PPRB
PUBLIC PROCUREMENT REVIEW BOARD
SPECIAL MEETING MINUTES
Monday, April 17, 2023

Location: E.T. Woolfolk State Office Building
501 North West Street, Room 145
Jackson, Mississippi

Board Members: Rita Wray, Chair
Billy Morehead
Norman McLeod
Norman Katool
Liz Welch

Board Member Absent: David Russell, Vice Chair

DFA Staff: Aubrey Leigh Goodwin
Brittney Thompson
Liz Bolin
Amelia Gamble, Special Assistant Attorney General
Suzanne Hudson, Special Assistant Attorney General
William Collins, Special Assistant Attorney General
Ross Campbell
Liz DeRouen
Clay Chastain

Guests:

Matt Dry, PEER

Change Healthcare Pharmacy Solutions, Inc. (Change Healthcare)
- Mary Margaret Gay, Gay Jones & Kuhn PLLC, Counsel for Change Healthcare
- Keri S. Henley, Gay Jones & Kuhn PLLC, Counsel for Change Healthcare
- Zack Beasley, Managing Sr. Counsel for Change Healthcare
- Paige Clayton, Change Healthcare Representative

Mississippi Division of Medicaid (DOM)
- Janet McMurtray, Purdie and Metz, PLLC, Counsel for DOM
- Laura Gibbes, Chief Counsel, DOM
- Kristen Jones, Special Assistant Attorney General, State Agencies Division
- Kayla McKnight, Procurement Director, DOM
- Brian Wardlaw, Contracts Officer, Attorney III, DOM
- Jennifer O. Wentworth, Deputy Administrator for Finance, DOM

MedImpact Healthcare Systems, Inc. (MedImpact)
D. Sterling Kidd, Counsel for MedImpact
Steffanie Mathewson, Associate General Counsel, MedImpact
Rob Coppola, Senior Director, MedImpact Managed Care Organizations and Public Sector Sales Team

I. Call to Order

The meeting was called to order by Chair Rita Wray.

II. Consideration of Protest

A. Protest; Change Healthcare Pharmacy Solutions, Inc. (Change Healthcare) v. Mississippi Division of Medicaid (DOM); Contract for Pharmacy Preferred Drug List (PDL), Supplemental Rebate (SR), Rate Setting and Programmatic Review and Assessment of Core Components (RFx # 3120002271)

1. Change Healthcare (Protestor):

- Ms. Henley presented arguments on behalf of the Protestor and reserved five (5) minutes for rebuttal.

2. DOM (Agency):

- Ms. McMurtray presented arguments on behalf of the Agency.

3. MedImpact (Intended Awardee):

- Mr. Kidd presented arguments on behalf of the Intended Awardee.

The Board asked questions of the presenters prior to rebuttal.

4. Change Healthcare Rebuttal

- Ms. Henley presented rebuttal for the Protestor.

B. Record on Appeal

i. Change Healthcare's Protest to DOM dated August 26, 2022
ii. Change Healthcare's Supplemental Protest dated August 29, 2022
iii. Change Healthcare's Second Supplemental Protest dated September 26, 2022
iv. DOM's Denial of Protest dated January 23, 2023
v. Change Healthcare's Appeal to PPRB dated January 30, 2023
vi. DOM's Response to Change Healthcare's Appeal dated March 3, 2023
vii. MedImpact's Response to Change Healthcare's Appeal dated March 3, 2023
viii. Change Healthcare's Reply dated March 13, 2023

The protest documents are attached to these Minutes as **Attachments B.i through B.viii.** Exhibits to the protest documents are voluminous and not attached to these Minutes, but are included by reference.

Action: A motion was made by Mr. Morehead to close the meeting to deliberate whether or not to declare an executive session. The motion was seconded by Mr. McLeod and unanimously approved by all members present.

Ms. Wray excused the public from the room so that the Board could consider going into Executive Session. Only DFA staff and Board members remained in the room while Board members determined whether an executive session was appropriate.

Action: Mr. Morehead made a motion to go into Executive Session in accordance with Mississippi Code Section 25-41-7(4)(b) for the purpose of strategy sessions or negotiations with respect to issuance of an appealable order when an open meeting would have a detrimental effect on the litigating position of the PPRB. The motion was seconded by Mr. McLeod and unanimously approved by all members present.

III. Executive Session

While the public was excused from the meeting, only discussion of the protest was had.

Motion: A motion was made by Mr. Morehead to deny the protest and uphold the intended award to MedImpact[1]. The motion was seconded by Mr. McLeod and unanimously approved by all members present.

The public returned to an open meeting and Ms. Wray announced that in Executive Session the Board voted to deny the protest and uphold the intended award to MedImpact. Counsel for the Board was directed to prepare an Order in conformance with Board's decision. The Order is attached as Exhibit C.

IV. Other Business

A. Ms. Wray announced the next Regular PPRB Meeting will be May 3, 2023 at 9:00 a.m.

V. Adjournment

Action: A motion was made by Mr. Morehead to adjourn. The motion was seconded by Mr. Katool and unanimously approved by all members present.

These Minutes of the Public Procurement Review Board were approved by the members on 7th of June, 2023.

Rita Wray

Rita Wray, Chair

June 7, 203

Date

[1] This action did not include approval of the contract award. The contract must be submitted to DFA staff for review and approval recommendation and voted upon by the Board.

PPRB
PUBLIC PROCUREMENT
REVIEW BOARD

STATE OF MISSISSIPPI
GOVERNOR TATE REEVES

DEPARTMENT OF FINANCE AND ADMINISTRATION

LIZ WELCH
EXECUTIVE DIRECTOR

NOTICE

A Special Meeting of the

PUBLIC PROCUREMENT REVIEW BOARD

will be held Monday, April 17, 2023, 9:00 a.m. in
Conference Room 145
Woolfolk State Office Building

PUBLIC PROCUREMENT REVIEW BOARD

PUBLIC PROCUREMENT REVIEW BOARD

Special Meeting
Wednesday, April 17, 2023
9:00 a.m.

BOARD ATTENDANCE SHEET

NAME AND TITLE	
Norman McLeod	PPRB Member
Billy Morehead	PPRB
Norman P. Eatod	PPRB
Rita Wray	PPRB

PUBLIC PROCUREMENT REVIEW BOARD

PUBLIC PROCUREMENT REVIEW BOARD

Special Meeting
Wednesday, April 17, 2023
9:00 a.m.

PPRB STAFF ATTENDANCE SHEET

(Please Print)

NAME	OFFICE/DIVISION
Clay Chastain	DFA/OIT
Aubrey Leigh Goodwin	Executive
Brittney Thompson	DFA
Ross Campbell	DFA
Liz DeRouen	DFA/OPC
Liz Poolin	DFA
Suzanne Hudson	AGO
William Collins	AGO
Amelia Gamble	AGO

PUBLIC PROCUREMENT REVIEW BOARD

PUBLIC PROCUREMENT REVIEW BOARD

Special Meeting
Wednesday, April 17, 2023
9:00 a.m

GUEST ATTENDANCE SHEET

(Please Print)

NAME AND TITLE		AGENCY/ENTITY
Rob Coppedge	Sr. Director Sales	MEDIMPACT
Stefanie Mathieson	Associate General Counsel	Medimpact
Sterling Hall	Baker Donelson	Medimpact
Mary Margaret Gray	Gray Jones Kuhn	Change
Keri Hinkley	"	Change
Zack Beasley	Managing Sr Counsel	Change
Kristen Jones	SAAG	Medicaid
JANET McMURRAY	PHRISIE & MED	MEDICAID
Pamela Gibbs	Medicaid	
Matthew Day		PEER
Bryan Wardlaw	Medicaid	DOM
Kayla McKnight	Medicaid	DOM
[illegible]	Change the	Change Healthcare

PPRB
PUBLIC PROCUREMENT REVIEW BOARD

SPECIAL MEETING AGENDA
Monday, April 17, 2023
9:00 a.m.

I. Call to Order

II. Consideration of Protest

A. Protest; Change Healthcare Pharmacy Solutions, Inc. (Change Healthcare) v. Mississippi Division of Medicaid (DOM); Contract for Pharmacy Preferred Drug List (PDL), Supplemental Rebate (SR), Rate Setting and Programmatic Review and Assessment of Core Components (RFx # 3120002271)

1. Protestor will have 20 minutes to present; may reserve 5 minutes for rebuttal
2. Agency will have 20 minutes to present
3. Intended Awardee will have 10 minutes to present
4. Protestor will have 5 minutes for rebuttal

Representatives for Change Healthcare (Protestor):
Mary Margaret Gay, Gay Jones & Kuhn PLLC, Counsel for Change Healthcare
Keri S. Henley, Gay Jones & Kuhn PLLC, Counsel for Change Healthcare

Representatives for DOM (Agency):
Janet McMurtray, Counsel for DOM
Laura L. Gibbes, Chief Counsel, DOM
Kristen Jones, Special Assistant Attorney General, State Agencies Division
Kayla McKnight, Procurement Director, DOM
Bryan Wardlaw, Contracts Officer, Attorney III, DOM
Jennifer O. Wentworth, Deputy Administrator for Finance, DOM

Representatives for MedImpact Healthcare Systems, Inc. (MedImpact)(Intended Awardee):
D. Sterling Kidd, Counsel for MedImpact
Steffanie Mathewson, Associate General Counsel, MedImpact
Rob Coppola, Senior Director, MedImpact Managed Care Organizations and Public Sector Sales Team

B. Record on Appeal

i. Change Healthcare's Protest to DOM dated August 26, 2022
ii. Change Healthcare's Supplemental Protest dated August 29, 2022

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viii. Change Healthcare's Reply dated March 13, 2023

III. Other Business

A. Next Regular PPRB Meeting May 3, 2023 at 9:00 a.m.

IV. Adjournment

Attachment B.i

Change Healthcare's Protest to DOM

August 26, 2022

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August 26, 2022

Via Hand Delivery

Kayla McKnight
Chief Procurement Officer
Procurement and Contracts Division
Mississippi Division of Medicaid
550 High Street| Jackson, MS 39201

Brittney Thompson
Director of the Office of Personal Service Contract Review
Mississippi Department of Finance and Administration
501 N. West St., Jackson, Mississippi 39201

Re: Protest of the Mississippi Division of Medicaid's Notice of Intent to Award RFP #20210813 to MedImpact Healthcare Systems, Inc.

Dear Ms. McKnight,

Pursuant to 12 Miss. Admin. Code Pt. 9, R. 7-112, Change Healthcare Pharmacy Solutions, Inc. ("Change Healthcare"), hereby submits its Protest to the decision of the Mississippi Division of Medicaid's ("DOM") August 19, 2022[1] Notice of Intent to Award RFP #20210813[2] (the "NOI")

[1] While dated August 19, 2022, the Notice of Intent to Award was not received until August 22, 2022, via e-mail. *See* Exhibit C. Following receipt of this e-mail, Change Healthcare was informed during a requested debriefing that it would have until Monday, August 29, 2022 to respond and file its Protest in response to the RFP, as this would be seven (7) calendar days following Change Healthcare's actual receipt of the NOI. On August 26, 2022, Procurement Director Kayla McKnight confirmed that "OPSCR has expressed that the period is seven (7) calendar days from receipt of the Notice of Intent to Award by e-mail." *See* Exhibit D. Due to the failure of Medicaid to deliver the NOI on its stated date, Change Healthcare requests and reserves the right to supplement this Notice until Monday, August 29, 2022.

[2] RFP #20210813 was a contract for the development and management of a Universal Preferred Drug List, administration of the Supplemental Drub Rebate (SR) program, management of the Rate Setting of Covered Outpatient Drugs (COD), and performance of programmatic review and assessment of the core components of the pharmacy program.

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BUTLER SNOW LLP

to MedImpact Healthcare Systems, Inc. ("MedImpact"). Change Healthcare also attaches hereto as Exhibit A its Public Records Request[3] relating to the RFP, and as Exhibit B its Bid Protest Bond in accordance with Section 4.28.6 of the RFP.

The NOI was decided in error for several reasons including, but not limited to: 1) MedImpact's failure to meet the Minimum Experience Requirements of Section 2.1 of the RFP, which required DOM to seek an offeror who has "a minimum of five years of experience servicing government accounts and . . . within the last 48 months, been engaged in a contract or awarded a new contract with *similar work* in a state Medicaid program"; 2) DOM's failure to provide competent evaluators with adequate experience in single preferred drug lists and supplement drug rebate programs to determine the best bid to the RFP; and significant underbidding by MedImpact in violation of Mississippi law and the provisions of the RFP. Because of these errors, the decision of DOM is arbitrary and capricious, and the NOI should be rescinded and awarded to Change Healthcare.

STATEMENT OF FACTS

On August 13, 2021, DOM issued RFP #20210813 to seek a contractor to develop and manage a Universal Preferred Drug List, administer a Supplemental Drub Rebate (SR) program, manage the Rate Setting of Covered Outpatient Drugs (COD), and perform programmatic review and assessment of the core components of DOM's pharmacy program. DOM received proposals from two entities—Change Healthcare and MedImpact. Change Healthcre's proposal was initially deemed non-responsive due to numerous instances of identifying information, and it was not

[3] Change Healthcare seeks pursuant to its Public Records Request the proposal submitted by MedImpact, the Evaluation Committee's Report for the RFP, and all written communication, including but not limited to notes regarding the calculation and scoring of the RFP by member of the Evaluation Committee.

evaluated pursuant to Sections 3-301.05 and 3-301.06 of the *Mississippi Public Procurement Review Board Office of Personal Services Contract Review Rules and Regulations.* MedImpact's proposal, however, continued through the evaluation process.

On December 15, 2021, DOM published a Notice of Intent to award the contract to MedImpact. However, due to the Office of Personal Services and Contract Review's determining MedImpact's name was listed in its Technical Proposal, DOM issued a Solicitation Cancellation Notice on February 25, 2022. A Notice of Rescission of Solicitation Cancellation Notice was subsequently issued by DOM on March 18, 2022, and hearing was conducted to determine whether a violation of Mississippi's procurement laws occurred. On July 15, 2022, DOM issued its final decision adopting the decision of the hearing officer that no violation of Mississippi law occurred and attempted to issue another Notice of Intent to Award to MedImpact.

However, on July 21, 2022, additional concerns were identified in MedImpact's proposal, the Notice of Intent to Award to Impact was again cancelled and DOM requested both Change Healthcare and MedImpact certify their proposals for an additional 180 days to proceed with the evaluation process. The proposals were submitted to OPSCR for review of identifying information, and an NOI dated August 19, 2022 was sent to Change Healthcare via e-mail on August 22, 2022, alerting Change Healthcare that the RFP was to be awarded to MedImpact for a total contract price of $8,199,492.00 for a term to begin on November 1, 2022 and to terminate on October 31, 2025, with an option for two one-year extension periods.

Following receipt of the NOI, Change Healthcare filed a Debriefing Request within three days of receiving the NOI in accordance with 12 Miss. Admin. Code Pt. 9, R. 7-113.01, and a debriefing was head with Change Healthcare on Wednesday, August 24, 2022. During this briefing

Change Healthcare was informed that it would have seven (7) calendar days from the day the NOI *was actually received* to file its Protest, or August 29, 2022.

LEGAL STANDARDS

It is a fundamental rule of government procurement that a bid must comply with the requirements of the solicitation, or else be rejected as ineligible for award. *W.G. Yates & Sons Constr. Co. v. City of Waveland*, 168 So. 3d 963, 972-73 (Ct. App. Miss. 2012) (reversing contract award, when winning bidder's proposal failed to comply with the solicitation); *see also Alfa Laval Separation, Inc. v. United States*, 175 F.3d 1365, 1367-68 (Fed. Cir. 1999) (sustaining bid protest when the awardee's "proposal was technically noncompliant").

Further, the state's contracting decisions may not be "arbitrary and capricious . . . . If an administrative agency's decision is not based on substantial evidence, it necessarily follows that the decision is arbitrary and capricious." *AT&T Corp. v. Miss. Dep't of Info. Tech. Servs.*, 298 So. 3d 938, 946 (Miss. 2020). "Substantial evidence . . . affords a substantial basis of fact from which the fact in issue can be reasonably inferred." *Id.* (citing *Miss. Div. of Medicaid v. All Health Ctr.*, 174 So. 3d 254, 261 (Miss. 2015)).

ARGUMENT

I. MedImpact Failed to Meet the Minimum Qualifications for Experience Required in the RFP

Section 2.1 of the RFP requires the Offeror "to coordinate all phases of the preferred drug list (PDL) and supplemental rebate (SR) administration ...with a *minimum of five years* of experience servicing government accounts and has, *within the last 48 months*, been engaged in a contract or awarded a new contract with similar work in a state Medicaid program."(emphasis added). Upon information and belief, MedImpact does not meet these basic and minimum experience requirements as set forth in the RFP. *See* Affidavit of Howard Daniel Hardin, attached

hereto as Exhibit E. MedImpact has not managed Medicaid Fee-for-Service ("FFS") programs, such as SR administration, in any state in the last 48 months. *See* Exhibit E at ¶ 12.

In fact, MedImpact's lack of experience in administering FFS programs is proven by its response to recent a RFP for the State of Kentucky, whereby MedImpact explicitly acknowledged that only in 2017 did it begin focusing and investing in providing FFS Medicaid solutions as required in the RFP:

Medicaid FFS (Fee For Service) Pharmacy Programs

In addition to its FFS experience collaborating with DMS in 2001 through 2004, in 2017, MedImpact's Senior Leadership team evaluated an evolving Medicaid PBM landscape that was carving PBM services away from health plans and implementing single PDLs (preferred drug lists). Following thorough and careful review, leadership determined that MedImpact solutions are well-aligned with FFS and made the decision to further invest in the technology, staffing, and resources necessary to develop enhanced FFS Medicaid solutions. These solutions include MECT (Medicaid Enterprise Certification Toolkit)-compliant Medicaid rebate, claims processing, and service authorization platforms and business processes.

MedImpact

A. Description of Capabilities | 5

Commonwealth of Kentucky, MCO Pharmacy Benefit Manager (PBM), RFP 7582000000380, attached as Exhibit F; *see also* Ex. E ¶¶ 8-10.

In its Notice of Intent to Award, DOM cited to MedImpact's "over 30 years of experience providing pharmacy programs and services to Medicaid programs and their beneficiaries." But this "experience" is uniquely different than what is required as minimum levels of experience in the RFP regarding FFS Medicaid programs. While MedImpact has experience in Medicaid managed care organizations, it does <u>not</u> have the required FFS Medicaid program experience (SR administration) established by the RFP. Pursuant to Mississippi law, a bid must comply with the requirements of the solicitation—here, MedImpact's proposal does not. Therefore, DOM should reject MedImpact's response as nonresponsive to the RFP for failure to meeting the minimum experience requirements.

II. DOM Failed to Adequately Evaluate the RFP

Mississippi law requires procuring agencies to hold a fair and equal contract competition, so that each bid is evaluated "with all other bids upon the same basis[.]" *Hemphill Constr. Co., Inc. v. City of Laurel*, 760 So. 2d 720, 724 (Miss. 2000). Equal treatment of bids is a key underpinning of competition for government contracts — "a contracting agency must treat all offerors equally, evaluating proposals evenhandedly against common requirements and evaluation criteria." *CliniComp Int'l, Inc. v. United States*, 117 Fed. Cl. 722, 741 (2014) (quotation omitted). DOM's NOI failed to meet these standards as it did not provide evaluators with adequate experience to determine whether the offerors met the minimum required experience as set forth in the RFP.

As stated above, MedImpact has a complete lack of experience in administering FFS programs. Upon information and belief, evaluators with any knowledge regarding the administration and provisions of FFS Medicaid solutions would have determined this lack of experience of MedImpact and its failure to meet the requirements of the RFP. Because of this lack of experience, DOM failed to evaluate Change Healthcare's proposal with proper evaluation criteria. The decision of DOM is therefore arbitrary and capricious and contrary to Mississippi law.

III. MedImpact's Bid is Misleading and Unreasonable and is Therefore Non-Responsive

MedImpact's bid proposal was for a total amount of $8,199,492.00. DOM's initial procurement request budged an anticipated contract amount of $15,500,000.00, as evidenced by Exhibit G attached hereto. Section 4.18 of the RFP provides as follows:

> **4.18 Rejection of Proposals**
> A proposal may be rejected in whole or in part when in the best interest of the State. A proposal may also be rejected for failure to conform to the rules or the

> requirements contained in this RFP. Proposals must be responsive to all requirements of the RFP in order to be considered for contract award. DOM reserves the right at any time to cancel the RFP or, after the proposals are received, to reject any of the submitted proposals determined to be non-responsive. Reasons for rejecting a proposal include, but are not limited to, the following:
>
> . . .
>
> *5. The proposal contains false or misleading statements or references;*
>
> . . .
>
> *8. The proposal is not responsive, i.e., does not conform in all material respects to the RFP;*
>
> . . .
>
> *12. The proposed price is clearly unreasonable.*

Item 12 of Section 4.18 complies with a fundamental tenant of procurement law—that proposals must be realistically priced and that it is mandatory for an agency to properly evaluate whether the proposed price is realistic. *See, e.g., UnitedHealth Military & Veterans Services, LLC v. United States*, 132 Fed.Cl. 529, 556 (2017) ("We have held that where, as here, a solicitation puts offerors on notice that a procuring agency may reject proposals that are evaluated as being unrealistic, the agency's rejection of proposals is discretionary, but the realism evaluation is mandatory.") (citations omitted); *see also UnitedHealth Military & Veterans Servs., LLC, et al.*, B-411837.2, 2016 WL 6821970 at *5 (Nov. 9, 2016).

Upon information and belief, MedImpact proposed a total contract price of approximately $8.1 million.[4] Again, the contract price for this scope of work was estimated to be $15.5 million. *See* Exhibit F. There is no proof in the present record that Medicaid conducted an analysis of the MedImpact price to determine whether this price, more than $6 million (approximately 43%)

[4] Please note that Protestor through its counsel, has requested a copy of the procurement materials that could be used to verify this information. Therefore, pursuant to Miss. Code Ann. § 25-61-5(1)(b), Protestor should be given additional time to "protest the procurement or intended award prior to contract execution.

below the agency's own estimates, was realistic. Therefore, the proposal of MedImpact was both misleading and non-responsive to the RFP, making DOM's decision to award the contract to MedImpact arbitrary and capricious.

CONCLUSION

For these reasons, DOM's decision to award the RFP to MedImpact was both arbitrary and capricious and contrary to the RFP' solicitation. We respectfully request that DOM rescind the NOI and award the contract to the only remaining offeror to meet the requirements of the RFP, Change Healthcare.

Sincerely,

BUTLER SNOW LLP

Mark W. Garriga

cc: Molly Drake, Esq.

Of Counsel
Mark Garriga (MB No. 4762)
Parker Berry (MB No. 104251)
Matt Sitton (MB No. 104091)
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Attachment B.ii

Change Healthcare's Supplemental Protest

August 29, 2022

BUTLER|

August 29, 2022

Via Hand Delivery

Kayla McKnight
Chief Procurement Officer
Procurement and Contracts Division
Mississippi Division of Medicaid
550 High Street| Jackson, MS 39201

Re: Supplement to Protest of the Mississippi Division of Medicaid's Notice of Intent to Award RFP #20210813 to MedImpact Healthcare Systems, Inc.

Dear Ms. McKnight,

Pursuant to 12 Miss. Admin. Code Pt. 9, R. 7-112, Change Healthcare Pharmacy Solutions, Inc. ("Change Healthcare"), hereby submits its Supplement to its Protest to the decision of the Mississippi Division of Medicaid's ("DOM") August 19, 2022, Notice of Intent to Award RFP #20210813 [1] (the "NOI") to MedImpact Healthcare Systems, Inc. ("MedImpact"). Change Healthcare submits this Supplementation in accordance with the seven (7) day timeframe set forth in R. 7-112, as the NOI—despite being dated August 19, 2022—was not issued until August 22, 2022. The issuance of the NOI and correct 7-day timeframe was acknowledged and confirmed by Kayla McKnight, Chief Procurement Officer of DOM, as evidenced by Exhibit D to Change Healthcare's August 26, 2022 Protest (the "Protest"). This Supplement is therefore timely and will address additional facts and legal authorities regarding the arguments in the Protest that 1) DOM

[1] RFP #20210813 was a contract for the development and management of a Universal Preferred Drug List, administration of the Supplemental Drug Rebate (SR) program, management of the Rate Setting of Covered Outpatient Drugs (COD), and performance of programmatic review and assessment of the core components of the pharmacy program (the "RFP").

MARK W. GARRIGA
601 985 1586

Failed to Adequately Evaluate the RFP and III) MedImpact's Bid is Misleading and Unreasonable and is Therefore Non-Responsive.

ARGUMENT

II. DOM Failed to Adequately Evaluate the RFP

DOM's first evaluation committee for the RFP consisted of eight individuals, including multiple individuals with significant knowledge and expertise relating to the operation and oversight of DOM's pharmacy program. *See* Ex. A. After concerns were expressed about identifying information in both MedImpact and Change Healthcare's proposals, the proposals were submitted to the Mississippi Public Procurement Review Board Office of Personal Services Contract Review for de-identification, and a new evaluation committee was subsequently chosen. This committee consisted of three individuals. *See* Ex. B.

While each of these individuals have significant experience in their respective fields, none appear to have any requisite experience which would lend itself to the evaluation of the RFP. Upon information and belief, one individual's experience is in the field of governmental relations, legislative affairs, and public policy—not involving the complexities of the development and management of a pharmacy preferred drug list ("PDL") or implementation of a supplemental drug rebate ("SR") program. Another serves as the State Insurance Administrator and the Director of the Mississippi Department of Finance and Administration's Office of Insurance, and upon information and belief, is similarly inexperienced with such matters. Lastly, the remaining individual's role on the evaluation committee was explicitly limited to a review of the audited financials of the proposals.

The relative inexperience of the evaluation committee may, in part, have been responsible for the failure of the reviewers to adequately appreciate the significance of the pricing difference, discussed in greater detail below. A comparison of the scoring shows that 15 of the 18.27-point

difference was attributable to MedImpact's lower price. The significant difference between the pricing of the two proposals was scored favorably by the reviewers when, in fact, it should have been a red flag that triggered a price realism analysis.

III. MedImpact's Bid is Misleading and Unreasonable and is Therefore Non-Responsive

Section 4.30 of the RFP requires those responding to provide a price for a three (3) year base contract, with pricing for two (2) additional years at the option of DOM. As noted in the NOI and as communicated to Change Healthcare in its debriefing, MedImpact's bid proposal was for a total amount of $8,199,492.00. It is Change Healthcare's understanding that this was the total amount of the MedImpact proposal for the full five-year period. If so, this would mean that MedImpact priced this work a full $7,300,508 or *47.10% below* what DOM estimated the work would cost. *See* Protest.

Change Healthcare has submitted a Public Records Request to obtain Appendix A to the MedImpact proposal so that it can independently verify that its Budget Summary information is correct; that is, that the $8.1 million figure represents the competitor's price for five (5) years and not the three (3) year base period. *See* Ex. A to the Protest. Section 25-61-9(7) of the Mississippi Code provides that "personal services provided, *the price to be paid, and the term of the contract* shall not be deemed to be a trade secret or confidential commercial or financial information . . . and shall be available for examination, copying or reproduction as provided for in this chapter." (emphasis added). This section dovetails with the requirement in Miss. Code Ann. § 25-61-5(7) that a protesting party "shall have a reasonable amount of time, but in no event less than seven (7) working days *after* the production of the competitive sealed proposals, to protest the procurement or intended award prior to contract execution." (emphasis added).

Change Healthcare's request, in this regard, is not an effort to cast aspersions on the integrity of any individual. Rather, because there is such a large disparity between DOM's own

estimate of the value of these services, Change Healthcare's pricing (submitted through a partnership with the incumbent vendor), and the MedImpact proposal, it is extremely important that the agency determine whether the proposal selected is, in fact, accurate and reasonable and thus responsive to the RFP. *See* RFP, Sect. 4.18. As noted previously, it is a fundamental tenant of procurement law that proposals must be realistically priced for the procuring agency to properly evaluate whether pricing is realistic. *See, e.g., Mortgage Contracting Services, LLC v. United States*, 153 Fed. Cl. 89, 135 (2021) ("[A]n agency is required to perform a price realism analysis when the solicitation expressly provides that the agency will evaluate price realism or states that '[t]he Government may reject any proposal that is ... unreasonably high or low in price when compared to Government estimates, such that the proposal is deemed to reflect an inherent lack of competence of [sic] failure to comprehend the complexity and risks of the program.'") (*quoting VitalCare Corp. v. United States*, 122 Fed. Cl. 559, 573 (2015)).

Allowing Change Healthcare to review MedImpact's winning price proposal and holding a final decision until all parties have the same information would help assure DOM that the proposal selected meets these criteria. Change Healthcare's debriefing made it clear that 15 of the approximately 18-points that made the difference between MedImpact's and Change Healthcare's scores was due to pricing. It is, therefore, of the utmost importance to determine whether the MedImpact price was not only realistic in relation to the value of the services provided, but also accurately scored.

CONCLUSION

For these reasons and reasons given in the original Protest, DOM's decision to award the RFP to MedImpact was both arbitrary and capricious and contrary to the RFP' solicitation. We

respectfully request that DOM rescind the NOI and award the contract to the only remaining offeror to meet the requirements of the RFP, Change Healthcare.

