

June 12, 2008

Mr. Anthony D. Rodgers
Director
Arizona Health Care Cost Containment System
801 East Jefferson
Phoenix, Arizona 85034

And

Mr. Michael Veit
Contracts and Purchasing Section
Arizona Health Care Cost Containment system
701 East Jefferson, MD 5700
Phoenix, Arizona 85034

Re: Appeal of AHCCCS Denial of PHS Protest of RFP No. YH09-0001

Dear Mr. Rodgers and Mr. Veit:

I am in receipt of Mr. Veit's correspondence of June 6, 2008 responding Pima Health System's ("PHS") official appeal to the denial issued by AHCCCS of PHS's protest in to the award of contracts made in connection with Request for Proposal No. YH09-0001 ("the RFP"). This letter serves as PHS's official appeal to Mr. Veit's denial of the protest originally filed on May 23, 2008. This appeal is filed consistent with the provisions of Arizona Administrative Code R9-22-604(I). Pursuant to A.A.C. R9-22-604(I)(2), I am providing the following information:

Name of Protestor:	Karen Fields for Pima Health System
Address:	3950 South Country Club, Suite 400 Tucson, Arizona 85714
Telephone Number:	(520) 243-8385
RFP Number:	YH09-0001
Legal and Factual Grounds	Follow in this letter
Relief Requested	Grant of a Contract pursuant to the RFP Referenced above or, in the alternative, issue a new RFP for the same services in Pima County

A copy of Mr. Veit's determination regarding PHS's protest is attached. Pima Health System also hereby requests a hearing on this matter.

This appeal is based on several considerations.

I. Pima Health System's Initial Protest Was Timely.

AHCCCS asserts that PHS's protest was untimely because certain issues raised in the protest relate to deficiencies in the AHCCCS RFP process. PHS acknowledges that A.A.C. R9-22-604(D)(2) requires that "[a] protester filing a protest alleging improprieties that do not exist in the original RFP but are subsequently incorporated into the RFP before the due date for receipt of proposals shall file the protest prior to the amended due date for receipt of proposals." A.A.C. R9-22-604(D)(3), however, establish a 10 (ten) day limit for filing protests: "In cases other than those covered in subsections (D)(1) and (2), a protester shall file a protest within 10 days after the protester knows or should have known the basis of the protest. It is PHS' position that the provisions of A.A.C. R9-22-604(D)(3) are applicable and therefore the protest was timely.

In its response, AHCCCS states that "[t]he claim by PHS in its protest that it could not have known the "extent of harm" prior to the disclosure of the award, the scoring, and the actuarial certifications is not a relevant factor to determining timeliness if the alleged impropriety is contained in the RFP (or RFP amendment) itself." This analysis is irredeemably flawed. AHCCCS cannot be allowed to argue that its capricious and arbitrary methodology was established by and incorporated into the RFP, thus negating any claim of harm that follows. Such an approach would not only permit the state to run rough shod over the basic tenets of openness and fair dealing that the Legislature intended all state agencies to employ in procurement, it would trample on the guarantees of due process found in the Constitutions of the United States and the state of Arizona. Accordingly, Mr. Veit's argument fails.

Mr. Veit professes that "AHCCCS is not required to address the merits of [PHS'] protest because [it] was not filed in a timely manner. As a courtesy, and without waiving our position that the claim is untimely, the Administration will do so." However, a careful reading of the discussion of the merits reveals that on multiple occasions Mr. Veit simply reiterates his erroneous mantra of "untimely filing" when addressing the merits rather than addressing AHCCCS' deficient practices in a meaningful manner.

Far from being "irrelevant," harm is a fundamental and necessary element to the filing of a protest. In fact, AHCCCS Administration's decision, arbitrary and capricious as it was, harmed PHS and may well harm thousands of AHCCCS members in Pima County if it is allowed to stand. PHS could not have foreseen that AHCCCS Administration's actions would be so arbitrary and capricious as to rise to the level of actual harm to PHS, but that is the situation in which the health plan finds itself. PHS intends to avail itself fully of all legal remedies available to it to undo the harm done and prevent further harm to itself and the residents of Pima County in this matter. The health plan's timely protest and timely

appeal, pursuant to A.A.C. R9-22-604(D)(3) and A.A.C. R9-22-604(I), respectively, are consistent with that commitment.

II. The Decision Making Process Underlying the Award of Contracts Was Fundamentally Flawed.

To pass constitutional and legal muster, administrative decisions regarding procurement must be supported by facts and must be arrived at through a process that is open to bidders and transparent to the public. Preference may not be given to any particular bidders or class of bidders (absent a legal basis for so doing); factors that were not part of publicized Request For Proposals may not be considered. Above all else, administrative decisions must not be arbitrary or capricious.

