

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

In the Matter of the Bid Protest
filed by Group Health Incorporated & Value Options
with respect to the procurement for the New York
State Empire Plan Mental Health and Substance Abuse
Program conducted by the New York State Department
of Civil Service Employee Benefits Division
Contract Number – C000585

Determination
of Bid Protest
SF-20080408

March 27, 2009

This Office has completed its review of the above-referenced procurement conducted by the New York State Department of Civil Service Employee Benefits Division (hereinafter “DCS”) and the bid protest filed by Group Health Incorporated (hereinafter “GHI”) and ValueOptions, Inc. (hereinafter “VO”) with respect thereto. As outlined in further detail below, we have determined that the grounds advanced by the protestor are without sufficient merit to overturn the contract award by DCS. We therefore hereby deny the protest and are today approving the DCS contract with UHC.

BACKGROUND

Facts

On December 20, 2007, DCS issued a Request for Proposals (hereinafter “RFP”) seeking competitive proposals to secure the services of an Insurer qualified to insure and administer the Empire Plan and Student Employee Health Plan Mental Health and Substance Abuse Program (hereinafter “Program”), either directly or through subcontracts with organizations qualified to perform all or some of the program services required in the RFP. The Program provides benefits that include coverage for inpatient and outpatient mental health and substance abuse (hereinafter “MHSA”) services through network and out-of-network providers.¹ The Student Employee Health Plan is a health insurance plan for graduate student employees of the State University of New York and their eligible dependents. The Empire Plan has over five hundred fifteen thousand (515,000) enrollees with approximately one million seventy-three thousand (1,073,000) covered lives. The Program is one of the four (4) components that comprise the Empire Plan benefit design. The benefit design of the Empire Plan is the result of collective bargaining between the State and the various unions representing its employees. The management of the Program includes a number of utilization management controls including a clinical referral line (used to make appropriate referrals to in-network providers), and care management (used to determine medical necessity, coordinate care,

¹ This coverage excludes inpatient detoxification when the seriousness of the Enrollee’s medical condition, as determined by a physician rather than a psychiatrist, requires treatment in a medical unit other than the designated detoxification unit. Such services are covered by the Hospital/Medical components of the Empire Plan.

and perform concurrent inpatient reviews). The Program provides benefits to enrollees and covered dependents for covered MHSA services subject to applicable co-payments and benefit maximums.

The proposers, in order to be considered responsive, had to meet a number of minimum mandatory requirements. One requirement, number 4, stated in part that:

The Offeror must attest and demonstrate that it meets the following Empire Plan MHSA Provider Network access prerequisite: seventy-five percent (75%) of Enrollees must have access (as defined below) to a Provider in the Offeror's existing Provider Network, as of the Proposal Due Date. To fulfill this requirement, the Offeror may utilize executed Empire Plan specific provider contracts contingent on award and/or existing agreements that can be made applicable to the Empire Plan. The Offeror must also attest that it has completed its credentialing process for all providers included in that file. The Offeror must agree to provide documentation, including provider contracts, as required to demonstrate satisfaction of this requirement.

The Offeror must attest and demonstrate that, as of the Proposal Due Date, its Empire Plan MHSA Provider Network must meet . . . thirty (30) Empire Plan MHSA Provider Network access prerequisites both within NYS and outside NYS.²

The RFP stated that the method of award would be based on a "Best Value Determination" taking into consideration the responsiveness and responsibility of the offeror that has accumulated the highest Total Combined Score.³ The Total Combined Score was the sum of the technical score at seventy percent (70%) and the cost score at thirty percent (30%). The proposal with the highest Total Combined Score was to be selected for award.

Section VI of the RFP generally described the evaluation and selection criteria. The points for technical evaluation were allocated to the following values:⁴ (i) Program Administration and Implementation – 15% of Total Technical Score; (ii) Program Delivery and Support Services – 65% of Total Technical Score; and (iii) Clinical Management and Appeal Process – 20% of Total Technical Score. The cost evaluation was based on: (i) Claims Costs broken down into Projected Cost of Network Claims and normalized Projected Non Network Claims; and (ii) Retention Costs.⁵

² RFP at Section III: Administrative Proposal Requirements, Pages 3-3 through 3-6.