Sincerely,

BUTLER SNOW LLP

Mark W. Garriga

cc: Brittney Thompson
Director of the Office of Personal Service Contract Review
Mississippi Department of Finance and Administration
501 N. West St., Jackson, Mississippi 39201
Molly Drake, Esq.

Of Counsel
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MISSISSIPPI DIVISION OF
MEDICAID

December 15, 2021

Evaluation Committee
RFQ #20210813
Pharmacy PDL, SR, Rate Setting and Programmatic Review and Assessment of Core Components

The following individuals served on the evaluation committee for RFP #20210813 based on knowledge and expertise related to the operation and oversight of the Pharmacy Program:

Terri Kirby – Pharmacy Director, Office of Pharmacy
Christopher Yount – Staff Officer III, Office of Pharmacy
Gail McCorkle – Pharmacist III, Office of Pharmacy
Dennis Smith – Pharmacist III, Office of Pharmacy
Richard Manning – Director of Hospital Programs, Office of Reimbursement
Shanda Boarden – Medicaid Nurse Bureau Director, Office of Medical Services
Laura Sue Reno – Medicaid Nurse Bureau Director, Office of Program Integrity
Keith Heartsill – Contractor, Office of Financial Reporting*

* Consulted during the review of the audited financials; See attached educational and professional qualifications and practical experience.

Exhibit A

Attachment B.iii

Change Healthcare's 2nd Supplemental Protest

September 26, 2022

BUTLER | SNOW

September 26, 2022

VIA MESSENGER

Kayla McKnight
Chief Procurement Officer
Procurement and Contracts Division
Mississippi Division of Medicaid
550 High Street| Jackson, MS 39201

Re: Second Supplement to Protest of the Mississippi Division of Medicaid's Notice of Intent to Award RFP #20210813 to MedImpact Healthcare Systems, Inc.

Dear Ms. McKnight:

Pursuant to 12 Miss. Admin. Code Pt. 9, R. 7-112, Change Healthcare Pharmacy Solutions, Inc. ("Change Healthcare"), hereby submits its Second Supplement to its Protest to the decision of the Mississippi Division of Medicaid's ("DOM") August 19, 2022, Notice of Intent to Award RFP #20210813[1] (the "NOI") to MedImpact Healthcare Systems, Inc. ("MedImpact"). Change Healthcare submits this Second Supplement following its receipt of documentation pursuant to its August 26, 2022 Public Records Request for the proposal submitted by MedImpact, the Evaluation Committee's report, and any and all and written communications regarding the calculation and scoring of the RFP.[2] This Second Supplement addresses the following four arguments derived

[1] RFP #20210813 was a contract for the development and management of a Universal Preferred Drug List, administration of the Supplemental Drug Rebate (SR) program, management of the Rate Setting of Covered Outpatient Drugs (COD), and performance of programmatic review and assessment of the core components of the pharmacy program (the "RFP").

[2] This documentation was sent by DOM via e-mail on September 1, 2022 to an employee of counsel for Change Healthcare who was not the Requestor of the public records. Exhibit "A." The Response states it was sent via e-mail to counsel of record, Mark Garriga; however, counsel did not receive the Response and was unaware of its receipt until a conversation with Cody Smith, Esq. of DOM on September 20, 2022.

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BUTLER SNOW LLP

from the documents produced by DOM in response to the Public Records Request: I) MedImpact does not meet the RFP's Minimum Requirements; II) MedImpact's proposal violated Rule 6.2.1 of the RFP and Mississippi law; III) the MedImpact price is not reasonable; and IV) DOM failed to properly score the Change Healthcare Proposal.

ARGUMENT

I. MedImpact Does Not Meet the RFP's Minimum Requirements

MedImpact does not meet the RFP's minimum requirements because the offeror does not possess the requisite experience in traditional fee-for-service ("FFS") reimbursement. As background, The Medicaid Drug Rebate Program ("MDRP") is a program that includes Centers for Medicare & Medicaid Services (CMS), state Medicaid agencies, and participating drug manufacturers that helps to offset the federal and state costs of most outpatient prescription drugs dispensed to Medicaid patients. *See, e.g.*, Medicaid Drug Rebate Program, Medicaid.gov, https://www.medicaid.gov/medicaid/prescription-drugs/medicaid-drug-rebate-program/index.Html. The MDRP's rebate, originally applicable only to FFS Medicaid reimbursements, was subsequently extended to outpatient drugs purchased for beneficiaries covered by Medicaid Managed Care Organizations ("MCOs") through the passage of the Affordable Care Act in 2010. *See* Patient Protection and Affordable Care Act, Public Law 111-148 (codified at 42 U.S.C. § 1396b (m)(2)(A)(xiii)). Thus, the MDRP now covers drugs purchased for Medicaid beneficiaries on a fee-for-service basis and drugs purchased by MCOs.

In addition to the statutory rebate set forth in the MDRP, state Medicaid programs can negotiate for supplemental rebates ("SRs") with drug manufacturers. Such rebates are not subject

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Therefore, this supplement is supplied within a "reasonable amount of time," pursuant to Miss. Code Ann. § 25-61-5(1)(b).

to a "best price" floor as set by the MDRP, and state Medicaid agencies are able to leverage these supplemental rebates through the creation of Preferred Drug Lists ("PDL"). 42 U.S.C. § 1396r-8(c)(1)(C). These PDLs can be used to create incentives to prescribe certain drugs, such as those not requiring a prior authorization. MCOs may also negotiate their own supplement rebates with manufacturers outside of a Medicaid agency's FFS program. Thus, creation of a PDL and negotiating a supplemental rebate for both managed care *and* FFS drug claims is the basis of the RFP. *See* RFP, § 2.1.2.2(1) ("The Contractor shall be qualified and experienced to process, invoice, resolve disputes and account for all Medicaid Supplemental Rebates, *inclusive of fee-for-service and managed care drug* claims.") (emphasis added).

As stated in Change Healthcare's initial protest ("Protest"), Section 2.1 of the RFP requires the offeror "to coordinate ***all phases*** of the preferred drug list (PDL) and SR administration ...with a *minimum of five years* of experience servicing government accounts and has, *within the last 48 months*, been engaged in a contract or awarded a new contract with *similar work* in a state Medicaid program."(emphasis added). Section 2.1.1.1 provides "Medicaid beneficiaries are inclusive of *both fee-for-service (FFS)* beneficiaries and Mississippi Coordinated Access Network (MSCAN) beneficiaries." (emphasis added). Further, Section 2.1.2.2(8) provides that the Offeror "shall collect supplemental rebates *for both fee-for-service (FFS)* and coordinated/managed care claims." (emphasis added). The RFP, therefore, is clear in its requirement that: (1) an Offeror must have a minimum of five years of experience of administering both FFS and MCO pharmacy PDL and SR programs; *and* (2) must either have an existing governmental account or have been awarded a governmental contract involving both types of reimbursement within the last 48 months.

But Change Healthcare believes that MedImpact does not have the requisite FFS Medicaid experience. The importance of prior experience administering an FFS Medicaid program is

evidenced by the volume of DOM's FFS pharmacy claims, which in calendar year 2020 was almost a million prescriptions (961,542). *See* RFP Question and Answer Document – REVISED – Amendment #4, Questions #3 and #25. FFS is a *significant* part of DOM's pharmacy program.

Change Healthcare has submitted a request to obtain a copy of MedImpact's unredacted proposal, in part, to review MedImpact's listing of Medicaid projects it claims support this requirement. *See* Exhibit "B" (seeking Attachment B to the MedImpact redacted proposal). As stated in the initial Protest and as evidenced in prior RFP responses of MedImpact, upon information and belief MedImpact does not have the requisite experience required by the RFP in administering FFS programs. *See* Affidavit of Dan Hardin at ¶¶ 6-12 (Exhibit "F" to Protest).

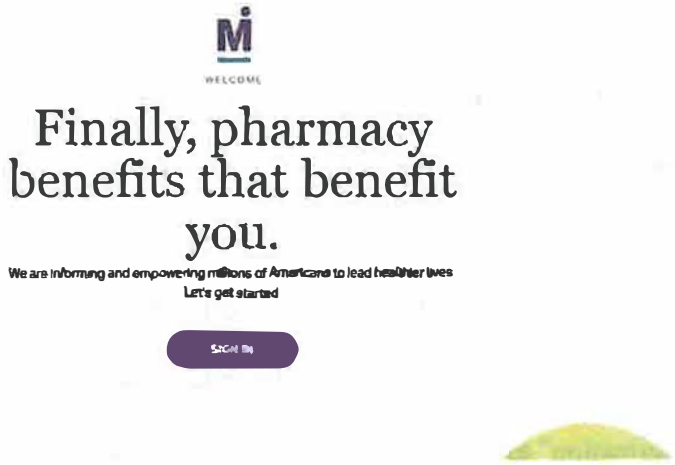
Although governmental bodies may overlook an offeror's non-compliance with a technical procurement requirement in certain circumstances, that is only true for a "minor irregularity" and then only when the irregularity does not "alter or destroy the competitive bidding process. . . ." *Miss. State Port Authority at Gulfport v. Eutaw Construction Company, Inc.*, 340 So. 3d 303, 311-312 (¶23) (Miss. 2022). Such an irregularity must not "prejudice the rights of the public *or the other bidders* . . . ." *Hill Brothers Construction & Engineering Co. v. Mississippi Transportation Commission*, 909 So. 2d 58, 70 (Miss. 2005) (emphasis added). Here, a failure by MedImpact to meet the RFP's requirements of five years' prior experience administering *both* FFS and MCO programs and being awarded a *similar* contract in the last 48 months would not constitute a "minor irregularity." Further, such a failure would certainly prejudice Change Healthcare, a bidder *which does* meet this--and all other—requirements.

Upon information and belief, MedImpact lacks the requisite FFS experience to meet the explicit requirements of the RFP. Therefore, the NOI should be rescinded.

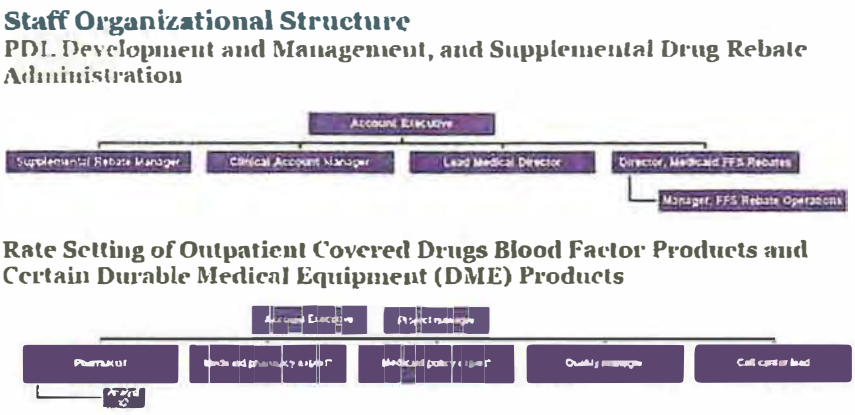
II. MedImpact's Proposal Violated Rule 6.2.1 of the RFP and Mississippi Law

MedImpact's proposal violated Rule 6.2.1 of the RFP and Mississippi law because it contained identifying information. Rule 6.2 of the RFP states that an Offeror is "responsible for ensuring that the sealed Technical Proposal and Cost Proposal have no *identifying information* as defined in Section 6.2.1 of this subsection." (emphasis added). Rule 6.2.1 of the RFP defines "identifying information" as "any prior, current and future names or addresses of the offeror, any names of incumbent staff, any prior, current and future logos, watermarks, ***and company colors***, any information, which identifies the offeror as an incumbent, and any other information, which would affect the blind evaluation of technical or cost factors." (emphasis added). This requirement mirrors PPRB/OPSCR regulations. *See* PPRB OPSCR Rules and Regulations, Section 3-203.12 ("Identifying information includes, but is not limited to, any prior, current and future names or addresses of the offeror, any names of incumbent staff, any prior, current and future logos, watermarks, and ***company colors***, any information, which identifies the offeror as an incumbent, and any other information, which would affect the blind evaluation of technical or cost factors.") (emphasis added).

MedImpact's company colors are evidenced both in their company logo and throughout their website and could be described as a unique combination of purple, yellow/green and teal/turquoise.



MedImpact website, https://www.medimpact.com/. In stark violation of the RFP and PPRB regulations, MedImpact's Technical and Cost Proposals are *replete* with the same typestyle and company colors, as evidenced by the following two examples from both the beginning and end of MedImpact's technical proposal:



124	3.2.5.1.11	Parallel testing	1 day	Fri 4/15/22	Fri 4/15/22	Manager of Rebate Operations	
125	3.2.5.1.12	Pull and review extracts for data validations	3 days	Mon 4/18/22	Wed 4/20/22	IT,Manager of Rebate Operations	
126	3.2.5.1.13	Provide agreed upon documents and request sign off from DOM	1 day	Wed 4/20/22	Wed 4/20/22	Manager of Rebate Operations/Director of Medicaid	
127	3.2.5.2	MILE... ONE: Completion of interface configuration	0 days	Fri 4/22/22	Fri 4/22/22	IT	MILESTONE
128	3.2.5.3	MILESTONE: DOM Approval	0 days	Fri 4/22/22	Fri 4/22/22	DOM	MILESTONE
129	3.2.6	2.a. Determine Day 1 Rate Methodology	65 days	Wed 2/2/22	Fri 4/29/22		
130	3.2.6.1	Confirmation of continued use of existing methodology for Day 1	21 days	Wed 2/2/22	Wed 3/2/22	Project manager,Pharmacist,MAS Director	Note: Assumes DOM will
131	3.2.6.2	2.a.1. Ingredient Cost for drugs with no Maximum Allowable Cost price	19 days	Wed 2/23/22	Mon 3/21/22		
132	3.2.6.2.1	Compare DOMs AAC methodology (AWP discount) for no standard price to the current CMS NADAC equivalency metrics	14 days	Wed 2/23/22	Mon 3/14/22	CPA,analyst,Pharmacist,Informatica	
133	3.2.6.2.2	Determine if the AWP discount needs updated based on comparison	5 days	Wed 3/9/22	Tue 3/15/22	Pharmacist,Analyst	
134	3.2.6.2.3	Update the AAC list	10 days	Mon 3/14/22	Fri 3/25/22	Pharmacist,Analyst	
135	3.2.6.2.3.1	DOM approval of AAC List	21 days	Thu 3/24/22	Thu 4/21/22	MS Medicaid	
136	3.2.6.2.3.2	DELIVERABLE: Updated AAC list for 4/1 go-live	1 day	Thu 3/24/22	Thu 3/24/22		DELIVERABLE
137	3.2.6.2.4	Create AAC rate file to send to DOM claims processor	2 days	Thu 3/24/22	Tue 3/29/22	Analyst	

MedImpact's Technical Proposal at pgs. 2, 100, attached hereto as Exhibit "C." These are not generic colors that may or may not correspond to a corporate marketing image. Rather, the use of such unique colors, combined with the use of corresponding typestyles in its Technical and Cost proposals constitutes "identifying information," potentially biasing the evaluators and clearly indicating which proposal belonged to MedImpact. MedImpact, therefore, failed in its responsibility to ensure that the parts of its proposal that were to be blind scored would have no identifying information as required by 6.2 of the RFP and Section 3-203.12 of the PPRB/OPSCR Rules and Regulations.

Procurement best practices, as provided for in the PPRB/OPSCR regulations and Mississippi statutory law, requires that if identifying information is revealed to the evaluators "the procurement process *shall* be terminated and the proposal or qualifications resolicited." Miss. Code Ann. § 31-7-417(2) (emphasis added). MedImpact's purposeful inclusion of identifying information in its proposal is not a technical or minor irregularity that can or should be excused.

III. The MedImpact Price Is Not Realistic

The latest documents produced by DOM include MedImpact's unredacted budget summary, attached to their proposal as Appendix A. *See* Exhibit "D." This document confirms that MedImpact quoted a five-year price of $8,199,492, which is $7,300,508 (47.10 %) below DOM's anticipated contract amount. *See* Protest, Exhibit "G" (PPRB Minutes, May 5, 2021).

Federal agencies are required to perform a "price realism analysis" when the solicitation provides that the government may reject any proposal that is unreasonably high or low in price when compared to government estimates. *See Rotech Healthcare, Inc. v. United States and Community Surgical Supply, Inc.*, 11 Fed.Cl. 387, 403 (2015). Likewise, the RFP in the present procurement provides that DOM has the authority to reject any proposal in which the "proposed price is clearly unreasonable." *See* RFP Sect. 4.18(12). Our courts look to federal acquisition laws for guidance when there is no Mississippi procurement decision on point. *See, e.g, Hill Bros. Construction*, 909 So.2d at 67 (¶41) (Miss. 2005).

Change Healthcare has requested the unit pricing assumptions that underly the MedImpact budget summary. *See* Exhibit "B." But the pages of the MedImpact proposal containing this information in DOM's production of documents have been redacted. They should not have been. Such information is considered a public record pursuant to Miss. Code Ann. § 25-61-9(7), which provides that the "unit prices" *and* the "overall price to be paid" in a procurement contract awarded must be made available for examination and copying. Therefore, until these records are produced Change Healthcare respectfully requests that it be given a "reasonable amount of time," pursuant to the authority of Miss. Code Ann. § 25-61-5(1)(b), to supplement the Protest.

IV. DOM Failed to Properly Score the Change Healthcare Proposal

Finally, it is worth noting that the evaluation notes produced by DOM show that the agency incorrectly deducted several potential points (out of a potential 6.27) from the Change Healthcare proposal because the agency concluded that the Offeror failed to include references in its proposal. *See* Exhibit "D"; *see also* Exhibit "E" (email from K. Holland to W. Ervin, *et al.*, August 9, 2022). However, Change Healthcare's proposal *did* include such references. *See* Change Healthcare Proposal at 169. When considered in conjunction with the other errors detailed in the Protest, First

Supplement and this Second Supplement, it is clear that the agency's evaluation and scoring of the proposals was arbitrary, capricious, and not based on substantial evidence.

CONCLUSION

For these reasons and those presented in its original Protest and First Supplement, we respectfully request that DOM rescind the NOI and award the contract to the only remaining offeror to meet the requirements of the RFP, Change Healthcare. In the alternative, the agency should not reach a final decision until the additional public records requested by Change Healthcare are produced and the requestor is given a reasonable amount of time to further supplement this protest.

Sincerely,

BUTLER SNOW LLP

Mark W. Garriga

cc: Ms. Brittney Thompson
Director of the Office of Personal Service Contract Review
Mississippi Department of Finance and Administration
501 N. West St., Jackson, Mississippi 39201

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EXHIBIT
A

Walter Sillers Building | 550 High Street Suite 1000 | Jackson, Mississippi 39201

MISSISSIPPI DIVISION OF
MEDICAID

08/31/2022

Mark Garriga
Butler Snow LLP
Mark.Garriga@butlersnow.com
Via Email

Dear Mark Garriga,

On August 26, 2022, The Division of Medicaid (DOM) received a public records request for the following:

- The proposal submitted by MedImpact Healthcare Systems, Inc. in response to the RFP;
- The Evaluation Committee Report(s) for the RFP; and
- All written communications, including but not limited to notes regarding the calculation and scoring of the RFP, by members of the Evaluation Committee.

Pursuant to Miss. Code Ann. § 25-61-1 et seq., our office performed a search of records responsive to your request. On August 31, 2022, you had a conversation with Cody Smith of our office where your you discussed your first and third request. Your first request could be for information protected under Miss. Code §25-61-9, which would require the Division to notify Medimpact and they will have 21 days to seek a protective order preventing disclosure. There is a version that has been redacted by Medimpact of information that Medimpact considers protected. That version is being provided, but you may request the unredacted version, and DOM will notify Medimpact. As for your third request, the DOM reads it to be for communications of the evaluators regarding the calculation and scoring of proposals. The DOM is producing records that it considers responsive. This will include communications, training material, attestations, the individual evaluator scoring, and the consensus scoring. Below you will find the DOM's index as well as privilege log.

The Division has agreed to waive all costs associated with this request. Our compliance with this request shall not be considered a waiver of any right, privilege, exemption, or argument that our office may have under the Public Records Act or otherwise.

Index	
Pages	Description
DOMPRR_20220826GARRIGA_000001-DOMPRR_20220826GARRIGA_000055	Communications of the Evaluators regarding Scoring and Evaluation
DOMPRR_20220826GARRIGA_000056-	Evaluator Individual Notes

Attachment B.iv

DOM's Denial of Protest

January 23, 2023

OFFICE OF THE GOVERNOR
Walter Sillers Building | 550 High Street, Suite 1000 | Jackson, Mississippi 39201

MISSISSIPPI DIVISION OF
MEDICAID

January 23, 2022

VIA ELECTRONIC AND U.S. MAIL
Dan Hardin
Change Healthcare Pharmacy Solutions, Inc.
45 Commerce Drive
Augusta, ME 04330
dhardin@changehealthcare.com

Re: Final Decision on Change Healthcare Pharmacy Solutions, Inc.'s Protest of the Mississippi Division of Medicaid's Notice of Intent to Award RFP #20210813 to MedImpact Healthcare Systems, Inc.

Dear Mr. Hardin:

The Mississippi Division of Medicaid has completed its review of Change Healthcare Pharmacy Solutions, Inc.'s Protest of the Mississippi Division of Medicaid's Notice of Intent to Award RFP #20210813 to MedImpact Healthcare Systems, Inc.

After reviewing the documentation concerning the procurement and the protest, I have concluded that the protest is without merit. The attached recommendation of the Office of Procurement is adopted, and those findings are incorporated herein. This letter serves as notice that the Division of Medicaid will proceed with the intent to award the contract to MedImpact Healthcare Systems, Inc.

This is the final agency decision in this matter. Any questions regarding this decision should be directed to Laura L. Gibbes, laura.gibbes@medicaid.ms.gov.

Sincerely,

Drew L. Snyder
Executive Director
Mississippi Division of Medicaid

Cc: Mark Garriga, Esq.

OFFICE OF THE GOVERNOR
Walter Sillers Building | 550 High Street, Suite 1000 | Jackson, Mississippi 39201

MISSISSIPPI DIVISION OF
MEDICAID

MEMORANDUM

To: Drew Snyder

From: Office of Procurement

Date: January 20, 2023

Re: Response and Recommendation to Change Healthcare's Protest of the Award of RFP # 20210813 to MedImpact

In August 2021, the Mississippi Division of Medicaid ("DOM") published Request for Proposal #20210813 - "Pharmacy Preferred Drug List, Supplemental Rebate, Rate Setting and Programmatic Review and Assessment of Core Components" (hereinafter "this RFP" or "Pharmacy RFP"). In response, DOM received proposals from MedImpact Healthcare Systems, Inc., ("MedImpact") and Change Healthcare Pharmacy Solutions, Inc. ("Change"). After a fair and impartial evaluation of the proposals by a duly constituted evaluation committee, DOM published a Notice of Intent to Award, naming MedImpact as the prevailing offeror. Thereafter, Change filed a procurement protest, challenging the award of the Pharmacy RFP to MedImpact.

After a thorough review of Change's protest and the corresponding procurement process, the Office of Procurement finds there is no merit to any of the issues raised in Change's protest. Instead, the Office of Procurement finds there is substantial evidence to support awarding the contract to MedImpact and that DOM did not act arbitrarily or capriciously at any point in the

procurement process to the detriment of Change. Both the Change and MedImpact proposals were objectively reviewed by evaluators possessing the necessary relevant experience, and those evaluators correctly applied all applicable rules, regulations, and terms of the RFP. Both the evaluators' scoring of the proposals and DOM's awarding of the contract to MedImpact are supported by substantial evidence, and there is no evidence of any arbitrary nor capricious conduct by DOM. Accordingly, the Office of Procurement recommends that DOM affirm the award of the Pharmacy RFP to MedImpact.

I. FACTS AND PROCEDURAL BACKGROUND

On August 13, 2021, DOM's Office of Procurement published a RFP soliciting offers from "qualified, experienced, responsible and financially sound vendors to develop and manage the Universal Preferred Drug List [], administer the Supplemental Drug Rebate [] program, manage the Rate Setting of Covered Outpatient Drugs [], and perform programmatic review and assessment of core components of the pharmacy program as assigned by DOM." ***Purpose***, RFP #20210813, 1.1 at *4. In response to the RFP, DOM received proposals from two vendors; (1) MedImpact, a vendor that has never contracted with DOM, and (2) Change, the vendor that currently holds the existing pharmacy contract with DOM.

During the initial review of the two proposals by DOM, Change's proposal was deemed non-responsive due to over 350 violations of the de-identification requirement of the Pharmacy RFP and Sections 3-301.05 and 3-301.06 of the *Mississippi Public Procurement Review Board Office of Personal Services Contract Review Rules and Regulations* (hereinafter OPSCR Rules"). Accordingly, Change's proposal was disqualified. MedImpact's proposal, on the other hand, was deemed responsive; thus, it was the only proposal submitted to an evaluation committee for

scoring. The evaluation committee determined that MedImpact's proposal met all the requirements of the Pharmacy RFP, and a Notice of Intent to Award was published by DOM on December 15, 2021, naming MedImpact as the awardee.

Thereafter, DOM submitted the MedImpact proposal and award to OPSCR for review, as part of the Public Procurement Review Board ("PPRB") contract approval process. In reviewing the award and underlying proposals, OPSCR identified one instance of "identifying" information contained in MedImpact's Technical Proposal, which it believed constituted a violation of OPSCR Rules 3-203.01(f)-(g), 3-203.12, 3-204.01.03 and Mississippi Code Annotated Section 31-7-417(2). Consequently, on February 25, 2022, DOM issued a Solicitation Cancellation Notice, cancelling the Pharmacy RFP solicitation. MedImpact appealed the Solicitation Cancellation Notice, arguing that it was entitled to an "opportunity to be heard" under OPSCR Rules 5-203.01 prior to any cancellation of the solicitation. After reviewing MedImpact's arguments, DOM issued a Notice of Rescission of Solicitation Cancellation Notice; this Notice cancelled the February 25, 2022 Solicitation Cancellation Notice and stated that a hearing would be conducted in compliance with OPSCR Rules 5-203.01.

On June 22, 2022, DOM conducted a Rule 5-203.01 hearing before Judge James Bell, a DOM Hearing Officer, to determine if the single reference in the MedImpact Technical Proposal noted by OPSCR in its review constituted "identifying information" and, if so, whether it required cancellation of the solicitation. In addition, DOM consulted with the Special Assistant Attorney General assigned to the Department of Finance and Administration ("DFA")/OPSCR, as required by OPSCR Rules 5-203.01. Following the hearing, Judge Bell issued a Report and Recommendation on July 2, 2022, finding that no violation of Mississippi law or OPSCR rules had occurred and that, in any event, DOM had authority to excuse an irregularity stemming from

the immaterial, one-time inclusion of MedImpact's name in its proposal. Thereafter, on July 15, 2022, DOM adopted the findings of the Hearing Officer and issued a Final Decision on the matter.

Based on these actions, DOM issued another Notice of Intent to Award to MedImpact on July 21, 2022. Thereafter, OPSCR continued its review of the MedImpact proposal and award. As part of this review, OPSCR raised additional concerns regarding "company colors" within MedImpact's proposal[1] that could also be construed as "identifying information." To comply with applicable regulations, OPSCR advised DOM it could de-identify both the MedImpact and Change proposals and submit them to a new team of evaluators for re-evaluation.

After discussions with OPSCR, DOM determined that it was in the best interest of the state to re-evaluate both proposals. Thus, DOM cancelled the Notice of Intent to Award issued on July 21, 2022, and de-identified both the MedImpact and Change proposals. The de-identified proposals were sent to OPSCR for a second review to ensure that all potential identifying information had been removed. Once OPSCR's review was completed, the de-identified proposals were submitted to a new evaluation committee. The new evaluation committee evaluated the proposals in accordance with comprehensive, fair, and impartial evaluation procedures and processes and scored the proposals as follows:

Ranking	Offeror	Total Score
1	MedImpact	79.67
2	Change	61.40

Based on these results, DOM published a Notice of Intent to Award on August 19, 2022, identifying MedImpact as the awardee of the Pharmacy RFP.

[1] Some of the type and graphics contained in MedImpact's proposal were in blue/purple ink. Blue/purple is a color that both MedImpact and Change use in its logo, letterhead, public documents, social media, and other branding materials.

