their protests. PEBA suspended its Intent to Award. [Ex. 20]
14. On August 28, 2013, Express Scripts and MedImpact filed their amended protests.

DISCUSSION

On November 13, 2012, pursuant to S. C. Code Ann. § 11-35-840, the Chief Procurement Officer (CPO) authorized Mr. H. David Quiat, CPPB, Director of Procurement for PEBA, to conduct this Solicitation. An initial Solicitation was posted but was withdrawn. On May 12, 2013, Mr. Quiat made the “Justification for Competitive Sealed Proposal” to issue this Solicitation pursuant to S.C. Code Ann. § 11-35-1530. Section 11-35-1530(6) authorizes the procurement office to conduct discussions with offerors whose proposals are classified as “acceptable” or “potentially acceptable for award.” S.C. Code Reg. 19-445.2095(I) sets out the procedure to be followed by the procurement officer conducting discussions. Mr. Quiat conducted discussions with all five (5) offerors, each of whom had been classified as “potentially acceptable for award.” Mr. Quiat sent three (3) discussion letters to Catamaran—July 1, 9, and 18, 2013. Catamaran conformed to the PEBA requests on each occasion. Hearing Exhibits 6–11, PEBA Discussion Letters and Catamaran Responses.

Section 11-35-1530(8) authorizes the procurement officer, in his sole discretion and not subject to review, to negotiate with the highest ranked offeror regarding price and/or matters

within the general scope of the contract. Mr. Quiat negotiated with Catamaran regarding the administrative price, asking for a lower price. Catamaran reduced its administrative price and the parties executed the Record of Negotiations (RON). [Ex. 18, Record of Negotiations]

PEBA's RFP is divided into the following numbered sections:

- Part I Instructions to Offerors
- Part II Scope of Proposal
- Part III Scope of Work
- Part IV Mandatory Minimum Qualifications
- Part V Information for Offerors to Submit
- Part VI Award Criteria
- Part VII Terms and Conditions
- Part VIII Contract Term/Option to Extend
- Part IX Attachments to Solicitation

According to the description in Part II, the RFP solicited proposals for the following services:

It is the intent of the State of South Carolina, S.C. Public Employee Benefit Authority, in accordance with all requirements stated herein or attached hereto, to solicit proposals for Pharmacy Benefit Management Services for the State Health Plan (Plan). The S.C. Public Employee Benefit Authority is seeking proposals based upon the following parameters:

Standard Plan: The Standard Plan will provide pharmacy coverage for all non-Medicare participants in the State Health Plan, all Medicare primary participants who have opted out of the Indirect Employer Group Waiver Plan (EGWP) with Wrap Plan, and Medicare primary participants enrolled in the Savings Plan. Administrative services shall be based on the current prescription drug plan and shall be based on a self-funded, transparent financial pricing arrangement. Under this arrangement, the State will receive the guaranteed manufacturer payment amounts as proposed by the Contractor in response to this Request for Proposal, in addition to all monies from pharmaceutical manufacturers that are described as revenue sources by the Contractor and are attributable to the utilization of the State's pharmacy benefit program.

The S.C. Public Employee Benefit Authority will participate in the Retiree Drug Subsidy (RDS) program for those Medicare-eligible retirees who opt out of the Indirect EGWP with Wrap Plan.

Indirect EGWP with Wrap Plan: The Indirect EGWP with Wrap Plan (Indirect EGWP + Wrap) will provide pharmacy benefits for all Medicare primary participants covered by the State Health Plan. Administrative services for

Medicare eligible participants include the use of an Indirect Employer Group Waiver Plan to provide Standard Part D benefits and a Wrap plan that will provide additional coverage such that current benefits are duplicated. Both the Indirect EGWP and Wrap products will be self-funded, transparent pricing arrangements (as described above).

The S.C. Public Employee Benefit Authority will make one (1) award to one (1) Offeror. The award will be made to the highest ranked, responsive and responsible Offeror whose offer is determined to be the most advantageous to the State. Selection will be at the sole discretion of the S.C. Public Employee Benefit Authority.

[Ex. 1, p.15]

Part III contains PEBA's expectations of performance from the successful offeror. It includes the following language:

The State is seeking proposals which comply with each of the requirements described in Part III, Scope of Work, Sections A through L below....The State considers any proposal which provides any deviations from, or caveats to, Part III, Scope of Work, Sections A through L, as unacceptable.

The Contractor shall provide, at a minimum, the following material and essential requirements for the fixed, single, all-inclusive PMPM² administrative fee, for the initial contract term of two (2) years, without deviation or modification....

Id., p. 18. Part V describes the format of an offeror's proposal, and requests information with this language:

Offerors should submit the following information for purposes of evaluation. The S.C. Public Employee Benefit Authority desires a detailed written submission so that it can make an accurate comparison of all proposals received. Please be specific in your answers....

Id., p. 37. Part V also requires each offeror submit a "Statement of Acceptance" in the following form:

Offerors shall reply to Part I Instructions to Offerors, Part II Scope of Proposal, Part III Scope of Work, Part VII Terms and Conditions and Part VIII Contract

² Per member, per month.

Term, by declaring that the Offeror fully understands, agrees to, and will comply with all of the provisions/ requirements/ terms in each of these Parts. Offerors shall include this statement of acceptance in their Executive Summary. Please note that the State considers any proposal containing deviations, exceptions or caveats to the Request for Proposal that have not been submitted for consideration during the questions and answer phase and adopted by the South Carolina Public Employee Benefit Authority as unacceptable.

Id.

PROTEST GROUNDS WITHDRAWN

During the hearing, Express Scripts withdrew the following allegations:

- Responsiveness – The banking arrangements proposed by Catamaran in Tab A-3a, Question 119 1 concerning Indirect EGWP+Wrap do not appear to be in compliance with CMS timeframes and requirements, making them untenable. [August 28, 2013 letter, p. 3, 6th paragraph]
- The evaluation was conducted improperly because it impermissible injected price into the evaluation of the technical proposal. [August 28, 2013 letter, Ground 5, p. 11]

MedImpact withdrew the following allegation:

- Responsiveness – Subcontracting Arrangements. [August 23, 2013 letter, II.1.D., p. 4]

MOTIONS TO DISMISS OR FOR SUMMARY JUDGMENT

Catamaran and PEBA offered motions asking the CPO to dismiss many of the grounds of protest. The motions to dismiss the following grounds of protest are granted. All other motions are denied.

Responsibility - Catamaran is non-responsible because it offered a price at which it simply will not be able to perform the contract. [Express Scripts 2., p. 5]

Protestants alleged that Catamaran is a non-responsible offeror principally because Catamaran will not be able to perform the contract at the proposed price.

The RFP does provide the State authority to reject proposals offering unreasonable prices, reading, “Any offer may be rejected if the Procurement Officer determines in writing that it is unreasonable as to price.” [Part I, Instructions to Bidders, (d) Price Reasonableness] The

supporting regulations to the Consolidated Procurement Code (Code) support that authority reading, “Any bid may be rejected if the procurement officer determines in writing that it is unreasonable as to price.” [19-445.2070.E.]

The quoted language from the solicitation, and Regulation 19-445.2070(E), are drawn from the federal acquisition regulations. FAR § 14.404-2, like the South Carolina regulation, is titled “Rejection of individual bids.” Section 14.404-2(f) provides:

Any bid may be rejected if the contracting officer determines in writing that it is unreasonable as to price. Unreasonableness of price includes not only the total price of the bid, but the prices for individual line items as well.

Decisions³ interpreting the FAR consistently hold, in the context of a bid protest, that the contracting officer’s evaluation for price reasonableness under FAR § 15.402(a) of an offer provided by a bidder “focuses primarily on whether the offered prices are higher than warranted ... below-cost pricing is not prohibited.” *All Phase Envtl., Inc.*, Nos. B–292919.2–B–292919.7, 2004 WL 437450, at *7 (Comp.Gen. Feb.4, 2004); *accord CSE Constr.*, No. B–291268.2, 2002 WL 31835783 (Comp.Gen. Dec.16, 2002), at *4; *see also Rodgers Travel, Inc.*, No. B–291785, 2003 WL 1088876 (Comp.Gen. Mar.12, 2003), at *2 n. 1 (stating that the purpose of a price reasonableness determination is to ensure that the prices offered are not higher, as opposed to lower, than warranted). Since Express Scripts alleges that Catamaran’s prices are too low, not too high, this ground of protest fails to state a claim for relief and must be dismissed.⁴

³ Decisions of the U.S. Comptroller General are not controlling in S.C. State Government protests. It does not appear the Panel has directly and definitively addressed the issue of pricing that is claimed to be too low. In cases like this, federal procurement decisions are enlightening.

⁴ This is not to suggest that a procurement officer should ignore extraordinarily low bid prices. She evaluates whether prices are too low, though, only to the extent that she is concerned that the contractor will not be able to perform the contract at that price. *See, e.g., CSE Constr.*, B–291268.2, 2002 WL 31835783. This is a matter of responsibility, not price reasonableness. *E.g., Diemaster Tool, Inc.*, B-238877, 90-1 CPD ¶375, 1990 WL 277910.

Unbalanced Pricing – Catamaran’s pricing is materially unbalanced and will not result in the State receiving the price that it scored as the lowest price. [Express Scripts 3, p. 9] [MedImpact’s August 23, 2014 letter, II.3. pp. 6 – 10]

The RFP required offerors to submit pricing in three elements: administrative fees and claims net of guaranteed rebates. Administrative fees refer to the monthly price, a flat fee, per covered life to administer the program. A claim refers to the price to process each pharmacy request actually submitted. A rebate refers to credits or actual payments received by the state from the successful offeror’s pharmaceutical providers.

Express Scripts and MedImpact allege that Catamaran offered an unreasonably high price to administer the program, a flat fee per month for each enrolled life, and an unreasonably low price to process claims, a per occurrence fee for processing each actual claim, thereby “gaming” the bidding process in order to appear lower, but actually cost more than competitors bids.

The RFP prohibits unbalanced bidding. It reads as follows:

(c) Unbalanced Bidding. The State may reject an Offer as nonresponsive if the prices bid are materially unbalanced between line items or subline items. A bid is materially unbalanced when it is based on prices significantly less than cost for some work and prices which are significantly overstated in relation to cost for other work, and if there is a reasonable doubt that the bid will result in the lowest overall cost to the State even though it may be the low evaluated bid.

[RFP, Part I, Instructions to Bidders, p. 11]

The Federal Highway Administration of the U.S. Department of Transportation released an informative memorandum several years ago explaining unbalanced bidding. The memorandum is just as informative today:

In discussing unbalanced bids, it is best to define two terms: mathematically unbalanced and materially unbalanced. An unbalanced bid may be only mathematically unbalanced or the bid may be mathematically and materially unbalanced.