³ See State Finance Law §163(1)(j) (defining "best value" as the "basis for awarding contracts for services to the offeror which optimizes quality, cost and efficiency, among responsive and responsible offerors").

⁴ RFP at Section VI: Evaluation and Selection Criteria, Pages 6-2 through 6-6.

⁵ RFP at Section VI: Evaluation and Selection Criteria, Pages 6-6 through 6-8.

Prior to the proposal due date of March 5, 2008, DCS received proposals in response to the RFP from the following entities: (i) GHI/VO; (ii) United HealthCare of New York (hereinafter "UHC")/OptumHealth Behavioral Solutions; and (iii) MVP Health Care (hereinafter "MVP")/Magellan Behavioral Health.

After conducting its evaluation, DCS by letter dated August 13, 2008, notified UHC that it had been selected for award and notified the other, unsuccessful, proposers of such award. By letter dated August 22, 2008, GHI, on its own behalf and on the behalf of its subcontractor, VO, filed a formal Selection Protest with DCS. Patricia Hite, acting on behalf of DCS Commissioner Nancy G. Groenwegen, designated Kathy Bennett, Counsel with the Division of the Budget, to perform a review of, and make a recommendation regarding, the procurement conducted by DCS and the issues raised in the Selection Protest filed by GHI. By letter to Kathy Bennett, dated September 12, 2008, the DCS Employee Benefits Division responded to the issues raised by the Selection Protest. By letter dated October 16, 2008, Ms. Bennett issued her recommendation to DCS Commissioner Groenwegen concluding that the Selection Protest was without merit and recommending that it be dismissed. By letter dated October 17, 2008, DCS Commissioner Groenwegen adopted the recommendation of Ms. Bennett and dismissed the Selection Protest filed by GHI.⁶

Subsequently, DCS signed a contract with UHC for the services required under the RFP and forwarded such contract to this Office for approval. The DCS/UHC contract was received by this Office on October 23, 2008.

By correspondence dated October 31, 2008, GHI filed an appeal (hereinafter "Appeal") with this Office to the DCS determination of the Selection Protest.⁷

Procedures and Comptroller's Authority

Under Section 112 of the State Finance Law (hereinafter "SFL"), before any contract made for or by a state agency, which exceeds fifty thousand dollars (\$50,000) in amount, becomes effective it must be approved by the Comptroller.⁸ Because DCS had already entered into a proposed contract with UHC resulting from this procurement, the Comptroller has reviewed the Appeal filed by GHI as part of his review of the contract award to UHC.

⁶ We note that there was other additional correspondence between the parties.

⁷ Both GHI and UHC included in their bid protest communications relating to an interim contract award. As the award of the interim contract is a separate matter, the aforementioned arguments raised by GHI and UHC will not be addressed. On Monday, December 1, 2008, to continue benefits under the Program pending our resolution of the Protest and our review of the procurement award to UHC, this Office approved an interim single source contract award to UHC.

⁸ SFL §112(2).

In carrying out the aforementioned responsibilities proscribed by SFL §112, this Office has issued Contract Award Protest Procedures that govern the process to be used when an interested party challenges a contract award by a State agency.⁹ The procedures govern initial protests to this Office of agency contract awards and contract awards made by this Office and appeals of agency protest determinations.

In the determination of this Appeal, this Office considered:

1. the documentation contained in the procurement record, including all documents relating to GHI's initial protest to DCS, forwarded to this Office by DCS with the DCS/UHC contract;
2. the correspondence between this Office and DCS arising out of our review of the proposed DCS/UHC contract; and
3. the following correspondence/submissions from the parties (including the attachments thereto):
 - Nixon Peabody's letter to Charlotte Breeyear, Director of Bureau of Contracts within the OSC, dated October 31, 2008, filed on behalf of GHI/VO, Appealing the Selection Protest determination by DCS;
 - Charlotte Breeyear's email, dated October 31, 2008, notifying this office of the Appeal;
 - DCS letter to Charlotte Breeyear, Director of Bureau of Contracts within the OSC, dated November 13, 2008, responding to the Appeal;
 - UHC's letter to Charlotte Breeyear, Director of Bureau of Contracts within the OSC, dated November 13, 2008, responding to the Appeal;
 - Nixon Peabody's letter to Charlotte Breeyear, Director of Bureau of Contracts within the OSC, dated November 19, 2008, replying to the UHC and DCS responses to the Appeal;
 - OSC letter of inquiry to DCS dated December 11, 2008;
 - The DCS letter dated December 17, 2008, responding to the OSC letter of inquiry dated December 11, 2008;
 - The UHC letter dated December 17, 2008, responding to the OSC letter of inquiry dated December 11, 2008;
 - The GHI letter dated December 23, 2008, responding to the aforementioned UHC and DCS letters dated December 17, 2008;
 - The OSC/DCS conference call regarding this matter on December 23, 2008 and the OSC email dated December 23, 2008 to DCS memorializing such conference call ;
 - The DCS reply letter, dated December 31, 2008, to questions posed by this Office and memorialized in the email dated December 23, 2008;
 - The UHC supplemental letter, dated January 6, 2009; and
 - The GHI reply letter, dated January 9, 2009.

⁹ Comptroller's G-Bulletin G-232.

Protesting Party

The protestor, GHI was the former Administrator of the Program on the contract ending December 31, 2008 and is one of the entities that submitted a proposal in response to the RFP issued by DCS.

Applicable Statutes

The requirements applicable to this procurement are set forth in SFL Article 11 which provides that contracts for services shall be awarded on the basis of "best value" to a responsive and responsible offerer.¹⁰ Best value is defined as "the basis for awarding contracts for services to the offerer which optimizes quality, cost and efficiency, among responsive and responsible offerers."¹¹ A "responsive" offerer is an "offerer meeting the minimum specifications or requirements described in a solicitation for commodities or services by a state agency."¹²

SFL §163(9)(a) provides that "[t]he commissioner or a state agency shall select a formal competitive procurement process ... [which] shall include ... a reasonable process for ensuring a competitive field."

SFL §163(9)(b) provides that the "solicitation shall prescribe the minimum specifications or requirements that must be met in order to be considered responsive and shall describe and disclose the general manner in which the evaluation and selection shall be conducted."

SFL §160(5) provides that "costs" as used in Article 11 "shall be quantifiable and may include, without limitation, the price of the given good or service being purchased; the administrative, training, storage, maintenance or other overhead associated with a given good or service; the value of warranties, delivery schedules; financing costs and foregone opportunity costs associated with a given good or service; and the life span and associated life cycle costs of the given good or service being purchased. Life cycle costs may include, but shall not be limited to, costs or savings associated with construction, energy use, maintenance, operation, and salvage or disposal."

ANALYSIS OF BID PROTEST

GHI's Appeal to this Office

In the Appeal to this Office, GHI challenges the procurement conducted by DCS on the following grounds:

¹⁰ SFL §163(10).

¹¹ SFL §163(1)(j).

¹² SFL §163(1)(d).

1. The cost scoring methodology utilized by DCS resulted in serious cost-scoring inconsistencies that suggest UHC's cost proposal was underestimated by five million dollars (\$5,000,000).
 - a. Specifically, the DCS cost scoring methodology failed to rectify the coordination of benefits (hereinafter "COB") and co-payment savings inconsistencies between the UHC and GHI proposals, which could have affected the final score enough to make GHI the winner.
2. The DCS' normalization methodology for determining the projected cost of out-of-network claims irrationally nullified the inherent value of GHI's more comprehensive and, therefore, cost-effective network.
3. GHI's FOIL Request was inappropriately denied, which has hampered its ability to perfect its bid protest.
4. Release of the GHI MHSA Program 4th Quarter Financial Report for 2007 constituted a release of proprietary information allowing UHC to artificially manipulate its projected unit costs and fatally tainted the procurement process.

DCS's Response to the Appeal

DCS responded to arguments raised in the Appeal as follows:

1. The cost scoring methodology was appropriate.
 - a. Co-payments and COB savings were only required for the purpose of determining the Guaranteed Average Unit Cost and ultimately in premium development with the successful proposer, and were not used as part of the Cost Evaluation.
 - b. Not using such information in the cost evaluation was appropriate because co-payment and COB savings are not under the control of any Offerer.
 - i. Co-payment savings are dependent on the terms of collective bargaining agreements and the mix of patients who present for treatment, as a result DCS assumed that any savings would be the same for everyone.
 - ii. COB savings are predicated on the existence of other insurance and the robustness of the providers COB program. However, it is impossible to ascertain the actual savings, so DCS incorporated the Providers process as part of the Technical Evaluation and not the Cost Evaluation.
2. DCS and UHC never engaged in impermissible communications as implied.
3. GHI had the ability to complain about the scoring methodology early in the Procurement process, and should have done so at that time.