On August 26, 2022, Change submitted its Protest of the Mississippi Division of Medicaid's Notice of Intent to Award RFP #20210813 to MedImpact Healthcare Systems, Inc. (hereinafter "this Protest" or "Change's Protest"). Change submitted a supplemental protest on August 29, 2022, and a second supplemental protest on September 26, 2022.[2]

As part of its protest-related activities, Change submitted several requests for documents to DOM under the Mississippi Public Records Act, Miss. Code Ann. §§ 25-61-1 *et seq*. On August 26, 2022, Change submitted a public records request seeking a fully unredacted copy of MedImpact's Pharmacy RFP proposal. On October 10, 2022, Change amended its request to seek only three unredacted portions of MedImpact's RFP proposal. After DOM provided the necessary notices under the Public Records Act, MedImpact filed a Petition for Protective Order on October 14, 2022, asserting that the requested information fell within the Public Records Act exemptions from disclosure for confidential and proprietary information. MedImpact further asserted that Change should be judicially estopped from asserting that such categories of information were not confidential or proprietary, since Change itself had asserted that these same categories of information were confidential and proprietary when document requests previously had been made for Change's own Pharmacy RFP proposal. MedImpact's Petition for Protective Order was argued before the Hinds County Chancery Court on December 13, 2022. On January

[2] Under OPSCR Rules 7-112.01, MedImpact had seven calendar days after the Notice of Intent to Award was published on August 19, 2022, to submit its protest. Based on guidance provided by OPSCR, that seven-day period to file the protest was "tolled" and did not start running until August 22, 2022, because of OPSCR's interpretation of the "48-hour rule" contained in OPSCR Rules 3-204.04. Accordingly, Change had until August 29, 2022, to file its Protest. Change filed its original Protest on August 26, 2022, and its first supplemental protest on August 29, 2022. Both of these documents fall within the time frame allowed under OPSCR Rules 7-112.01. However, Change's second supplemental protest was not filed until September 26, 2022, which was well outside the time-period allowed under OPSCR Rules 7-112-01. The Office of Procurement finds that Change's second supplemental protest was untimely and should not be allowed. However, for purposes of completeness, the issues raised in Change's second supplemental protest are fully analyzed in this memorandum.

17, 2023, the Court entered an Order granting MedImpact's Petition for Protective Order with regard to all three categories of redacted information at issue.

Finally, the services contained in the Pharmacy RFP are mandatory under Mississippi's Medicaid State Plan, and a failure to provide those services would jeopardize federal funding for the state's Medicaid program. Thus, while this Protest has been pending, DOM is required to proceed under an Emergency Contract with Change, the incumbent vendor for many of the services at issue in the Pharmacy RFP. Under that Emergency Contract, DOM is paying significantly more for those services than it would pay under the winning proposal submitted by MedImpact.

II. ANALYSIS OF ISSUES STATED IN CHANGE'S PROTEST

Change makes five key arguments in its Protest. First, Change argues that the evaluators who sat on the second evaluation panel lacked the necessary experience required to properly evaluate the Change and MedImpact RFP proposals. Change Supp. Protest at *2-3; Change 2nd Supp. Protest at *2. Second, Change asserts that MedImpact failed to meet the minimum years of pharmacy experience required by the terms of the RFP. Change Protest at *4-6. Third, Change contends that the proposals were submitted to the evaluation panel with improper identifying information. Change 2nd Supp. Protest at *5-7. Fourth, Change asserts that the pricing portions of MedImpact's proposal were misleading and unreasonable, thus rendering them non-responsive. Change Protest at *6; Change Supp. Protest at *3-4. Finally, Change asserts that the evaluation committee improperly deducted points from the scoring of its proposal. For the reasons set forth below, the Office of Procurement finds that none of Change's arguments have merit. All actions by DOM are supported by substantial evidence and, as a result, cannot be deemed arbitrary or capricious. Accordingly, Change's Protest should be denied.

A. MEMBERS OF THE EVALUATION COMMITTEE POSSESSED THE ADEQUATE RELEVANT EXPERIENCE NECESSARY TO EVALUATE THE PHARMACY RFP PROPOSALS.

Change argues that DOM failed to meet the evaluation standards required by Mississippi law because DOM "did not provide evaluators with adequate experience," to evaluate the Change and MedImpact proposals. Change Protest at *6; Change Supp. Protest at *2-3. Change asserts that the three evaluators used on the second panel lacked the background and experience necessary to evaluate pharmacy proposals, with its primary argument being that the evaluators lacked sufficient experience to "adequately appreciate the significance of the pricing differences between the two proposals." Change Supp. Protest at *2. However, Change has failed to provide any evidence to support its claims of inadequate experience, other than unsupported and conclusory statements regarding the backgrounds of the evaluators which are not supported by the facts.

Mississippi Code Section 31-7-415 requires that "[p]ersons appointed to an evaluation committee shall have the relevant experience necessary to evaluate the proposal or qualification." Here, the evaluation committee consisted of three members, two of whom scored the proposals and a third non-scoring member who evaluated the financial information of the offerors.

The first scoring evaluation committee member, who Change characterizes as a DOM "governmental affairs" employee who also works as a "legislative liaison," *see* Change Supp. Protest at *2-3, is actually a Deputy Executive Director of DOM who directly oversees all operations of the DOM Office of Pharmacy. As such, that individual clearly possesses not only general knowledge of pharmacy matters relevant to the RFP but also the specific relevant knowledge of DOM's pharmacy operations, since he is in charge of them. Based on knowledge

and experience, this evaluator is clearly capable of assessing both the requirements of the Pharmacy RFP, as well as distinguish a sufficient response from an inadequate response in evaluating the Change and MedImpact proposals.

The second scoring evaluation committee member of whom Change complains is an employee of the Department of Finance and Administration ("DFA"), and she serves as State Insurance Administrator and the director of DFA's Office of Insurance. The DFA Office of Insurance is the state entity tasked with oversight and administration of both medical and pharmaceutical benefits for all state employees. As both the State Insurance Administrator and the director of DFA's Office of Insurance, this individual clearly possesses expertise in matters regarding pharmacy benefits and operations.[3] Based on knowledge and experience, this evaluator clearly has sufficient expertise to assess the requirements of the Pharmacy RFP and to determine if the submitted proposals sufficiently respond thereto.

Finally, the third non-scoring member of the evaluation committee was tasked solely with evaluating the audited financial statements of the two offerors. This individual is a licensed Certified Public Accountant with over eleven years' experience in the healthcare industry. Prior to her time at DOM, this individual spent approximately eight years serving as Controller for Mississippi healthcare entities. Beginning in 2020, she has served as Director of DOM's Office of Managed Care Financial Oversight, where she directs financial oversight of all DOM managed care entities. In addition, she oversees distribution of over $3 billion worth of healthcare payments annually. This individual clearly has the relevant experience necessary to evaluate audited financial statements.

[3] Additionally, this evaluator worked at DFA's Office of Insurance for over ten years and has been the state insurance administrator for DFA since Jan. 2021. Prior to that, she held positions at United Health Group and Blue Cross Blue Shield of MS for over fourteen years.

Accordingly, Change's argument that the evaluators were not adequately experienced to evaluate the proposals is without any merit. Substantial evidence exists that all three evaluators possessed the required relevant experience to fully and adequately evaluate the Change and MedImpact proposals.

B. MEDIMPACT POSSESSES THE EXPERIENCE REQUIRED BY SECTION 2.1 OF THE RFP.

Change argues that MedImpact fails to meet the experience requirements set forth in Section 2.1 of the Pharmacy RFP. Change Protest at *4-6; Change 2nd Supp. Protest at *2-4. That provision states:

> DOM seeks an Offeror to coordinate all phases of preferred drug list (PDL) and supplemental rebate (SR) administration that is consistent with both federal and state law with a minimum of five years of experience servicing government accounts and has, within the last 48 months, been engaged in a contract or awarded a new contract with similar work in a state Medicaid program.

Preferred Drug List Development & Management and Supplemental Drug Rebate Administration – Component 1, RFP #20210813, 2.1 at *6. Thus, by its express terms, this provision contains two components: (1) the offeror must have at least five years of experience in servicing government accounts; and (2) within the last 48 months, the offeror must either have performed or been awarded a contract to perform work similar to the work to be performed under the Pharmacy RFP.

After reviewing Change's Protest and the materials submitted therewith, the Office of Procurement finds that Change has failed to establish any credible argument that MedImpact lacks the experience required under Section 2.1 of the Pharmacy RFP. Instead, MedImpact's Pharmacy proposal contains substantial evidence that it possesses the requisite level of experience in providing the services required under the Pharmacy RFP. MedImpact has serviced

government contracts for more than five years and engaged in work in the last 48 months that is similar to the work to be performed under the Pharmacy RFP.

The primary evidence submitted by Change in support of its argument is the affidavit of Dan Hardin, who is a Senior Vice President of Change. As with any affidavit, Mr. Hardin's affidavit must be based on his own personal knowledge. *See* ***Illinois Central R. Co. v. Jackson***, 179 So. 3d 1037, 1043 (Miss. 2015). However, Mr. Hardin's affidavit fails to meet this standard and otherwise contains unsubstantiated and unpersuasive statements regarding the points raised. For example, much of the affidavit is devoted to Mr. Hardin's interpretation of a document MedImpact submitted in response to a 2017 Commonwealth of Kentucky RFP, which Mr. Hardin contends establishes MedImpact lacked the experience with fee-for-service Medicaid as required under the RFP. However, a careful review of that document reveals no such thing. This document does not state in any way that MedImpact first began to operate in the Medicaid fee-for-service industry in 2017. Rather, as the document states, MedImpact had fee-for-service experience going back to 2001. The documents further states that, at some point in 2017, MedImpact began to "evaluate[] an evolving Medicaid PBM landscape . . . and made the decision to ***further*** invest in the technology, staffing, and resources necessary to develop ***enhanced*** FFS Medicaid solutions." Hardin Aff. at Change Protest Ex. E. (emphasis added). This language indicates "further" and "enhanced" development of fee-for-service resources, not the initial implementation of them. None of this language supports Mr. Hardin's allegation that MedImpact had no experience or inadequate experience in Medicaid fee-for-service prior to 2017. Instead, the plain language speaks to MedImpact's collaborative experience in fee-for-service since 2001 and 2017 respectively. Similarly, other portions of Change's Protest raise arguments regarding MedImpact's lack of experience based on "information and belief". *See*

Change 2nd Supp. Protest at *3-4. Yet Change fails to produce any actual evidence to support its "beliefs." Because it lacks any evidentiary basis, Change's argument is without merit.

Finally, DOM rejects any argument that it was required to select the "more experienced" vendor, which in this case is asserted to be Change. Even if Change had produced evidence to support such an assertion regarding its experience, which it has not, DOM is not required to pick the most experienced vendor. Rather, DOM is free to evaluate all vendors who meet the RFP qualifications, and that is exactly what happened here. The Change and MedImpact proposals - including experience considerations - were fairly and objectively scored using the criteria outlined in the RFP to find an appropriate vendor with the requisite experience to provide these services to the state at a reasonable cost.

C. BOTH PROPOSALS WERE SUBMITTED TO EVALUATORS WITHOUT IDENTIFYING INFORMATION.

Next, Change asserts that MedImpact violated Rule 6.2.1 of the RFP and OPSCR Rules Section 3-203.12 because its proposal contained identifying information when it was scored by the evaluation panel. *See* Change 2nd Supp. Protest at *5-8. Specifically, Change complains MedImpact's proposal as submitted to the evaluation committee contained both "company colors" and a "typestyle" that were indicative of MedImpact. Change, 2nd Supp. Protest at *5-6.

Section 6.2.1 of the Pharmacy RFP states:

> Identifying information is defined by Rule 3-203.12 of the Public Procurement Review Board (PPRB) Rules and Regulations as the following:
>
> "Identifying information includes, but is not limited to, any prior, current and future names or addresses of the offeror, any names of incumbent staff, any prior, current and future logos, watermarks, and company colors, any information, which identifies the offeror as an incumbent, and any other information, which would affect the blind evaluation of technical or cost factors."

> The Division of Medicaid (DOM) defines "any other information" as information, including but not limited to, names of parent or umbrella companies with which the Offeror is associated, listing(s) of current and past State Medicaid contracts including dates of service, current or past provider lists in the State of Mississippi, and specific details describing the Offeror's history in working with the State of Mississippi. Subcontractor identifying information must also be excluded.
>
> Not included in the definition of "any other information" are policies, procedures, standards, guidelines, and other practices that the Offeror uses in the delivery of services. Description of these details are integral to the DOM's ability to assess all Offers and are expected to make up the bulk of the Proposal.

Identifying Information, RFP #20210813, 6.2.1 at *67-68.

As noted above in the discussion of the facts and procedural history of this matter, DOM received guidance from OPSCR in July 2022 which led it to conclude that it would be in the best interests of the state to de-identify both the Change and MedImpact proposals and submit them to a new panel for re-evaluation. Thus, DOM de-identified both the Change[4] and MedImpact proposals, which were then resubmitted to OPSCR for a second review to ensure that all potential identifying information had been removed. Once OPSCR's review was completed, and based on guidance provided by it, the evaluation committee members were supplied with black and white copies of the Change and MedImpact proposals. Thus, neither proposal contained any color markings when submitted to the new panel for re-evaluation.

Change's argument regarding a unique "typestyle" is equally meritless. Both the Change and MedImpact proposals used Times New Roman, as required by the terms of the RFP. *See* ***Proposal Formatting***, RFP #20210813, 6.2.1 at *64 ("Proposals must be typewritten using Times New Roman font type, font size 12, with standard half-inch margins. Appendices, as well as samples and templates required of the proposal, need not comply with font and margin

[4] Notably, Change's proposal included more than 350 instances of identifying information. However, DOM de-identified the proposal to ensure no identifying information would be included in the evaluation process.

restrictions."). For these reasons, Change's arguments regarding identifying information are wholly without merit.

D. THE PRICE COMPONENT OF MEDIMPACT'S BID IS NEITHER UNREASONABLE NOR MISLEADING, AND PRICING WAS SCORED OBJECTIVELY BY THE EVALUATION PANEL.

Change contends that the pricing elements of MedImpact's proposal are unreasonable and misleading because MedImpact's pricing is too low. Change Protest at *6-8l; Change Supp. Protest at *3-4; Change 2nd Supp. Protest at *7-8. This, according to Change, renders MedImpact's proposal nonresponsive. The Office of Procurement finds no evidence to support Change's assertions.

Change first contends that the unreasonableness of MedImpact's pricing is established by the fact that MedImpact's pricing falls significantly below "DOM's own estimate of the value of these services." Change Supp. Protest as 3-4. In this regard, Change notes that DOM's Petition for Relief from Competitive Bidding, which was submitted to PPRB in connection with the Pharmacy RFP, contains a nonbinding price estimate for pharmacy services:

> To determine this anticipated amount, DOM combined the total of the first four years from both the current Pharmacy Rate Setting and the Pharmacy Support Services contracts. The 5th year of those contracts were estimated and totaled. Added an increased dollar amount to the total to determine the estimated amount of $15,500,000.

Change's argument regarding DOM's nonbinding estimate in a Petition for Relief from Competitive Bidding is misplaced. First, this estimate was not included in the RFP and in no way constitutes any requirement or standard for the offerors' proposals. Second, DOM's estimate for these services was simply that – an estimate of an unknown cost set forth as a

required component of a PPRB administrative form.[5] While DOM derived the estimate stated on the form from expenses paid on two previous separate Pharmacy services contracts (Pharmacy Rate Setting and Pharmacy Support Services) over a four (4) year period plus an estimated additional amount for a fifth year to arrive at a total estimated amount of $15,500,000, DOM fully expected that the consolidation of these services into a single contract would decrease the overhead and administrative costs compared to separate contracts, thereby resulting in lower overall costs to provide the combined services. The lower cost submitted by MedImpact is both reasonable, plausible, and aligns with DOM's belief that the consolidation of these services will result in cost savings.

Nonetheless, Change asserts that the pricing gap between DOM's estimated costs and MedImpact's actual pricing establishes that MedImpact's proposal is unreasonable and that it was mandatory for DOM to engage in some form of "price realism analysis." No such requirement exists. While Change has cited several Federal Claims Court cases that discuss "price realism analysis," these cases are inapplicable here. Neither Mississippi law nor OPSCR Rules require such an analysis to be used, and the terms of the Pharmacy RFP clearly contain no such provision. As even the Federal Claims Court cases cited by Change acknowledge, a price realism analysis is not required unless the express language of the solicitation and/or applicable law requires it to be utilized. *See, e.g.,* ***Mortgage Contracting services, LLC v. United States***, 153 Fed. Cl. 89, 135 (2021); ***UnitedHealth Military & Veterans Servs., LLC, et al.,*** B-411837.2, 2016 WL 6821970 at *5 (Nov. 9, 2016) ; ***Optex Systems, Inc.,*** B-408591, Oct. 30, 2013 at *5.

[5] Pursuant to OPSCR's Rules, state agencies are required to request approval from PPRB to issue an RFP instead of utilizing the preferred solicitation method of an Invitation for Bids ("IFB"). OPSCR Rules 3-201.01. This request is an administrative function of PPRB and requires a state agency to present a Petition for Relief from Competitive Bidding form to PPRB for approval. There is no rule or regulation that requires or even suggests that the components of a Petition for Relief from Competitive Bidding become a binding part of any resultant RFP.

Here, DOM's RFP does not contain any language stating that DOM would perform a price realism analysis as part of its evaluation of proposals and no Mississippi law or regulation requires such. Furthermore, neither Federal Claims Court decisions or opinions by the federal General Accounting Office are binding precedent, and they do not reflect the requirements of Mississippi law. *See, e.g.,* ***UnitedHealth Military & Veterans Services, LLC v. United States***, 132 Fed. Cl. 529, 560 (2017) ("Although the undersigned has high regard for the GAO and the quality of the decisions issued by the GAO, this court is not bound by decisions of the GAO....").

Next, Change claims that ***Rotech Healthcare, Inc. v. United States and Community Surgical Supply, Inc.***, 121 Fed. Cl. 387, 403 (2015) requires a price realism analysis to be conducted anytime the pricing in a RFP proposal appears too high or low. Change 2nd Supp. Protest at *7-8. ***Rotech*** is inapplicable because it is a federal claims court case regarding a federal contract. Again, as numerous courts have acknowledged, decisions of the Federal Claims Court are not binding beyond the jurisdiction of that particular court. *See, e.g.*, ***Varilease Technology Group, Inc. v. U.S.***, 289 F. 3d 795, 802 (C.A. Fed., 2002).

PPRB's OPSCR Section 3-204.01.3.1 requires that DOM score pricing "objectively" which is reflected through the RFP in Section 7.1.3. The RFP contained no language requiring DOM to perform any analysis under a "price realism" standard. Under the RFP, Mississippi law governs the contract and proposal process. ***Applicable Law***, RFP #20210813, 5.3.1 at *39 ("The contract shall be governed and construed in accordance with the laws to the State of Mississippi[.]"). Furthermore, neither the United States Supreme Court, the Mississippi Supreme

Court,[6] nor State or Federal law require a cost realism evaluation for State government contracts. Importantly, "price realism" is not mentioned once throughout PPRB's OPSCR Rules and Regulations. Accordingly, DOM is not bound to evaluate the proposals using a price realism analysis since it is not required by the RFP or by law.

Next, Change asserts that MedImpact's pricing was "clearly unreasonable," yet it fails to articulate any standard for "unreasonableness." Clearly, the fact that pricing differences exist between proposals does not establish "unreasonableness." In this instance, a comparison of prior invoices provided by DOM's incumbent pharmacy vendor is instructive. MedImpact's proposed pricing for preferred drug list and supplemental rebate services was in-line with pricing reflected in prior invoices for the same services when performed by another vendor. Further, MedImpact's proposed pricing for rate setting services is also consistent with the pricing provided by DOM's incumbent vendor for those same services. Change's assertion that MedImpact's price is unreasonable simply because it was below DOM's estimate and/or Change's proposed pricing[7] is without merit.

Section 4.18(12) of the RFP stated that DOM reserves the right to reject a proposal where "[t]he proposed price is clearly unreasonable." MedImpact's proposed price appeared reasonable based on DOM's estimate and the detailed Pricing and Assumptions spreadsheet outlining how MedImpact arrived at its total proposed cost.[8]

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[6] The Mississippi Supreme Court has acknowledged that regulations from the Federal Acquisition Regulation system are not binding unless otherwise adopted by contracts, the Mississippi Legislature, or the Mississippi Supreme Court. ***Hill Bros. Const. & Engineering Co., Inc. v. Mississippi Transp. Comm'n***, 909 So. 2d 58, 67 (Miss. 2005).

[7] DOM's five-year estimate for this contract was $15,500,000.00. MedImpact's proposal cost was $8,199.492.00 whereas Change's proposal calculated its costs at $14,695,831.00.

[8] Change's cost proposal binder did not provide a detailed Pricing Assumption spreadsheet further outlining and supporting its proposed costs.

Finally, Change asserts that DOM failed to objectively score the pricing components of both proposals. While Change correctly notes that equal treatment of bids is a key underpinning of competition related to government contracting, *see, e.g.,* Hemphill ***Constr. Col, Inc. v. City of Laurel,*** 760 So. 2d 720, 724 (Miss. 2000), it fails to demonstrate any way in which the Evaluation Committee deviated from this standard. OPSCR Rules Section 3-204.01.3.1 requires that DOM score pricing "objectively," which is reflected in Section 7.1 of the RFP. Here, the pricing sections of both proposals were scored blindly by the Evaluation Committee, with no awareness of which price was associated with which proposal. The same criteria were applied to both proposals. Change has failed to demonstrate in any way that DOM's evaluation of pricing was inconsistent with the evaluation standard required by OPSCR Rules or the terms of the RFP. Change has failed to demonstrate that the scoring of pricing was "'freakish, fickle or arbitrary,' '[done] without reason, in a whimsical manner, [or] implying either a lack of understanding of or a disregard for the surrounding facts…'" ***Mississippi True v. Dzielak***, 293 So. 3d 243, 254 (Miss. 2020) (quoting ***McGowan v. Mississippi State Oil & Gas Bd.,*** 604 So. 2d 312, 322 (Miss. 1992)).

E. THE EVALUATION COMMITTEE PROPERLY DEDUCTED POINTS FROM CHANGE'S SCORE FOR FAILURE TO INCLUDE REFERENCES IN ITS PROPOSAL.

Finally, Change argues that DOM "incorrectly deducted several potential points (out of a potential 6.27) from the Change Healthcare proposal" because DOM erred in asserting that Change failed to include references in its proposal. Change 2nd Supp. Protest at *8-9. However, a careful review of Change's proposal as compared to the requirements of the Pharmacy RFP demonstrates that Change failed to properly submit any references for evaluation panel consideration. Moreover, to the extent Change now contends that it wishes such references to be

considered, Change's proposal would be deemed non-responsive and thus disqualified from consideration. Ultimately, however, the inclusion or non-inclusion of such references would have no impact on the awarding of the RFP to MedImpact.

The RFP itself clearly stated both the type and number of copies of the proposals each offeror was required to submit to DOM as part of its packet. Offerors were required to submit one original paper hard copy and eight identical paper copies of the Technical Proposal (Blind Evaluation); one original paper hard copy and eight identical paper copies of the Cost Proposal (Blind Evaluation); and one original paper hard copy and eight identical paper copies of the Management Proposal. *See* RFP at Section 6.1. It was these original hard paper copies that were to be used for distribution to the evaluation team.

In addition to the hard paper copies, offerors were required to submit electronic copies of their proposals as well, which would be used only for the specific purposes identified in the RFP. Offerors were required to submit one ***unredacted*** copy of the proposal and one ***redacted*** version of the proposal on a USB Flash Drive in a searchable Microsoft Word or Adobe Acrobat (PDF) format. *See* RFP at Section 6.1. These electronic copies were for the administrative use of DOM and were not intended for distribution to the evaluation committee. Importantly, the ***redacted*** version of the proposal on USB flash drive was to be labeled as "PUBLIC COPY," and it was to be used only to address any document requests DOM received under the Mississippi Public Records Act. *See* RFP at *65-66.

In this instance, none of the hard paper copies of Change's proposal contained references as required by Section 6.4.4.1.3 of the RFP. In addition, the electronic version of Change's ***unredacted*** proposal did not contain references as required by Section 6.4.4.1.3 of the RFP. Instead, references were contained only in the ***redacted*** "PUBLIC COPY" version of Change's

proposal, which is used only for purposes of the Mississippi Public Records Act. Thus, since Change failed to submit its references in the correct proposal copies as required by the RFP, its references were not evaluated and scored by the panel. If, as Change now seems to contend, it wished the "References" portion of its "PUBLIC COPY" to be scored by the panel, then Change's proposal would be deemed non-responsive and could be disqualified from consideration.

Ultimately, however, the inclusion or non-inclusion of Change's references would have no impact on the awarding of the RFP to MedImpact, because Change could not overcome the scoring difference through corporate references alone. As noted above, MedImpact scored 18.27 points higher than Change. At a maximum, corporate references could be awarded 3.64 points, not the 6.27 points claimed by Change. Thus, even if Change were awarded all of the 3.64 points allowed for the references, there would still be insufficient points to achieve a higher score than MedImpact. Thus, Change's protest fails for these reasons as well.

III. CONCLUSION

The Office of Procurement finds there is no merit to any of the issues raised by Change in its Protest of the Mississippi Division of Medicaid's Notice of Intent to Award RFP #20210813 to MedImpact Healthcare Systems, Inc. The Office of Procurement finds there is substantial evidence to support the awarding the contract to MedImpact and that DOM did not act arbitrarily or capriciously at any point in this procurement process to the detriment of Change. Both the Change and MedImpact proposals were objectively reviewed by evaluators possessing the necessary relevant experience, and those evaluators correctly applied all applicable rules and regulations, as well as the terms of the RFP. Both the evaluators' scoring of the proposals and DOM's awarding of the contract to MedImpact are supported by substantial evidence, and there

is no evidence of any arbitrary nor capricious conduct by DOM. Accordingly, the Office of Procurement recommends that DOM affirm the award of the Pharmacy RFP to MedImpact.

EXHIBIT 13

Attachment B.v

Change Healthcare's Appeal to PPRB

January 30, 2023

BUTLER | SNOW

January 30, 2023

VIA HAND DELIVERY
Rita Wray, Chair
Mississippi Public Procurement Review Board
c/o Department of Finance and Administration, Office of Personal Service Contract Review
E.T. Woolfolk State Office Building, Suite 701 E
501 North West Street
Jackson, Mississippi 39201

Re: Appeal of Final Decision of the Mississippi Division of Medicaid on Change Healthcare Pharmacy Solutions, Inc.'s Protest of the Mississippi Division of Medicaid's Notice of Intent to Award RFP #20210813 to MedImpact Healthcare Systems, Inc.

Dear Ms. Wray:

Pursuant to 12 Miss. Admin. Code. Pt. 9, R. 7-112.04, Change Healthcare Pharmacy Solutions, Inc. ("Change Healthcare"), through undersigned counsel, timely submits this appeal of the Mississippi Division of Medicaid's ("DOM") decision to adopt the recommendation of the Office of Procurement affirming DOM's intent to award the contract under RFP #20210813 to MedImpact Healthcare Systems, Inc. ("MedImpact").

I. INTRODUCTION

DOM's award to MedImpact—an inexperienced offeror, offering an unrealistically low price – was the result of a fundamentally flawed and illegal procurement. The litany of errors in the evaluation conducted under the RFP include (1) DOM's violation of statute and regulation in convening an evaluation committee for the reevaluation of proposals that lacked the necessary relevant experience with the Medicaid program and Medicaid pharmacy benefit; (2) DOM's violation of statute and the terms of the RFP based on its failure to evaluate offerors' technical proposals blind, free of information identifying the offeror – including in the most recent reevaluation of proposals; (3) DOM's failure to evaluate whether MedImpact's price was unrealistically low and posed a risk that MedImpact could not successfully perform in

accordance with the RFP requirement that DOM evaluate whether proposed prices were realistic; (4) DOM's failure to evaluate MedImpact's experience in accordance with the RFP, where MedImpact lacks experience performing similar work for any state Medicaid program; and (5) DOM's arbitrary and capricious failure to score Change Healthcare's corporate references, which were, as DOM concedes, included in Change Healthcare's proposal. Each of these errors is an independent basis for sustaining Change Healthcare's protest and cancelling the proposed contract award to MedImpact.

Moreover, in a troubling development, DOM has sought to shield the basis for its award decision from public scrutiny at every step in this procurement—an effort that hinders the public's ability to ascertain whether DOM selected the best value offeror and compromises the integrity of Mississippi's procurement system. DOM's evasive tactics, however, cannot conceal the multiple evaluation errors that have contaminated this procurement, now entering its third year. The Agency's approach to these errors has resembled a game of whack-a-mole with errors surfacing at every turn. The conclusion is inescapable: it is time for DOM to start with a clean slate.

As demonstrated below, the PPRB should reverse DOM's decision affirming its intent to award the contract to MedImpact and direct DOM to either cancel the RFP or resolicit proposals and conduct an evaluation in accordance with the RFP and applicable statutes and regulations. Alternatively, the record shows a compelling need for the PPRB to conduct an audit of this procurement, including a review of the evaluated proposals, DOM's compliance with blinding requirements during the evaluation process, and evaluator qualifications, and fashion appropriate relief consistent with the audit's findings, to include the remedies identified above.

II. FACTUAL BACKGROUND

A. DOM's Pharmacy Program

Mississippi's Medicaid program is a jointly funded state and federal government program that provides healthcare coverage—including coverage of pharmacy benefits—to children, low-income families, pregnant people, the elderly, and people with disabilities.

The Medicaid Drug Rebate Program ("MDRP")—a program that includes the Centers for Medicare & Medicaid Services ("CMS"), state Medicaid agencies like DOM, and participating drug manufacturers—helps to offset the Federal and state costs of outpatient prescription drugs for Medicaid beneficiaries. *See Medicaid Drug Rebate Program*, Medicaid.gov, https://www.medicaid.gov/medicaid/prescription-drugs/medicaid-drug-rebate-program/index.html (last visited Jan. 30, 2023).[1] Under the program, drug manufacturers must agree to offer certain rebates in exchange for state Medicaid agencies to cover most of the manufacturer's drugs. *See id.* The program applies to both Medicaid Fee-for-Service ("FFS") reimbursements *and* Medicaid Managed Care reimbursements. *See* Patient Protection and Affordable Care Act, Public Law 111-148 (codified as 42 U.S.C. § 1396(m)(2)(A)(xiii)).