A mathematically unbalanced bid is one containing lump sum or unit bid items which do not reflect reasonable actual costs plus a reasonable proportionate share

of the bidder's anticipated profit, overhead costs, and other indirect costs, which he/she anticipates for the performance of the items in question.

A Comptroller General's opinion further defined a mathematically unbalanced bid as follows:

"A bid is mathematically unbalanced if the bid is structured on the basis of nominal prices for some work and inflated prices for other work; that is, each element of the bid must carry its proportionate share of the total cost of the work plus profits." Matter of: Howell Construction, Comp. Gen. B-225766 (1987)

There is no prohibition per se against a contractor submitting a mathematically unbalanced bid unless an SHA has adopted a specific contract requirement precluding such submittal.

While mathematically unbalanced bids are not prohibited per se, evidence of a mathematically unbalanced bid is the first step in proving a bid to be materially unbalanced. A materially unbalanced bid has been defined as:

"A bid is materially unbalanced if there is a reasonable doubt that award to the bidder submitting the mathematically unbalanced bid will result in the lowest ultimate cost to the Government. Consequently, a materially unbalanced bid may not be accepted." Matter of: Crown Laundry and Dry Cleaners, Comp. Gen. B-208795.2, April 22, 1983.

... There are numerous reasons why a bidder may want to unbalance his/her bid on a contract. One reason is to get more money at the beginning of the project. The bidder does this by overpricing the work done early in the project. ...

Another reason is to maximize profits. The bidder does this by overpricing bid items he/she believes will be used in greater quantities than estimated in the proposal and underpricing items he/she thinks will be used in significantly lesser quantities.⁵

In decisions regarding allegations of unbalanced bidding, the Comptroller General has written:

Turning to the question of whether Peach State's bid is unbalanced, our office has recognized the two-fold aspects of unbalanced bidding. The first is a mathematical evaluation of the bid to determine whether each bid item carries its share of the cost of the work plus profit, or whether the bid is based on nominal prices for some work and enhanced prices for other work. The second aspect -

⁵ United States Dep't of Transportation, Memorandum RE Bid Analysis and Unbalanced Bids (May 16, 1988), available at <http://www.fhwa.dot.gov/programadmin/contracts/051688.cfm> (last viewed September 12, 2013).

material unbalancing - involves an assessment of the cost impact of a mathematically unbalanced bid. **A bid is not materially unbalanced unless there is a reasonable doubt that award to the bidder submitting a mathematically unbalanced bid will not result in the lowest ultimate cost to the government. Consequently, only a bid found to be materially unbalanced may not be accepted.**

Reliable Trash Service, B-194760, 79-2 CPD ¶107, 1979 WL 12196 ⁶ (emphasis added).

Whether a bid is materially unbalanced “is a factual determination which varies depending on the particular circumstances of each procurement,” *Howell Construction, Inc.*, B-225766, 87-1 CPD ¶455, 66 Comp. Gen. 413, 1987 WL 96939. “[C]omparison of a competitor’s prices with one’s own prices is not by itself sufficient to establish price enhancement or that a bid is unbalanced,” *OMSERV Corporation*, B-237691, 90-1 CPD ¶271, 1990 WL 277810 (internal citations omitted).

In order to prevail in this protest ground, Express Scripts and MedImpact must not only prove that Catamaran’s price proposal was mathematically unbalanced, but materially unbalanced as well (that it would cost the state more). They proposed to introduce no evidence that Catamaran’s price was mathematically unbalanced; pointing out only that its administrative fee was higher than others had proposed. They therefore admitted they would fail to prove Catamaran’s price proposal was mathematically unbalanced. Even if they could do so, neither protestant claimed the price evaluation formula was defectively designed, so as not to identify the offeror whose price structure would yield the lowest cost to the State. Since Catamaran’s price proposal was the lowest offer for the PBM services according to the unprotested price structure of the RFP, protestants could not prove Catamaran’s price would actually cost the state more.

⁶ Decisions of the U.S. Comptroller General are not controlling in S.C. State Government protests. It does not appear the Panel has directly and definitively addressed the issue of unbalanced bidding. In cases like this, federal procurement decisions are enlightening.

REMAINING GROUNDS OF PROTEST

After withdrawal and dismissal, the following protest issues remain:

1. Responsiveness⁷

- a. Catamaran repeatedly failed and refused to provide requested material and essential information in the Technical Proposal. [Express Scripts 1.a., p. 1 - 5] [MedImpact's August 23, 2013 letter, II.1., pp.2 – 4]
- b. Catamaran failed to submit adequate proof of insurance. [Express Scripts 1.b., 4]

2. Responsibility

- a. Catamaran is non-responsible because it has a poor financial rating and it has admitted and self-reported significant resource constraints caused by its recent massive expansion activities. [Express Scripts 2.b., p. 5] [MedImpact's August 23, 2013 letter, II.3, pp. 4 – 6]
- b. The State failed to make any determination of Catamaran's responsibility. [Express Scripts 2.c., p. 8]

3. The evaluation and scoring were arbitrary and capricious [Express Scripts 4, p. 10] [MedImpact's August 28, 2013 letter, II., p. 7]

- a. The evaluators inappropriately scored MedImpact's proposal for mail order and specialty pharmacy services. [MedImpact's August 23, 2013 letter, II.4., p. 10]

4. Dissemination of Information is Not Fair and Equal. [MedImpact's August 28, 2013 letter, III., p. 9]

CONCLUSIONS OF LAW

Regarding award of a request for proposals, the Consolidated Procurement Code reads, "Award must be made to the responsible offeror whose proposal is determined in writing to be the most advantageous to the State, taking into consideration price and the evaluation factors set forth in the request for proposals." [11-35-1530(9)] Section 11-35-1530, Competitive Sealed Proposals, also incorporates the requirements of Section 11-35-1520, Competitive Sealed Bidding, as it reads, "notice of an award or an intended award of a contract [must be given] to

⁷ MedImpact also alleged Express Scripts' proposal was non-responsive. As no award was posted to Express Scripts, those allegations are not ripe for determination and are dismissed without prejudice.

the lowest responsive and responsible bidders whose bid meets the requirements set forth in the invitation for bids.” [11-35-1520(10) Award] Therefore, in order to be eligible for award, an offeror’s proposal must be responsive and responsible.

1. Responsiveness

The Code defines a responsive bidder 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.” [11-35-1410(7)] Express Scripts and MedImpact alleged on the following grounds that Catamaran’s proposal was nonresponsive.

Catamaran repeatedly failed and refused to provide requested material and essential information in the Technical Proposal. [Express Scripts 1.a., p. 1 - 5] [MedImpact’s August 23, 2013 letter, II.1., pp.2 – 4]

Express Scripts and MedImpact contend Catamaran is non-responsive because they believe Catamaran did not provide complete answers to some of the questions in the RFP. Without exception, those questions are from Section V of the RFP. The protestants alleged “In Tab A-1 of the Technical Proposal, offerors were required to provide information and statistics about their background, experience, and financial viability and capability. Catamaran repeatedly failed and refused to answer these questions. See Tab A-1, Section I., questions 18, 19b, 20, 21, 22, 23, 24, 25, [26] and 27,” See also Section III, Question 2, Tab A-2a, questions 1, 19, 23, 28, 68c, 71, 82, and 119. [Express Scripts protest 1.a. and MedImpact protest II.A (MedImpact included question 26 from Tab A-1, Section I; Express Scripts did not.)]

Regarding Tab A-1, the RFP read:

Tab A-1: Background and Qualifications

Offerors shall complete Tab A-1: Background and Qualifications, as requested. In Section III of Tab A-1, entitled Mandatory Minimum Qualifications, Offerors shall describe, in detail, how the Offeror satisfies each mandatory minimum qualification. In section IV of Tab A-1, entitled References, Offerors shall provide

at least one (1) reference for which the proposed account manager currently provides services.

[Ex. 1, p. 38] Catamaran's answers which Express Scripts and MedImpact allege were nonresponsive appear on Appendix A attached to this decision.

In Tab A-1, PEBA asked offerors to provide answers to 33 questions, many with sub-parts. The questions included General Offeror Information [Part I], Contact Information [Part II], and References [Part III]. Express Scripts and MedImpact assert Catamaran did not answer ten of those questions. To some of the questions, Catamaran did answer or the answer is easily discernible from the information Catamaran provided. For example, Question 19.b. asked offerors to provide, "Percent of enrollees as of December 31, 2013, who are covered through an employer." While Catamaran did respond that it did not maintain the data in that fashion, it wrote also, "Currently, the percentage of client volume represented by Employer clients is 38%." [Tab A-1, Q. 19.b.] The answer to Question 22, the total number of mail order prescriptions for 2012, is determined by a simple calculation: 200 million prescriptions x 1% = 2 million.

Regarding Tab A-2a, the RFP read:

Offerors should answer each question in Tab A-2a: Service Description Questionnaire completely in the space provided. If additional space is needed, the response can be continued in Tab A-2b: Additional Answers to Questionnaire. Continued responses should be labeled clearly with both the Section number (A-2a) and the corresponding question number.

If a drop down list is available, the Offeror should select a response from the list provided.

[Ex. 1, p.9] Catamaran's answers which Express Scripts and MedImpact allege were nonresponsive appear in Appendix B attached to this decision.

In Tab A-2, PEBA asked offerors to provide answers to 144 questions, many with sub-parts. The questions included Pricing and Cost Containment, Pharmacy Network Management, Mail Order Pharmacy Management, Specialty Pharmacy, Customer Service, Communications

and Training, Claims Processing and Payment Reporting, Retiree Drug Subsidy, Financial, Indirect EGWP + Wrap Options, Eligibility or Participants and Computer Support, Implementation program, and Account Management and Personnel. Catamaran answered every question. Express Scripts and MedImpact assert Catamaran did not answer eight of the 144 questions sufficiently.

Catamaran failed to submit adequate proof of insurance. [Express Scripts 1.b., 4]

Regarding proof of insurance, the RFP required,

INSURANCE: The Contractor shall maintain general liability insurance coverage, including errors and omissions and broad form personal injury coverage in an amount not less than \$5,000,000. The coverage can be a combination of primary and excess coverage or self-insured and excess coverage, and the insurance shall name the S.C. Public Employee Benefit Authority as an additional named insured.

Prior to the commencement of the work, the Contractor shall provide to the state a signed, original certificate of liability insurance (ACORD 25). The certificate shall identify the types of insurance, state the limits of liability for each type of coverage, include a provision for thirty (30) days notice prior to cancellation and name the S.C. Public Employee Benefit Authority as an additional insured.

The state's failure to demand a certificate of insurance required by this section is not a waiver of the Contractor's obligations to obtain the required insurance.