4. DCS' decision to apply a fixed value for out-of-network claims, as set forth in the RFP, is appropriate and fully complies with the State Finance Law and Procurement Guidelines.
 - a. DCS determined that to require all Offerer's to have in place, on the proposal due date, executed contracts with every provider in their proposed network would inhibit competition and favor the incumbent, as the network credentialing and contracting process is an expensive and time consuming endeavor, which an insurer, typically, only enters into in geographic areas where it has a contract covering patients.
 - b. DCS included thirty (30) minimum mandatory requirements related to provider access that would ensure that Offerers had a substantial likelihood of meeting the access requirements of the Plan.
 - c. The RFP also included performance penalties should the Offerer's network fail to satisfy said requirements during the life of the contract.
 - d. Plan experience demonstrates that even a modest incremental cost acts as an incentive for employees to use network providers whenever possible and consequently, given no change in the Plan's benefits, DCS has no reason to project that a network which meets the Plan's access requirements will result in a substantially different distribution of claims between network and out of network providers.
5. GHI's failure to obtain all records requested in its FOIL request is immaterial to the issues raised in the protest, as the fundamental problem is GHI's misunderstanding of the cost evaluation process.
6. GHI's release of its own report is irrelevant to the DCS Procurement process since the financial information released was aggregate information and did not contain any information related to GHI unit cost or a pricing advantage in relation to claim costs.
 - a. The information released was similar to information included in the RFP.
 - b. The RFP did not require Offerers to project aggregate claim amounts for evaluation purposes.

UHC's Response to the Appeal

UHC responded to the issues raised in the Appeal as follows:

1. GHI's challenge to the scoring methodology is untimely, as the DCS scoring methodology was fully disclosed in RFP §VI(B.1.a.ii) (Evaluation and Selection Criteria).
 - a. DCS in RFP §VI(B.1.c) reserved the right to make cost calculation adjustments, including normalization of other factors to promote a fair bid comparison in accordance with Procurement Guidelines §7(II)(A)(7).
 - b. With the aforementioned provisions being stated in the RFP, GHI had ample opportunity to object and/or question the methodology during the proposers' conference and question submission period.

2. GHI was not put at a disadvantage under the scoring methodology.
 - a. The scoring methodology was applied to all proposals equally.
 - b. The normalization process leveled the playing field in accordance with applicable State Finance Law and Procurement Guidelines.
3. Any FOIL information regarding UHC's proprietary cost information has no bearing on the scoring methodology that DCS developed, disclosed and applied.
4. GHI's own transmission of cost data to a current UHC employee who had worked for VO approximately two (2) years ago resulted in no prejudice.
 - a. UHC disclosed the receipt of said document to both DCS and the GHI, and affirmatively represented that none of its employees made any use of the data contained in the email in question.
 - b. Both DCS and UHC took all appropriate steps to ameliorate any issue raised by GHI.

DISCUSSION

We recognize that GHI sought a variety of documents from DCS under the New York State Freedom of Information Law (Public Officers Law Article 6, hereinafter "FOIL") which, presumably, GHI would have utilized in framing and supporting the issues identified in its Selection Protest and Appeal. DCS, in part, denied access to the records requested by GHI. Consistent with prior determinations of this Office, since issues raised in the FOIL process do not directly relate to the procurement process at issue, this Office does not consider FOIL issues as part of its review of bid protests. This Office does, however, as part of our review process review allegations that a protestor might assert, based on documentation in the procurement record, whether or not that documentation was made available to the protestor.