In addition to the statutory rebate required by the MDRP, state Medicaid programs can negotiate for supplemental rebates ("SRs") with drug manufacturers. Accordingly, DOM, like other state Medicaid agencies, leverages these SRs through the creation of a Preferred Drug List ("PDL")—a continuously updated list of medications that DOM encourages providers to

[1] The PPRB may take notice of facts, including publications on a federal agency website, that "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Mississippi Rule of Evidence 201(b)(1); *see also AT&T Corp. v. Miss. Dep't of Info. Tech. Servs.*, 298 So.3d 938, 946 n.5 (Miss. 2020) (taking judicial notice of a state agency publication on the agency's website).

prescribe over other medications. DOM incentivizes providers to prescribe drugs on the PDL through prior authorization requirements. Ex. 1 (RFP), § 2.1.1.1.

The Universal PDL represents "the clinical judgement of members of the Pharmacy and Therapeutics (P & T) Committee and approved by DOM's executive director to foster safe, appropriate, and effective drug therapy ***while ensuring optimal savings for the state***." *Id.* (emphasis added). As a result, "[a]n integral component of PDL management is consideration of supplemental drug rebate offers from pharmaceutical manufacturers as well as the Mississippi Coordinated Access Network (MSCAN) drug utilization claims volume among the state's three managed care organizations." *Id.*

DOM relies on contractor support to develop and manage the Universal PDL for all Medicaid beneficiaries, inclusive of fee-for-service and managed care beneficiaries, while ensuring maximum cost savings for the State. To that end, contractor responsibilities include, but are not limited to: (1) producing systematic clinical reviews of each therapeutic class of specific drugs for Mississippi's Pharmacy and Therapeutics ("P & T") Committee, (2) formulating recommendations using pharmacoeconomic modeling of preferred drugs in each class, (3) providing SR negotiations and savings information to the P & T Committee, (4) assisting DOM in maintaining ongoing provider communications, and (5) creating and maintaining new and existing prior authorization criteria. *Id.*, § 2.1.1.2. Change Healthcare currently manages Mississippi's PDL and administers the SR program under the predecessor contract to this RFP.

B. Request for Proposals

In anticipation of the upcoming expiration of Change Healthcare's current contract, DOM petitioned the Department of Financial Administration ("DFA") Office of Personal Service

Contract Review ("OPSCR") for relief from the use of "competitive sealed bidding" pursuant to Miss. Code Ann. § 31-7-403(4). *See* Ex. 2 (Change Healthcare's Protest, Ex. G (August 26, 2022)). In its request to OPSCR, DOM represented that it anticipated the contract amount to be $15.5 million, and that "use of [competitive sealed biding] is neither practicable nor advantageous when procuring pharmacy providers." *Id.* DOM further explained that it required an RFP as the method of procurement "to conduct reviews of offerors' ability to provide the ***appropriate level of professional experience and expertise***." *Id.* (emphasis added). On May 5, 2021, OPSCR granted the request. *Id.*

With OPSCR having granted its request for relief from competitive sealed bidding procedures, on August 13, 2021, DOM issued RFP #20210813 seeking a contractor to manage the "fundamental core components" of DOM's pharmacy program. Ex. 1 (RFP), § 1.3. Specifically, the RFP sought a contractor to develop and manage a PDL, administer the SR program, manage the Rate Setting of Covered Outpatient Drugs, and perform programmatic review and assessment of the core components of DOM's pharmacy program. *Id.*

As a threshold matter, the RFP provided that offerors "must have the ***capability and experience*** to ensure that the fundamental core components of DOM's pharmacy program, including the physician administered drug program, are managed in a ***clinically and fiscally sound manner***." *Id.*, § 1.3 (emphasis added). For this same reason, the RFP included specific experience requirements: Offerors were required to have a "minimum of five years of experience servicing government accounts" and were required to have "within the last 48 months, been engaged in a contract or awarded a new contract with similar work in a state Medicaid program." *Id.*, § 2.1.

Beyond demonstrating compliance with these threshold experience requirements, offerors' proposals were required to include a (1) technical proposal, (2) cost proposal, (3) management proposal, and (4) price proposal. *See id.*, § 6.3. The RFP advised that the technical and cost proposals would be subject to a "blind evaluation." *Id.*, § 6.2. Accordingly, offerors were instructed to refrain from including any "identifying information" in these sections of their proposals. *See id.* The RFP further advised that "[a]s a precautionary measure, DOM will review the proposals for any additional identifying information prior to distribution to the evaluation committee for the evaluation process," and that DOM reserved the right "to remove identifying information found in the Proposals if the removal of the information will not affect the substance of the submission." *Id.*, §§ 6.2, 6.4.2, 6.4.3.

The RFP required DOM to evaluate proposals based on the below scoring system. *See id.*, § 7.1. Offerors could receive a maximum of 100 points:

Weight/Percentage 40pts/40%

Proposal Section	Maximum Score
Executive Summary/Understanding of Project	2pts/2%
Methodology	30pts/30%
Work Plan and Schedule	8pts/8%

Weight/Percentage 1pt/1%

Proposal Section	Maximum Score
Cost Proposal	1pt/1%

Weight/Percentage 24pts/24%

Proposal Section	Maximum Score
Organization and Staffing	8pts/8%
Management and Control	8pts/8%
Corporate Background/Ownership/Experience	8pts/8%

Proposal Section	Maximum Score
Price	35

See id. For price, the RFP provided that a maximum of 35 points would be assigned to the "lowest and best acceptable proposal," and other proposals would be assigned points based on the following formula:

$\frac{X}{Y} * 35 = Z$	X = Lowest bid price Y = Offeror's bid price Z = Assigned points

Id., § 7.1.3.

Even though the RFP's scoring formula provided for the lowest price to receive the maximum number of points, the RFP also warned that "[a]ny bid price determined by DOM to be ***unrealistically or unreasonably low*** may not be considered acceptable, as such a proposal has a ***high probability of not being accomplished*** for the cost proposed." Ex. 1 (RFP), § 7.1.3 (emphasis added).

C. Evaluation History

1. First Notice of Intent to Award to MedImpact

Two offerors submitted proposals in response to the RFP– Change Healthcare and MedImpact. For the evaluation of proposals, DOM (initially) assembled a seven-person evaluation committee "based on knowledge and expertise related to the operation and oversight of the Pharmacy Program"[2]:

- Terri Kirby – Pharmacy Director, Office of Pharmacy
- Christopher Yount – Staff Officer III, Office of Pharmacy
- Gail McCorkle – Pharmacist III, Office of Pharmacy
- Dennis Smith – Pharmacist III, Office of Pharmacy
- Richard Manning – Director of Hospital Programs, Office of Reimbursement

[2] Keith Heartsill, a contractor with the Office of Financial Reporting, consulted during the review of audited financials. *See* Ex. 3 (Change Healthcare's First Supplemental Protest, Ex. A (Aug. 29, 2022)).

- Shanda Boarden – Medicaid Nurse Bureau Director, Office of Program Integrity
- Laura Sue Reno – Medicaid Nurse Bureau Director, Office of Program Integrity

See Ex. 3 (Change Healthcare's First Supplemental Protest, Ex. A (Aug. 29, 2022)). DOM only evaluated MedImpact's proposal, and eliminated Change Healthcare's proposal, asserting that Change Healthcare's "blind" technical and cost proposals each contained identifying information that DOM could not de-identify. As a result, on December 15, 2021, DOM issued its **first** award decision, selecting MedImpact as the only responsive offeror for award for a total contract price of $7,771,641. *See* Ex. 4 (First NOI).

2. Second Award to MedImpact

On February 25, 2022, however, DOM cancelled the RFP and announced its intent to re-solicit proposals because the OPSCR discovered that MedImpact's proposal also included identifying information, and determined that DOM was required to re-solicit proposals. Ex. 5 (First Solicitation Cancellation Notice, Feb. 25, 2022). On March 18, 2022, DOM rescinded the cancellation notice, citing a failure to consult with the DFA Special Assistant Attorney General, providing the offeror at issue an opportunity to be heard, and making a written determination. *See* Ex. 6 (Notice of Rescission of Solicitation Cancellation, Mar. 18, 2022). Accordingly, DOM requested a hearing with an Administrative Hearing Officer to consider whether the RFP contained any potential violation of law due to MedImpact's inclusion of identifying information in its proposal. On July 2, 2022, the Hearing Officer issued a decision, concluding that the inclusion of identifying information in MedImpact's proposal was immaterial, and DOM should be permitted to proceed with the proposed award to MedImpact, even though DOM had declined to evaluate Change Healthcare's proposal for that very reason. Specifically, the Hearing Officer concluded that DOM's failure to de-identify MedImpact's proposal should not impact the award to MedImpact because (1) based on their knowledge of Change Healthcare's approach as the

incumbent, the evaluators likely knew the proposal was MedImpact's irrespective of the inclusion of identifying information, and (2) the State should not be required to reject a proposal offering a dramatically low price. *See* Ex. 7 (DOM Decision & Administrative Hearing Officer Recommendation).

On July 21, 2022, DOM, having adopted the Hearing Officer's recommendation, issued a **second** award notice, reinstating the award to MedImpact. *See id.*, at 1; Ex. 8 (Second NOI). Just over a week later, however, DOM reversed course again and cancelled its second NOI to award the contract to MedImpact. *See* Ex. 9 (Second Cancellation of Notice of Intent to Award).

3. Third Notice of Intent to Award to MedImpact

Following its second cancellation of the RFP, DOM assembled a new, much smaller evaluation team. Having initially established a seven-person evaluation team, DOM relied on two people to conduct the reevaluation of proposals – Wil Ervin, DOM Deputy Administrator, and Cindy Bradshaw, DFA State Insurance Administrator.[3] *See* Ex. 3 (Change Healthcare's First Supplemental Protest, Ex. B (Aug. 29, 2022)).

The evaluators assigned the following scores to Change Healthcare's and MedImpact's proposals:

Ranking	Offeror	Technical	Cost	Management	Price	Total
1	MedImpact	26.02	1	17.65	35 ($8,199,492.00)	79.67
2	Change Healthcare	26.09	.33	14.98	20 ($14,695,831)	61.40

See Ex. 10 (DOM Debriefing Agenda)

[3] Lisa Shaw, DOM Accounting Manager, consulted during the review of audited financials.

The evaluators did not evaluate whether MedImpact's dramatically low price of $8,199,492 was realistic and reflected an understanding of DOM's requirements.

On August 19, 2022, DOM issued its **third** notice of award to MedImpact. Ex. 11 (Third Notice of Intent to Award).

D. Change Healthcare's Protests

On August 26, 2022, Change Healthcare filed its initial protest with DOM's Chief Procurement Officer asserting that (1) MedImpact failed to meet the minimum qualifications for experience required in the RFP and (2) MedImpact's unrealistically low price rendered its bid misleading and unreasonable. *See* Ex. 2 (Change Healthcare's Protest (Aug. 26, 2022)).

Consistent with Mississippi bid procedures, Change Healthcare submitted a public records request seeking:

- The proposal submitted by MedImpact in response to the RFP;
- The Evaluation Committee Report(s) for the RFP; and
- All written communications, including but not limited to notes regarding the calculation and scoring of the RFP, by members of the Evaluation Committee.

See Ex. 3 (Change Healthcare's First Supplemental Protest (Aug. 29, 2022) Ex. A). On August 29, 2022, Change Healthcare filed a timely supplement to its initial protest asserting that (1) DOM failed to adequately evaluate the RFP because it relied on an evaluation committee that lacked the necessary experience and qualifications to reasonably evaluate proposals, and (2) MedImpact's low price was inaccurate and unrealistic. *See* Ex. 3 (Change Healthcare's First Supplemental Protest (Aug. 29, 2022)).

On September 26, 2022, Change Healthcare filed a timely second supplement to its protest. Based on information in documents produced by DOM in response to Change Healthcare's public records request, which included evaluation scoring documents and a redacted

copy of MedImpact's proposal, Change Healthcare asserted that: (1) MedImpact did not meet the minimum experience requirements, (2) MedImpact's proposal violated Section 6.2.1 of the RFP and Mississippi law because it contained identifying information, (3) MedImpact's price is not realistic, and (4) DOM failed to properly score Change Healthcare's proposal because it erroneously concluded that Change Healthcare's proposal did not include references.[4] *See* Ex. 13 (Change Healthcare's Second Supplemental Protest (Sept. 26, 2022)).

E. Public Records Requests and MedImpact's Petition for a Protective Order

Under Mississippi's Public Records Act ("MPRA"), it is the policy of the State of Mississippi that each public body ensure the public has access to public records. *See* Miss. Code. Ann. § 25-61-2. The exceptions to the presumption that public records should be released are limited. *See, e.g.*, Miss. Code. Ann. § 25-61-9.

MPRA requests are the mechanism through which unsuccessful offerors and the public in general can assess whether an agency's procurement was conducted fairly and reasonably, and in accordance with applicable rules and laws. The MPRA expressly contemplates that competitors will request and *receive* information contained in competitively sealed proposals that is not exempt from release and that competitors will potentially use that information in a protest. *See*

[4] DOM's assertion that Change's Second Supplemental Protest was untimely filed has no merit. *See* Ex. 12 (DOM Decision on Change Healthcare protest) at 5 n.2. The Mississippi Public Records Act ("MPRA") provides a "reasonable amount of time" for persons making public records requests to protest an intended contract award following production of public records in response to a records request for competitively sealed proposals. *See* Miss. Code Ann. § 25-61-5(1)(b). Counsel for Change Healthcare submitted a public records request under the MPRA to DOM on August 26, 2022. *See* Ex. 13 (Change Healthcare's Second Supplemental Protest, Ex. A (Sept. 26, 2022)). Change Healthcare filed its second supplemental protest on September 26, 2022, six days after Change Healthcare's counsel of record received notice of the production, within a "reasonable amount of time" as permitted under the statute. *See* Miss. Code Ann. § 25-61-5(1)(b).

Miss. Code Ann. § 25-61-5(b). Moreover, the MPRA makes clear that procurement contracts, including the awardee's unit prices, do not constitute "trade secret or confidential commercial or financial information" exempt from public release for purposes of the MPRA. Miss. Code Ann. § 25-61-9(7).

As noted above, Change Healthcare submitted MPRA requests to support its bid protest allegations. On October 10, 2022, Change Healthcare significantly narrowed its public records request, revising the request to only include:

- "Detailed Pricing and Assumptions" contained within pages 104 through 106 of MedImpact's proposal;
- References contained within 108-109 of MedImpact's proposal; and
- "Listing of MedImpact's Medicaid Projects" contained within pages of 117-20 of MedImpact's Proposal.

See Ex. 14 (Oct. 10, 2022 Public Records Request).

In response to Change Healthcare's MPRA requests, MedImpact filed a petition for a Protective Order with the Chancery Court in Hinds County, seeking to shield certain portions of its proposal from public release. In total, MedImpact filed three petitions for a protective order. *See* Ex. 15 (MedImpact Petitions). In its Answer to MedImpact's petition, DOM did not take a position on whether portions of MedImpact's proposal were subject to release. Instead, DOM represented that it "deferred to the Court's final judgment in this matter as to whether MedImpact's Response to this RFP contains any confidential and protected information." *See* Ex. 16 (DOM Answer ¶ 36, Dkt. No. 5, *In re: MedImpact Healthcare Sys., Inc., et al.*, No. 25CH1:22-CV-02168 (Ch. Ct. First Dist. Dec. 7, 2022)). DOM's initial position was consistent with DOM's historical responses to petitions for protective order seeking to shield from public release proposal information submitted to DOM. Indeed, a review of DOM's answers

responding to protective order petitions reveals that DOM ordinarily has not taken positions on whether a proposal contains confidential commercial or financial information or trade secrets, and instead defers to the Chancery Court's judgment. *See* Ex. 17 (DOM Answers to Protective Order Petitions).

In a puzzling and unusual development in this case, however, DOM filed a subsequent response to MedImpact's Petition and urged the Court to shield MedImpact's proposal information from release. *See* Ex. 18 (DOM Mem. of Law in response to MedImpact's Mot. for Final Protective Order, Dkt. No. 12, *In re: MedImpact Healthcare Sys., Inc., et al.*, No. 25CH1:22-CV-02168 (Ch. Ct. First Dist. Dec. 7, 2022)).

The Chancery Court ultimately granted MedImpact's Petition, finding that the requested records constituted trade secret and/or confidential commercial information. *See* Ex. 19 (Protective Order, Dkt. No. 20, *In re: MedImpact Healthcare Sys., Inc., et al.*, No. 25CH1:22-CV-02168 (Ch. Ct. First Dist. Jan. 17, 2023)). Although the effect of this ruling prevents Change Healthcare from reviewing MedImpact's detailed pricing, references, and experience projects, it does not prevent the PPRB from doing so.

F. DOM's Denial of Change Healthcare's Protest

On January 23, 2023, DOM issued a decision adopting the recommendation of the Office of Procurement denying Change Healthcare's protest and providing notice of its intent to proceed with its award to MedImpact. *See* Ex. 12 (DOM Decision on Change Healthcare Protest).

This appeal follows.

III. ARGUMENT

A. Jurisdiction and Standard of Review

Under 12 Miss. Admin. Code. Pt. 9, R. 7-112.04, the PPRB has jurisdiction over appeals from protest decisions by an agency head, including the Executive Director of the Mississippi Division of Medicaid. 12 Miss. Admin. Code. Pt. 9, R. 7-112.04.

Change Healthcare received DOM's decision adopting the recommendation of the Office of Procurement denying Change Healthcare's protest and providing notice of its intent to proceed with its award to MedImpact on January 23, 2023. This appeal to the PPRB is timely filed within seven calendar days of Change Healthcare's receipt of a protest decision by the agency head. 12 Miss. Admin. Code. Pt. 9, R. 7-112.04.

The PPRB reviews the agency head's protest decision *de novo*, without deference to the decision of DOM's Executive Director adopting the recommendation of the Office of Procurement. *See Moran Hauling v. Dep't of Finance & Admin.*, 105 So. 3d 1126, 1127 ("PPRB is the appellate, de novo review board."). The Mississippi Supreme Court has confirmed that *de novo* review is appropriate and no deference is due agency interpretations of rules and regulations. *See Miss. Methodist Hosp. & Rehabilitation Ctr., Inc.*, 319 So. 3d 1049, 1055 (Miss. 2021).

The PPRB applies the arbitrary and capricious standard of review to an appeal of an agency protest decision such as this one. The State's contracting decisions may not be "arbitrary and capricious . . . If an administrative agency's decision is not based on substantial evidence, it necessarily follows that the decision is arbitrary and capricious." *AT&T Corp. v. Miss. Dep't of Info. Tech. Servs.*, 298 So. 3d 938, 946 (Miss. 2020). "Substantial evidence . . . affords a

substantial basis of fact from which the fact in issue can be reasonably inferred." *Id.* (citing *Miss. Div. of Medicaid v. All Health Ctr.*, 174 So. 3d 254, 261 (Miss. 2015)).

B. DOM's Selection of Evaluators Who Lacked the Relevant Qualifications Was Arbitrary and Capricious

As an initial matter, contrary to DOM's assertions, DOM selected only two evaluators to conduct the reevaluation of Change Healthcare's and MedImpact's proposals, and those evaluators lacked adequate experience with Mississippi's Medicaid Program.[5] The Agency's selection of evaluators without relevant experience was contrary to statute and regulation and the terms of the RFP.

Applicable Mississippi law and regulations require that "[p]ersons appointed to an evaluation committee shall have the relevant experience necessary to evaluate the proposal or qualification." Miss. Code Ann. § 31-7-415(1); *see also* Miss. Admin. Code Pt. 9, R. 3-204.01.2 (same). The RFP also required the evaluation committee members to "have relevant experience in the Medicaid program." *See* Ex. 1 (RFP), § 7.1.

As Change Healthcare argued in its First Supplemental Protest, DOM's first evaluation committee consisted of seven individuals with relevant experience in the Medicaid program and pharmacy benefits. *See* Ex. 3 (Change Healthcare's First Supplemental Protest) at 2. The committee included personnel from the Office of Pharmacy, including a Staff Officer and two Level III Pharmacists; an official from the Office of Reimbursement; and Medicaid Nurse Bureau Directors from the Office of Medical Services and Office of Program Integrity. *See id.*, Ex. A. In contrast, the second evaluation committee convened by DOM consisted of only two

[5] Lisa Shaw, DOM Accounting Manager, consulted during review of the offerors' audited financials. *See* Ex. 3 (Change Healthcare's First Supplemental Protest, Ex. B (Aug. 29, 2022)).

scoring members, down from seven scoring committee members for the first evaluation, and, while well-qualified in their respective fields, both scoring evaluators lack relevant experience with state Medicaid programs. Accordingly, the selection of these evaluators was contrary to applicable statute and regulation and is a basis for sustaining Change Healthcare's protest.

Contrary to DOM's assertion, Change Healthcare supported its allegation that DOM Deputy Administrator Wil Ervin lacks relevant experience with the Medicaid program. As Change Healthcare asserted, Mr. Ervin's background is in government relations, legislative affairs, and public policy. *See* Ex. 3 (Change Healthcare's First Supplemental Protest) at 2. Mr. Ervin's LinkedIn profile confirms that he has spent the majority of his time at DOM involved in government relations and legislative affairs.[6] *See* Ex. 20 (Wil Ervin LinkedIn Profile) at 3 (showing that Mr. Ervin served as Senior Director of External Affairs, Director of Government Relations, and Legislative Affairs Officer for a total of seven years and one month). In August 2022, during the reevaluation of Change Healthcare's and MedImpact's proposals, Mr. Ervin had been in his current position as Deputy Administrator of Health Policy and Services for less than two years. *See id.* While Mr. Ervin may be an expert in health policy and government relations, Mr. Ervin lacks the specialized knowledge of and expertise in Mississippi Medicaid and DOM's pharmacy program that would enable him to evaluate an offeror's technical approach for administering the Mississippi SR program and developing and managing the PDL in accordance

[6] The PPRB may take notice of facts that "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Mississippi Rule of Evidence 201(b)(1); *see also AT&T Corp. v. Miss. Dep't of Info. Tech. Servs.*, 298 So.3d 938, 946 n.5 (Miss. 2020) (taking judicial notice of a state agency publication on the agency's website). An appellate court may also take judicial notice of facts, even if such facts were not noticed by the trial court. *See United States v. Herrera-Ochoa*, 245 F.3d 495, 501 (5th Cir. 2001) (citing Federal Rule of Evidence 201(f)). Although the PPRB is not a court, this authority is persuasive given the PPRB's role as an appellate review board.

with the RFP requirements. DOM relies on Mr. Ervin's position as a Deputy Executive Director and the fact that he oversees the DOM Office of Pharmacy to demonstrate that he was qualified to serve as an evaluator for this RFP, but neither his official title nor his role as an administrator establish that he meets the statutory and regulatory requirements for an evaluation committee member.

Similarly, State Insurance Administrator Cindy Bradshaw also lacks the requisite qualifications to serve as an evaluation committee member for the SR and PDL evaluation. *See* Ex. 3 (Change Healthcare's First Supplemental Protest) at 2. According to Ms. Bradshaw's own description of her role at DOM in her LinkedIn profile, she manages the operations of the State and School Employees' Life and Health Insurance Plan, a self-funded plan that provides health and life insurance to approximately 200,000 state employees and retirees. *See* Ex. 21 (Cindy Bradshaw LinkedIn profile) at 1. Ms. Bradshaw also serves as the administrator for the Self-Insured Workers' Compensation Trust. *See id.* While she appears to have extensive experience with the State employees' health plan and workers' compensation, neither of these roles demonstrates that Ms. Bradshaw has knowledge of the state Medicaid program. Indeed, there are significant differences between commercial health care plans and Medicaid such that Ms. Bradshaw lacks the relevant experience to serve as a qualified evaluator on the evaluation committee for the PDL and SR RFP. The programs cover vastly different populations, are governed by different rules and regulations, and have their own unique funding and cost considerations. All of these distinctions are fundamental to the administration of a pharmacy program. DOM's assertions to the contrary are unpersuasive. Ms. Bradshaw does not "clearly possess expertise in matters regarding pharmacy benefits and operations" that are relevant to the

RFP because she does not possess knowledge of Medicaid or the Medicaid pharmacy benefit. *See* Ex. 12 (DOM Decision on Change Healthcare Protest) at 8.

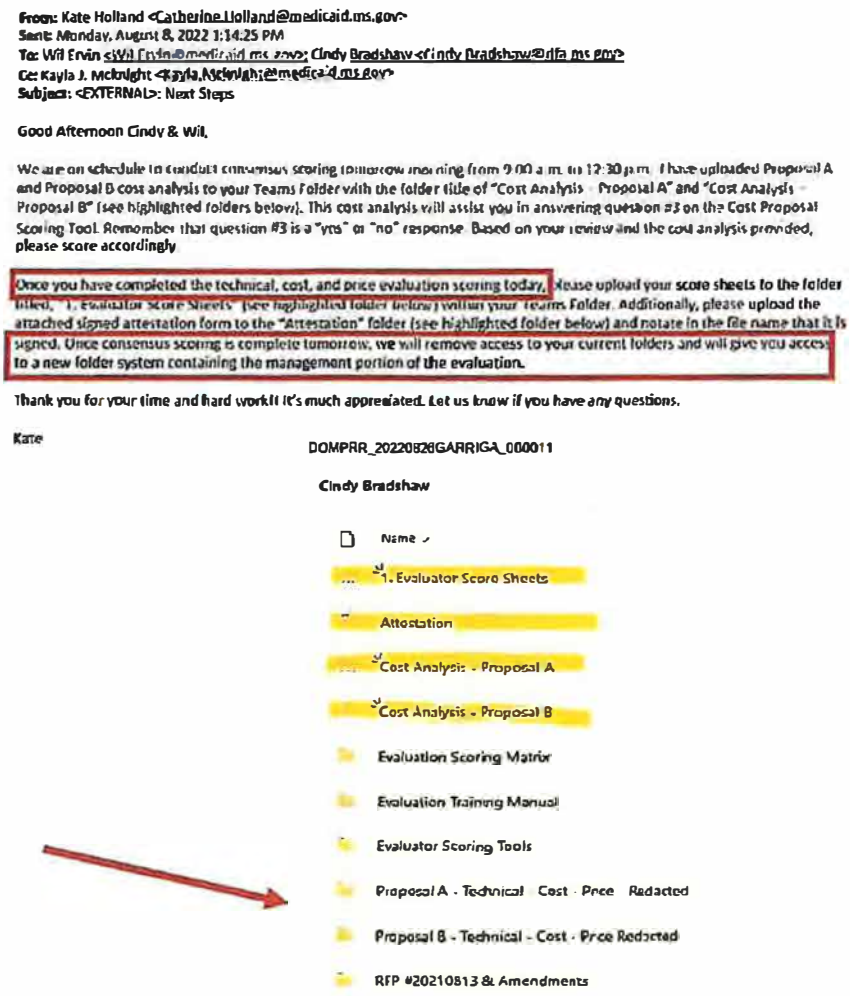
DOM's selection of the two scoring evaluation committee members lacking the required experience was arbitrary and capricious and contrary to statute and regulation. As demonstrated below, the lack of qualified evaluation committee members compromised the evaluation of offerors' proposals. Specifically, the evaluators failed to meaningfully assess Change Healthcare's superior experience performing similar work for state Medicaid programs and whether offerors' pricing reflected a realistic approach to the RFP's technical requirements and low performance risk. Instead, the evaluators ignored the glaring need to look behind MedImpact's shockingly low price. Change Healthcare's proposal should be sustained on this basis.

C. DOM's Evaluation Process Failed to Comply with Statutory Blinding Requirements and Was Contrary to Law

1. DOM's Approach to the Pricing Evaluation Introduced Identifying Information into the Evaluation of Technical Proposals

DOM's Decision also confirms that DOM's approach to the price evaluation injected identifying information into the "blind" technical proposal evaluation. This is an independent basis to sustain Change Healthcare's protest and cancel the RFP pursuant to Miss. Code Ann. § 31-7-417(2).

The RFP provided for the blind evaluation of offerors' technical proposals. Ex. 1 (RFP), § 6.4.2. The evaluation record, however, establishes that the evaluation of the technical proposals was not blind because the evaluators were provided offerors' technical, cost, ***and*** price proposals ***at the same time*** in ***one folder***:



From: Kate Holland <Catherine.Holland@medicaid.ms.gov>
Sent: Monday, August 8, 2022 1:14:25 PM
To: Wil Ervin <Wil.Ervin@medicaid.ms.gov>; Cindy Bradshaw <Cindy.Bradshaw@dfa.ms.gov>
Cc: Kayla J. McKnight <Kayla.McKnight@medicaid.ms.gov>
Subject: <EXTERNAL>: Next Steps

Good Afternoon Cindy & Wil,

We are on schedule to conduct consensus scoring tomorrow morning from 9:00 a.m. to 12:30 p.m. I have uploaded Proposal A and Proposal B cost analysis to your Teams Folder with the folder title of "Cost Analysis - Proposal A" and "Cost Analysis - Proposal B" (see highlighted folders below). This cost analysis will assist you in answering question #3 on the Cost Proposal Scoring Tool. Remember that question #3 is a "yes" or "no" response. Based on your review and the cost analysis provided, please score accordingly.