[Ex. 1, Part VII.R., p. 51]

Catamaran provided a representative Certificate of Liability Insurance with its proposal. Further, in response to a question from Mr. Quiat during discussion, Catamaran answered "Catamaran confirms" that it will provide an insurance certification listing the South Carolina Public Employee Benefit Authority as an additional insured. [Ex. 7]

Conclusion – Responsiveness

"Responsiveness ... deals with the question of contract formation and whether the contractor *has promised to do exactly what the Government has requested.*" J. CIBINIC, JR. AND R.C. NASH, JR., FORMATION OF GOVERNMENT CONTRACTS 545 (Geo. Washington Univ., 3d. ed.

1998) (emphasis in original). The Panel consistently has found that a proposal need not conform to all of the requirements of an RFP to be responsive; instead the proposal “must simply conform to all of the *essential* requirements of the RFP.” *In re: Protest of Value Options, et al.; Appeal by Value Options, et al.*, Panel Case No. 2001-7 (emphasis in original). “[A] requirement is not ‘essential’ if variation from it has no, or merely a trivial or negligible, effect on price, quality, quantity, or delivery of the supplies or performance of the services being procured. . . . [A] requirement is not ‘essential’ simply because it is mandatory.” *In re: Protest of Value Options, et al.; Appeal by Value Options, et al.*, Panel Case No. 2001-7.

Here, PEBA told offerors in the RFP exactly which requirements mattered. Part III, the statement of work, explicitly describes its content as “material and essential.” The statement of acceptance—which Catamaran included, verbatim, in its proposal—requires unconditional acceptance of Parts I, II, III, VII, and VIII. In other words, PEBA asserted that the material and essential elements of a contract appeared in these five sections of the RFP.

Catamaran, in fact, unconditionally agreed to provide those material and essential requirements. It furnished the statement of acceptance required of all offerors. And it confirmed that its pricing included all items PEBA required:

I, Joel Saban, Executive Vice President of Pharmacy Operations, hereby certify that the financial proposal submitted in response to this Request for Proposals contains only this cover letter and a completed Tab A-9: Financial Proposal form. No pricing variables have been submitted in response to this Request for Proposal and Tab A-9: Financial Proposal has not been modified to include pricing variables. Furthermore, the fixed, single, all-inclusive PMPM administrative fees requested in Table 1 of Tab A-9: Financial Proposal include all costs associated with providing the State with all required services described in Part III, scope of Work, Sections A through L. Any indication to the contrary that may appear in our proposal was inadvertent and should be ignored and not taken into consideration. Otherwise stated, Part III, Scope of Work, Section A through L requirements will be met fully, satisfactorily, and performed in their entirety, without exception of any sort, in a first class manner for the fixed, single, all-

inclusive PMPM price proposed for at least the initial two (2) year term of the contract.

[Ex. 21, Financial Proposal Statement] In terms of contract formation, the CPO cannot think of anything these statements omit from the PEBA's stated requirements. Since Catamaran unequivocally "has promised to do exactly what the Government has requested," *see above*, its proposal is responsive to the RFP.

PEBA did not include compliance with Part V among those material and essential requirements. Part V is, in fact, different from the five sections enumerated in the statement of acceptance. Its title is an invitation, not a command: "Information for Offerors to Submit." Its introduction says nothing about contract performance: "Offerors *should submit* the following information *for purposes of evaluation*." [Ex. 1, Part V, Information for Offerors to Submit, p. 37] [Emphasis added] Information submitted by offerors in response to Part V was requested, not required. Mr. Quiat testified that offerors furnish incomplete or ambiguous answers "at their peril." He also said that he expected evaluators would generally assign lower scores for answers they felt did not furnish sufficient information.

Only one challenge to Catamaran's responsiveness—the insurance certificate, treated below—pertains to the sections of the RFP PEBA itself described as mandatory and essential. All other allegations of non-responsiveness derive from statements in Catamaran's proposal submitted to satisfy Tabs A-1 and A-2a in Part V. For a small percentage of questions asked under Part V, Catamaran did not provide the most comprehensive answers. However, Catamaran did answer all questions. Any shortcoming in Catamaran's responses to Part V questions did not concern PEBA's essential requirements. In other words, those shortcomings—if indeed they are—should be taken into account by the evaluators. They simply do not go to responsiveness.

Regarding the insurance certificate, the RFP required, “Prior to the commencement of the work, the Contractor shall provide to the state a signed, original certificate of liability insurance (ACORD 25).” [Ex. 1, p. 51] [Emphasis added] The timing of this requirement was affirmed by PEBA in Amendment #1, which repeats the requirement of “Prior to commencement of the work.” [Ex. 2, Question 150, p. 40] The obligation to furnish the specified insurance coverage is a matter of contract performance, not responsibility.

Express Scripts’ protest ground ignores the time line of the Insurance requirement. The RFP does not require the insurance certificate to be provided with the proposal, but rather, prior to the commencement of the contract. At that point, Catamaran knows that it is the contractor and can go to its insurance provider and have the PEBA named as an additional insured and ensure that the amounts and types of coverage are correct. Therefore, Express Scripts’ argument that Catamaran is non-responsive because it failed to provide adequate insurance coverage is baseless.

Catamaran has affirmed its commitment to all essential requirements of the RFP. The allegations that Catamaran’s proposal was nonresponsive are denied.

2. Responsibility

The Code reads, “Award must be made to the responsible offeror whose proposal is determined in writing to be the most advantageous to the State, taking into consideration price and the evaluation factors set forth in the request for proposals.” [11-35-1530(9)] The Code defines a responsible offeror as, “a person who has the capability in all respects to perform fully the contract requirements and the integrity and reliability which will assure good faith performance which may be substantiated by past performance.” [11-35-1410(6)]

The supporting regulations read, “Factors to be considered in determining whether the state standards of responsibility have been met include:

- (1) available the appropriate financial, material, equipment, facility, and personnel resources and expertise, or the ability to obtain them, necessary to indicate its capability to meet all contractual requirements;
- (2) a satisfactory record of performance;
- (3) a satisfactory record of integrity;
- (4) qualified legally to contract with the State; and
- (5) supplied all necessary information in connection with the inquiry concerning responsibility.

[19-445.2125. Responsibility of Bidders and Offerors. A. State Standards of Responsibility.]

Catamaran is non-responsible because it has a poor financial rating and it has admitted and self-reported significant resource constraints caused by its recent massive expansion activities. [Express Scripts 2.b., p. 5] [MedImpact’s August 23, 2013 letter, II.3, pp. 4 – 6]

Express Scripts and MedImpact challenge Catamaran’s financial stability and assert Catamaran is not a responsible offeror because of its recent expansion activities, including receiving a significant contract with Cigna and its acquisitions of Restat and Catalyst. MedImpact wrote,

The ongoing material nature of the recent and future expansion and integration commitments of Catamaran raise significant uncertainty as to Catamaran’s ability to implement such growth and deliver on the obligations required under the contract with the Authority. MedImpact believes that the ability to provide quality services pursuant to such a continued growth rate is not feasible and will significantly impair the ability of Catamaran be responsible for performance in accordance with the requirements of the Authority’s contract.

Catamaran provided the State with the requested financials and qualifications, which were sufficient to convince Mr. Quiat that Catamaran was capable of performing the contract. Express Scripts and MedImpact cannot prove that Catamaran cannot perform the contract because they rely upon suppositions regarding Catamaran’s future financial health. Section 11-35-1810 clearly states, “Responsibility of the bidder or offeror shall be ascertained for each

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contract let by the State based upon full disclosure to the procurement officer concerning capacity to meet the terms of the contracts and based upon past record of performance for similar contracts.” S.C Code Ann. § 11-35-1810(1) Neither protestant offered any testimony that Catamaran’s expansion through acquisition would actually prevent it from performing the contract. The concern, they argue, is that something in the future may happen. Conjecture about the future health of an entity by a protestant, and not the state that actually bears the risk, cannot be the basis for a determination of non-responsibility. *See, e.g., ASC Medicar Service, Inc.*, B- 213724 (Comp.Gen.), 84-1 CPD P 45, 1983 WL 27814 (1983); *Kitco, Inc.*, B- 221386 (Comp.Gen.), 86-1 CPD P 321, 1986 WL 63328 (1986).

The State failed to make any determination of Catamaran’s responsibility. [Express Scripts 2.c., p. 8]

Express Scripts alleges the State failed to make a written determination of Catamaran’s responsibility. [Express Scripts Amended Protest, p. 8–9.] Because the State is not required to make a written determination of responsibility, this argument is a red herring and is dismissed. Section 11-35-1810 concerns the responsibility of offerors and does not contain a requirement the finding be made in writing. The only time a finding regarding responsibility is required to be in writing is when the State makes a finding of non-responsibility. [S.C. Code Ann. § 11-35-1810(2) (“A written determination of nonresponsibility of a bidder or offeror shall be made in accordance with regulations promulgated by the board.”)]. The regulations mirror the requirements in the statute. Regulation 19-445.2125(D) states, “Before awarding a contract or issuing a notification of intent to award, whichever is earlier, the procurement officer must be satisfied that the prospective contractor is responsible.” Again, no requirement of a written determination of responsibility is found. Regulation 19.445-1225(E) only requires a written determination when the procurement officer finds an offeror to be non-responsible.

The protestants argue further that much of the information, including the financial statements, offered by Catamaran were for Catamaran Corporation, the sole owner of the actual offeror, Catamaran PBM of Illinois, Inc.

Catamaran Corporation owns Catamaran LLC which owns Catamaran PBM of Illinois. Joel Saban, Executive Vice President, Pharmacy Operations, of Catamaran, who signed Catamaran's proposal, as authorized by Mark Clear, CEO of Catamaran Corporation, testified that Catamaran PBM of Illinois is a wholly-owned subsidiary of Catamaran Corporation. He stated that Catamaran decided to contract with the State of South Carolina as Catamaran PBM of Illinois, and identified itself as such in its proposal, because Catamaran PBM of Illinois is the primary pharmacy contracting component of Catamaran Corporation. He stated further Catamaran Corporation is committed to the State of South Carolina, as Catamaran and its subsidiaries are really one company.