The resolution of this Appeal, and our review of the contract award by DCS, requires that we address the following issues:

- I. Was the evaluation methodology utilized by DCS for claims costs, which considered only the Contracted Average Unit Cost, appropriate, particularly in light of the fact that said methodology excluded from consideration:
 - (i) co-payment savings;
 - (ii) COB savings;
 - (iii) Guaranteed Average Unit Costs; and
 - (iv) the out-of-network claims cost?¹³

¹³ While the evaluation methodology did include costs for out-of-network claims costs in the calculation of total cost, such methodology normalized said costs such that it was assumed that such costs would be the same for all proposers. This effectively precluded any comparison of differences in such costs between proposers from the cost evaluation. As discussed in SF 20080412, in a somewhat analogous situation, we have some concerns as to whether it is appropriate for an agency to include a normalized amount in the

II. Did the disclosure of the Financial Report by GHI to UHC fatally taint the procurement process?

I. Claims Cost Evaluation

We believe that SFL §163 implicitly requires that the evaluation methodology used by the procuring agency in determining cost must have a reasonable relationship to the anticipated costs that will be incurred under the terms of the resulting contract.¹⁴ As a result, when scoring cost, we believe that all fees to be assessed by a proposer, as well as other variables that impact upon cost to the state, generally should be factored into the scoring of the cost proposal. Obviously, the various factors impacting on the total cost related to the procurement should be ascribed relative weights based upon the agencies expectations concerning the relative significance in amount of each factor. However, all fees or other elements that will impact on cost should be evaluated unless the impact of such fee or element on cost: (i) will be substantially identical for all providers; (ii) are difficult or impossible to estimate and therefore are speculative; or (iii) are unlikely to occur.

DCS evaluated the claims cost by scoring only the projected cost of network claims that were identified in the cost proposals, proposed as the Contracted Average Unit Cost (hereinafter "CAUC"), without any consideration of co-payment savings, COB savings, the Guaranteed Average Unit Costs (hereinafter "GAUC"), or out-of-network claims costs.¹⁵ Since each of these elements impact upon the claims cost to be borne by the State under the Program, the exclusion of such elements is in our view, as noted earlier, proper only if either: (i) it is reasonable to assume that there will be little, if any variation in the effect of such elements on the costs to the state between responsive proposers; or (ii) it is difficult or impossible to calculate the effect of such elements on the cost of each proposal; or (iii) it is unlikely that the cost will be incurred.¹⁶ Consistent with this

calculation of total cost, where the agency has determined that such component of cost will not vary between proposers or cannot be estimated. The use of such a normalized amount, particularly where such amount is relatively large in relation to the other costs, may skew the cost evaluation and substantially reduce, or in extreme cases even effectively eliminate, the true weight of cost in the overall evaluation process. In this case, however, we need not determine whether it was appropriate to include the normalized out-of-network costs in the calculation of total cost, since we have computed the costs scores without the normalized amounts, and have determined that the outcome of the bid process would have not changed, and indeed that margin between UHC and GHI would have increased.

¹⁴ SFL §160(5) provides that "costs" "shall be quantifiable and may include, without limitation, the price of the given good or service being purchased..."

¹⁵ As discussed above in footnote 13, although the evaluation methodology did include normalized costs for out-of-network claims, this effectively precluded any comparison of differences in such costs between proposers from the cost evaluation.

¹⁶ SFL §160(5) provides that costs must be "quantifiable." Therefore, where it is difficult or impossible to calculate the effect of certain elements of the proposals on cost, such elements cannot be considered as part of the cost evaluation. However, as discussed *infra*, in such cases, such elements should be considered as part of the technical evaluation if it is possible to undertake a meaningful subjective evaluation with respect to such element.

standard we must determine whether DCS' exclusive reliance on the CAUC, and the concomitant exclusion of co-payment savings, COB savings, the GAUC and out-of-network costs, in the evaluation of claims cost was appropriate, particularly since the contract does not bind the proposers to the exact CAUC contained in their proposals.¹⁷

CAUC:

As part of the cost proposal, each proposer was required to complete Exhibit V.B -- Projected Average Unit Cost by Type of Service. Column A of this Exhibit was the CAUC for each respective type of service. According to the terms of the RFP: "[t]he amounts quoted in Column A shall represent the Offeror's best estimate of average fees contracted with network providers prior to the application of co-payments or the coordination of benefits and shall represent the Offeror's best estimates of the average fees expected to be charged to the program for the period January 1, 2009 - December 31, 2013."¹⁸ The proposers were required to calculate and submit a separate CAUC for four (4) network inpatient services and eight (8) network outpatient services. In the evaluation, the CAUC for each of the twelve types of service was then multiplied by a normalized number of services to arrive at a total for projected network incurred claims.