Once you have completed the technical, cost, and price evaluation scoring today, please upload your score sheets to the folder titled, "1. Evaluator Score Sheets" (see highlighted folder below) within your Teams Folder. Additionally, please upload the attached signed attestation form to the "Attestation" folder (see highlighted folder below) and notate in the file name that it is signed. Once consensus scoring is complete tomorrow, we will remove access to your current folders and will give you access to a new folder system containing the management portion of the evaluation.

Thank you for your time and hard work! It's much appreciated. Let us know if you have any questions.

Kate

DOMPRR_20220826GARRIGA_000011

Cindy Bradshaw

Name

1. Evaluator Score Sheets

Attestation

Cost Analysis - Proposal A

Cost Analysis - Proposal B

Evaluation Scoring Matrix

Evaluation Training Manual

Evaluator Scoring Tools

Proposal A - Technical - Cost - Price - Redacted

Proposal B - Technical - Cost - Price Redacted

RFP #20210813 & Amendments

See Ex. 22 (Email K. Holland to W. Ervin and C. Bradshaw) (yellow highlighting in original); *cf.* Ex. 1 (RFP), § 7.1.3 (providing that price would not be evaluated until phase 5). Even though DOM presumably redacted each offeror's name from its price proposal before providing the proposals to evaluators along with the blinded technical proposals, MedImpact's price (and the fact that its price was ***lower*** than Change Healthcare's) was ***already*** public. DOM's first and second award notices and the Administrative Hearing Officer's recommendation, which are posted on DOM's website, all revealed that MedImpact proposed a dramatically lower price. *See*

Exs. 4, 7, 8 (DOM's First and Second Award Notices and Administrative Hearing Officer's Recommendation). Because DOM included both the technical and price proposals in one folder for each evaluator to access at the same time, instead of requiring evaluators to first finalize scores for the technical proposals before accessing the price proposals for evaluation, the evaluators could readily identify the offeror that had submitted each technical proposal based on the accompanying price proposal. This evaluation process was contrary to the RFP and violated applicable law requiring the blind evaluation of technical proposals. Miss Code. Ann. § 31-7-417(2). This material procurement defect requires cancellation of the RFP.

2. *The record does not establish that DOM removed identifying information from MedImpact's proposal*

In addition to DOM's introducing identifying information into the evaluation of technical proposals, DOM has provided no evidence to support its assertion that the evaluation committee evaluated proposals that contained no identifying information. There is no sworn testimony or evidence in the record memorializing DOM's de-identification process. The absence of an affidavit or evidentiary support for DOM's assertion is even more glaring given the circumstances of this procurement where DOM overlooked instances of identifying information in MedImpact's proposal after eliminating Change Healthcare's proposal from consideration, issued its first NOI to award the contract to MedImpact, and then attempted to proceed with the award. DOM has already conducted a flawed de-identification process in this procurement, and Change Healthcare has no means of verifying that all identifying information was properly removed from the evaluated versions of the proposals by DOM because these de-identified proposals have never been released to Change Healthcare. Ex. 12 (DOM Decision on Change Healthcare Protest) at 4 (stating that in response to OPSCR's recommendation, DOM de-identified Change Healthcare's and MedImpact's proposals and submitted them to a new team of

evaluators for reevaluation). Accordingly, the PPRB should reject DOM's unsupported assertion that all identifying information was removed from the proposals prior to evaluation. Instead, the PPRB should perform an audit of the Agency Procurement File, including a review of the proposals actually evaluated by the evaluation committee members and the evaluation process itself, to determine whether it complied with the RFP and applicable statute and regulation.

D. DOM's Failure to Evaluate Whether Proposed Prices Were Realistic, as Required by the RFP, Was Arbitrary and Capricious and Contrary to Law

In its decision denying Change Healthcare's protest, DOM blatantly ignored that the RFP required evaluators to consider whether offerors' prices were too low to successfully perform the contract. *See* Ex. 12 (DOM Decision on Change Healthcare Protest) at 13-17. Mississippi law provides that agencies must evaluate proposals in accordance with the terms of the RFP. *See* Miss. Code. Ann. § 31-7-419. DOM's failure to evaluate offerors' price proposals in accordance with this RFP requirement was arbitrary and capricious and contrary to law.

1. *DOM Failed to Adhere to the RFP's Price Evaluation Criteria*

In defense of its evaluation, DOM insists that the RFP's price evaluation criteria required DOM to do nothing more. Ex. 12 (DOM Decision on Change Healthcare Protest) at 13-16. DOM relies on the fact that the PPRB's OPSCR Rules do not mandate that agencies conduct a price realism evaluation. This argument, however, ignores the plain language of the RFP, which explicitly required that DOM evaluate whether proposed prices were realistic, *and* the statutory requirement that proposals be evaluated in accordance with the terms of the RFP. *See* Ex. 1 (RFP), § 7.1.3; Miss. Code. Ann. 31-7-419. DOM's decision to ignore the terms of the RFP was contrary to law.

The RFP provided that DOM would evaluate price in the second to last phase of the evaluation process and that a numerical score would be assigned to each offeror's price proposal.

See Ex. 1 (RFP), § 7.1.3. The maximum 35 points would be assigned to the "lowest and best ***acceptable*** proposal," and all other proposals would be assigned points based on the formula set forth in the RFP. *See id.* (emphasis added). Contrary to DOM's contentions, the RFP unequivocally stated that "***[a]ny bid price determined by DOM to be unrealistically or unreasonably low may not be considered acceptable, as such proposal has a high probability of not being accomplished for the price proposed.***" *Id.* (emphasis added). This language in the RFP at least required DOM to consider whether offerors' pricing was "unrealistically low" for the work to be performed, and DOM had no discretion to ignore the RFP requirement to conduct that analysis.

To facilitate the evaluation of whether an offeror's price was too low, and consistent with Mississippi law requiring for blind evaluations of technical proposals only, the RFP intentionally did not provide for a blind price evaluation. *See id.*; Miss Code. Ann. § 31-7-417(2). Rather, the RFP provided that price would be evaluated ***after*** DOM evaluated the blinded portions of the proposals and evaluators' scoring for those sections was locked in. Ex. 1 (RFP), §§ 6.4.2, 6.4.3, 6.4.5. That the price proposal was not subjected to a blind evaluation enabled DOM to evaluate offerors' proposed prices with the benefit of knowledge regarding the offerors' technical approaches. This way DOM could reasonably consider whether an offeror's proposed technical approach had a probability of being accomplished for the proposed price, and DOM could have the opportunity to request that an offeror produce additional documentation to authenticate its price proposal in the event the offeror's low price raised questions about its feasibility. *See id.*, § 7.1.3.

DOM concedes that it conducted no such inquiry into whether offerors' proposed prices were realistic in light of the proposed technical approaches. Ex. 12 (DOM Decision on Change

Healthcare Protest) at 17. Contrary to the terms of the RFP, DOM admits that "pricing sections of both proposals were scored blindly by the Evaluation Committee with no awareness of which price was associated with which proposal." *Id.*; *see also* Ex. 22 (Email from Kate Holland to Evaluators (Aug. 8, 2022)). The evaluation records confirm this fact as well. When faced with MedImpact's proposed price that was half the amount reflected in DOM's own estimate of $15.5 million and almost half the amount proposed by an experienced incumbent contractor, DOM conducted no further inquiry into whether MedImpact's price could reasonably accomplish the RFP's requirements. *See* Ex. 13 (Change Healthcare's Second Supplemental Protest, Ex. E (Sept. 26, 2022)). As a result, the award to MedImpact was inconsistent with the terms of the RFP and contrary to law and cannot stand.

2. *MedImpact's Proposed Price is Unrealistically Low Given the RFP's Extensive Performance Requirements*

Contrary to DOM's contentions, MedImpact's proposed price was unrealistically low. The magnitude and breadth of complex requirements for the SR and PDL contractor set forth in the RFP is considerable. Specifically, the RFP requires the contractor (among other things):

- Be present on-site for ***each*** P & T Committee meeting;
- Produce systematic clinical reviews for each therapeutic class or specific drugs for ***all*** P & T committee meetings;
- Provide a ***weekly*** PDL data file to ensure appropriate PDL indicators are assigned to new drugs, necessary for inclusion in the claims processing system;
- Develop periodic articles for the MS Medicaid Provider bulletin and assist DOM staff with developing articles and presentations;
- Be available for onsite presentations ***as requested*** by DOM
- Provide gross verses net spend trending report and an estimated cost savings report on a ***quarterly*** basis, and provide ***all ad hoc*** reports requested by DOM;
- Develop recommendations for enhancing rebates and/or lowering overall pharmacy costs;

- Respond to ***all*** inquiries from labelers and manufacturers related to supplemental rebates;
- Generate invoices for and collect supplemental rebates, including resolving all disputes;
- Implement a plan to ensure it is able to respond to DOM within one business day to changing circumstances in the drug marketplace that require any prices to be adjusted in the system;
- Audit pharmacy claims, including, but not limited to high-dollar and high-cost disease state claims for payment accuracy, billing anomalies, correction and intervention with pharmacy providers and Medicaid's Program Integrity Office;
- Produce a Super Utilizer Report that identifiers top users of pharmacy, medical, and combined services relative to percentage of total spend;
- Provide key pharmacy program statistics that provide comprehensive pharmacy metric calculations over a minimum of eight quarters across all delivery systems.

Ex. 1 (RFP), §§ 2.1.1.2, 2.1.2.2, 2.2.2, 2.3.2 (emphasis added). Moreover, the RFP provides that the Contractor must retain highly qualified key personnel (some devoted full time to this Pharmacy program) to support each component of the contract. *See id.*, §§ 2.1.3, 2.2.3, 2.3.3. MedImpact's dramatically low price indicates that it does not understand the breadth of these requirements and the resources required to successfully and timely perform them. Although DOM apparently contends that MedImpact's pricing was comparable to other vendors, MedImpact's price is significantly lower than DOM's own estimate and the price of the incumbent – the two entities most familiar with the cost of contract performance. Ex. 12 (DOM Decision on Change Healthcare Protest) at 16 (asserting that "MedImpact's proposed pricing for preferred drug list and supplemental rebate services was in-line with pricing reflected in prior invoices for the same services when performed by another vendor.")

Throughout the long history of this procurement, DOM has repeatedly refused to inquire into MedImpact's low price and has gone to unprecedented lengths to shield further information about MedImpact's proposal from public release based on purported cost savings to the State.

See Ex. 12 (DOM Decision on Change Healthcare Protest) at 6; Ex. 18 (DOM Mem. of Law in response to MedImpact's Mot. for Final Protective Order, Dkt. No. 12, *In re: MedImpact Healthcare Sys., Inc., et al.*, No. 25CH1:22-CV-02168 (Ch. Ct. First Dist. Dec. 7, 2022) at 4). DOM is under the mistaken impression that MedImpact's proposal price represents significant cost savings for the State's Medicaid Program. But a fundamental goal of this contract is to maximize cost savings for the State through the development of a fiscally sound PDL and the collection of supplemental rebates. If the contractor is unable to devote the necessary resources and expertise to performance, it cannot optimize cost savings for the program. Thus, a short-term savings in terms of the awarded contract price will likely result in significant costs for Mississippi long-term. DOM, however, ignored both the fiscal impact of its selection of MedImpact and the RFP requirement to inquire into MedImpact's low price.

E. DOM's Failure to Evaluate MedImpact's Experience, which did not Meet the RFP's Minimum Qualifications, was Arbitrary and Capricious

DOM's failure to evaluate MedImpact's relevant experience in accordance with the RFP requirements was arbitrary and capricious. DOM continues to ignore that MedImpact lacks the minimum experience required by the RFP that is necessary to successfully perform the requirements of the contract. DOM's decision to relax the RFP's experience requirements for MedImpact was arbitrary and capricious. *See Hemphill Constr. Co., Inc. v. City of Laurel*, 760 So. 2d 720, 724 (Miss. 2000) (emphasizing the well-established principle that each bid must be evaluated "with all other bids upon the same basis[.]").

The RFP provided that the contractor must "coordinate all phases of the preferred drug list (PDL) and supplemental rebate (SR) administration . . . with a minimum of five years of experience servicing government accounts and has, ***within the last 48 months***, been engaged in a contract or awarded a new contract with ***similar work in a state Medicaid program.***" Ex. 1

(RFP), § 2.1 (emphasis added). Because Mississippi has a Unified PDL, ***similar work*** is inclusive of both FFS and managed care program experience.

MedImpact does not meet these minimum requirements. Contrary to DOM's bare assertions, MedImpact has not managed Medicaid FFS programs in **any state** in the last 48 months. As Change Healthcare set forth in its protest, the proposal MedImpact submitted in response to a recent RFP for Kentucky's Medicaid program confirms that MedImpact only began focusing and investing in providing FFS Medicaid solutions as required in the RFP in 2017. Despite MedImpact's stated shift in focus to FFS, a review of publicly available information demonstrates that MedImpact does not serve as the vendor responsible for managing any state's PDL for the state's Medicaid FFS benefit. *See* Ex. 23 (Chart of Pharmacy Vendors Supporting Medicaid FFS Benefit by State).[7] The Chancery Court's decision granting MedImpact's petition for a protective order also confirms that MedImpact lacks the required experience. After an *in camera* review of MedImpact's experience projects, the Chancery Court determined that the list of Medicaid projects MedImpact included in its proposal reflected confidential commercial information. *See* Ex. 19 (Protective Order, Dkt. No. 20, *In re: MedImpact Healthcare Sys., Inc., et al.*, No. 25CH1:22-CV-02168 (Ch. Ct. First Dist. Jan. 17, 2023)). Because contracts with state Medicaid agencies are routinely publicized and are publicly available, MedImpact's project list is likely limited to projects with commercial entities or does not reflect relevant work with state Medicaid agencies. And in any event, publicly available information demonstrates that

[7] *See AT&T Corp. v. Miss. Dep't of Info. Tech. Servs.*, 298 So.3d 938, 946 n.5 (Miss. 2020) (taking judicial notice of a state agency publication on the agency's website); *see also* Pharmacy Vendors and PBMs for Medicaid Fee-For-Service Benefit, https://www.kff.org/other/state-indicator/use-of-pharmacy-vendors-and-pbms-for-medicaid-fee-for-service-benefit/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D (survey information as of July 1, 2019).

MedImpact's recent experience does not include relevant FFS experience. *Cf.* Kentucky Department for Medicaid, Kentucky Medicaid MCO PBM Pharmacy Provider Point-of-Sale (POS) Billing Manual, *available at* https://kyportal.medimpact.com /sites/default/files/2021 09/KY%20MCO%20PBM_ Provider%20Billing%20 Manual_V1.2%20pharm.pdf (noting MedImpact's award of its PBM MCO contract and clarifying that Magellan Rx would continue serving as the FFS PBM) (last visited Jan. 29, 2023). As such, MedImpact lacks the minimum experience called for by the RFP.

MedImpact's lack of required experience is not immaterial. FFS experience is not only required by the RFP; it is critical to contract performance. Under the contract, the contractor will be responsible for financial models that can accurately capture the actual impact of reimbursement costs. As Change Healthcare explained in its proposal, the contractor's financial models must recognize the downstream impact of gross reimbursement costs on managed care expenditures and, in turn capitation. *See* Change Healthcare Proposal at 44. In a carved-out Medicaid pharmacy program, gross reimbursement amounts are minimally consequential to the state since they pay 100% of the claim and receive 100% of the rebate. *Id.* With a Unified FFS-MCO PDL, however, the reimbursement amount takes on additional importance because the consideration of the downstream impact of the reimbursement amount is more complex. DOM, however, ignored this material noncompliance in evaluating MedImpact's proposal. MedImpact's lack of experience in this arena jeopardizes the State's ability to not only generate cost savings, but also poses a risk of increased costs in the long-term.

F. DOM's Evaluation of Change Healthcare's References Was Arbitrary and Capricious

DOM's argument that Change Healthcare failed to submit experience references in its proposal is erroneous. *See* Ex. 12 (DOM Decision on Change Healthcare Protest) at 17.

Accordingly, DOM's decision to deduct points from Change Healthcare's proposal based on the incorrect conclusion that Change Healthcare failed to include references in its proposal is unsupported by the evidence.

First, Change Healthcare included corporate references in its proposal to substantiate its experience with contracts for similar work in a state Medicaid program. *See* Ex. 1 (RFP), § 2.1. ***DOM's decision concedes that Change Healthcare included these references in its proposal.*** *See* Ex. 12 (DOM Decision on Change Healthcare Protest) at 18 ("[R]eferences were contained only in the ***redacted*** 'PUBLIC COPY' version of Change's proposal . . .") (emphasis in original). Thus, DOM's argument is ***not*** that Change "failed to properly submit any references" whatsoever, *id.* at 17, as DOM misleadingly asserts, but that Change failed to include them in the hard copies of its proposal submitted nearly a year prior to the instant evaluation. *Id.* at 18.[8]

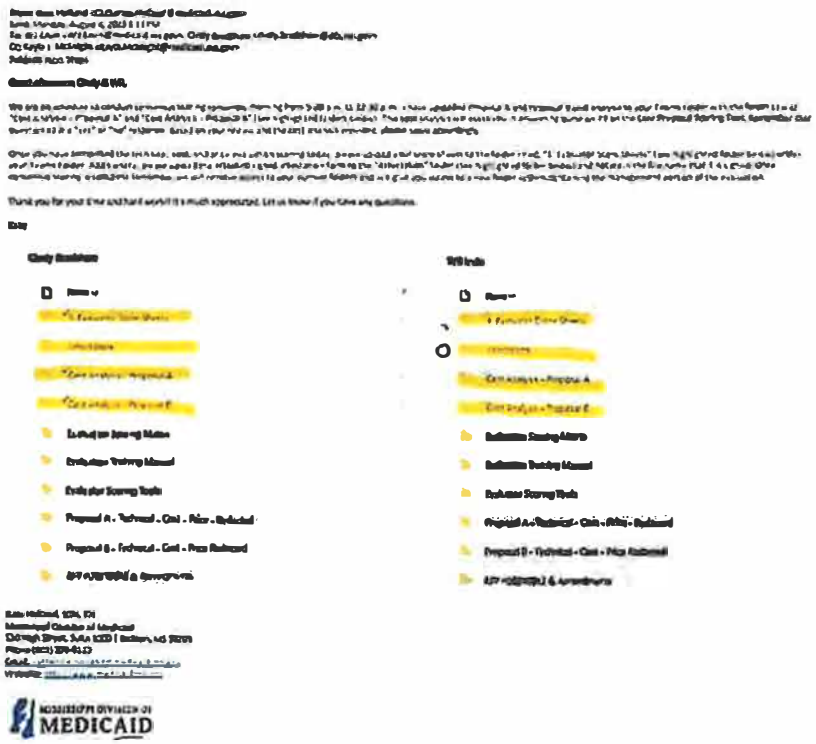
Not only does DOM mischaracterize Change Healthcare's proposal submission, it is wrong on its interpretation of the RFP well. DOM argues that the RFP required the evaluators to evaluate only the hard paper copies of offerors' proposals, Ex. 12 (DOM Decision on Change Healthcare Protest) at 18, but there is no such requirement in the RFP, and tellingly, DOM cites no provision to support its assertion. *See id.* The RFP provided that offerors were to submit nine paper copies of each section of their proposals, but there was no provision of the RFP restricting DOM's evaluation to the hard paper copies of offerors' proposals and precluding the evaluators from reviewing the electronic versions of offerors' proposals. *See* Ex. 1 (RFP), § 6.1.

DOM's assertion that the electronic, redacted version of the proposal on the USB flash drive submitted by an offeror "was to be used only to address any document requests DOM

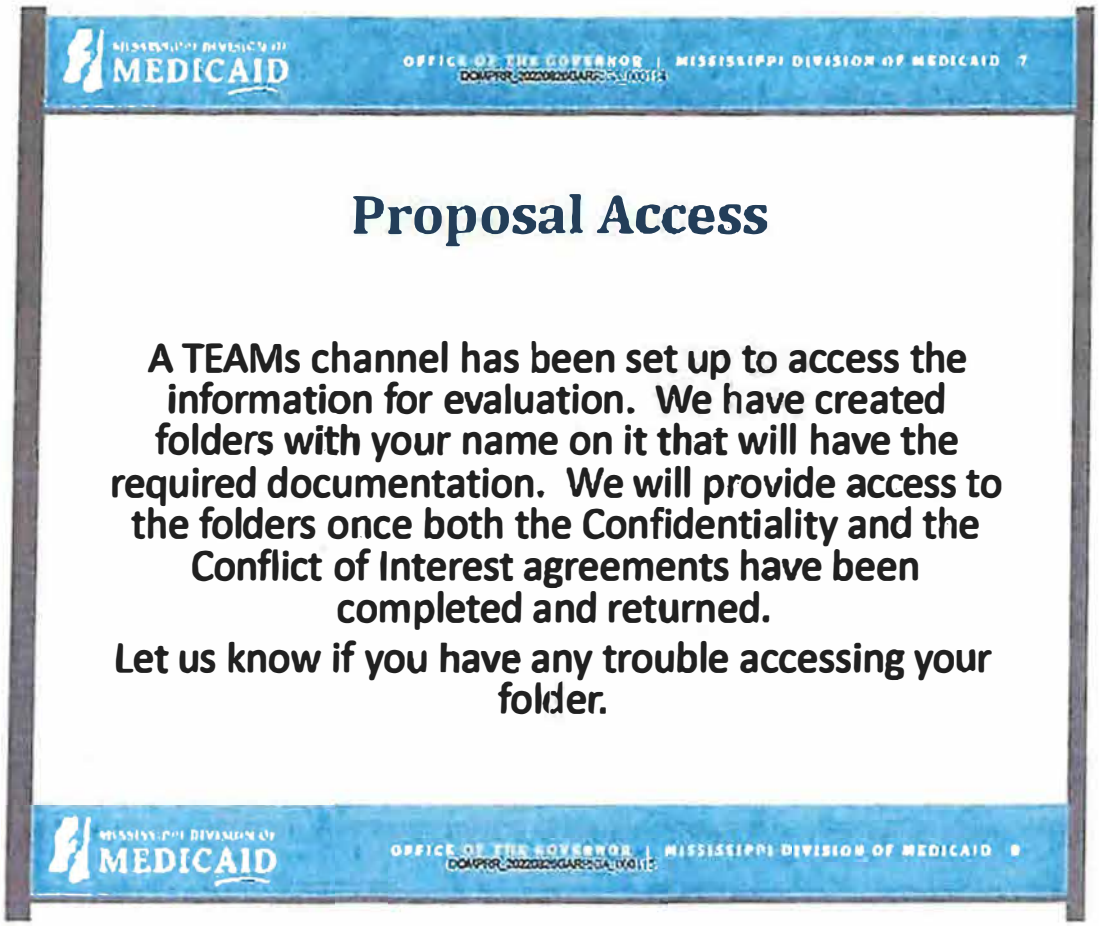
[8] Change Healthcare has no way of evaluating DOM's assertion that the references were not contained in the hard copies it submitted, so assumes for purposes of this argument that DOM's assertions in this regard are accurate.

received under the Mississippi Public Records Act" is also erroneous. *See* Ex. 12 (DOM Decision on Change Healthcare Protest) at 18. The RFP provided that the files on the USB flash drive were "for the use and files of the Office of Procurement only," but there is no restriction on their use by the Office of Procurement for the evaluation, nor is there any reference whatsoever to the MPRA in this section of the RFP. *See* Ex. 1 (RFP), § 6.1.

Finally, the record shows that the premise of DOM's argument—that the evaluators only evaluated hard paper copies of Change Healthcare's proposal—is erroneous. Documents produced by DOM in response to Change Healthcare's public records requests establish that the evaluators actually evaluated electronic copies of Change Healthcare's and MedImpact's proposals, not paper versions. In an email dated August 9, 2022, Kate Holland from DOM advised the evaluators that "You should now have access to the Management Folder which contains the management scoring tool, RFP and amendments, proposals, and references." *See* Ex. 13 (Change Healthcare's Second Supplemental Protest, Ex. F (Sept. 26, 2022)). On August 8th, Ms. Holland also advised the evaluators that she had uploaded proposal documents to "your Teams Folder" and included screen shots of electronic folder icons containing proposal documents and evaluation tools:



See Ex. 22 (Email from K. Holland to W. Ervin & C. Bradshaw, "Next Steps" (Aug. 8, 2022, 1:14 PM)). In an Evaluation Orientation Manual specifying the evaluation process under the RFP that was produced by DOM in response to Change Healthcare's public records request, the Agency also described its creation of a TEAMS channel for access to information from the evaluation (see below):



See Ex. 24 (Evaluation Orientation Manual) at 8. Accordingly, DOM's interpretation of the proposal evaluation process as confined to the hard paper copies of offerors' proposals was not only not required by the RFP but does not reflect the evaluation that actually occurred. The record evidence establishes that the evaluators conducted their evaluation based on electronic versions of offerors' proposals on a TEAMS channel. *See* Ex. 13 (Change Healthcare Second Supplemental Protest, Ex. F (Sept. 26, 2022)); Ex. 22 (Email from K. Holland to W. Ervin & C. Bradshaw, "Next Steps" (Aug. 8, 2022, 1:14 PM)); Ex. 24 (Evaluation Orientation Manual) at 8.

For multiple reasons, DOM's argument that the evaluators could not evaluate Change Healthcare's references is clearly erroneous and arbitrary and capricious. As detailed above,

there is no basis for DOM to claim that Change Healthcare did not submit references to the Agency, or that the evaluators were unable to access these corporate references for evaluation purposes under the terms of the RFP, when the references were available in Change Healthcare's electronic proposal—which DOM concedes. DOM's argument is also based on a misinterpretation of the RFP, specifically that only paper copies of proposals could be evaluated under the terms of the RFP. However, there is no such restriction in the RFP. Had DOM wished to restrict the evaluation to the hard paper copies of proposals, it could have done so by including this requirement in the terms of the RFP. Absent language in the RFP precluding the Agency from evaluating the references included in the electronic version of Change Healthcare's proposal, however, it was arbitrary and capricious for the Agency to fail to evaluate the references in its possession and downgrade Change Healthcare's proposal on this basis. Finally, even if the RFP had required evaluation of hard paper copies, as DOM asserts, the evidence is that the evaluators did not conduct their evaluation in accordance with the RFP's terms, as they evaluated the electronic, not paper versions, of offerors' proposals. Accordingly, DOM's argument should be rejected.

IV. CONCLUSION

It would be hard to imagine a procurement process beset with this many errors or improvised remedies on the part of the state agency. Nor is there an easy explanation, breaking with years of custom, for an agency to ***actively*** work to prevent a protestor from obtaining copies of key aspects of the winning proposal, documents that could be used to help demonstrate that the agency's selection was fundamentally flawed. The PPRB, however, has the authority under Mississippi law to examine this entire process with a fresh perspective. After doing so, and for the reasons set forth above, Change Healthcare respectfully requests that the PPRB:

1) Declare that the proposed award to MedImpact is in violation of applicable statute and application regulation and set aside the January 23, 2022 final agency decision of the Mississippi Division of Medicaid adopting the Office of Procurement's recommendation denying Change Healthcare's protest and affirming DOM's award of the contract under the RFP to MedImpact; and either

2) Cancel the solicitation for failure to comply with Miss. Code Ann. § 31-7-417(2), requiring proposals to be evaluated by the evaluation committee without identifying information; or

3) Cancel the proposed contract award to MedImpact in accordance with Miss. Admin. Code Pt. 9, R. 5-205 and

    a. award the contract under the RFP to Change Healthcare; or

    b. conduct an audit of DOM's conduct of this procurement in accordance with Miss. Admin. Code Pt. 9, R. 3-602(a) based on the complete Agency Procurement File (as defined in Miss. Admin. Code Pt. 9, R. 1-201.01(c)) and hold a hearing in accordance with Miss. Admin. Code Pt. 9, R. 5-203.01, allowing Change Healthcare an opportunity to participate; or

    c. Direct DOM to re-open the procurement, convene a new qualified evaluation committee "with relevant experience in the Medicaid program," solicit revised proposals, and conduct an evaluation in a manner consistent with the RFP and in accordance with applicable statute and regulation; and

4) Award such other relief as the PPRB deems appropriate.

Sincerely,
BUTLER SNOW LLP

Mark W. Garriga

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Encl., Exhibit List

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Brittney Thompson, Director
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Attachment B.vi

DOM's Response to Change Healthcare's Appeal to PPRB

March 3, 2023

BEFORE THE MISSISSIPPI PUBLIC PROCUREMENT REVIEW BOARD
OFFICE OF PERSONAL SERVICE CONTRACT REVIEW

IN RE:
APPEAL OF THE FINAL DECISION OF THE MISSISSIPPI DIVISION OF MEDICAID ON CHANGE HEALTHCARE PHARMACY SOLUTIONS, INC.'S PROTEST OF THE NOTICE OF INTENT TO AWARD RFP #20210813 TO MEDIMPACT HEALTHCARE SYSTEMS, INC.