Conclusion - Responsibility

The duty of determining the responsibility of offerors to the RFP falls upon the procurement manager, David Quiat. Mr. Quiat based his determination of responsibility on much more than the financial information Catamaran submitted with its proposal. According to his testimony, he took the following steps in determining Catamaran responsible: (a) noted Catamaran's "BB" financial rating by Standard and Poor's and performed a web search of the Standard and Poor's website to learn its meaning, (b) noted Catamaran's "Ba" Moody's rating and performed a web search of the Moody's website to learn its meaning, (c) found no criminal activity involving Catamaran, (d) found no defaults by Catamaran, (d) checked references by emailing reference check forms identifying Catamaran PBM of Illinois to five of ten references offered by Catamaran, received responses from three, and considered the reference responses, (e)

noted and considered the client list provided by Catamaran, (f) consulted with the consultants assisting PEBA with the procurement and received no concerns from the consultants, (g) considered the qualifications of the subcontractors listed by Catamaran, and (h) confirmed that, according to its proposal, Catamaran met the mandatory minimum requirements stated in the RFP. Mr. Quiat sought clarification of matters of uncertainty from Catamaran. He stated that he took his determination of responsibility serious and followed the same process he has employed over his decades long career as a procurement officer. He received no indication of any problems that would preclude Catamaran from performing the contract and concluded, considering the totality of the proposal and the information he gathered, that Catamaran was responsible. According to the South Carolina Procurement Review Panel (Panel), the procurement officer is obligated to determine responsibility before award and may consider any source of information. *Protest of CollegeSource, Inc.*, Panel Case No. 2008-4 [citing Code Section 11-35-1810(1) and Reg.19-445.2125(B)]. A procurement officer's responsibility determination is a matter of discretion and cannot be overturned unless the protestant shows it was "clearly erroneous, arbitrary, capricious, or contrary to law." Code Section 11-35-2410(A). In *Protest of Value Options*, Panel Case No. 2001-7, the Panel noted that procurement officers are given broad discretion in making their responsibility determinations because these are a matter of business judgment. The Panel explained that "[t]o prove arbitrary and capricious conduct such as will permit the court to overturn a procurement decision, the aggrieved bidder must demonstrate a lack of reasonable or rational basis for the agency decision or subjective bad faith on the part of the procuring officer or clear and prejudicial violation of relevant statutes and regulations which would be tantamount to a lack of reasonable or rational basis." *Id.*, citing *Robert E. Derecktor of Rhode Island, Inc. v. Goldschmidt*, 516 F.Supp. 1085 (D.C. R.I. 1981).

The protestants have failed to prove that Mr. Quiat's determination of responsibility was clearly erroneous, arbitrary, capricious, or contrary to law. The protests of Catamaran's responsibility are denied.

3. The evaluation and scoring were arbitrary and capricious

Express Scripts alleged:

The evaluation and scoring were arbitrary and capricious in regard to the scoring and evaluation of all of the matters described in Section 1 above for all of the reasons set forth therein. As shown above, Catamaran failed and refused to provide answers to at least nine of the questions of Tab A-1 and A-2, which served as the basis for scoring Criteria E: Background and Qualifications. Yet, at least one evaluator gave Express Scripts and Catamaran the exact same score for Background and Qualifications and the other evaluators scored Catamaran within 2.5 points of Express Scripts. This scoring is shown to be even more arbitrary and capricious given that Express Scripts has extensive experience with EGWPs and Catamaran will have its first ever EGWP + Wrap implementation (presumably, with PEBA) in January 2014.

Catamaran failed and refused to put any amount at risk for Performance Guarantees 15, 16, and 17, instead stating "Catamaran would be pleased to develop a mutually agreed upon guarantee to meet your needs after further discussion of this guarantee's intent." See Tab A-8 of Catamaran's Technical Proposal. Even though Catamaran refused to even provide responses to these three sections, two evaluators scored them 7 out of 10 – which according to the scoring chart meant "Meets Expectations." Catamaran did not even provide any guarantees, yet two evaluators scored them as meeting expectations – that, like the other issues described in item 1 above, is also clearly erroneous, arbitrary and capricious, and cannot stand.

MedImpact added:

Lack of Independence: In order to reduce the potential for bias or other unfair advantage, the Solicitation emphasizes the need for independence in the scoring process.

"You may fill out your panel score sheet in pencil, or fill out a working panel score sheet, prior to the selection meeting. You may want to adjust your scores when the panel meets for discussion. Please be objective in scoring each proposal, and do not allow others, or prior knowledge, to influence you. This is an independent evaluation, and you were chosen to serve on this committee because your expertise is valued. Do not discuss the evaluation process among yourselves outside of this forum. Remember, you may score only what is contained in each proposal." See

Memorandum from the desk of David H. Quiat to RFP Committee Members, regarding Request for Proposals-Pharmacy Benefit Management Services for the State Health Plan, dated July 18, 2013 (Exhibit C).

“Your responsibility is to provide an impartial, unbiased evaluation of each and every proposal according to the award criteria contained in the Request for Proposal. You must arrive at your scores independently, without the influence of any other evaluator. The evaluation panel shall meet for the purpose of discussions prior to finalizing scores and making an award. See Panel “Briefing: Instructions to the Evaluation Panel (Exhibit D).

Notwithstanding the desire to preserve independence required to preserve the integrity of the Solicitation, the Solicitation also includes contrasting instructions that expressly require an evaluator to determine scores based on consideration and/or coordination with the opinions of others.

“At the selection meeting you will have the opportunity to hear the opinions of all other committee members. They may have caught something significant that you missed, or vice versa. You may adjust preliminary scores at any time prior to finalizing them in ink and turning them in.” See Memorandum from the desk of David H. Quiat to RFP Committee Members, regarding Request for Proposals-Pharmacy Benefit Management Services for the State Health Plan, dated July 18, 2013 (Exhibit C).

The instructions requiring coordination and/or consideration of the opinions of other persons may: (i) preclude independence in the scoring process and (ii) create undue influence or bias in the scoring process. The potential existence of such bias indicates that the Authority needs to conduct a new solicitation process that assures the preservation of independence in the determination of scores.

According to the RFP, “Proposals will be evaluated by a review panel on the basis of the following criteria. Evaluation criteria are stated in relative order of importance with the first criteria being the most important.” [Ex. 1, Part VI, Award Criteria, p. 44] The RFP listed those criteria, in the order of importance as:

1. Total Net Cost
2. Pharmacy Network Management
3. Formulary Analysis
4. Service Description
5. Background and Qualifications
6. Performance Guarantees

A team of three evaluators reviewed and subjectively scored the technical proposals. Mr. Quiat mathematically scored the offerors' total net cost, the most important award criterion, and provided those scores to the evaluators. The evaluators completed their scores ranking the proposals in the following order:

	<u>Offeror</u>	<u>Total Score</u>
1.	Catamaran	256.10
2.	Express Scripts	250.86
3.	MedImpact	242.06
4.	Magellan	235.76
5.	Envision	233.55

[Ex. 17]

Mr. Quiat completed a Determination and Finding concluding, "Based upon the above findings, it is determined that the competitive sealed proposal award be made to Catamaran PBM of Illinois, Inc. as a responsive offeror whose proposal is the most advantageous to the State, price and other factors considered." [Ex. 23]

The scores for evaluation criterion #1, Total Net Cost, were evaluated mathematically resulting in a totally objective evaluation of price. Three evaluators scored the technical proposals, the only subjective portion of the scores. Two evaluators ranked Express Scripts highest of all offerors on its technical proposal. Only after Mr. Quiat provided the mathematical scores for Total Net Price, did Catamaran overcome Express Scripts' score by the evaluators.

Because neither protestant called any evaluator to testify about his scoring, the CPO cannot say whether the evaluators took into account Catamaran's answers to questions posed in Part V of the RFP; nor whether any evaluator's independent judgment was overborne by influence of the group.

Conclusion – Evaluation and Scoring

Pursuant to Section 11-35-2410(A) of the Code, a determination by the State as to which proposal is the most advantageous, after taking into consideration price and the other evaluation criteria, is final and conclusive unless such determination is “clearly erroneous, arbitrary, capricious, or contrary to law.” On several occasions, the Panel has held that it [the Panel] will not re-evaluate proposals and will not substitute its judgment for the judgment of the evaluators, who are often experts in their fields, or disturb their findings so long as they follow the requirements of the Code and the RFP, fairly consider all proposals and are not actually biased. *See, e.g., Protest of Santee Wateree Regional Transportation Authority*, Panel Case No. 2000-5 (reaffirming that the evaluation process need not be perfect as long as it’s fair and the Panel will not re-evaluate proposals); *Protest of Transportation Management Services, Inc.*, Panel Case No. 2000-3 (finding that the evaluation process is not required to be perfect and that the Panel will not re-evaluate proposals); *Protest of First Sun EAP Alliance*, Panel Case No. 1994-11 (noting that the Panel will not disturb the evaluators’ findings so long as they following the Code and the RFP’s requirements, fairly consider all proposals and are not actually biased); *Protest of Volume Services*, Panel Case No. 1994-8 (holding that the Panel will not substitute its judgment for that of the evaluators). In the *Santee Wateree* case, *ante*, the Panel also explained that subjectivity is the hallmark of the RFP process and does not equate with arbitrariness. Moreover, the Panel has found that “the variation of evaluators’ scores alone is only proof of the subjective nature of the evaluation aspect of the RFP process.” *Protest of Travelsigns*, Panel Case No. 1995-8. Regardless, the protestant bears the burden of proof to demonstrate by a preponderance of the evidence that the evaluators’ determinations were flawed. *Id.*

The protests of the evaluation are denied.

4. Dissemination of Information is Not Fair and Equal

MedImpact alleges:

The South Carolina Procurement Code notes that “discussions may be conducted [by the Procurement Officer] with offerors who submit proposals determined to be reasonably susceptible of being selected for award for the purpose of clarification to assure full understanding of, and responsiveness to, the solicitation requirements. All offerors whose proposals, in the procurement officer’s sole judgment, need clarification must be accorded that opportunity.” South Carolina Procurement Code Section 11-35-1530(6).

The South Carolina Code of Regulations emphasize that such discussions between the Procurement Officer and a responder must provide fair and equal treatment for all responders:

“Offerors shall be accorded fair and equal treatment with respect to any opportunity for discussions and revisions of proposals. Ordinarily, discussions are conducted prior to final ranking. Discussions may not be conducted unless the solicitation alerts offerors to the possibility of such an exchange, including the possibility of limited proposal revisions for those proposals reasonably susceptible of being selected for award.” South Carolina Code of Regulations Section 19-445.2095(I)

MedImpact has requested but not yet received copies of correspondence issued by the compliance officer to the other responders. MedImpact believes that a significant difference exists with respect to the nature and volume of information provided by the procurement officer to the various responders. For example, MedImpact believes that MedImpact’s “proposal problems” identified by the procurement officer in correspondence dated May 9, 2013, may reflect a level of review and information distribution that is less robust than more extensive “proposal problems” issued to other responders.

The issuance of additional and/or different information by the Procurement Officer to other responders would (i) violate the fair and equal treatment requirements and (ii) result in the provision of an unfair advantage to another responder. Thus, the conduct of a new solicitation process is required to eliminate the potential for any unfair advantage that results from the apparent lack of uniformity regarding review procedures, communications and transparency regarding the Procurement Officer’s issuance of notices of “proposal problems” to the various responders.