Pima Health System asserts that the decision making process utilized by AHCCCS Administration was flawed in no small part because all bids were based on unsound actuarial premises and assumptions. In addition, AHCCCS violated its own procurement rules by injecting a mystery risk adjustment factor into the process without providing adequate notice to bidders as to the nature and operation of the risk adjustment factor. This point is important and bears repeating: AHCCCS may not excuse its capriciousness and arbitrariness by claiming that it informed potential bidders that it intended to behave in an arbitrary and capricious manner. This is akin to the fabled defendant accused of murdering his parents, who throws himself on the mercy of the court because he is an orphan.

A. All Bids Were Erroneous Due to Methodological Deficiencies.

PHS maintains that the capitation rate calculation methodology established by AHCCCS required offerors to ignore actual data and base their responses on untested data that is so attenuated as to be fictional. All bids were non-responsive because AHCCCS required bidders to bid on fictional populations, thus establishing an invalid premise that in turn invalidates all bids. Mr. Veit alleges that all but PHS' certifications indicated they were "actuarially sound for an average Medicaid population." This conclusion ignores the actual language contained in the actuarial certifications. For example, see the certification provided by Molina Healthcare of Arizona, Inc. "I cannot provide an opinion relative to adequacy of the rates following the implementation of risk adjustment planned for implementation 4/1/09 since the data book and supplementary materials do not provide the details necessary to draw a conclusion about that." Or that submitted by Health Choice which is titled as "Qualified" and states "The AHCCCS bid instructions and the data provided in the Bidder's Library make it necessary to qualify the certification of actuarially sound rates. The data in the Bidder's Library is not sufficiently detailed to determine the average demographic profile of an enrollee in each GSA and risk category or to determine the base to which a health plan should apply its own expected medical management and unit cost levels. In addition the unknown status of the risk adjustment methodology and its application are a major concern for actuarial soundness. . . .Therefore in my opinion, HCA's rates are actuarially sound . . . with the following two qualifications 1. . . .lack of sufficiency of the data in the Bidder's Library;

and 2. The impact of the risk adjustment methodology” The list of qualifications by other bidders goes on. Clearly either Mr. Veit didn’t understand the qualifications provided by the actuaries or simply ignored them.

B. AHCCCS Failed to Provide Adequate Notice Regarding the Risk Adjustment Factor.

In its own letter denying PHS’s protest, AHCCCS admits that it failed to disclose salient, material information regarding the risk adjustment methodology that it planned to use: “...PHS appears to be making broad assumptions about the risk adjustment model. Since PHS does not know what model AHCCCS will employ, it is not clear how you determined any flaws in the model.” (Mr. Veit’s letter of June 6, 2008 to Karen Fields, page 4.) (One may infer that AHCCCS does not know what model it will employ, either.)

Perhaps the risk adjustment factor was introduced as an attempt by AHCCCS to remedy the obvious deficiencies in the original rate calculation methodology set forth in the RFP. Whatever the reason, the risk adjustment factor was injected into the process at a late stage. This is not necessarily prohibited, but it is unusual for such a material change to be introduced at such a late stage in the RFP process. Taken together, however, the flawed original capitation rate methodology, the unusual timing of the rate adjustment modification and the complete lack of adequate, meaningful information regarding the rate adjustment methodology clearly support both PHS’s contention that the rate calculation methodology was so flawed as to be meaningless and that AHCCCS failed to provide notice as to the methodologies it would use in reimbursing its contractors.

In its protest, PHS stated that “offerors were confused....” In his response, Mr. Veit stated that this assertion “lacks a factual basis.” He goes on to state that because PHS only submitted three of the total of 68 questions submitted, PHS was not “befuddled” by the risk adjustment methodology. With respect to the state of confusion that AHCCCS created, it is self-evident that a change that generates 68 questions from throughout the population of potential bidders was not clear or unambiguous. It was, in fact, confusing. As to PHS’s understanding regarding the change, PHS submitted only those questions that had not been otherwise raised by other parties. PHS agreed with most, if not all, of the 65 questions that other bidders submitted, including the key question as to the reason for the change. It is inappropriate for AHCCCS to make assumptions regarding PHS’s questions or non-questions related to the change and incorporate those assumptions into its decision making on this matter.

As described in Pima Health System’s protest and further set forth in this appeal, AHCCCS’s decision making underlying the award of contracts pursuant to RFP YH09-0001 was fundamentally erroneous, arbitrary and capricious for all the reasons discussed above. The Administration’s failure to adhere to its own procurement rules and the requirements of openness and fair dealing doomed the process from the outset and resulted in harm to PHS, which scored the highest or second highest in all categories save

rates. Rates aside, based on the merits, PHS would receive an award from AHCCCS due to the excellent programs and member services documented in its proposal.

It is within AHCCCS's authority to grant award of a fifth contract. AHCCCS should exercise its authority in PHS's favor by finding in the health plan's favor in this appeal and awarding it a contract. In the alternative, AHCCCS should re-bid the service, making corrections to the rate methodologies that have been urged by the majority of bidders.

Sincerely,

A handwritten signature in black ink, appearing to read "Karen Fields". The signature is fluid and cursive, with the first name "Karen" being more prominent than the last name "Fields".

Karen Fields
Director Pima Health System