MISSISSIPPI DIVISION OF MEDICAID'S RESPONSE TO CHANGE HEALTHCARE PHARMACY SOLUTIONS, INC.'S APPEAL OF THE DIVISION OF MEDICAID'S FINAL DECISION TO AWARD RFP #20210813 TO MEDIMPACT HEALTHCARE SYSTEMS, INC.

COMES NOW the Mississippi Division of Medicaid ("DOM") and submits this *Mississippi Division of Medicaid's Response to Change Healthcare Pharmacy Solutions, Inc.'s Appeal of the Division of Medicaid's Final Decision to Award RFP #20210813 to MedImpact Healthcare Systems, Inc.* ("Response"). DOM states as follows:

INTRODUCTION

This matter involves a *Request for Proposal* ("Pharmacy RFP") issued by DOM on August 13, 2021, to procure certain pharmacy services. Change Healthcare Systems, Inc. ("Change") and MedImpact Healthcare Systems, Inc. ("MedImpact") are the two (2) companies that submitted proposals ("Proposal") to DOM. Change was not awarded the contract.

After careful evaluation and comparison between the two (2) Proposals, DOM awarded the contract to MedImpact. MedImpact's Proposal contained a detailed analysis of its technical and management Proposals that satisfied all of the requirements of the Pharmacy RFP. In addition,

MedImpact provided a detailed cost analysis with pricing of $8,199.492.00 as opposed to the Change Proposal which was $14,695,831.00. Change's Proposal was almost $6.5 million higher than MedImpact's Proposal and gave only a lump sum figure with no analysis of the costs for its services.

In addition, Change's Proposal lacked sufficient components and detail in the technical and management portions as well, suggesting a "trust us" component to the Proposal. If DOM awarded the contract to Change, DOM could not explain to Mississippi taxpayers why it had needlessly agreed to spend $6.5 million more on a contract with Change. Yet, Change asks the Public Procurement Review Board ("PPRB" or "Board") to do exactly that in this Appeal. Neither DOM nor the PPRB can award Change the contract for $6,500,000 more based on nothing more than Change's wholly unsupported belief that MedImpact cannot perform the contract for the price quoted.

Because of the unique circumstances of this Pharmacy RFP process, DOM evaluated the MedImpact proposal twice, using a total of nine (9) evaluators. The consensus of both Evaluations is that MedImpact has the necessary experience and is perfectly capable of performing the contract for the price proposal and at a substantially lower cost than Change. Change simply did not supply a responsive and financially competitive Proposal, and it now seeks a "do-over."

It is time to move forward and allow DOM to award its contract to the most responsive and responsible offeror to provide services at a cost that is most advantageous to the State. The Pharmacy RFP and DOM's entire procurement process complied in all respects with Mississippi law. DOM conducted the Pharmacy RFP and subsequent evaluations of the proposals in a fair, equitable, and transparent manner. As a result, DOM has received a competitive proposal that serves the taxpayers of Mississippi well. Accordingly, Change's challenge to the award of the

Pharmacy RFP to MedImpact should be denied.

I. Facts and Procedural History

A. The Medicaid Program

Medicaid is a cooperative federal-state program established under Title XIX and Title XXI of the Social Security Act, as amended. Through Medicaid programs, states finance the delivery of medical care to low-income individuals and disadvantaged persons with monies provided by both the federal and state governments.

In Mississippi, the Medicaid program is administered by DOM, a state agency that is a division of the Office of the Governor, State of Mississippi. Miss. Code Ann. §§ 43-13-101 to -147. Like other states, Mississippi designs and administers its version of Medicaid through state statutes and regulations, as well as the Mississippi Medicaid State Plan ("State Plan"), a comprehensive agreement between the state and the federal Centers for Medicare & Medicaid Services ("CMS") that sets forth the scope and conditions of Mississippi's Medicaid program.[1] In turn, the Mississippi statutes, regulations, and State Plan must comply with federal requirements, including both federal statutes as well as rules and regulations promulgated by the U.S. Department of Health and Human Services. These statutes, rules, and regulations set the federal parameters for participation in the Medicaid program and, among other things, require states to cover certain services in their plans. *See* 42 U.S.C. § 1396a(a) and 42 U.S.C. § 1396a(a)(10)(A).

Medicaid is statutorily required to provide to its beneficiaries pharmaceutical benefits. Miss. Code Ann. § 43-13-117(A)(9). To provide these benefits, DOM's Office of Pharmacy ("Pharmacy Program") must perform certain administrative and programmatic functions to comply

[1] https://medicaid.ms.gov/about/state-plan/

with state and federal law. For example, DOM must develop and timely update a Preferred Drug List ("PDL"), which is the list of medications that DOM has approved for use by Medicaid beneficiaries. (DOM Exhibit 1, § 2.1.1, p. 7).[2] In addition, DOM must administer a drug rebate program, including both the Medicaid Drug Rebate Program ("MDRP") and the Supplemental Drug Rebate Program ("SR"). (*Id.* at §§ 1.1, 2.1.1., pp. 4 & 7). Through these programs, DOM can offset the costs of outpatient prescription drugs by entering agreements with drug manufacturers whereby they rebate a portion of prescription costs in exchange for inclusion on the PDL.

DOM must also perform Rate Setting of Covered Outpatient Drugs ("COD"). (*Id.* at §§ 1.1, 2.2.2, pp. 4 & 15). Rate setting for COD is a methodology that is designed to set drug reimbursement rates at the lowest possible rate that aligns with the acquisition cost of drugs and also provides an appropriate professional dispensing fee. In addition to these tasks, the Pharmacy Program also performs administrative tasks such as review of core functions and assessment of pharmacy operations. (*Id.* at §§ 1.1, 2.3, pp. 4 & 18).

Traditionally, DOM has contracted with outside vendors to perform most, if not all, of these functions. For example, vendors such as Change, Mercer Health & Benefits, LLC ("Mercer"), and Myers and Stauffer, LC previously have contracted with DOM to perform various aspects of the Pharmacy Program. At the time that the Pharmacy RFP at issue in this Appeal was being developed, DOM had two (2) vendors under contract to perform these services: (1) Change, which developed the PDL and performed drug rebate services; and (2) Mercer, which performed rate setting tasks for covered drugs. *See* https://www.transparency.ms.gov/ Change Healthcare

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[2]Attached to Change's Appeal Letter are twenty-four Exhibits. Citations to these Exhibits will be designated as "(Appeal Exhibit ___)". Exhibits attached to this Response will be designated as "(DOM Exhibit ___)". DOM Exhibit 1 consists of excerpts from the Pharmacy RFP. The Pharmacy RFP in its entirety is found as Appeal Exhibit 1.

Pharmacy Solutions Contract 8200025336 and 8200038529; Mercer Health & Benefits, LLC Contract 8200030998.

B. The Pharmacy Procurement

As the end of DOM's contracts with Change and Mercer approached, DOM considered various options for securing future pharmacy services. Based on a desire to consolidate services, eliminate duplicative costs, and obtain the best price available, DOM decided to combine all of these services into one contract, which meant they would be solicited through one RFP. Accordingly, on August 13, 2021, DOM's Office of Procurement published RFP# 20210813 soliciting offers from "qualified, experienced, responsible and financially sound vendors to develop and manage the Universal Preferred Drug List ("PDL"), administer the Supplemental Drug Rebate ("SR") program, manage the Rate Setting of Covered Outpatient Drugs ("COD"), and perform programmatic review and assessment of core components of the pharmacy program as assigned by DOM." (DOM Exhibit 1, § 1.1, p. 4).

In response to the Pharmacy RFP, DOM received Proposals from two (2) vendors: (1) MedImpact, a vendor that has never contracted with DOM, and (2) Change, the current UPDL and SR contract vendor since 2011.

In its initial review of the Proposals for responsiveness, DOM noted that Change had substantially failed to comply with the requirements of the Pharmacy RFP. For example, Change's Proposal contained over 350 instances of "identifying information," which were violations of the de-identification requirement of the Pharmacy RFP and *Mississippi Public Procurement Review Board Office of Personal Services Contract Review Rules and Regulations* §§ 3-301.05 and 3-301.06.[3]

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[3]The *Mississippi Public Procurement Review Board Office of Personal Services Contract Review Rules and Regulations* are commonly cited as the OPSCR Rules. These rules, however, are actually

Accordingly, DOM disqualified Change's Proposal.[4] MedImpact's Proposal, on the other hand, was deemed responsive, and it was the only proposal submitted to an evaluation committee for scoring.

MedImpact's Proposal was scored by an evaluation committee of seven people ("First Evaluation Committee"). The First Evaluation Committee utilized a comprehensive, fair, and impartial evaluation procedure in compliance with the terms of the Pharmacy RFP and OPSCR Rules and processes. Based on this evaluation, the Evaluators scored the MedImpact Proposal as follows:

FIRST EVALUATION		
RANKING	OFFEROR	TOTAL SCORE
1	MedImpact	81.83

(DOM Exhibit 2).

Significantly, in light of Change's Appeal issues, the First Evaluation Committee reviewed MedImpact's experience, price, and cost factors. Not only did the First Evaluation Committee find that MedImpact met the experience criterion, but MedImpact also rated 5.09/8.0 in that category. (DOM Exhibit 2). Likewise, the First Evaluation Committee reviewed the price, its underpinnings, and MedImpact's explanations of how it would staff and perform the contract. The First

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in the *Mississippi Administrative Code* ("Administrative Code") at Title 12 *Mississippi Department of Finance and Administration* Part 9 *Office of Personal Service Contract Review Rules & Regulations.* For purposes of this Response and for ease in locating the rules, the official citation will be given to the Administrative Code. 12 *Miss. Admin. Code* Pt. 9, Ch. 3, R. 3-301.05 and 3-301.06.

[4]In addition to the inclusion of "identifying information", Change's proposal also failed to comply with the requirements of the Pharmacy RFP in other ways: Change's Executive Summary exceeded the page limitation, no independent auditor's report was provided, the cost proposal did not meet regulations, and no corporate references were provided in the correct form. *See* Section III(E) of this Response.

Evaluation Committee was satisfied that MedImpact could perform the contract for the price quoted.

Based on the scoring and the First Evaluation Committee's determination that MedImpact's proposal met all the requirements of the Pharmacy RFP, DOM published a *Notice of Intent to Award* on December 15, 2021. In this notice, MedImpact was identified as the recommended contractor for the Pharmacy RFP. (Appeal Exhibit 4).

Thereafter, DOM submitted the Pharmacy RFP materials and the MedImpact Proposal to OPSCR for review. In reviewing these materials, OPSCR identified one instance of "identifying" information contained in MedImpact's Technical Proposal. OPSCR believed this constituted a violation of OPSCR Rules 3-203.01(f)-(g), 3-203.12, and 3-204.01.3[5] and MISS. CODE ANN. § 31-7-417(2). Consequently, on February 25, 2022, DOM issued a *Solicitation Cancellation Notice* canceling the Pharmacy RFP solicitation. (Appeal Exhibit 5).

Thereafter, MedImpact appealed to DOM, arguing that it had not been given any sort of hearing before the cancellation. (DOM Exhibit 3). After reviewing MedImpact's arguments, DOM agreed that OPSCR Rule 5-203.01[6] required DOM to consult with the Special Assistant Attorney General assigned to the Department of Finance and Administration ("DFA") and to also give MedImpact an "opportunity to be heard" before any cancellation of the Pharmacy RFP was considered. Accordingly, DOM issued a *Notice of Rescission of Solicitation Cancellation Notice* on March 18, 2022. (Appeal Exhibit 6). In this recision, DOM noted that it would undertake the steps required by OPSCR Rule 5-203.01[7] to determine if any cancellation of the Pharmacy RFP might be

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[5] 12 *Miss. Admin. Code* Pt. 9, Ch. 3, R. 3-203.01(f)-(g), 3-203.12, and 3-204.01.03.

[6] 12 *Miss. Admin. Code* Pt. 9, Ch. 5, R. 5-203.01.

[7] *Id.*

warranted. (*Id.*)

On June 22, 2022, a hearing was held before Judge James D. Bell to determine whether MedImpact's Proposal contained any potential violation of state laws or regulations regarding "de-identification" and, if so, whether such violation required cancellation of the Pharmacy RFP.

On July 2, 2022, Judge Bell issued a *Report and Recommendation*, finding that the mistaken, one-time inclusion of MedImpact's name in one attachment to its Technical Proposal was immaterial and did not violate Mississippi law. (Appeal Exhibit 7). In addition, Judge Bell found that DOM had the authority to excuse any irregularity stemming from the immaterial, one-time inclusion of MedImpact's name. (*Id.* at 6.). Accordingly, Judge Bell concluded that MedImpact should be awarded the contract. (*Id.* at 8.).

Following receipt of Judge Bell's recommendation, DOM consulted with DFA and its Special Assistant Attorney General, as required by OPSCR Rules 5-203.01.[8] On July 15, 2022, DOM's Executive Director issued DOM's Final Decision ("Final Decision") on the Pharmacy RFP. (*Id.*). In the Final Decision, DOM adopted the Recommendation of Judge Bell with the following additional comments:

> 1. This action by DOM is limited to the facts and circumstances presented by the particular matter at issue here and should not be read to create any binding or persuasive authority that could apply to other RFPs issued by DOM.
>
> 2. Section 3-204.03.4 of the *Mississippi Public Procurement Review Board Office of Personal Services Contract Review Rules and Regulations* provides "[m]istakes shall not be corrected after award of the contract except when the Agency Head finds that it would be unconscionable not to allow the mistake to be corrected." For the

[8]The transcript of this hearing was placed under seal by Judge Bell because of references to confidential and proprietary information. Judge Bell subsequently modified his recommendation to allow a copy of the transcript to be provided to OPSCR. (DOM Exhibit 4). The transcript was provided to OPSCR on July 20, 2022.

> reasons cited in Judge Bell's Recommendation, I find that it would be unconscionable not to correct the inclusion of MedImpact's name in a single exhibit to the bid proposal, particularly where no members of the scoring panel have stated that they were even aware of the singular inclusion of the name or that it impacted the blind evaluation in any way. In addition, I find that it would be unconscionable to deprive the State of the lowest and best bid for these services, particularly where the fact developed at the hearing demonstrates that there was no contamination of the blind scoring process caused by this mistake.

(*Id.*).

Based on the Final Decision, DOM issued a second *Notice of Intent to Award* on July 21, 2022. In the notice, DOM again confirmed that MedImpact was the recommended contractor for the Pharmacy RFP. (Appeal Exhibit 8).

Thereafter, OPSCR resumed its review of the MedImpact Proposal. At this juncture, OPSCR raised concerns regarding "company colors" within MedImpact's Proposal which it considered "identifying information" pursuant to OPSCR Rules 3-203.12.[9] To comply with applicable regulations, OPSCR advised DOM it could de-identify both the MedImpact and Change Proposals and submit them to a new team of evaluators for evaluation.

After discussions with OPSCR, DOM determined that it was in the best interest of the state to re-evaluate both Proposals. Thus, DOM issued a Cancellation of Notice of Intent to Award canceling the July 21, 2022 notice. (Appeal Exhibit 9). DOM then de-identified both the MedImpact and Change Proposals by scanning the original hard copies to black and white, which created de-identified black and white copies, and then scanning these de-identified black and white copies as locked PDFs. It was these locked PFDs copies that were distributed to the Evaluators.

The black and white, de-identified Change and MedImpact Proposals were sent to OPSCR for a second review to ensure all potential identifying information had been removed. Once

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[9]12 *Miss. Admin. Code* Pt. 9, Ch. 3, R. 3-203.12.

OPSCR's review was completed, the de-identified Proposals were submitted to a new evaluation committee ("Second Evaluation Committee"). In compliance with the terms of the Pharmacy RFP and OPSCR Rules, the Second Evaluation Committee evaluated the Proposals. The Second Evaluation Committee used a fair and impartial evaluation procedure that resulted in the following scores:

FIRST EVALUATION		
RANKING	OFFEROR	TOTAL SCORE
1	MedImpact	79.67
2	Change	61.40

(DOM Exhibits 5 & 6).

Based on these scores, DOM published a *Notice of Intent to Award* on August 19, 2022. In this notice, DOM recommended that the pharmacy contract be awarded to MedImpact. (Appeal Exhibit 11).

On August 26, 2022, Change filed with DOM its *Protest of the Mississippi Division of Medicaid's Notice of Intent to Award RFP #20210813 to MedImpact Healthcare Systems, Inc.* ("Protest" or "Change's Protest"). (Appeal Exhibit 2). Change submitted a supplemental protest on August 29, 2022, and a second supplemental protest on September 26, 2022.[10] (Appeal Exhibit 3 and Appeal

[10] Under OPSCR Rules 7-112.01 (12 *Miss. Admin. Code* Pt. 9, Ch. 7, R. 7-112.01), Change had seven (7) calendar days after the August 19, 2022, notice was published to submit its protest. Based on guidance provided by OPSCR, that seven-day period to file the protest was "tolled" and did not start running until August 22, 2022, because of OPSCR's interpretation of the "48-hour rule" contained in OPSCR Rules 3-204.04 (12 *Miss. Admin. Code* Pt. 9, Ch. 3, R. 3-204.04). Accordingly, Change had until August 29, 2022, to file its Protest. Change filed its original Protest on August 26, 2022, and its first supplemental protest on August 29, 2022. Both of these documents fall within the time frame allowed under OPSCR Rules 7-112.01. Change's second supplemental protest, however, was not filed until September 26, 2022, which was well outside the time period allowed under OPSCR Rules 7-112-01 (12 *Miss. Admin. Code* Pt. 9, Ch. 7, R. 7-112.01).

Change contends that the second supplemental protest was timely because DOM did not

Exhibit 13, respectively).

C. Public Records Requests and Protective Orders Related to the Pharmacy RFP

DOM received numerous public records requests under the Mississippi Public Records Act, Miss. Code Ann. §§ 25-61-1 to -19, for documents related to the Pharmacy RFP. Change alleges that DOM has attempted to shield MedImpact's information from disclosure in dealing with these requests. However, the facts do not support Change's contention, and establish that Change greatly benefitted from the legal positions DOM took in these matters. The facts also show that it is Change, not DOM, who has attempted to manipulate the protective order process for its benefit by claiming that the Proposals are confidential when someone has requested a copy of Change's Proposal, but then claiming no such protection exists when MedImpact's Proposal is at issue.

1. Change's Agreed Protective Order

On or about January 20, 2022, DOM received a public records request for unredacted copies of both Pharmacy RFP Proposals. (DOM Exhibit 9). In response, Change and MedImpact separately filed Petitions for Protective Order in the Chancery Court of Hinds County Mississippi. (DOM Exhibits 10 & 11). MedImpact's Petition for Protective Order is still pending.

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respond to its August 26, 2022, public records request until September 20, 2022, and the six (6) day "gap" in filing the second supplemental protest on September 20, 2022, was "reasonable" under Miss. Code Ann. § 25-61-5(1)(b). Change has egregiously misstated the facts on this issue. On August 26, 2022, Mr. Garriga's legal assistant, Adrienne Warren, submitted the public records request to DOM. (DOM Exhibit 7). On September 1, 2022, DOM provided its response to the request, including 487 pages of documents, to Ms. Warren. (DOM Exhibit 8). Thus, as of September 1, 2022, Mr. Garriga's office had been supplied with all documents responsive to his request. When Mr. Garriga later contacted DOM, to inquire about the documents, he was informed that the documents had been in his office's possession since September 1, 2022. Thus, it was not "reasonable" for Change to delay filing the second supplemental protest until September 26, 2022, which was nearly one (1) month after the documents had been provided.

With regard to in its *Petition for Protective Order* ("Change's Petition"), Change requested broad protection from disclosing any information "marked 'Confidential', or otherwise designated 'Confidential'". This included information related to: "[the] pricing proposal; key underlying details, strategies, and assumptions; the identity of critical Change Healthcare employees; unique financial modeling; and information on several of Change Healthcare['s] prior and current clients/customers, " (DOM Exhibit 10, ¶¶ 10 & 27). as well as "information about Change Healthcare's business systems, strategies, and pricing structures, all of which are designed to distinguish Change Healthcare from its competitors." (*Id.* at ¶¶ 9-10, 23, 26(c)).

Thereafter, the Special Assistant Attorney General representing DOM consented to sign an agreed order granting Change a protective order ("Change Agreed Order"). The Change Agreed Order was entered on May 10, 2022, and granted Change's request for protected status in full.[11] (DOM Exhibit 12). Thus, far from being a victim, Change has actually been a benefactor when DOM allegedly "abandoned" a neutral position with regard to confidential information.

2. MEDIMPACT'S PROTECTIVE ORDER

After Change obtained the Change Agreed Order protecting its own pricing, customer, and business strategy information from disclosure, Change then submitted several public record requests for MedImpact's Proposal and other documents related to the Pharmacy RFP. (DOM Exhibit 7). In one of its requests, Change sought an unredacted copy of MedImpact's Pharmacy

[11]The Change Agreed Order granted protected status to Change's "trade secrets, proprietary and confidential commercial information, and proprietary and confidential financial information[,]" including Change's "pricing proposal; key underlying details, strategies, and assumptions; the identity of critical Change ... employees; unique financial modeling; and information on several prior and current clients/customers of Change[.]" (DOM Exhibit 10, ¶¶ 2-11). The parties further agreed that "DOM shall disclose only the Redacted Response in response to any existing or **future public records requests**." *Id.* (emphasis added).

RFP Proposal, which was later amended to seek only three (3) unredacted sections of MedImpact's Pharmacy RFP Proposal: (1) "Detailed Pricing and Assumptions"; (2) "References"; and (3) "Listing of MedImpact's Medicaid Projects." (Appeal Exhibit 14). These are the very same categories of information that Change and the Special Assistant Attorney General representing DOM had earlier agreed were confidential in the Change Agreed Order signed by Change and DOM.

Subsequently, on October 17, 2022, MedImpact filed a *Petition for Protective Order* ("MedImpact Petition"), asserting that the requested information fell with the Mississippi Public Records Act exemptions for confidential and proprietary information. (DOM Exhibit 13).[12] In addition, MedImpact asserted a "judicial estoppel" argument. Because Change had previously taken the position in its own petition and the Change Agreed Order that these exact same categories of information were proprietary and confidential, MedImpact argued that Change should be judicially estopped from asserting a contrary position when it came to those same categories of information in the MedImpact Proposal. DOM joined in the "judicial estoppel" argument asserted by MedImpact but took no position on the "confidential and proprietary" nature of the information at issue. (Appeal Exhibits 17 & 18). DOM's only interest was to ensure that the same rule applied to these categories of information, regardless of which Proposal was at issue.

MedImpact's Petition was argued before the Hinds County Chancery Court on December 13, 2022. On January 17, 2023, the Court entered a *Protective Order* ("MedImpact Protective Order") granting MedImpact's Petition with regard to all three (3) categories of redacted information at

[12]Once the MedImpact Petition was filed, OPSCR Rule 3-202.11.3 required that a 90-day stay of the RFP Protest go into effect, during which DOM could not issue any ruling on the pending protest. (12 *Miss. Admin. Code* Pt. 9, Ch. 3, R. 3-202.11.3).

issue.[13] (DOM Exhibit 14). Change has appealed this ruling to the Mississippi Supreme Court, maintaining its position that these categories of information are not proprietary and confidential. *See Change Healthcare Pharmacy Solutions, Inc. v. MedImpact Healthcare Systems, Inc.*, 2023-TS-00180.

3. Public Records Requests for the Change and MedImpact Proposals Related to the Manage Care Procurement

Finally, one of the parties involved in a RFP totally unrelated to the Pharmacy RFP, the Medicaid managed care procurement, requested copies of the Change and MedImpact Proposals. Amerigroup Mississippi, Inc. ("Amerigroup") requested unredacted copies of the Change and MedImpact Proposals along with a number of related documents. (DOM Exhibit 15). Despite its arguments in the prior MedImpact proceeding that at least three (3) categories of information in the Proposals were not confidential and proprietary, Change has again reversed course and filed a Petition for Protective Order in Chancery Court seeking confidential and proprietary protection for its full Proposal. (DOM Exhibit 16). MedImpact filed a similar Petition for Protective Order. (DOM Exhibit 17). To date, neither of these petitions has been set for hearing.

D. DOM's Final Decision Denying Change's Protest

On January 20, 2023, DOM's Office of Procurement issued its *Response and Recommendation* memorandum ("Memorandum") to DOM's Executive Director, Drew Snyder. (Appeal Exhibit 12). In its Memorandum, Office of Procurement found that there was no merit to any of the issues raised in Change's Protest and the Protest should be denied in full.

First, Office of Procurement found that the Evaluators who evaluated the Change and

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[13]Once the Chancery Court ruled on MedImpact's Petition, the 90-day stay provided by OPSCR Rule 3-202.11.3 was no longer applicable. Therefore, DOM was able to proceed with a decision on Change's Protest. (12 *Miss. Admin. Code* Pt. 9, Ch. 3, R. 3-202.11.3).

MedImpact Proposals had the relevant knowledge and experience to properly evaluate the Proposals. (*Id.* at 7-9.). Second, Office of Procurement found that MedImpact met the pharmacy experience requirements set forth in the Pharmacy RFP. (*Id.* at 9-11.). Third, Office of Procurement found that no improper identifying information was contained in the Proposals that had been submitted to the Second Evaluation Committee. (*Id.* at 11-13.). Fourth, Office of Procurement found that MedImpact's pricing was neither misleading nor unreasonable and that it could not be considered non-responsive. (*Id.* at 13-17.). Finally, Office of Procurement found that since Change had failed to submit its references as required by the Pharmacy RFP, the award of no points to Change for this element was proper. Further, even if full reference points had been awarded to Change, it would not be enough points to close the scoring gap between Change and MedImpact. (*Id.* at 17-19.). Office of Procurement concluded that Change had failed to present sufficient evidence to established any of the arguments raised in its Protest and that substantial evidence existed to support DOM's decision to award the Pharmacy RFP to MedImpact. (*Id.* at 20.).

On January 23, 2023, DOM's Executive Director adopted the recommendation of Office of Procurement, and Change's Protest was fully denied. On January 30, 2023, Change filed its Appeal of DOM's Final Decision with this Board.

II. STANDARD OF REVIEW

This Appeal is governed by OPSCR Rule § 7-112[14] which provides the procedure for an aggrieved offeror to protest a state agency's award of a contract pursuant to a RFP. The aggrieved offeror may file a protest with the awarding agency or directly with PPRB. OPSCR Rule § 7-

[14]12 *Miss. Admin. Code* Pt. 9, R. 7-112.01.

112.01.[15] If an offeror first protests to the awarding agency, then the offeror may appeal the agency's final decision on the protest to PPRB. (*Id.* at R. 7-112.04).

In this case, Change filed its Protest with DOM. As a result, DOM is the determining agency under Rule 7-112.02, and PPRB acts as the appellate review board. *See Moran Hauling Inc. v. Department of Finance and Admin.*, 105 So. 3d 1126, 1127 (¶ 2) (Miss. Ct. App. 2012).

While Rule 7-112.04 is clear that a direct protest to PPRB is reviewed *de novo*, it is silent as to the applicable standard when PPRB is reviewing an agency's Final Decision. In cases where PPRB is sitting as an appellate review board, the Mississippi Court of Appeals has made clear that "PPRB is the appellate, de novo review board." *Moran Hauling*, 105 So. 3d at 1127 (¶ 2). In the context of appellate review of administrative decisions, the Mississippi Supreme Court has explained what *de novo* review means:

> The chancellor was correct that he could not reverse the Commission's decision to impose penalties solely because he would have found differently than the Commission; rather, he could reverse only if Equifax proved that the imposition of penalties was unsupported by substantial evidence presented to the Commission, arbitrary and capricious, beyond the power of the Commission, or in violation of Equifax's statutory or constitutional rights. . . .

Equifax, Inc. v. Mississippi Dep't of Rev., 125 So. 3d 36, 46 (¶ 20) (Miss. 2013).

When conducting appellate review, the reviewing entity "'[sits] in the same position as the trial court,' [and] will not consider issues or arguments that were never presented to the trial court." *Stowe v. Edwards*, 331 So. 3d 24, 34 (¶ 34) (Miss. Ct. App. 2021) (quoting *R.J. Reynolds Tobacco Co. v. King*, 921 So. 2d 268, 270-71 (Miss. 2005)). As a result, unless Change presented an argument in its Protest to DOM for consideration, this Board cannot consider the argument on appeal.

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[15] 12 *Miss. Admin. Code* Pt. 9, R. 7-112.01.

As an appellate review board, the PPRB must evaluate the evidence to determine whether DOM's Final Decision was supported by substantial evidence. "Substantial evidence" is defined as "something less than a preponderance of the evidence but more than a scintilla or glimmer." *Harrington v. Office of Mississippi Secretary of State*, 129 So.3d 153, 158 (¶ 13) (Miss. 2013). The reviewing board "is concerned only with the reasonableness of the administrative order, not its correctness." *Id.* So long as "substantial evidence" exists, an "agency's fact finding must be allowed to stand even though there might be room for disagreement on that issue." *Mississippi Public Service Comm'n v. Merchants Truck Line, Inc.*, 598 So.2d 778, 782 (Miss. 1992).