As noted previously, the protested solicitation followed another solicitation that failed and was cancelled. After cancelling the first solicitation, in an attempt to pre-empt similar problems in the re-solicitation, Mr. Quiat sent letters to each offeror explaining the deficiencies he noted in the responses. His correspondence occurred after the cancellation of the first

solicitation and before this solicitation was initiated – there was no active solicitation. MedImpact challenges that correspondence arguing that Mr. Quiat violated S.C. Reg. 19-445.2095 by favoring Catamaran by being more informative with Catamaran than the other offerors.

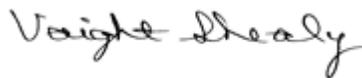
Such an allegation is off base, as it relates to correspondence before this solicitation was even issued. The regulation MedImpact relies upon in its allegation was not even in play. Such an allegation brings to mind the old adage of let no good deed go unpunished. Further, MedImpact offered no substantive evidence to support its allegation even if Regulation 19-445.2095 had been in effect.

Conclusion – Dissemination of Information

This ground of protest is denied.

DETERMINATION

For the reasons stated above, the protests are denied.



R. Voight Shealy
Chief Procurement Officer
For Supplies and Services

September 16, 2013

Date

Columbia, S.C.

APPENDIX A
CATAMARAN ANSWERS TO QUESTIONS ON TAB A-1

Question	Catamaran's Response
19.b) Percent of enrollees as of December 31, 2013, who are covered through an employer group	Catamaran does not report information as requested above. Currently, the percentage of client volume represented by Employer clients is 38%.
20. Total number of employer clients, as of December 31, 2012.	Catamaran does not provide statistics as requested. Across our PBM book of business, we manage 1,500 clients.
21. Total mail order prescription volume, based on days of therapy, for the period January 1, 2012 through December 31, 2012.	Catamaran does not provide statistics as requested. We manage more than 200 million prescriptions each year on behalf of 25 million members. Less than 1% are mail service claims (defined as the percent of overall adjusted paid claims.)
22. Total number of mail order prescriptions for the period January 1, 2012 through December 31, 2012.	Catamaran does not provide statistics as requested. We manage more than 200 million prescriptions each year on behalf of 25 million members. Less than 1% are mail service claims (defined as the percent of overall adjusted paid claims.)
23. Total retail prescription volume based on days of therapy, for the period January 1, 2012 through December 31, 2012.	Catamaran does not provide statistics as requested. Catamaran manages more than 200 million prescriptions each year.
24. Total number of retail prescriptions for the period January 1, 2012 through December 31, 2012.	Catamaran does not provide statistics as requested. Catamaran manages more than 200 million prescriptions each year.
25. Please provide a distribution of employer clients by number of members in the following categories (Clients do not need to be identified.)	For various categories, Catamaran responded, "Catamaran does not provide statistics as requested. Across our PBM book of business."

<p>27. For the 12 months ending December 31, 2012, provide the following for your book of business under your managed retail and mail pharmacy programs. All cost data should be based on total cost before retiree copays/coinsurance.</p>	<p>Catamaran provided answers in a different format from that requested.</p>
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APPENDIX B
CATAMARAN ANSWERS TO QUESTIONS ON TAB A-2

Question	Catamaran's Offer
Q-1 Describe, in detail, your transparent pricing model.	We have a long history of fully transparent administrative fee-based relationships and will approach the State contract in the same manner.
Q-19 Provide the results of your field audit programs for calendar years 2010, 2011 and 2012.	Catamaran provided the results of its field audit programs for calendar year 2012. For calendar years 2010 and 2011, Catamaran wrote, "Due to the combination of Catamaran, this information is not available. Please see our responses to 2012 information."
Q-23 a) Describe how you would advise S.C. Public Employee Benefit Authority on your progress to obtain network participation of the largest number of pharmacies covering the greatest geographical area of the State.	The State's dedicated account management team can provide progress reports as requested.
23.b) How frequently will you provide the S.C. Public Employee Benefit Authority with an update of your network participation efforts?	Quarterly
Q-28 a) What was the average daily number of prescriptions filled during the period January 1, 2012 through December 31, 2012?	Catamaran does not report information as requested.
Q-28.b) Does this represent an increase or decrease in volume from the previous year?	Increase
Q-28. c) If this represents an increase or decrease from the previous year, by how	Catamaran does not report information as requested. However, our mail service volume continues to increase each year as our client base continues to grow.

<p>much did the average daily number of prescriptions change as a percent?</p>	
<p>Q-68.c) Do you use an independent outside vendor to conduct the survey? If so, who?</p>	<p>Yes.</p>
<p>Q-71. b) What target should S.C. Public employee Benefit Authority set for their population given nearly 50% web access and strong promotion?</p>	<p>Catamaran would be pleased to discuss a specific target for the State. Based on our advanced technology tools and member engagement philosophy, we are confident in our ability to provide cutting edge web tools for members.</p>
<p>Q-82 How would you propose to optimize the mix between retail and mail order prescriptions?</p>	<p>Catamaran has the capability to provide in-depth analyses for different copayment and benefit design structure scenarios. At a minimum, these analyses offer a summary of the impact of formulary changes and/or implementations and benefit design considerations which include modifying the member cost share (copayments and deductibles).</p>

STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW

Protest Appeal Notice (Revised June 2013)

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 108.1 of the 2013 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.

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In the Matter of Protest of MedImpact Healthcare Systems, Case No. 2013-128, and Protest of Express Scripts Holding Company, Case No. 2013-129.

**South Carolina Procurement Review Panel
Request for Filing Fee Waiver
1105 Pendleton Street, Suite 202, 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.

Via e-mail protest-mmo@mmo.sc.gov
Via e-mail protest-mmo@mmo.state.sc.us

Via facsimile (803) 737-0639

August 23, 2013

Chief Procurement Officer
Materials Management Office
1201 Main Street, Suite 600
Columbia, SC 29201

Hand Delivery

David H Quiat, CPPB
South Carolina Public Employee Benefit Authority
Fontaine Business Center
202 Arbor Lake Drive
Columbia, SC 29223

Re: Notice of Protest Relating to Solicitation for Pharmacy Benefit Management Services for the State Health Plan

Dear Chief Procurement Officer and Mr. Quiat:

MedImpact Healthcare Systems, Inc. ("MedImpact") respectfully submits this protest relating to the notice of the award of the contract ("Award Notice") issued by the South Carolina Public Employee Benefit Authority ("Authority") to Catamaran PBM of Illinois, Inc. ("Catamaran"). The Award Notice is dated August 13, 2013 and is issued by the Authority to Catamaran pursuant to the Solicitation for Pharmacy Benefit Management Services for the State Health Plan, issued on May 13, 2013 ("Solicitation").

I. Background

As described more thoroughly in the sections set forth below, MedImpact is filing this protest with respect to certain scoring decisions made by the Authority in connection with the issuance of the Award Notice. The protest items include, without limitation, those relating to (i) the lack

of responsiveness to the Solicitation, (see Section II.1 below), (ii) the existence of certain resource constraints and other factors that preclude the ability to be responsible for the performance of duties required by the Authority (see Section II.2 below, and (iii) the failure to properly establish and document the reasonableness of certain favorable pricing, rebate and cost factors recognized by the Authority in the computation and scoring of total net cost (see Section II.3 below). In summary, the Catamaran proposal should have been rejected as being non-responsive to the Solicitation and Catamaran should not be awarded the contract since it is not a responsible offeror under the South Carolina Procurement Code.

This protest is timely submitted within ten (10) days of the August 13, 2013 posting date ("Notification Date") and sets forth the grounds of the protest, the issues to be decided and the nature of the relief requested, as required under the Solicitation, the Award Notice, and Section 11-35-4210 of the South Carolina Code.¹

MedImpact reserves the right to amend this protest to the extent required due to (i) MedImpact's recent receipt of new information, (ii) the nature of its outstanding requests for information that will require further evaluation, and (iii) any additional information that may become available which might affect the grounds or the bases for this protest.

II. Protest Items

1. **Responsiveness:** The Solicitation states that "all Offers should be complete and . . . should convey all of the information requested."² The South Carolina Procurement Code further notes that "[p]roposals must be evaluated using only the criteria stated in the request for proposals and there must be adherence to weightings that have been assigned previously . . . [and] 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." (South Carolina Code Section 11-35-1530(7)).

Notwithstanding the requirement for complete responses to the Solicitation, the submission by Catamaran includes certain incomplete information, and therefore the Catamaran proposal should have been automatically rejected as being non-responsive under the South Carolina Procurement Code. In addition, the failure by Catamaran to properly submit all required information to the Solicitation does not appear to have been properly considered by the Authority to reduce Catamaran's score in certain categories. The bases for both the rejection of the Catamaran proposal for being non-responsive and for the reduction of the scoring of its proposal include the following:

¹ See e.g., Notice of Award ("Any actual bidder, offeror, contractor, or subcontractor who is aggrieved in connection with the intended award or award of a contract shall protest within ten (10) days of the date notification of award is posted in accordance with this code. A protest shall be in writing, shall set forth the grounds of the protest and the relief requested with enough particularity to give notice of the issues to be decided, and must be received by the appropriate Chief Procurement Officer within the time provided. [South Carolina Code Section 11-35- 4210]"); see also Solicitation at page 10

² See Solicitation at page 13.

A. Background and Qualifications (6% of Score): Catamaran's response to the Solicitation indicates that it does not track and report certain key operational and financial information, including, those relating to employees covered through an employer group, mail order prescription volume, and retail prescription volume. (See Questions 19b through 27 Tab A-1, Backgrounds and Qualifications). The failure to report such information generally precludes the ability to obtain an overview of key operational aspects and therefore, should be viewed as nonresponsive answer to Solicitation. Accordingly, Catamaran failed to meet the responsiveness standards required for participation in the Solicitation (or, at the minimum, Catamaran's score for the "Background and Qualifications" section should be reduced to reflect Catamaran's failure to respond to these inquiries).

B. Pharmacy Network Management (20% of Score)

1. Pharmacy Field Audits: Catamaran reports that information relating to its pharmacy field audit programs is not available for the fiscal years ending 2010 and 2011. (See Tab A-2, question 19) Catamaran notes that the information is not available due to the post-combination integration activities of Catamaran. The inability of Catamaran to provide a response to the Solicitation due to the post-merger integration issues should be viewed as a non-responsive answer. Accordingly, Catamaran failed to meet the responsiveness standards required for participation in the Solicitation (or, at the minimum, the lack of response should result in a reduction of any score for the applicable category).

2. Network Participation: Catamaran also failed to provide a response to the Authority's request for information as to how Catamaran would advise the Authority regarding progress on network participation of network pharmacies in geographical coverage area of the State. (See Question 23, Tab A-2). Rather than responding with the requested recommendation, however, Catamaran's response merely indicates that it will provide progress reports as requested by the Authority. The failure to provide a meaningful recommendation should be viewed as nonresponsive answer to Solicitation. Accordingly, Catamaran failed to meet the responsiveness standards required for participation in the Solicitation (or, at the minimum, Catamaran's score for the pharmacy network component should be reduced for the failure to respond to this inquiry).