Since the claims cost represents the largest component of the costs to be paid by the State under the proposed contract,¹⁹ as part of our review, this Office sought to ensure that the CAUC figure relied upon by DCS was an accurate representation of the claims cost to be paid by the State and that the proposers were reasonably bound to that number under the contract.

In response to a question posed by this Office on December 23, 2008, DCS, in its letter dated December 31, 2008 stated that the "CAUC is the best indicator of the relative cost of network claims under the proposals." GHI does not appear to have challenged this assertion. After our review of the positions advanced by the parties and the documentation contained in the procurement record, we accept the position of DCS, the agency charged with administering the employee health insurance program, and therefore accept that the CAUC is a reasonable predictor of what the costs to the State will be under the Program.

In addition, pursuant to §13.2.0 of the proposed contract, the successful proposer is bound to prices consistent with its proposed price in each of the twelve (12) types of services (i.e. the CAUC for each type of service).²⁰ In fact, UHC, in its submission to

¹⁷ We note that the CAUC is a component of the GAUC, as discussed more fully below, and the GAUC is incorporated into the contract as a contract cap.

¹⁸ RFP at Section V: Cost Proposal Requirements, Page 5-5.

¹⁹ The cost evaluation also factored in "retention", which included the annual administrative fee. However, the amount of the CAUC was much greater than the total retention amounts.

this Office dated January 6, 2009, confirms its understanding that the “[c]ontract nevertheless affords the State adequate protection against aggressive or inaccurate unit cost projections by requiring the successful proposer to follow its proposed pricing quotes.”

Based upon the foregoing, we accept DCS’ position that the CAUC is a reasonable predictor of what the costs to the State will be under the Program. As a result, we are satisfied that it was appropriate to evaluate costs primarily by comparing the CAUCs proposed by each proposer.²¹ However, we must now review DCS’ decision to exclude from consideration in the evaluation of cost co-payment savings, COB savings, the GAUC and out-of network claims costs.

Co-payment Savings:

The co-payment savings under the Program will be dependent on the mix of patients who utilize the services under the Program and the terms of the collective bargaining agreements negotiated by the State which set the rates of such co-payments. Since these factors will be the same irrespective of the provider, it was reasonable to assume that there will be little if any variation in the savings to the State from co-payments regardless of which proposer was the successful bidder. Therefore, we believe DCS’ decision not to evaluate this aspect of cost was appropriate.

COB Savings:

The COB savings are dependent on two factors, namely, the existence of additional insurance coverage from an alternate policy and the robustness of the respective proposer’s program to coordinate benefits. The first factor, the existence of secondary insurance, (much like the factors constituting the co-payment savings discussed above) would appear consistent irrespective of the provider. However, the second factor, the robustness of the proposer’s COB program, can vary among providers. Therefore, the “robustness” of a proposer’s program appears likely to impact the ultimate cost to the State.

DCS stated it did not evaluate COB savings as a part of the cost proposal because it is impossible to accurately quantify the incremental savings associated with minor

²⁰ This clause was based on the requirements of the RFP §13.1.3. This section states that “[t]he Offeror must provide all aspects of claims processing. Such responsibility shall include but not be limited to: ... 13.1.3 Charging the Program consistent with the Offeror’s proposed pricing quotes”

²¹ We also note that, assuming, arguendo, it were not appropriate to include the CAUC in the evaluation of cost, and since as discussed *infra*, it is not appropriate to include co-payments, COB savings, the GAUC or out-of-network charges in the cost evaluation, then costs would have to have been evaluated solely based upon the retention fees proposed by each proposer. If that had been done in this case, UHC would still have been the low cost proposer and would have received all of the 30 percent of the points allocated to cost (assuming that 30 percent of total points were still allocated to cost), but GHI would have received significantly less cost points than it received under the methodology actually used by DCS, with the result that the difference between UHC’s total score and that of GHI would have increased.

variations in the proposers' COB programs. DCS did, however, evaluate and score the respective proposer's COB program as part of the Technical Evaluation.