Moreover, Mississippi law defines an act as "arbitrary" only when it is done "without adequately determining principle: not done according to reason or judgment, but depending upon will alone—absolute in power, tyrannical, despotic, non-rational—implying either a lack of understanding or a disregard for the fundamental nature of things. . ." *Electronic Data Systems v. Mississippi Division of Medicaid*, 853 So.2d at 1192, 1205 (¶ 36) (Miss. 2003) (quoting *Dep't of Health v. S.W. Mississippi Reg'l Med. Ctr.*, 580 So.2d 1238, 1240 (Miss. 1991)). Likewise, an act is only "capricious" under Mississippi law when "it is done without reason, in a whimsical manner, implying either a lack of understanding of or a disregarding for the surrounding facts and settled controlling principles." *Electronic Data Systems,* 853 So. 2d at 1205 (quoting *S.W. Mississippi Reg'l Med. Ctr.*, 580 So.2d at 1240). Decisions which one could consider to be "fairly debatable" are not arbitrary and capricious. *Electronic Data Systems,* 853 So. 2d at 1203 (citing *City of Biloxi v. Hilbert*, 597 So.2d 1276, 1281 (Miss. 1992)). Mississippi law recognizes that "a holding which is supported by substantial evidence cannot be arbitrary and capricious." *Electronic Data System*, 853 So.2d at 1203 (¶ 30) (citing *McDerment v. Mississippi Real Estate Comm'n*, 748 So.2d 114, 119 (Miss. 1999)).

Mississippi law recognizes that "[a] rebuttable presumption exists in favor of the action of

an administrative agency, and the burden of proof is on the party challenging an agency's action." *Miss. State Port. Authority at Gulfport v. Eutaw Construction Co., Inc.*, 340 So. 3d 303, 310 (¶ 15) (Miss. 2022) (citation omitted). Specifically, in any appeal of an agency decision, the burden of proof rests with the party challenging the findings and conclusions of the administrative agency. *Electronic Data Systems*, 853 So.2d at 1204 (¶ 36); *see also Melody Manor Convalescent Ctr. v. Mississippi State Dep't of Health*, 546 So.2d 972, 974 (Miss. 1989) ("The burden of proof rests with the party challenging the actions of an administrative agency" on appeal of agency action. (citing *Mississippi Hospital Association, Inc. v. Heckler*, 701 F.2d 511 (1983))). Thus, "[t]he party challenging the decision of the agency has the burden to prove that the agency's decision should not be affirmed . . . because the agency's decision was not supported by substantial evidence, was arbitrary or capricious, was outside the scope of the agency's power or violated a statutory or constitutional right of the aggrieved party." *Methodist Specialty Care Center v. Miss. Div. of Medicaid*, 305 So. 3d 1088, 1096 (¶ 24) (Miss. 2020) (citation omitted). Therefore, Change, as the challenger, must prove that DOM's Final Decision was unsupported by substantial evidence, was arbitrary and capricious, was outside the scope of DOM's authority, or violated a statutory right.

III. Summary of Argument

Change appeals the award of the Pharmacy RFP to MedImpact on five (5) grounds, none of which have merit. First, Change claims that the Second Evaluation Committee members were unqualified to evaluate the Pharmacy RFP. A comparison of each member's actual qualifications to the statutory and Pharmacy RFP requirements quickly disposes of this argument. To serve on an evaluation committee, the statutory requirements are that a member must have relevant experience and no conflict of interest. The Pharmacy RFP added one (1) additional requirement by seeking one (1) evaluator with Medicaid experience. DOM obtained that evaluator by selecting

the Deputy Director of DOM who was specifically supervising the Office of Pharmacy. He had also been employed with DOM for more than ten years. This satisfied the Pharmacy RFP requirement of specific Medicaid experience.

Another evaluator had been employed with DFA since 2012 and had healthcare and insurance experience since 1997. She had relevant experience as required by statute and the Pharmacy RFP. The last committee member, who was to analyze the financial statements provided by the offerors, was a C.P.A., having been employed by DOM as an Account Manager and by Merit Health as a C.P.A. She was certainly capable of reviewing the financial data supplied. Change's claim that the evaluators were not qualified should be rejected.

Second, Change alleges that DOM did not comply with the Pharmacy RFP blinding requirements (1) because DOM did not prove that it had de-identified the Proposals and (2) because by providing the Second Evaluation Committee with the technical and redacted cost and price proposals, the Evaluators could have exercised bad faith and gone outside the materials provided and looked at the prior Notices of Intent to figure out which Proposal MedImpact had submitted. This argument must be rejected for several reasons. Although Change raised an argument related to "blinding", it did not raise this one to DOM in its Protest. As a result, the argument is barred. But even if it were allowed, it would be unavailing. It is not DOM's burden to prove de-identification occurred in this matter. Change has the burden of proof, which it has not met. As the Proposals were reviewed by both DOM and OPSCR prior to submission to the Second Evaluation Committee, both Proposals were properly de-identified. In any event, Change does not actually argue that either MedImpact or DOM failed to de-identify the Proposals since it fails to point to a single item which was not de-identified. Rather, the argument is that by knowing the price (a requirement of an offer), an evaluator could, if so inclined, try to determine the identity

of the offeror by looking up the old Notice of Intent. That makes assumptions for which there is no proof. It assumes that the evaluators would act in bad faith and that they would know or remember the previous published Notices of Intent, or would attempt to look them up, an assumption for which there is no proof. The fact that MedImpact made an earlier Proposal that was considered does not preclude DOM from re-evaluating the Proposals or from presuming that the evaluators will follow the process. This argument should be rejected.

Third, Change argues that DOM failed to evaluate MedImpact's price as required by the Pharmacy RFP. In its Protest before DOM, Change claimed that DOM was required to conduct a "price realism analysis." After realizing that Mississippi law does not impose such a requirement, Change now has morphed that argument by claiming that the Pharmacy RFP itself requires DOM to determine if the price is too low. This is simply a different way of saying DOM had to conduct a price realism analysis, which it does not. Nothing in the Pharmacy RFP requires the Evaluators to do anything more than evaluate the price and the Proposals according to the factors and criteria given in the Pharmacy RFP, which they did. The Pharmacy RFP does give DOM the right to reject an offer which on its face appears to be too low. MedImpact's Proposal and offer was actually evaluated by a total of nine (9) evaluators. None of the Evaluators found that it was too low. Moreover, MedImpact supported its price with backup materials. Change did not. Change's baseless and unsupported claim that the price must be too low should be rejected.

Fourth, Change claims that MedImpact must lack experience. The Proposal and the materials supplied by MedImpact with its Proposal demonstrate that MedImpact and its subcontractor meet the experience requirements of the Pharmacy RFP.

Fifth, while Change admits it failed to properly submit its references, it nevertheless claims that DOM should have searched its Proposal and fixed any deficiencies in it. Under the Pharmacy

RFP as well as OPSCR rules, it is the responsibility of the offeror to ensure that its Proposal complies with the Pharmacy RFP. It is undisputed that the Pharmacy RFP required a hard copy of the Proposal, including references, and eight (8) copies to be submitted in tabbed binders. Change failed to supply references with its hard copies as required by the Pharmacy RFP. Instead, the only place Change had any references was in the electronic copy supplied to DOM for the purpose of distribution under a public records request. This should have been redacted. It was not. The Evaluators are not required to look at an electronic copy marked "PUBLIC COPY" to find Change's mandatory references. Change argues that if DOM had searched all of the documents it had submitted, it could have found the missing references and supplied them to the Evaluators. This is not DOM's responsibility. As such, DOM cannot be faulted for not searching for and finding Change's references. This argument should be rejected.

IV. Legal Analysis

A. The Evaluation Committee Met all Legal Qualification Requirements

1. DOM Complied with All Legal Requirements for the Evaluation Committee

Change argues that the award of the contract to MedImpact should be set aside because the three (3) Evaluators on the Second Evaluation Committee were unqualified. Both Mississippi law and the Pharmacy RFP itself govern the required qualifications of an evaluator. The Mississippi Legislature established the requirements for evaluators in Miss. Code. Ann. § 31-7-415, which states:

> Evaluation committees shall be used to evaluate request for proposals . . . and award contracts. Persons appointed to an evaluation committee shall have the relevant experience necessary to evaluate the proposal or qualification. The members of the evaluation committee shall have no personal, financial or familial interest in any of the contract offerers, or principals thereof, to be evaluated.

Miss. Code Ann. § 31-7-415(1).

Thus, the only requirements the Legislature established for an evaluator are that the person has *relevant experience* and no conflict of interest. Contrary to Change's argument, the Legislature did not say that the evaluator had to have relevant experience with the specific agency publishing an RFP. Nor is any such requirement set out in the *Mississippi Administrative Code* ("Administrative Code"). The OPSCR Rules repeat the provisions of MISS. CODE ANN. § 31-7-415(1) and provide that a committee shall be created to evaluate an RFP and "[p]ersons appointed to an evaluation committee shall have the relevant experience necessary to evaluate the proposal or qualification. The members of the evaluation committee shall have no personal, financial or familial interest in any of the contract offerors, or principals thereof, to be evaluated." OPSCR Rule 3-204.01.2.[16] Thus, like the Mississippi Code, the OPSCR Rules only require an evaluator to have relevant experience and no conflict of interest.

Likewise, Mississippi law sets no requirement for the number of evaluators on an evaluation committee. Change seems to think that because the First Evaluation Committee had seven (7) evaluators, the Second Evaluation Committee is invalid because it was composed of three (3) evaluators. The Legislature did not, however, set a minimum or maximum number of evaluators for a committee. Therefore, the fact that the Second Evaluation Committee had three (3) members is of no consequence and has no effect on the validity of the Second Evaluation Committee.

As for the Pharmacy RFP itself, it states that "the committee will be appointed by the Executive Director of the Division of Medicaid and will include members who have relevant experience in the Medicaid program." (Dom Exhibit 1, § 7.1, p. 80). Change argues that because

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[16] 12 *Miss. Admin. Code* Pt. 9, Ch. 3, R. 3-204.01.2.

one of the evaluators worked for DFA and not Medicaid, she lacks the relevant experience to evaluate the Pharmacy RFP.

Change is misreading the language of the Pharmacy RFP. The Pharmacy RFP does not state that **all** members of the committee have to have specific experience in the Medicaid program. Rather, it states that the committee will **include** members with experience in the Medicaid program. That is exactly what DOM did. DOM appointed three (3) qualified evaluators for the Second Committee: two (2) specifically with Medicaid experience and one (1) with health care insurance and pharmacy programs experience. Contrary to Change's arguments, DOM clearly met the requirements of the Pharmacy RFP to "include members" with Medicaid experience.

2. The Evaluators Possessed Relevant Experience to Serve on the Evaluation Committee

The first evaluator Change alleges lacks relevant experience to evaluate the Pharmacy RFP is Wil Ervin. Mr. Ervin has worked for DOM in various capacities since 2013. (DOM Exhibit 19). Since 2018, Mr. Ervin has been a member of DOM's executive leadership team. Beginning in 2020, Mr. Ervin became the Deputy Administrator of Medicaid. One of his responsibilities is to oversee the clinical operation offices, which include the Pharmacy Division. He clearly possesses specific knowledge of DOM's overall pharmacy operations. Since Mr. Ervin is in charge of the Pharmacy Division, he clearly possesses relevant experience necessary to evaluate the pharmacy programs contained in the Pharmacy RFP.

Mr. Ervin was charged with evaluating the "technical, cost, and management proposals" of the Change and MedImpact Proposals. (DOM Exhibit 1, § 7.1, p. 80). Based on his ten (10) years of experience and knowledge at DOM, Mr. Ervin is clearly capable of assessing the technical, cost, and management aspects of the Proposals to determine whether they meet the requirements of

DOM and the Pharmacy RFP.

The next evaluator Change alleges lacks relevant experience is Cindy Bradshaw. Ms. Bradshaw has worked in the healthcare industry in various capacities since 1997. (DOM Exhibit 20). Ms. Bradshaw has worked for the DFA from 2012 until the present time. Before going to DFA, Ms. Bradshaw worked in the private healthcare sector. She was employed by Blue Cross Blue Shield for over fourteen (14) years and by UnitedHealthCare for a year and one-half. Ms. Bradshaw has the relevant experience in the healthcare industry to evaluate the "technical, cost, and management proposals" submitted by Change and MedImpact. (*Id.*).

As shown by her resume, Ms. Bradshaw has in-depth knowledge of medical and pharmacy benefits. In her current position as the State Insurance Administrator and director of the Office of Insurance, she oversees the health insurance plans for approximately 200,000 active and retired state employees. She "procure[s] and oversee[s] vendor contracts . . . [and] develops benefits, premium structures and cost containment strategies." (*Id.*). This includes pharmacy plans for state employees. Ms. Bradshaw has relevant experience not only in negotiating pharmacy plans but also in analyzing vendor contracts. There is no question that Ms. Bradshaw has the relevant experience required by the Mississippi Code and OPSCR Rules to be a member of the Second Evaluation Committee.

The third evaluator is Lisa Shaw. Ms. Shaw was charged with evaluating the audited financial statements of Change and MedImpact. Ms. Shaw has been employed by DOM since 2020 as the Accounting Manager of DOM's Office of Managed Care - Financial Oversight. Ms. Shaw has been a licensed Certified Public Account since 2006. Before coming to DOM, Ms. Shaw worked for nine (9) years as a CPA for Merit Health Madison where one of her duties included contract review and oversight, as well as performing various accounting functions. (*Id.*). In her duties with

DOM, Ms. Shaw analyzes contracts between Managed Care Organizations ("MCO") and vendors and reviews the setting of rates for MCOs. (DOM Exhibit 21).

With over eleven (11) years of experience specifically in the healthcare industry and her twenty (20) years of accounting work, Ms. Shaw has the relevant experience required to evaluate the audited financial statements of Change and MedImpact.

Change does not cite any legitimate authority to show that these Evaluators lack relevant experience. Instead, Change attempts to discredit the experience of the Evaluators by quoting from their personal LinkedIn pages. DOM agrees that a court or PPRB may take judicial notice of facts that "can be accurately determined from sources whose accuracy cannot reasonable be questioned." Miss. R. Evid. 201. DOM also agrees that in general a state agency qualifies as such a source; however, LinkedIn is not a state agency and is not associated with any state agency. As such, LinkedIn does not qualify as a source of unerring accuracy as to be deserving of unquestioned admission. As this Board is well aware, individuals create profiles on LinkedIn and these profiles are not endorsed, approved, or adopted by any employer much less a state agency. As such, information on LinkedIn may not be accurate or even current.

Based on the lack of any legal basis or credible evidence to support its assertions, this portion of Change's Appeal is meritless, and DOM's selection of these three (3) Evaluators should be upheld.

B. DOM Complied with All Statutory Requirements Regarding Blind Review When Proposals were Evaluated

1. Change's Arguments that DOM failed to Comply with Blinding Requirements are Barred by its Failure to Raise Them in its Protest Filed With DOM

For the first time in its Appeal, Change argues that DOM failed to comply with the

requirements of the RFP for blind evaluations of the Technical and Cost sections of the Proposals. Consequently, for the first time in its appeal Change claims that the RFP should be canceled according to MISS. CODE ANN. 31-7-417(2).

Importantly, Change is procedurally barred from raising new issues in the appeal of DOM's Final Decision. Change failed to argue that the RFP should be canceled in the original or supplemental Protests filed by Change. (*See* Appeal Exhibits 2, 3, & 13). Cancellation is a wholly different remedy than what Change had requested in its Protest, which was to cancel the Notice of Intent to Award the contract to MedImpact and instead award the contract to Change. Now with this argument, Change raises new arguments and also seeks a new remedy, all of which is clearly barred by the Mississippi Supreme Court. *See Moran Hauling*, 105 So. 3d at 1127 (¶ 2); *Stowe*, 331 So. 3d at 34 (¶ 12 & 13). As such, DOM was not able to address it when the Executive Director issued his Final Decision on January 23, 2023. For this reason, this argument should be disregarded. DOM will, however, address this argument and show that it too is a baseless argument.

2. DOM REMOVED ALL IDENTIFYING INFORMATION FROM THE PROPOSALS

The Pharmacy RFP places the responsibility of removing or redacting identifying information on the offeror–not on DOM. The Pharmacy RFP provides:

> The Offeror is responsible for ensuring that the sealed Technical Proposal and Cost Proposal have no identifying information as defined in Section 6.2.1 of this subsection. If this requirement is not followed, then the Offeror may be immediately rejected as non-responsive. As a precautionary measure, DOM will review the proposals for any additional identifying information prior to distribution to the evaluation committee for the evaluation process.

(DOM Exhibit 1, § 6.2, p. 67). Despite the inclusion of identifying information in both Change and MedImpacts's Proposals, after consultation with OPSCR, DOM opted to remove all identifying

information from both Proposals and submit them for evaluation. In this regard, the Change and MedImpact Proposals were treated exactly the same. Both DOM and OPSCR reviewed the materials to be submitted to the Second Evaluation Committee and found no identifying information in the Proposals. Change has submitted no evidence that the Proposals evaluated by the Second Evaluation Committee contained any identifying information.

3. Notices of Intent Published by DOM did not Identify MedImpact's Proposal to the Second Evaluation Committee

Change also argues that the Notices of Intent which had been posted on DOM's website prior to the Second Evaluation identified the MedImpact Proposal to the Second Evaluation Committee. Change has not, however, presented any proof whatsoever that any of the Evaluators were aware of or had seen any of the Notices of Intent. Yet even if the Second Evaluators had seen the notices, information in those notices did not correlate with any information presented to the Second Evaluation Committee.

The two (2) Notices of Intent resulting from the First Evaluation state a Proposal price of $7,771,641 (Appeal Exhibits Nos. 4 & 8). However, the MedImpact Proposal amount presented to the Second Evaluation Committee was $8,199,492. (Appeal Exhibit No. 11). This did not match any of the pricing information in the previous notices,[17] and could not constitute identifying information.

Nor was MedImpact's price ever identified in the published notices as lower than Change's price. While the Notices of Intent associated with the First Evaluation do characterize

[17]As part of the First Evaluation, MedImpact submitted a Best and Final Offer ("BAFO") to DOM resulting in the $7,771,641 price contained in the published notices. That price became known to Change, although MedImpact did not know what price Change had submitted. To preserve the integrity of the process and prohibit Change underbidding MedImpact's known BAFO price, DOM did not request a BAFO with the Second Evaluation.

MedImpact's price as the "lowest" it was lowest because it was the only proposal evaluated by the First Evaluation Committee. Change's Proposal, and its pricing, had not been evaluated at all. Thus, the notices could not logically be construed to mean that MedImpact's price was lower than Change's price since Change's price had not been considered at all.

4. DOM SATISFIED THE BLINDING REQUIREMENTS

Change next claims that the Cost and Price Proposals were not blind evaluations because these sections were given to the Evaluators with the Technical Proposal. *Appeal Letter*, p. 18. In support of this argument, Change cites an email to one of the evaluators which states that the redacted technical, cost, and price proposals were available. *Appeal Letter*, p. 19. This email, however, **clearly** shows that the Technical, Cost, and Price Proposals were all "Redacted". *Appeal Letter*, p. 19. Therefore, since the Technical, Cost, and Price Proposals were redacted and blind, there was no reason that the Evaluators were not able to have access to the Technical, Cost, and Price Proposals all at one time. Since all identifying information was removed from these sections, the Evaluators had no knowledge of which belonged to Change or MedImpact.

Next, DOM agrees that § 6.4.5 of the Pharmacy RFP does not state that the Business/Price Proposals will be evaluated blind. OPSCR Rule 3-203.01(g),[18] however, clearly states that the Cost/Price Proposals must be blind. The rule provides that price must be "scored without knowledge of the identity of the offeror (blind), **unless** permission is granted through the Petition for Relief by PPRB to reveal the identity of the offeror." OPSCR Rule 3-203.01(g)(2).[19] Before the Second Evaluation, OPSCR informed DOM that the OPSCR Rules required the Cost/Price Section

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[18] 12 *Miss. Admin. Code* Pt. 9, Ch. 3, R. 3-203.01(g).

[19] 12 Miss. Admin. Code Pt. 9, Ch. 3, R. 3-203.01(g)(2).

to be scored blind because DOM had not obtained permission from the PPRB to disclose the identity of the offerors for pricing. As a result, DOM redacted all identifying information in the Cost/Price Section before giving that section to the Evaluators. (DOM Exhibit 18). Therefore, there was no prejudice or unfairness to Change or MedImpact for the Evaluators to receive the redacted/blind Technical, Cost, and Price Proposals at one time.

Finally, Change argues that because § 7.1 of the Pharmacy RFP lists phases of the evaluation, the Evaluators could only look at one phase at a time. Again, Change is misguided. Nowhere in § 7 of the Pharmacy RFP does it state that the Evaluators must look at the various Proposals separately and in the order of the phase number given to Technical, Cost, and Price Proposals. Nor does the Pharmacy RFP state that the phases could not be combined and considered at one time. Further, the *Anticipated Procurement Timetable* in § 1.4 does not list the Evaluation as being in phases. Instead, it simply lists the date of October 1, 2021, as the date for the Proposal Evaluation to begin. (DOM Exhibit 1, §§ 1.4 & 7, pp. 5 & 80-85). Calling the various sections of the Proposals "Phases" is simply a nomenclature and of no legal significance. This argument is without merit and should be disregarded.

C. Neither Mississippi Law nor the Pharmacy RFP Requires DOM to Perform a "Price Realism" Analysis

In its original Protest, Change argued that DOM was required to conduct a "price realism" analysis of MedImpact's pricing proposal which would have caused it to be rejected. As DOM noted in its Final Decision, Mississippi law does not require a price realism analysis. While Change now acknowledges that nothing in the Mississippi Code or the OPSCR Rules requires agencies to conduct a price realism evaluation, it now recasts its argument to allege that MedImpact's pricing was "unrealistically low", which violated the terms of the RFP. *Appeal Letter*,

p. 21. Even in its new form, Change's argument is factually and legally incorrect. To the extent Change argues that is "unrealistically low" argument is not price realism under another name, then this is a new argument raised for the first time on appeal and she be disregarded by this Board. *See* Section II of this Response.

As this Board is well aware, the Mississippi Legislature has established that in awarding a contract as an RFP, the price quoted by an offeror is the most important factor to be considered. The Mississippi legislature has mandated that "price as an evaluation factor shall be given the highest criteria weighting...." MISS. CODE ANN. § 31-7-413(2)(a). The statute further requires that the minimum percentage weight that the price may be assigned is thirty-five percent (35%). *Id.* Further, the OPSCR Rules mirror the statute. (OPSCR Rule 3-203.)[20] DOM followed the mandate of the Mississippi Code and OPSCR Rules to the letter by assigning thirty-five percentage/points (35%) points to the cost/price category. (DOM Exhibit 1, § 7.1.3, p. 84.).

In awarding these points, Section 7.1.3 of the Pharmacy RFP outlines all of the factors to be considered in the evaluation of the price proposal, and it further showed the formula which would be used to assign points for this factor. None of the factors listed included a price realism evaluation.

Change selectively quotes a paragraph from § 7.1.3 of the Pharmacy RFP to argue that the Evaluation Committee was required to conduct a pricing analysis as part of its evaluation. *Appeal Letter*, p. 22. The quoted portion of the Pharmacy RFP, however, does not contain any language stating that the detailed analysis Change is suggesting is required. Rather, Pharmacy RFP § 7.1.3 merely gives DOM the right to reject any proposal that on its face appears unrealistically low. In

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[20] 12 *Miss. Admin. Code* Pt. 9, Ch. 3, R. 3-203.

this case, nine (9) seasoned and experienced Evaluators stretching over two (2) Evaluation Committees looked at MedImpact's proposal in detail and did not find that it should be rejected because it was unrealistically low. (DOM Exhibit 2 and DOM Exhibit 5).

The reason MedImpact's pricing proposal was not rejected is clear. In its Proposal, MedImpact produced detailed information as required by Pharmacy RFP § 6.4.5 as well as Pharmacy RFP § 6.4.3. (DOM Exhibit 1, §§ 6.4.5 & 6.4.3, pp. 79 & 73-74.). While Change has not been able to review this information because it is confidential,[21] DOM and its Evaluators have extensively reviewed the information and found it to be satisfactory. (DOM Exhibit 23, p. 104-07.). In contrast, Change did not supply any detailed pricing information in its Proposal at all. (DOM Exhibit 24, p. 212.).

OPSCR § 3-204.01.3.1[22] requires that DOM score pricing "objectively". This is reflected in Pharmacy RFP § 7.1.3, which allows DOM to reject a proposal price that on its face is unrealistically low. Section 7.1.3 certainly does not impose any duty to separately perform a price realism evaluation to determine if a proposed price is unreasonable. Since neither the Mississippi Code nor the OPSCR Rules require such an evaluation, the Pharmacy RFP does not require this additional evaluation.

D. The Cost Factor Should Have Been Scored Blind

Doubling down, Change then argues that separate, objective price evaluation must be performed after the blind evaluation of the Technical Proposal and Cost Proposal-Financial Disclosure Information, and claims that the price analysis should not be done blind. *Appeal Letter,*

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[21]The unredacted Proposals are available to the Board.

[22]12 *Miss. Admin. Code* Pt. 9, Ch. 3, R. 3-204-01.3.1.

pp. 22-23. Change is wrong. As previously noted, both OPSCR direction and OPSCR Rules, required DOM to evaluate all portions of the cost/price analysis blind unless PPRB granted an exception. OPSCR Rule 3-203.01(g) provides:

> Evaluation Factors: The Request for Proposals or Request for Qualifications shall show the relative importance of each evaluation factor in terms of important, very important, and critical. Price as an individual evaluation factor shall be given the highest criteria weighting, more than any other individual factor, and at least thirty-five percent (35%) out of the one hundred percent (100%) total weight of all the other individual evaluation factors.
>
> (1) Technical Factors: Factors scored without knowledge of the identity of the offeror (blind). These factors aid in determining the offeror's technical ability to perform the service.
>
> (2) **Cost Factors: Factors scored without knowledge of the identity of the offeror (blind), unless permission is granted through the Petition for Relief by PPRB to reveal the identity of the offeror. These factors aid in determining the offeror's financial ability to perform the service. These factors may include price as an individual factor.**
>
> (3) Management Factors: Factors scored with knowledge of the identity of the offeror. These factors aid in determining the offeror's past performance of the service.

12 *Miss. Admin. Code* Pt. 9, Ch. 3, R. 3-203-01(g) (emphasis added).

If DOM had specifically asked to evaluate the cost factors with the identity of the offeror revealed, the Evaluators would have been allowed to look at cost factors without redactions. DOM did not, however, make such a request in its *Petition for Relief from Bidding as a Procurement Method* ("Petition for Relief"). (DOM Exhibit 22). Accordingly, DOM correctly evaluated the cost factors blindly as required under OPSCR Rules and as OPSCR personnel specifically directed DOM to do.

Contrary to the arguments of Change, there is simply no requirement to evaluate the Technical and Management Proposals blind and then conduct a non-blind analysis of cost. In fact,

such an analysis would violate OPSCR rules. The cost factor, which is separate under § 6.4.3 of the Pharmacy RFP, was also scored blindly and was worth one (1.0) point. Both Offerors were required to produce their audited financial statements for the past three (3) years and had to demonstrate financial stability and strength to meet the financial obligations of the contract. As noted in footnote 4, Change failed to produce independent auditor reports as required by the Pharmacy RFP. This was evaluated by the C.P.A., Ms. Shaw. MedImpact scored a perfect one (1.0) while Change only scored 0.33, which demonstrates that Change was evaluated as less financially stable than MedImpact.

The price is scored according to a formula found in § 7.1.3 of the Pharmacy RFP, and it is not evaluated on separate lines. The scoring of the price factors is a straight mathematical calculation. The lowest bid will get the full 35 points and the higher bids a lesser score. The formula does not leave room for discretion by the Evaluators. As shown by the Score Evaluation Sheets, the Evaluators followed the formula exactly and correctly awarded MedImpact the full 35 points. Change's arguments to the contrary should be disregarded.

1. MEDIMPACT'S PROPOSAL PRICE IS NOT TOO LOW

Looking at the MedImpact Proposal itself, MedImpact produced detailed information as required by the Pharmacy RFP § 6.4.5 and § 6.4.3. If the Board compares the pricing information of the MedImpact Proposal (DOM Exhibit 23, Tab 2, pp. 104-07) to the Change Proposal (DOM Exhibit 24, Tab 2, p. 212), the Board will notice the difference between the two (2) Proposals. MedImpact provided a detailed analysis of how it arrived at its yearly numbers while Change merely gave much higher, lump-sum figures with no analysis of how it arrived at those figures. And, to the extent Change claims MedImpact did not understand the magnitude of the contract, the Pharmacy RFP scores this factor based on the offeror's completion of the Proposal in the

Executive Summary/Understanding the Project. (DOM Exhibit 1, § 6.4.2, p. 71). MedImpact scored well in this category. (DOM Exhibit 2 & 5).

Once the Board has an opportunity to review and compare the Price Proposals of both MedImpact and Change, the Board will see that MedImpact's detailed Proposal was correctly scored the highest. All nine (9) Evaluators were convinced that the contract can be performed for the amount proposed. As such, this Board should affirm DOM's Final Decision to award the contract to MedImpact.