3. Mail Order Units: Catamaran indicated that it does not report or track units by manufacturer for its mail order business. (Question 23, Tab A-2). The failure to provide the requested information should be viewed as nonresponsive answer to Solicitation. Accordingly, Catamaran failed to meet the responsiveness standards required for participation in the Solicitation (or, at the minimum, Catamaran's score for the pharmacy network component should be reduced for the failure to respond to the Solicitation on this issue).

C. Services Description (10% of Score)

1. Pricing and Cost Containment: Catamaran's response to the Solicitation indicates that it does not track and report key pricing information relating to (i) average MAC cost as a percentage of total generic drug cost, and (ii) average generic costs as a percent of a multi-source brand drug cost required to be disclosed at Questions 2.f and g. of

Tab A-2a Service Description). The failure to report such information precludes the ability to obtain an overview of key operational aspects and therefore, should be viewed as nonresponsive answer to the Solicitation. Accordingly, Catamaran failed to meet the responsiveness standards required for participation in the Solicitation (or, at the minimum, Catamaran's score for the "Pricing and Cost Containment" section should be reduced to reflect the failure to respond to this inquiry).

2. Indirect EGWP+Wrap: Catamaran's response to the Solicitation indicates that it does not track and report information relating to the distribution of employer clients in the EGWP+ Wrap service line required to be disclosed at Questions 122 of Tab A-2a Service Description). The failure to report such information should be viewed as nonresponsive answer to the Solicitation. Accordingly, Catamaran failed to meet the responsiveness standards required for participation in the Solicitation (or, at the minimum, Catamaran's score for the "Indirect EGWP + Wrap" section should be reduced to reflect the failure to respond to this inquiry).

D. Subcontracting Arrangements (Tab A-3): Catamaran also failed to disclose issues relating to services that are provided through subcontractors. The failure to disclose such information appears to preclude the proper assessment of Catamaran's ability to arrange for the provision of goods and services required under the contract. Further, the lack of a response should be viewed as a non-responsive answer and may raise issues relating to Catamaran's ability to provide services under the contract. Accordingly, even though subcontracting arrangements are not part of the scoring, we believe that the failure to respond to the inquiry indicates that Catamaran failed to meet the responsiveness standards required for participation in the Solicitation (or, at the minimum, such failure to respond should result in a reduction of Catamaran's score in the "Services Description" category and/or other impacted areas due to the potential significant impact that may result from the lack of information relating to the required disclosure subject matter).

2. Responsible Offeror: Services and Network Management - Commitments and Resource Constraints

The South Carolina Procurement Code requires the award to be made to a "responsible bidder" who has "the capability in all respects to perform fully the contract requirements and the integrity and reliability which will assure good faith performance which may be substantiated by past performance." (See South Carolina Code, Section 11-35-1410(t). The Solicitation requires, among other items, the demonstration that the responders will be responsible for the execution of the contract. The Solicitation requires the development and execution of a final implementation plan that "shall outline, in detail, all the steps necessary to begin full performance of the contract on January 1, 2014."³

³ Solicitation at 35.

The implementation plan is critical to assuring that a responder is responsible and able to provide the services and administer the network required by the Authority. The information relating to Catamaran's implementation plan, however, has been redacted by the Authority. Thus, it not possible to properly evaluate the ability of Catamaran's to execute an implementation plan for the contract. MedImpact hereby requests copies of un-redacted information used by the Authority to evaluate whether the responders are "responsible offerors" which are capable of meeting the obligations relating to the implementation of the Authority's contract for the scheduled commencement on January 1, 2014.

The issues relating to Catamaran's ability to execute the implementation plan for the contract are enhanced by the significant resource constraints imposed by Catamaran's recent massive expansion activities. In its recent filing with the Securities and Exchange Commission on August 2, 2013, Catamaran emphasized the following significant risks relating to its ability to take on new business in light of its recent agreement with Cigna, which is expected to result in a 50% increase in the size of Catamaran's current business:

"The implementation of the Cigna contract is the largest and most complex implementation we have ever undertaken. We are required under the Cigna contract to devote a sufficient amount of personnel, systems, equipment, technology and other resources as are necessary to ensure a timely and successful implementation, which will require us to incur significant up-front costs. In addition, due to the amount of resources dedicated to the Cigna implementation, our ability to successfully bid for and implement other new customer contracts and integrate acquisitions of other businesses may be adversely affected. If we fail to implement the Cigna contract successfully and in a timely manner, or if as a result of resource constraints, we fail to properly implement other new customer contracts, we may face significant penalties that will adversely affect our financial results."⁴

In August, 2013, Catamaran also announced the planned \$400 million acquisition of Restat. Catamaran noted that the Restat acquisition will require an eighteen month integration plan commencing near the start date of the contract with the Authority in January, 2014.⁵ In addition to the expansion efforts relating to Cigna and Restat disclosed during the Authority's

⁴ Form 10-Q for June 30, 2013, filed August 2, 2013.

⁵ See e.g., Catamaran press release, August 1, 2013 ("Catamaran to Acquire Restat at <http://finance.yahoo.com/news/catamaran-acquire-restat-095500456.htm> ("Catamaran . . . announced it has entered into a definitive agreement to acquire Restat, LLC one of the largest privately held pharmacy benefit managers, for a purchase price of \$409.5 million in cash, subject to certain customary post-closing adjustments. Restat provides prescription claim processing and PBM services for self-funded employers, third-party administrators, workers' compensation plans, health plans, and unions. Restat is expected to contribute approximately \$650 million of annual drug spend and \$45 million of annual EBITDA. Catamaran expects to generate \$20 million in annualized synergies once Restat is fully integrated, which is expected to take 18 months following completion of the transaction. Catamaran expects the transaction to close in the fourth quarter of 2013").

proposal process, Catamaran's prior restructuring efforts continue to require Catamaran to allocate significant resources.

In particular, Catamaran continues to focus significant attention on the post-combination integration efforts⁶ relating to Catamaran's \$4.673 billion purchase of Catalyst in April, 2012.⁷ In addition to the 50% increase expected from the Cigna contract in the upcoming periods, the transformational activities undertaken by Catamaran during the 2010 to 2012 period have resulted in a reported 500% increase in the scope of Catamaran's operations during the most recent two full year periods (i.e., Catamaran's revenues increased from \$1.948 billion in 2010 to \$4.975 billion in 2011 to \$9.94 billion in 2012).⁸

The ongoing material nature of the recent and future expansion and integration commitments of Catamaran raise significant uncertainty as to Catamaran's ability to implement such growth and deliver on the obligations required under the contract with the Authority. MedImpact believes that the ability to provide quality services pursuant to such a continued growth rate is not feasible and will significantly impair the ability of Catamaran be responsible for performance in accordance with the requirements of the Authority's contract.

3. Total Net Cost (45% of Score):

The Solicitation indicates that the Authority may reject an offer as nonresponsive if the prices are materially unbalanced between line items or subline items.⁹ The Solicitation also notes that a bid is materially unbalanced when it is based on prices significantly less than cost for some work and prices which are significantly overstated in relation to cost for other work, and if there is a reasonable doubt that the bid will result in the lowest overall cost to the State even though it may be the low evaluated bid.¹⁰ The Solicitation further states that an offer may be rejected if the procurement officer ("Procurement Officer") determines in writing that it is unreasonable as to price.¹¹

The Solicitation states that the rankings of the financial proposals will be based on a simulated total net cost to the Authority, which will be calculated as the sum of the fixed, all-inclusive [per member per month] (PMPM) administrative fees and claims net of guaranteed rebates. The estimated claims cost will be based on the repayment of claims incurred during the period January 1, 2012 through December 31, 2012 using each offeror's pricing guarantees and the Offeror's submitted preferred, [Maximum Allowable Cost] (MAC) and specialty drug lists. The offeror with the lowest total net cost will receive all of the 45 evaluation points assigned to the criterion of total net cost. The points are awarded proportionally to each of the other offerors

⁶ See e.g., Catamaran's Form 10-Q for the quarter ending June 30, 2013, Part I, Financial Information at 21.

⁷ See e.g., Catamaran's Form 10-Q for the quarter ending June 30, 2013, Notes to Unaudited Financial Statements, Business Combinations.

⁸ See e.g., Catamaran's Form 10-K for fiscal year ending December 31, 2012.

⁹ See Solicitation at page 11.

¹⁰ See Solicitation at page 11.

¹¹ See Solicitation at page 11.

on the basis of the following formula ((lowest net cost amount / offeror net cost amount) multiplied by 45 (i.e., the assigned evaluation points)).¹²

The total net costs reflected in the "Memo to File/Record," by the Procurement Officer dated August 8, 2013, suggests that the costs computed for Catamaran are (i) not reasonable and (ii) are materially unbalanced and reflect material understatement of claims costs and an overstatement of administrative costs and rebate amounts. The factors that support the materially unbalanced nature and unreasonableness of Catamaran's net costs, include, without limitation, the following:

A. Claims Cost: Catamaran's recent significant expansion efforts (see further discussion in "Commitments; Resource Constraints" above) places significant reliance on the assumed ability of Catamaran to arrange for its network of pharmacy providers to meet the significant service and pricing expectations associated with increased volumes arising under the Authority's contract and its other expansion activities. On August 2, 2013, Catamaran summarized the risk factors relating to its pharmacy networks as follows:

"If we lose our relationship, or our relationship otherwise changes in an unfavorable manner, with one or more key pharmacy providers, or if significant changes occur within the pharmacy provider marketplace, or if other issues arise with respect to our pharmacy networks, our business could be impaired. Our operations are dependent to a significant extent on our ability to obtain discounts on prescription purchases from retail pharmacies that can be utilized by our clients and their members. Our contracts with retail pharmacies, which are non-exclusive,¹² are generally terminable by either party on short notice. If one or more of our top pharmacy chains elects to terminate its relationship with us, or if we are only able to continue our relationship on terms less favorable to us, access to retail pharmacies by our clients and their health plan members, and consequently our business, results of operations, financial condition or cash flows could suffer. In addition, several large retail pharmacy chains either own or have strategic alliances with PBMs or could attempt to acquire or enter into these kinds of relationships in the future. Ownership of, or alliances with, PBMs by retail pharmacy chains, particularly large pharmacy chains, could have material adverse effects on our relationships with those retail pharmacy chains, particularly the discounts they are willing to make available, and on our business, results of operations, financial condition and cash flows."¹³

The risk factors with respect to Catamaran's pharmacy network are accelerated by increased service demands on the pharmacy network arising from Catamaran's massive recent expansion activities, including, the 2012 Catalyst merger, the recent Cigna contract and Authority's proposal.