Section 160(5) of the State Finance law provides that costs must be quantifiable. As a result, to the extent that the COB savings associated with each proposal cannot reasonably be quantified, such savings cannot be considered as part of the cost evaluation – but should, instead be considered, if possible, as part of the technical evaluation.

While the robustness of a proposer's COB savings program will impact the cost to the State under the contract, we accept DCS' position that any attempt to quantify said savings would be highly speculative and unreliable. Therefore, we believe it was appropriate for DCS not to attempt to consider such impact as part of the evaluation of cost, but rather to consider such impact in the technical evaluation.²²

GAUC/Contract Cap:

In an effort to limit the risk to the State, the RFP required proposers to calculate the GAUC for network inpatient and network outpatient services, which become the contract cap for each of these categories of services.²³ The successful proposer is bound to its proposed GAUC under the proposed contract which also requires that following the completion of each plan year an Actual Average Unit Cost (hereinafter "AAUC") for Inpatient services and Out-Patient services be calculated. If the AAUC was less than the GAUC, the State would be charged the actual claims cost. If however, the AAUC exceeds the GAUC, the successful proposer must return the difference to the State. However, DCS did not score the GAUC.

To support its decision not to score the GAUC, DCS contends that the CAUC is the best indicator of the relative cost of network claims under the Program, and that, in fact, no insurer under this program, has ever reached the contract cap established under the contract.²⁴ Based upon our review, it appears that DCS is correct in this assertion. As a

²² In reaching this conclusion, we recognize that DCS did require each proposer to include, and thus indirectly be bound to, projected COB savings, in the calculation of the GAUC, to which the proposer is contractually bound, but which, also all parties agree has never been reached. DCS contends that this information is used by DCS in the premium development with the successful proposer, by providing DCS with insight into the proposer's approach to underwriting for use in subsequent premium negotiations with the carrier each year of the contract. DCS appears to have understood that the co-payment and COB savings would be rough estimates at best, and acknowledges that much of the actual savings would be based on factors outside the proposer's control. While we are unclear as to whether there was any value to such estimates, ultimately this is irrelevant since, as discussed above, we are satisfied that such estimates (which were not included in the evaluation) were too speculative to properly consider in the cost evaluation.

²³ Proposers were directed to calculate the GAUC by adding together the weighted cost of each of the CAUC subcategories, after applying the proposer's estimate of co-payment and COB savings for that subcategory, and then multiplying such amount by 103%.

²⁴ In its letter to Charlotte Breeyear, dated January 9, 2009, GHI agrees that the GAUC has never been exceeded.

result, consistent with the standards outlined above, we are satisfied that it was appropriate for DCS to exclude the GAUC from the calculation of cost, since it is unlikely that the State will ever compensate a provider based upon the GAUC.²⁵

Out-of-Network Claims Cost:

DCS normalized the out-of-network claims costs thereby effectively excluding said costs, which are clearly a material component of cost, from its cost evaluation.²⁶ DCS appears to assert two separate justifications for its normalization of these costs. First, it asserts that any attempt by DCS to assign projected out-of-network costs to proposers would be highly speculative and therefore inconsistent with the provisions of SFL §163(7).²⁷ DCS also justifies its normalization of these costs on its contention that there will be little if any variation in the volume of out-of-network claims between proposers that meet the minimum access requirements of the RFP and contract.

We agree with DCS that the out-of-network costs cannot reasonably be quantified. Quantifying out-of-network costs would require a non-incumbent bidder to have a complete or substantially complete provider network in place by the time its proposal is submitted. Then, DCS, or each proposer, would be required to attempt to estimate, for each proposer, based upon their network, the number of enrollees who would utilize out-of-network providers, and the costs to the plan for such services. Such an exercise would, in our view, result in estimates that would be highly speculative and with little relationship to the actual costs to be borne by the State. Consequently, we conclude that out-of-networks costs cannot be reasonably quantified and therefore cannot, consistent with SFL §160(5), properly be included in the calculation of cost.²⁸

²⁵ We are cognizant of the possibility that, as in this case, a proposer with a CAUC lower than that proposed by another proposer, may have a higher GAUC than the other proposer and therefore, if selected, would have a contract with a higher cap (thereby creating the possibility of higher costs to the State). This concern is outweighed, however, by the fact that it is unlikely that the State will ever make payment based upon the GAUC and that scoring the GAUC could result in an award to an ultimately more expensive proposer (one that has a lower GAUC, but a higher CAUC).