¹² See Solicitation at page 43-45. The 45 assigned points are based on the Procurement Officer's Memo to File/Record, dated August 8, 2013.

¹³ See Catamaran Form 10-K for fiscal year ending December 31, 2012.

Notwithstanding such massive capacity risks relating to its pharmacy network and other scope of operations, however, the total claims cost indicate that Catamaran will be able to deliver such services at a cost that is far beneath the costs of the other responders, none of whom are undergoing such a massive organizational transformation. The computations indicate that Catamaran's claims costs of \$785,617,113.79 are approximately \$6.5 million lower than the claims costs of the next responder (\$792,104,579 million by Envision) and \$8.3 million less than MedImpact (\$793,949,089).¹⁴

The increased service demands placed on Catamaran's vendors through its recent expansion efforts suggests that Catamaran's ability to obtain such favorable pricing advantages is not feasible and/or is otherwise subject to significant uncertainty. The competitive nature for pharmacy network services places further uncertainty as to Catamaran's ability to obtain pricing advantages.

Accordingly, MedImpact requests that the Authority provide information to further substantiate (i) the computation of the claims cost that supports Catamaran's ability to obtain such favorable rates, and (ii) Catamaran's ability to implement and maintain a pharmacy delivery network that is capable of providing the required services at such favorable rates. Such documentation should include, but not be limited to, confirmation that Catamaran has executed arrangements in place with key pharmacy networks (e.g., CVS, Walgreens, Rite Aid and Wal-Mart) to support the pricing levels required to provide Catamaran with the favorable pricing advantage. Absent the ability to clearly demonstrate Catamaran's ability to attain such favorable pricing throughout its other expansion activities, the scoring should be revised to eliminate the bias to Catamaran that results from its stated pricing advantages.

B. Rebates. The "revised financial computation" provided by the Authority indicates that Catamaran will receive (and reduce overall net costs) by \$128,206,858 in rebates, an amount that is: (i) the second highest amount among all responders (second only to Express Scripts total rebates of \$139,862,726), and (ii) significantly in excess of the rebates to be received by the other responders (\$91,057,714 for MedImpact, \$87,448,102 for Magellan and \$65,272,643 for Envision). The ability of Catamaran to receive such rebates appears to be subject to significant uncertainty based on consideration of various factors, including, the following:

1. Catamaran's rebate to claims expense ratio of 16.32%¹⁵ is approximately equal to the rate for the higher responder (Express Scripts (16.58%)) and is far in excess of the amounts for the other responders.¹⁶ Such a rebate rate for Catamaran is

¹⁴ See "Revised Financial Computation" worksheet.

¹⁵ Computed per "Revised Financial Computation" worksheet made available by the Authority (based on total rebates of \$128,206,858 and total claims cost of \$785,617,113).

¹⁶ Computed as follows:

inconsistent with historical experience, including, amounts reported by Catamaran in connection with a recent bid for the State of Ohio, which indicated that Catamaran's rebates rates were 42% less than Express Scripts, the highest rate among all responders.¹⁷

2. Catamaran's actual rebate experience appears to conform to industry trends and is payable only on claims in which members pay less than 50% of the claims cost.¹⁸ The amount of the rebates computed for Catamaran for purposes of the Solicitation's total net cost computation, however, suggests that the computation may improperly reflect rebates payable on claims where members pay more than 50% of the costs. The improper inclusion of claims where members pay more than 50% of the claims in the Solicitation scoring of total net costs may result in a material overstatement of the actual rebate amounts to be received by Catamaran.

Accordingly, MedImpact requests that the Authority provide information to further substantiate (i) the computation of the claims cost that supports Catamaran's ability to obtain such favorable rebate rates, and (ii) Catamaran's ability to implement and maintain a pharmacy delivery network that is capable of providing the required services at such favorable rates. Absent such a demonstration, the computation of total net costs should be revised to eliminate Catamaran's reported significant increase in its rebate percentage.

C. Administrative Cost. The "revised financial computation" provided by the Authority indicates Catamaran's administrative costs of \$53,874,982, an amount that is: (i) the second highest amount among all responders (second only to Envision's administrative costs of \$58,857,488), and (ii) significantly in excess of the administrative costs for the other responders (\$26,166,366 for MedImpact, \$34,198,854 for Magellan and \$38,718,707 for Express Scripts).

The materiality of Catamaran's administrative fees (i.e., more than two times the amount of administrative fees computed by MedImpact) raises significant concerns with respect to various

Computations per "Revised Financial Computation" worksheet provided by the Authority, as follows:

	ESI		Envision		Medimpact		Catamaran		Magellan	
	Amount	% of Claims	Amount	% of Claims	Amount	% of Claims	Amount	% of Claims	Amount	% of Claims
Admin Cost	38,719	4.59%	58,857	7.43%	26,166	3.30%	53,875	6.86%	34,199	4.25%
Claim Cost	843,540	100.00%	792,105	100.00%	793,948	100.00%	785,617	100.00%	805,461	100.00%
Rebates	139,863	16.58%	65,273	8.24%	91,058	11.47%	128,207	16.32%	87,448	10.86%
	742,396		785,689		729,056		711,285		752,212	
Rebate to Claims Costs	16.58%		8.24%		11.47%		16.32%		10.86%	

¹⁷ See e.g., "Combined Financial Results," workpaper compiled by AON Hewitt for State of Ohio RFP and obtained pursuant to a FOIA request (Catamaran (Catalyst) projected rebates of \$23.650 million equals 58% of Express Scripts rebates of \$40.833 million).

¹⁸ See e.g., May 9, 2013 letter from South Carolina to Catamaran, Item 13, page 4.

issues that may impair Catamaran's ability to provide services under the agreement, including, without limitation, those relating to the following:

- Whether such fees are reasonable and necessary and consistent with fair market value for the scope of administrative services required to be provided under the agreement;
- Whether the high administrative costs effectively provide Catamaran with a financial "cushion" to be used to make payments to its pharmacy network in addition to Catamaran's reported claims costs, which represent the lowest among all responders (see above discussion);
- Whether the administrative expenses comply with applicable regulatory requirements restricting the amount and type of payments to manufacturers, pharmacies or other parties;
- Whether the administrative fees in comparison with Catamaran's low claims costs raises issues under the Solicitations prohibitions on unbalanced billing requirements. (See e.g., paragraph P of Solicitation at page 11).

In order to assure that such concerns have been adequately evaluated by the Authority, MedImpact requests documentation reasonably necessary to demonstrate and document the Authority's evaluation of the administrative fees.

Pursuant to the South Carolina Freedom of Information Act (Section 30-4) and the South Carolina Procurement Code (Section 11-35-410), MedImpact previously requested information from the Authority relating to the costs and other financial information submitted in response to the Solicitation. MedImpact believes that access to such information is critical to assure transparency and propriety in the evaluation of the responder's ability to meet the complex series of financial and related service arrangements that are required under the contract. As noted above, certain of the information required to compute and evaluate total net costs has not yet been made available.

MedImpact requests that the information be made available for review to assure that potential issues relating to Catamaran's proposal are properly addressed. To assure the propriety and transparency of the procurement process, MedImpact also believes that the information requested below (and in other sections of this protest) should be made available even where information provided to date has been redacted by the Authority based on rights of confidentiality asserted by the other responders.

4. Mail Order and Specialty Pharmacy. The procurement scoring process indicates that MedImpact received a reduction in its pharmacy network scoring. MedImpact believes

that the scoring reflects an improper reduction related to its non-ownership interests in the mail order and pharmacy businesses.¹⁹

MedImpact's business model is based on the strong recognition that the use of subcontracting arrangements enhances the quality of mail order and specialty pharmacy services that can be provided to beneficiaries by providing access to enhanced expertise and resources. Accordingly, MedImpact requests information relating to the reduction in the scoring for its pharmacy network. MedImpact also requests that such reduction be eliminated to the extent that such reduction relates to MedImpact's subcontracting arrangements which are documented in the proposals and which MedImpact believes result in a clearly enhanced service offering.

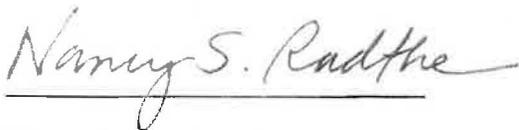
III. Conclusion

Catamaran is neither a responsive nor responsible offeror and their proposal should have been rejected. MedImpact's proposal was responsive to the Solicitation and MedImpact has an established history of meeting contractual obligations as a responsible offeror. The award for this contract should be made to MedImpact.

MedImpact appreciates the opportunity to provide comments on the solicitation process. We look forward to continuing to work to serve the health needs of the public employees and residents of the State of South Carolina residents.

Thank you for your consideration. Please let us know if you have any questions or require further information.

Sincerely,



Nancy S. Radtke, Esq.

SVP Corporate Services

¹⁹ MedImpact notes that Magellan also does not own a specialty or mail order business and received a similar reduction in its score.



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August 23, 2013

Via Email to protest-mmo@mmo.sc.gov and Hand Delivery

Mr. Voight Shealy
Chief Procurement Officer
Materials Management Office
1201 Main Street, Suite 600
Columbia, South Carolina 29201

RE: Protest of Notice of Intent to Award to Catamaran PBM of Illinois, Inc.
Description: Pharmacy Benefit Management Services for the State Health Plan

Dear Mr. Shealy:

This firm represents Express Scripts Holding Company ("Express Scripts") in connection with the above matter and provides this protest of the Intent to Award in connection with the above procurement to Catamaran PBM of Illinois, Inc. ("Catamaran"). Express Scripts has submitted a Freedom of Information Act request to the South Carolina Public Employee Benefit Authority ("PEBA") to obtain a copy of documents relevant to this proposed award. However, as of the submission of this letter, Express Scripts has not yet received all documents pursuant to that request and has only received a heavily redacted copy of Catamaran's proposal. Therefore, in order to preserve its right to protest, Express Scripts submits this protest, which it will either amend or otherwise revise after a thorough review of all of the relevant documents provided by PEBA. Based on the materials that Express Scripts has received to date, Express Scripts asserts the following grounds of protest:

1. Catamaran's offer is non-responsive to the material requirements of the Request for Proposal.

Catamaran failed to meet the essential, material requirements of the RFP and should have been found to be non-responsive. Express Scripts has only been provided a heavily redacted copy of Catamaran's proposal. However, based on a review of Catamaran's redacted proposal, the following issues of non-responsiveness are apparent. Other issues may arise based on a full and complete review of the unredacted proposal, and Express Scripts reserves the right to amend or revise this protest at a later date.

a. Catamaran repeatedly failed and refused to provide requested material and essential information.

In Tab A-1 of the Technical Proposal, offerors were required to provide information and statistics about their background, experience, and financial viability and capability. Catamaran repeatedly failed and refused to answer these questions. See Tab A-1, Section I., questions 18, 19b, 20, 21, 22, 23, 24, 25, and 27. This is important, essential information which the State requested in order to evaluate Catamaran. Yet, Catamaran refused to provide the requested information. Further, with regard to its enrollment history metrics (question 26 of tab A-1), Catamaran lists incomplete and obviously inaccurate numbers. For years 2010 – 2012 for number of covered lives, Catamaran lists exactly 25,000,000 and 1500 for employer groups. Those numbers could not remain completely static over a three year period. Those statistics represent people – people are born, people die, get jobs, get married, and leave employment. Catamaran obviously provided misleading and incomplete information and was non-responsive to this material requirement of the RFP. In fact, according to Catamaran’s 2011 Annual Report (which is publicly-available at www.catamaranrx.com), Catamaran grew by 1.3 million lives in 2011, making its apparent static growth impossible.

With regard to Tab A-1, Section III regarding Mandatory Minimum Qualifications, Catamaran failed to provide the requested information. Question 2 of that section requires offers to “provide detailed information to establish that they are currently providing Pharmacy Benefit Management Services of the type and scope outlined herein for a minimum of 2,000,000 covered managed lives.” Catamaran fails to provide this detailed information, instead just again citing the flat 25 million lives which it contends has remained completely static for the last three years. Upon information and belief, Catamaran failed to provide adequate references of the quality and type requested. However, this information was redacted.

With regard to Tab A-2a of the Technical Proposal, Catamaran was required to “describe in detail” its transparent pricing model. See Q-1. Again, Catamaran fails and refuses to answer, instead stating that “We have a long history of fully transparent administrative fee-based relationships and will approach the State contract in the same manner.” The question asked for all information about the transparent pricing model. Yet Catamaran limits its answer to only asserting that it has a history with “transparent administrative fee based relationships” and completely fails to provide the requested details. With regard to Question 45, Catamaran when asked “are purchase discounts passed along to the plan or kept as margin by the PBM,” it refused to answer the question, instead simply asserting that “Catamaran is proposing an aggressive AWP pricing structure for specialty medications.” With regard to Question 68c, when asked to identify the independent outside survey vendor, Catamaran refused to provide that information. With regard to Question 71 of that same tab, Catamaran, when asked to give a specific target percentage for on-line registration, Catamaran does not answer, asserting instead that it “would be pleased to discuss a specific target for the State.” This non-responsive answer is again proof

(as with the above items) of Catamaran's failure to provide full and complete responses as required, to provide sufficient information from which a meaningful evaluation can be conducted, and underscores their lack of responsiveness, responsibility and experience. With regard to Question 82, when asked how it proposed to optimize the mix between retail and mail order prescriptions, again Catamaran fails to answer the question at all, instead discussing its ability to provide an in-depth analysis of different co-payment and benefit design structures. Further, the banking arrangements proposed by Catamaran do not appear to be in compliance with CMS timeframes and requirements.

b. Catamaran failed to provide mandatory and essential subcontractor information as required.

The RFP required as follows:

Offerors should complete one section of the Subcontractor Questionnaire for each subcontractor proposed to perform any of the requirements of this contract. All subcontractor arrangements must be finally established and all contracts negotiated with subcontractors prior to submission of proposals. Following submission of proposals and prior to award, copies of all subcontractor contracts may be requested for review by the S.C. Public Employee Benefit Authority.

RFP, p. 38.

In direct contradiction to this material and essential requirement, Catamaran failed to provide this information, instead stating that "Additional information pertaining to subcontractors will be provided upon award of the contract." The subcontractor information was required to be submitted in the submission of proposals. Unlike other responsive offerors, such as Express Scripts, Catamaran failed and refused to provide this information, presumably leaving itself the ability to re-negotiate these subcontracts, depending on the outcome of this procurement. This is the very reason that identification, in the proposal, of subcontractors is required. No other responsive offeror was allowed that same option.

c. Catamaran failed to propose required performance guarantees.

The RFP required as follows:

Offerors shall propose guarantees, at a minimum, for those performance standards/measurements outlined in Tab A-8. The Contractor shall strictly adhere to their proposed performance standards and associated guarantees and related penalties for

deviation from those standards as agreed to between the S.C. Public Employee Benefit Authority and Contractor.

RFP, p. 40.

Contrary to this mandatory, material and essential requirement of the RFP, Catamaran failed and refused to put any amount at risk for Performance Guarantees 15, 16, and 17, instead stating “Catamaran would be pleased to develop a mutually agreed upon guarantee to meet your needs after further discussion of this guarantee’s intent.” See Tab A-8 of Catamaran’s Technical Proposal. The time for Catamaran to understand the intent of those Performance Guarantees was during the question and answer period. The law absolutely forbids a vendor from promising to arrive at “mutually agreed” monetarily-significant terms after proposal submission. Instead of putting an amount at risk, as required and as done by other responsive offerors, Catamaran instead put nothing at risk and therefore is not bound by any standard for these Performance Guarantees. Accordingly, Catamaran is ineligible for an award.

d. Catamaran failed to submit adequate proof of insurance.

The RFP required that:

INSURANCE: The Contractor shall maintain general liability insurance coverage, including errors and omissions and broad form personal injury coverage in an amount not less than \$5,000,000. The coverage can be a combination of primary and excess coverage or self-insured and excess coverage, and the insurance shall name the S.C. Public Employee Benefit Authority as an additional named insured.

Prior to the commencement of the work, the Contractor shall provide to the state a signed, original certificate of liability insurance (ACORD 25). The certificate shall identify the types of insurance, state the limits of liability for each type of coverage, include a provision for thirty (30) days notice prior to cancellation and name the S.C. Public Employee Benefit Authority as an additional insured.

The state’s failure to demand a certificate of insurance required by this section is not a waiver of the Contractor’s obligations to obtain the required insurance.

RFP, p. 51. The certificate of insurance offered by Catamaran shows that they do not have all of the coverages required by the RFP. The Contractor here is "Catamaran PBM of Illinois, Inc." and the RFP requirement is for the Contractor to maintain the required coverages. However, the insurance certificate provided by Catamaran lists the insured as "Catamaran, Inc." Therefore, Catamaran as the Contractor failed to meet this mandatory requirement. Also the certificate does not reflect the required "errors and omissions" coverage. See also Amendment #2, question 150.

2. Catamaran is a non-responsible offeror.

- a. Catamaran is non-responsible because it offered a price at which it will not be able to perform the contract.

Catamaran's offered price was over 18 million dollars lower than the next lowest offeror and over 30 million dollars lower than Express Scripts' price. Upon information and belief, Catamaran will not be able to perform the contract at that low price and they should have been determined to be a non-responsible offeror. However, it does not appear that any analysis was done as to Catamaran's ability to perform at this price. In fact, the State negotiated the price down even lower prior to issuing the Intent to Award, thereby increasing the likelihood that Catamaran cannot successfully perform the contract. By accepting Catamaran's pricing, the State has set itself up for a crisis. This circumstance is all the worse because Catamaran's financial condition is poor, leaving the State with no recourse when the crisis emerges.

- b. Catamaran is non-responsible because it has a poor financial rating.

In tab A-1 of the Technical Proposal, Catamaran offered only one of the multiple required financial ratings. This rating indicates that Catamaran was rated only a "BB" by Standard & Poor's on June 2012. It indicated that there was no prior rating for the company, although Catamaran indicates that its company dates back to 1981. A Standard & Poor's rating of BB means "less vulnerable in the near-term but faces major ongoing uncertainties to adverse business, financial and economic conditions." See http://www.standardandpoors.com/ratings/definitions-and-faqs/en/us#def_1. This rating, coupled with Catamaran's unreasonably and unrealistically low price, renders Catamaran a non-responsible offeror.

3. The evaluation and scoring were arbitrary and capricious.

The evaluation and scoring were arbitrary and capricious in regard to the scoring and evaluation of all of the matters described in number 1 above for the reasons set forth therein. As shown above, Catamaran failed and refused to provide answers to at least nine of the questions of Tab A-1 which served as the basis for scoring Criteria E: Background and Qualifications. Yet, at least one evaluator gave Express Scripts and Catamaran the exact same score for Background and

Qualifications and the other evaluators scored Catamaran within 2.5 points of Express Scripts. This scoring is shown to be even more arbitrary and capricious given that Express Scripts has extensive experience with EGWP and Catamaran will have its first EGWP implementation in January 2014.

As shown above, Catamaran refused to provide any guarantees for three performance criteria. Even though Catamaran refused to even provide responses to these three sections, two evaluators scored them 7 out of 10 – which according to the scoring chart meant “Meets Expectations.” Catamaran did not even provide any guarantees, yet two evaluators scored them as meeting expectations – that is arbitrary and capricious.

Further, the scoring was rendered arbitrary and capricious as the evaluators were not properly apprised of the weighting of evaluation criteria thereby affecting their ability to fairly analyze the proposals under the weighting in the proposal. Criteria A-F were listed in the RFP in order of importance and were actually assigned a ranking of 45%, 20%, 15%, 10%, 6%, and 4% respectively. In spite of this stated ranking, evaluators were simply told to rank every Criterion from 1-10 using the following scale:

Section Requirement Not Addressed		Does Not Meet Expectations		Acceptable		Meets Expectations		Exceeds Expectations		Outstanding
1	2	3	4	5	6	7	8	9	10	

If the evaluators had actually known that a section was worth only 4 instead of 10 points or 15 points instead of 10, they could very well have scored differently.

4. The evaluation was conducted improperly because it impermissibly injected price into the evaluation of the technical proposal.

The RFP specifically provided that:

The Financial Proposals shall be submitted in a sealed envelope labeled “Financial Proposal Documents.” No information from the Financial Proposals should be included in the Technical Proposal.

RFP, p. 41. This purpose of this requirement is to keep from prejudicing the technical evaluation by injecting price into that technical evaluation. Here, scoring of the pricing component was to be done by a mathematical formula and was to be done by the Procurement Officer, not by the evaluators. Here, the scoring sheets indicate that the evaluators all improperly knew the results of the financial scoring when writing their final scores. That fact improperly interjects price into the technical evaluation and renders the scoring arbitrary and capricious.

CONCLUSION

Based on the grounds set forth herein, Express Scripts respectfully requests that the award be stayed pending resolution of this protest, that Express Scripts be granted a hearing on this matter, and that the award to Catamaran be rescinded and an award be made to Express Scripts as the lowest responsive and responsible offeror. Express Scripts also requests all relief available under the South Carolina Consolidated Procurement Code. Express Scripts also requests that the CPO require that Express Scripts be given prompt access to the relevant procurement records so that it can timely amend this protest.

Very truly yours,

Melissa J. Copeland

Melissa J. Copeland

cc: via email only to:
Liz Crum, Esq.
Craig Davis, Esq.