²⁶ See, footnote 13.

²⁷ DCS' assertion that any estimate would be speculative is, in part, predicated on the fact that, in an effort to foster competition and maintain a level playing field, it did not require in the RFP that proposers, prior to award, establish its complete and final network, because of the time and expense of doing so. Rather DCS required only that each proposer meet the 75% access requirements of the RFP, at the time of its proposal, and 95% at the time of contract. We are satisfied that DCS acted appropriately in establishing the 75% and 95% requirements.

²⁸ DCS did, as part of its technical evaluation, conduct an evaluation of the proposed networks. As part of this evaluation, proposers were required to propose access information based on enrollee addresses. This information was utilized in the technical scoring whereby proposers were rewarded for the greater number of providers within the respective areas as identified in the RFP. Therefore, we would reasonably assume that generally proposers were awarded more points the larger their proposed network, up to certain maximums. Therefore, if it is assumed, as GHI appears to imply, that out-of-network costs will decrease as the size of the network increases, then proposers with larger networks would be rewarded for such reduced costs (which in our view cannot be quantified), as part of the technical evaluation. We note, based upon

Because we agree with DCS that out-of-network costs cannot be quantified, we need not address DCS' second assertion, that there will be little if any variation in such costs between responsive proposers.

II. Disclosure of Financial Report

GHI alleges that the procurement process was fatally tainted by the disclosure of certain proprietary information to UHC. The facts as have been presented to this Office are as follows: GHI transmitted the MHSA Program 4th Quarter Financial Report for 2007 to an email address, ending with @uhc.com, assigned to a woman who worked for VO approximately two (2) years ago, and who currently works for UHC. GHI alleges that the Financial Report contained proprietary information, which allowed UHC to artificially manipulate its projected unit costs, thereby fatally tainting the procurement process.

Specifically, GHI argues on appeal that a two million dollar (\$2,000,000) figure included in the Financial Report allowed UHC to manipulate its costs, as evidenced by the discrepancy between UHC's GAUC and the CAUC. However, GHI fails to explain how the aforementioned discrepancy is evidence of cost manipulation by UHC.

DCS takes the position that the information disclosed in the Financial Report did not provide a competitive advantage to UHC, and was in fact similar to information that was disclosed for prior periods in the RFP. Further, after GHI refused to disclose the Financial Report to the other proposers, the DCS Procurement Steering Committee reviewed the implications of the release of the information contained in the Financial Report. The Steering Committee concluded that the Financial Report "did not contain information which was beneficial/material to other potential Offerors nor would it result in a competitive disadvantage to those potential Offerors."²⁹ The Steering Committee further concluded that UHC's execution of the MacBride Statement and Non-Collusive Bidding Certification (Exhibit I.D of the RFP) provided further support for its finding that the procurement process was not tainted by GHI's release of the Financial Report. In addition, the Steering Committee requested and received from UHC, a letter signed by Associate General Counsel John F. Stevenson, dated February 28, 2008, stating, in part, that "United HealthCare represents that none of its employees reviewed or analyzed these documents, or made any use of them whatsoever, including any use in connection with the Empire Plan Mental Health and Substance Abuse Program procurement process."

Based upon conclusions of the DCS Steering Committee and the statements of the UHC employees, we are satisfied that the inadvertent disclosure of the information to UHC by

our review, that, in fact, GHI received more technical points than either UHC or MVP in these respective categories.

²⁹ The findings of the Steering Committee were set forth in a report which has been reviewed by this Office. This Office is satisfied that the Steering Committee did investigate this matter and this Office has no basis to disturb the findings of the Steering Committee.

GHI did not, in any way, taint the procurement process. We therefore find no merit in GHI's protest allegations with respect to this issue.

CONCLUSION

We find that the issues raised in the protest are not of sufficient merit to overturn the award by DCS to UHC and, therefore, the protest is denied and we are today approving the DCS/UHC contract.

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