2. CHANGE'S RELIANCE ON DOM'S ESTIMATE IN THE PETITION FOR RELIEF IS MISPLACED

Change appears to think that MedImpact's Proposal is too low because it significantly underbids DOM's projected contract cap in its Petition for Relief. While DOM projected the cost of the Pharmacy RFP would be up to $15,500,000, it is by no means a factual statement of the actual cost DOM expected to pay. Rather, to adequately budget for the contract, this figure is the highest possible number DOM thought an offeror could propose. Importantly, the estimate is not in any way binding on DOM or any of its offerors.

As such, the estimate DOM proposed for these services was a generous estimate of unknown costs which is a required component of the PPRB administrative form (*See* DOM Exhibit 22). The estimated cost was derived from expenses on two (2) previous separate Pharmacy services contracts (Pharmacy Rate Setting and Pharmacy Support Services) over a four (4) year period plus an estimated additional cost to arrive at a total estimated amount of $15,500,000. As stated in its Petition for Relief:

> To determine this anticipated amount, DOM combined the total of the first four years from both the current Pharmacy Rate Setting and the Pharmacy Support Services contracts. The 5th year of those contracts were estimated and totaled. Added an increased dollar amount to the total to determine the estimated amount

of $15,500,000.

(DOM Exhibit 22, unnumbered p. 3).

As opposed to separate contracts, DOM expected that the consolidation of these services into a single contract would decrease the overhead and administrative costs, thereby, resulting in lower overall costs.

E. MEDIMPACT POSSESSES THE REQUISITE EXPERIENCE AS REQUIRED BY § 2.1 OF THE PHARMACY RFP

Again without any basis in fact or law, Change argues that DOM did not properly evaluate MedImpact's experience and that if it had, DOM would have found that MedImpact lacked experience required by the Pharmacy RFP. Change's arguments are completely incorrect.

First, the Scoring Sheets reflect that DOM and the Evaluators specifically looked at both offerors' experiences. (Compare DOM Exhibit 5 with DOM Exhibit 6). Second, the unredacted MedImpact Proposal reflects that MedImpact meets the requirements of the Pharmacy RFP. (DOM Exhibit 23, pp.117-26).

1. THE SCORING SHEETS REFLECT THAT THE EVALUATORS CONSIDERED MEDIMPACT'S EXPERIENCE

A review of the Scoring Sheets makes short work of this unfounded argument. Both parties supplied their experience. As is evident by the Scoring Sheets, it is clear that the Evaluators looked at both Change and MedImpact's experience. (DOM Exhibits 5 & 6).

Change argues that it has more experience than MedImpact, and thus, should have been chosen. But experience was one of many factors DOM considered. Even if Change had more experience, DOM was not required to choose Change simply on that fact. The Pharmacy RFP is very clear about the evaluation of the experience of an offeror and its relative weight in the overall scheme of the Pharmacy RFP– it will count for 8 of 100 points/percentage. Pharmacy RFP § 7.1.4

provides that the entire *Evaluation of Management Proposal* will count for 24 points/percentage. The Management Proposal consists of three sections– (1) Organization and Staffing, (2) Management and Control, and (3) Corporate Background, Ownership, and Experience. Each of the three (3) sections counted for eight (8) points/percentage. (DOM Exhibit 1, § 7.1.4, pp. 83-84). The factors to be considered for each of the three sections under management are clearly outlined. (*Id.*)

MedImpact scored higher in overall Management at 17.65/24 v. 14.98/24 for Change, which is where the experience factor was scored. (DOM Exhibit 1, § 7.1.4.3, p. 84). Specifically, the ownership/experience factor was scored 6.55/8 for MedImpact and 4.12/8 for Change. (DOM Exhibit 5 & 6).

In addition, MISS. CODE ANN. § 31-4-413 and the OPSCR Rules specifically identify, price, not experience, as the most important factor to be considered in awarding a contract under a RFP. That is why the price is given the weight of thirty-five percent (35%) and experience is included in the Management and Control for a total of eight percent/points (8%). (DOM Exhibit 1, § 7.1.4.3, p. 84). In this case, MedImpact not only has the required experience, but it also had the lowest proposed price.

2. MEDIMPACT MEETS THE EXPERIENCE REQUIREMENTS OF THE PHARMACY RFP

MedImpact clearly meets the experience qualifications outlined in the Pharmacy RFP. Section 2.1 of the Pharmacy RFP provides:

> DOM seeks an Offeror to coordinate all phases of preferred drug list (["]PDL["]) and supplemental rebate (["]SR["]) administration that is consistent with both federal and state law with a minimum of five years of experience servicing government accounts and has, within the last 48 months, been engaged in a contract or awarded a new contract with similar work in a state Medicaid program.

(DOM Exhibit 1, § 2.1, p. 6).

The Pharmacy RFP is specific. It seeks an offeror (1) with at least five (5) years of experience servicing government accounts, and (2) that, within the last 48 months, has been awarded a contract or has been engaged in a contract with another state Medicaid program performing similar work to that being requested in the Pharmacy RFP.

Nevertheless, Change somehow reads Pharmacy RFP § 2.1 to mean only Fee for Service ("FFS") experience for the last five (5) years is material and that the 48-month requirement must solely be the management of an FFS Medicaid program. In its Appeal Letter, Change claims that "MedImpact has not managed Medicaid FFS programs in any state in the last 48 months." *Appeal Letter*, p. 26. Further, Change cites a 2017 Kentucky RFP in which MedImpact submitted a proposal. Change alleges this is "proof" that MedImpact began "focusing and investing in providing FFS Medicaid solutions as required in the Pharmacy RFP in 2017." *Id.* Change then makes the giant leap to claim that since the Chancery Court entered a Protective Order finding MedImpact's proposal contained confidential information, MedImpact must not have done any work for a state agency because work for a state agency would not be confidential. *Id.* How Change extrapolates the entry of a Protective Order to MedImpact having no state experience is beyond reason.

Again, these arguments miss the mark. Change's focus on only one aspect of a multi-faceted contract demonstrates its myopic, narrow reading of the Pharmacy RFP that DOM does not share. The Board should note that being in charge of a FFS Medicaid program is not even a separately described portion of the contract. Rather, the Pharmacy RFP seeks an offeror to manage the PDL, administer the SR Program, manage the Rate Setting of COD, and perform programmic review and assessment of core components of DOM's Pharmacy Program. (DOM Exhibit 1, § 1.1, p. 4). Section 2.1 of the Pharmacy RFP, which is Change's focus, actually provides:

> DOM seeks an Offeror to **coordinate all phases of preferred drug list (PDL) and supplemental rebate (SR) administration** that is consistent with both federal and state law with a minimum of five years of experience servicing government accounts and has, within the last 48 months, been engaged in a contract or awarded a new contract with similar work in a state Medicaid program. The Offeror shall provide proven methodologies yet preserve flexibility for DOM to customize the pharmacy program to suit Mississippi's needs.

(DOM Exhibit 1, § 2.1, p. 6) (emphasis added). Being in charge of a state Medicaid FFS program is simply not a requirement. Instead, DOM seeks an offeror who can coordinate several services.

DOM did not require experience in services that were identical to the pharmacy services requested within the Pharmacy RFP. Instead, an offeror had to demonstrate its experience in pharmacy services similar to those requested in this Pharmacy RFP. Similar experience through an existing or newly awarded contract within the past 48 months would adequately demonstrate a vendor's capacity and ability to perform the requested pharmacy services in this Pharmacy RFP. MedImpact has this experience.

Likewise, the Pharmacy RFP sought a vendor to "coordinate all phases of the [PDL] and [SR] administration." Such coordination could include an offeror subcontracting with other specialized entities or an offeror bringing on new or additional staff with relevant project experience in providing the requested SR services. MedImpact also meets the experience requirements through this approach. A sub-vendor for MedImpact has prior experience providing DOM with some of the pharmacy services contained in the Pharmacy RFP. In addition, the prior experience of its proposed staff provided sufficient experience to meet the SR services in both FFS and MCO: MedImpact provided evidence of five (5) years of PDL experience and the planned SR manager has over ten (10) years of experience in a similar role. (DOM Exhibit 23, p.135).

MedImpact's Proposal also establishes that it meets the requirement for having a minimum of five (5) years experience servicing government contracts with at least three (3) states. (DOM

Exhibit 23, pp. 117-19). MedImpact has extensive experience in other pharmacy services requested in the Pharmacy RFP. (*Id.*) Moreover, the staffing portions of its Proposal show that it had management with significant experience in all areas related to the Pharmacy RFP, including hiring two (2) SR specialists, each of whom has fifteen (15) years of experience giving MedImpact in-house staff with SR experience. (*Id.* at 131, 150). In addition, its subcontractor has been performing rate setting for Medicaid programs in multiple states since 2001 including being the incumbent subcontractor for the previously procured. (DOM Exhibit 23, p. 123-25.)

In its Proposal, MedImpact provided its extensive experience along with that of its subcontractor. As the Board can see from the Proposal, MedImpact provided evidence that it had sufficient experience to meet the Pharmacy RFP qualifications. The arguments of Change challenging MedImpact's experience should be soundly rejected.

F. Change Failed to Properly Include References in its Proposal

Finally, Change argues it properly included its references in its submissions to DOM, and DOM erred when it excluded those references from the materials provided to the evaluation committee, causing reference points not to be awarded to Change. However, a comparison of the submission requirements in the Pharmacy RFP and the actual submission made by Change clearly demonstrates that Change's references were not submitted in proper form, and they were correctly excluded from the materials submitted to the evaluation committee for scoring.

The Pharmacy RFP clearly stated both the type and number of copies of the Proposal each offeror was required to submit to DOM as part of its proposal submission packet. First, each offeror was required to submit

> one original hard copy of the Technical Proposal (Blind Evaluation) and eight identical copies of the original; one original hard copy of the Cost Proposal (Blind Evaluation) and eight identical copies of the original; and one original hard copy

of the Management Proposal and eight identical copies of the original.

(DOM Exhibit 1, § 6.1, p. 65.). These copies were subject to the de-identification requirement of § 6.2 of the Pharmacy RFP.

In essence, each original hard copy of a particular section of the proposal had to be submitted with eight identical paper copies of the original. Based on the division of these submissions into the individual sections of the proposal, i.e., the "Technical Proposal", the "Cost Proposal", and the "Management Proposal", and the manner in which these individual components would be used by the evaluation committee, it is clear that these copies of the sections of the proposal were intended for use in the evaluation. Further, DOM directed all offerors to place the separate sections in specific binders and tab each provision appropriately, a method of preparation for individual use that was not required of any other version of the proposal.

With regard to each of these sections of the proposal, "items to be included under each section of these proposal[s] are identified in the paragraphs" of the Pharmacy RFP. (DOM Exhibit 1, § 6.3, p. 68). The Pharmacy RFP required offerors to submit references in each hard copy of the management proposal. (DOM Exhibit 1, § 6.4.4.1.3, p. 76). Failure to comply with these requirements of the Pharmacy RFP renders a proposal non-responsive. (DOM Exhibit 1, §§ 4.18(8) & 4.18(10), pp. 29 & 30).

Comparing these Pharmacy RFP requirements to the actual hard copies of the proposal sections submitted by Change, it is undisputed that the original hard copy and eight identical paper copies of the Management proposal section submitted by Change **did not** contain any references.

The Pharmacy RFP also required all offerors to submit two different digital copies of the full proposal on a USB file in a searchable Microsoft Word or Adobe Acrobat (PDF) format: one

full copy marked "PUBLIC COPY" and one full copy marked "UNREDACTED." (DOM Exhibit 1, § 6.1, pp. 64-67). The Pharmacy RFP clearly states that "[t]hese full copies will be for the use and files of the Office of Procurement only," and makes no references at all to use of these versions of the proposals by the evaluation committee. (DOM Exhibit 1, § 6.1, p. 66).

The copy marked "PUBLIC COPY" was intended for use as its label plainly states. This was the copy in which offerors were required to redact any information they deemed confidential or proprietary information that should not be released to the public. As the Pharmacy RFP notes, the "PUBLIC COPY" was to be used when a redacted copy of the proposal was needed by DOM, "including but not limited to, submission to the Public Procurement Review Board (PPRB), posting to the Transparency Mississippi website, Mississippi Public records Act, etc." (DOM Exhibit 1, § 6.1, p. 66). Importantly, in this instance, the "PUBLIC COPY" of Change's proposal was the only copy that contained any of the references of which Change complains, a fact which Change does not dispute. (Appeal Exhibit 12, p. 18). Ironically, however, the 'PUBLIC COPY" failed to contain any redactions for confidential or proprietary information at all. (DOM Exhibit 1, § 6.1, p. 66).

The second digital copy of the full proposal to be provided to DOM was a copy marked "UNREDACTED", which the Pharmacy RFP clearly states is intended "for the use and files of the Office of Procurement only." (*Id.*). The copy marked "UNREDACTED" was intended to be just that – a complete copy of the proposal that contained no redactions for confidential or proprietary information. In this instance, Change failed to submit a digital copy of the proposal marked "UNREDACTED." Instead, it submitted a digital copy marked "REDACTED" which failed to include any references. It did, however, contain numerous redactions of material Change characterized as confidential or proprietary. The submission of a "REDACTED" copy instead of an "UNREDACTED" copy is a clear violation of the requirements of the Pharmacy RFP. (DOM

Exhibit 1, §§ 4.18(8),(10) & 6.1, pp. 29, 30 & 66). Failure to comply with these requirements renders Change's proposal non-responsive. (DOM Exhibit 1 at 4.18(8), p. 29).

Thus, a few things become clear when comparing Change's proposal as it was submitted to the requirements of the Pharmacy RFP. First, it is undisputed that Change failed to include its references in the original hard copy and eight identical paper copies of the Management proposal section, as required by the express terms of the Pharmacy RFP. (DOM Exhibit 1, §§ 6.1 & 6.4.4.1.3, pp. 64, 76). Second, the only place Change did include its references was in the electronic version of its proposal marked 'PUBLIC COPY," which was intended for use only when a redacted copy of the proposal was deemed necessary by DOM, i.e. "submission to the Public Procurement Review Board (PPRB), posting to the Transparency Mississippi website, Mississippi Public records Act, etc." (DOM Exhibit 1, § 6.1, p. 66). Third, the terms of the Pharmacy RFP did not state that DOM could simply substitute the "PUBLIC COPY" for consideration by the evaluation committee. Fourth, Change's "UNREDACTED" copy was never properly submitted. And finally, the improperly submitted "REDACTED" copy submitted by Change failed to include any of the references.

To rebut the defects in its submission, Change offers two theories. First, Change argues that DOM was required to review all paper and electronic copies of submissions, each full or partial, which totaled 29 in all, to locate any missing sections such as its references and then transport them into the original copy of the proposal to be considered by evaluators, despite Change's responsibility under the Pharmacy RFP to include that material as part of the original hard copy submission. According to Change, "[a]bsent language in the RFP precluding the Agency from evaluating the references included in the electronic version of Change['s] proposal," DOM was required to take such action. *Appeal Letter,* p. 32. Change, however, mistakes an absence of

language as a legal directive to act, creating obligations on behalf of DOM that do not exist. The Pharmacy RFP makes no such directive for DOM to act. Nor does the Pharmacy RFP impose a duty on DOM to search each copy submitted for missing sections and then "mix and match" various sections of the proposal to create the best version for review by evaluators. The Pharmacy RFP unequivocally requires all offerors to submit each section as required by the Pharmacy RFP. (DOM Exhibit 1, § 4.18(10), p. 30). DOM cannot and is not responsible for any failure or shortcomings caused by an offeror's inability to follow directions. Instead, DOM is responsible for fairly, equally, and reasonably evaluating each proposal submitted to it under terms set forth in the Pharmacy RFP.

Second, Change argues that DOM violated the terms of the Pharmacy RFP because the evaluators reviewed an "electronic version" of the proposals rather than the original hard copies submitted by the offerors. No such "violation" occurred. The reason that Change's original hard copies could not be used is simple. Change's original hard copies contained over 350 instances of identifying information, which could not be presented to the evaluators. Originally, these violations caused Change's proposal to be declared non-responsive, and it was not included in the first round of evaluation. When a close review of MedImpact's proposal by OPSCR revealed one instance of potential identifying information and the potential use of identifying colors, DOM – after consultation and advice from OPSCR – determined it was in the state's best interest to remove all identifying information and colors from both proposals and submit them both for consideration by the second evaluation committee.

In this regard, both the Change and MedImpact proposals were treated **exactly the same**. To de-identify copies of the proposals for review, DOM took the original hard copies submitted by both offerors, de-identified them, scanned them to digital black and white, scanned the de-

identified black and white copies as locked PDFs, and then submitted them to OPSCR for a final review before they were submitted to the evaluation committee. Thus, the hard copies submitted by the offerors were the basis for what was reviewed by the evaluators. Stated another way, evaluators reviewed de-identified, black and white, locked electronic copies of the hard paper copy submissions. Under these facts, both the spirit and substance of the Pharmacy RFP were met.

Finally, the inclusion or non-inclusion of Change's references had no impact on awarding the Pharmacy RFP contract to MedImpact. This issue is a true "red herring" in its best sense, since Change could not overcome the scoring difference with MedImpact through corporate references alone. The total points available to Change through the scoring of references is a maximum of 3.64 points. Change scored 18.27 points lower than MedImpact. Thus, even if Change were awarded all of the 3.64 points allowed for the references, there would still be insufficient points to achieve a higher score than MedImpact.

CONCLUSION

For the foregoing reasons, Change's Appeal should be dismissed, DOM's Final Decision denying Change's Protest should be upheld, and DOM's Final Decision awarding the Pharmacy RFP to MedImpact should be upheld as all were supported by substantial evidence, were not arbitrary or capricious, were not beyond the power of DOM to make, nor did they violate a statutory or constitutional right of Change.

DATED: March 3, 2023.

Respectfully Submitted,

MISSISSIPPI DIVISION OF MEDICAID AND DREW SNYDER, *IN HIS OFFICIAL CAPACITY AS EXECUTIVE DIRECTOR OF MISSISSIPPI DIVISION OF MEDICAID*

By: */s/ Janet D. McMurtray*
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CERTIFICATE OF SERVICE

I, Janet D. McMurtray, do hereby certify that on the 3rd day of February 2023, I electronically sent the foregoing document and exhibits to the following:

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Attachment B.vii

MedImpact's Response to Change Healthcare's Appeal to PPRB

March 3, 2023

BEFORE THE MISSISSIPPI PUBLIC PROCUREMENT REVIEW BOARD

In re:	)
	)
CHANGE HEALTHCARE PHARMACY SOLUTIONS, INC.	)
	)
APPELLANT	)

MEDIMPACT HEALTHCARE SOLUTIONS, INC'S BRIEF IN OPPOSITION TO CHANGE HEALTHCARE'S APPELLATE BRIEF

Change's appeal asks this Board to second-guess the DOM's factual findings and re-write the relevant law. The Board should instead affirm its confidence in the DOM's findings and application of the law.

The record reflects that MedImpact submitted a cogent proposal that demonstrated MedImpact had decades of pertinent experience and that committed MedImpact to provide that expertise to the State at a competitive price point. MedImpact's presentation was the product of hard work and detailed analysis. It closely reviewed the RFP to determine what the State was seeking, evaluated the staffing and other resources needed to perform the work, and arrived at a reasonable price for those services. Change, by marked contrast, submitted a non-competitive proposal that seemingly focused on nothing other than maintaining its own bloated profit margin, and that was so shoddily done that in hundreds of instances, Change violated the plain language of the RFP by providing its corporate identity in section l that was supposed to be anonymous. Given Change's high price, there is also a reasonable inference that Change elected to overstaff the project to its financial benefit and to the State's detriment. In sum, this record leaves the unmistakable impression that Change took for granted that it would win the contract as the incumbent and was not expecting competition.

Approximately a dozen different DOM employees reviewed the parties' respective proposals and factually determined that MedImpact's proposal was responsive and the best option, with MedImpact consistently outscoring Change on nearly all metrics. These factual findings were well-reasoned and comprehensive. Change simply has not shown that DOM failed to properly interpret or apply the law (including, but not limited to, the law related to blind evaluations, to qualifications of evaluators, or the qualifications/pricing of MedImpact).

The Board should affirm the DOM's denial of Change's protest.

FACTS

I. The DOM followed proper procedure, and Change is lucky its proposal was scored.

The DOM implemented a thorough, lawful, and equitable process before it selected MedImpact's proposal. It subjected the proposals to thorough review by its procurement staff, two separate evaluation committees, and its executive director. Change's arguments to the contrary are premised on unfounded speculation, conclusory statements, and self-serving hyperbole.

After MedImpact and Change submitted their respective proposals, the DOM's procurement staff reviewed the proposals to ensure they were responsive to the RFP. Among other things, they confirmed that the proposals included the sections required by the RFP, that Change and MedImpact had the experience demanded by the RFP, and that the proposals had either been appropriately redacted or that the DOM could correct any redaction failures. Exhibit 1, June 22, 2022 Transcript at 52-56. During this review process, the procurement team determined that MedImpact's proposal satisfied these requirements, but that Change's proposal had to be disqualified because it contained 350 instances of identifying information that could not be reasonably removed. The DOM de-briefed Change on is disqualification, Change affirmed its understanding, and Change has never challenged this finding. While the initial disqualification is

not directly at issue, it is important context given Change's unwarranted criticism of the DOM's process. *E.g.,* Change Brief at pg. 1 (contending that the DOM conducted a "flawed and illegal procurement" tainted by a "litany of errors".) Change, not the DOM, committed the litany of errors, with those errors being but one indicator of the arrogance inherent in its incumbent-knows-best attitude.

After disqualifying Change, the procurement team submitted MedImpact's proposal to the initial evaluation committee that Change concedes was well-qualified. The evaluators went through a laborious process, completing individual and consensus scoring for the blinded sections, followed by individual and consensus scoring for the non-blinded sections. They awarded MedImpact a consensus score of 81.83, which is higher than the score later awarded by the second committee. Given Change's concession that the first committee was qualified, the Board can and should deem their score as empirical support for the reasonableness of the second committee's score.

Following subsequent guidance from the OPSCR, the DOM submitted MedImpact's and Change's respective proposals to a second evaluation committee. The committee consisted of a DOM Deputy Executive Director with pharmacy-specific experience and a director in DFA's Office of Insurance with extensive knowledge of health insurance and pharmacy benefits. This committee also went through a laborious scoring process before ultimately awarding MedImpact a score of 79.67, 18 points higher than Change's score of 61.40. Of the four sections (Technical, Cost, Management, and Price), the second committee awarded Change a higher score only as to technical proposal, and even then, by only .07 points.

II. MedImpact is properly qualified to perform the contract.

The RFP required that the winning offeror have "five years of experience servicing government accounts" and "within the last 48 months, been engaged in a contract or awarded a new contract with similar work in a state Medicaid program." MedImpact's proposal demonstrated that it readily meets this standard. Among other things, it: (1) identified twenty-one responsive Medicaid-related projects – twenty more than required, Exhibit 2, Redacted Proposal at pgs. 117-120; and (2) provided five governmental references – two more than required. *Id.* at 51-55; RFP at § 6.4.4.1.3.

Consistent with its deep expertise, the framing of MedImpact's proposal was led by Rob Coppola, an eminently qualified pharmacist (PharmD, MBA) with approximately twenty years of industry experience. Exhibit, June 22, 2022 Transcript. At 120. Mr. Coppola used his expertise to review the RFP and craft a nimble proposal that included a thoughtful and reasonable approach to staffing the project. MedImpact did not sacrifice quality in presenting such a competitively-priced proposal. To the contrary, it presented the DOM with extensive information describing the team's qualifications, painstakingly proving that it was ready, willing, and able to meet the State's needs. Exhibit, Redacted Management Proposal at 55-61. MedImpact also is "one of only four PBM organizations in the United States selected for the CMS Pharmacy Precertification Participation program", and achievement that required a "rigorous six-month evaluation period[.]" *Id.* at 45.

MedImpact's PDL/SR team has extensive experience, which includes, but is not limited to: (1) a clinical account manager with "more than 20 years of pharmacy experience, including nine years of Medicaid experience, and five years of formulary management experience; (2) a lead medical director with "11 years of experience serving directly as, or consulting as, a medical director at various organizations in South Carolina, including the South Carolina Department of

Health & Human Services and four years at Select Health of South Carolina, a Medicaid MCO[;]" and (3) a supplemental rebate manager with "10 years of Medicaid experience", including but not limited to serving as "director of value-based purchasing at Magellan Rx Management where he clinically and operationally supported drug manufacturer rebate negotiations for the Medicaid Preferred Drug List for 25 Medicaid agencies and led a team of pharmacist account managers responsible for the Medicaid PDL contracts for 13 Medicaid agencies." *Id.* at 8, 56-58. Similarly, the MedImpact rate-setting team "bring[s] over 94 years of combined experience working directly in the Medicaid pharmacy reimbursement space. They include four former state Medicaid pharmacy directors or pharmacy program managers." *Id.* at 58-60. In addition, the DOM requested, and MedImpact provided, certain supplemental information related to some of the key team members.

STANDARD OF REVIEW

While Change correctly notes that the Board reviews legal decisions de novo and factual determinations for abuse of discretion, Change's recitation of the second point is incomplete. Change fails to make the observation that a party hoping to reverse an agency's factual findings carries a heavy burden. *Davis v. Pub. Employees' Ret. Sys.*, 750 So. 2d 1225, 1232 (Miss. 1999) ("Our familiar position of judicial review for administrative decisions is that we may interfere only when the decision is arbitrary or capricious, leaving a very heavy burden[.]")

Change's failure to acknowledge or address its heavy burden is particularly telling in the light of its admission in the Chancery Court proceedings that if the Court denied its request for MedImpact's unredacted proposal, "[t]here would be no grounds for protest." Exhibit 3, December

13, 2022 Transcript at 26.[1] While the argument was a failed attempt to convince the Court to side with Change, Change's briefing is consistent with its admission, as Change has no proof to support its arguments. Change's initial bid protest further proves the point because it repeatedly made allegations "on information and belief", not on facts.

Change, having admitted to the Chancery Court and to the DOM that it has no evidence, should have abandoned this protest. Regardless, it absolutely does not have the proof needed to bear its burden.

ARGUMENT[2]

I. Change's argument that the DOM's evaluators were not qualified is factually unsupported and would require the Board to re-write the statute at issue.

For three core reasons, the Board should reject Change's argument that the evaluation committee did not have the requisite experience.

First, Change misstates the applicable standard. The evaluators were not required to possess "specialized [pharmacy] knowledge" or to be pharmacy experts. Change Brief at pg. 16 (stating that one evaluator is an "expert in health policy" but criticizing his alleged lack of "specialized knowledge . . . in DOM's pharmacy program"); *see also* Miss. R. Evid. 702 (expert testimony requires "specialized knowledge"). The plain statutory and regulatory text does not require subject-matter experts, opting instead for the much broader standard of "relevant experience". Miss. Code Ann. § 31-7-415(1); Miss. Admin. Code Pt. 9, R. 3-204.01.2. Where the Legislature wishes to require experts, it knows how to do so. *E.g.,* Miss. Code Ann. § 43-21-324 (requiring the Department of Public Safety to "contract with a juvenile justice expert" for certain

[1] Change devotes a significant portion of its brief criticizing the Chancellor's ruling. That ruling, of course, is not before this Board, and is currently the subject of an appeal before the Mississippi Supreme Court.

[2] MedImpact will not address Change's argument that Change submitted references that were not properly considered. MedImpact has no facts pertinent to this issue, so it defers to any responsive arguments presented by the DOM.

purposes). Further, while neither the statute nor the regulation define "relevant", the Rules of Evidence construe that word "broadly". *Pugh v. State*, 270 So. 3d 949, 958 (Miss. Ct. App. 2018).

Second, for the reasons explained by the DOM, the second evaluation committee had sufficient experience. MedImpact adopts those arguments by reference.

Third, Change cannot establish that a more qualified committee would have scored it as the winner. In fact, Change concedes that the first committee had sufficient expertise – but, as explained previously, that committee gave MedImpact an even higher score than did the second evaluation committee. Relatedly, because Change nearly doubled MedImpact's price, the pricing section gave MedImpact a fifteen-point advantage, such that Change needed a nearly perfect score on the remaining sections to rank higher than MedImpact. Unsurprisingly, Change's error-riddled proposal that contained more than 350 instances of identifying information did not achieve such perfection.

II. The Board should reject Change's untimely and incorrect guess that the evaluation process was not blinded.

The statute with respect to blinding merely required that DOM "keep the names of the officers and their identifying numbers or letters, or combination thereof, in a . . . secure location until factors not requiring knowledge of the name of the offeror have been evaluated and scored." Miss. Code Ann. § 31-7-417. Change posits that the DOM violated the statute because the evaluation committee was able to simultaneously review MedImpact's technical proposal and cost proposal. The argument fails for multiple reasons.

First, Change does not dispute that the DOM in fact complied with Section 31-7-417 and in fact affirmatively concedes that the DOM "redacted each offeror's name from its price proposal before providing the proposals to evaluators along with the blinded technical proposals[.]" Change Brief at pg. 19.

Second, Change waived the argument by not raising it before the DOM. "In the federal arena, the general rule is that courts will not review a question that was not presented to or passed on by the administrative agency. A court might undertake review of such a question in exceptional circumstances. This Court has said that we reserve the right to consider an issue that was not raised before an administrative agency where the facts are undisputed and the issue is one that would allow an erroneous application of a statute, and where failure to address such issue will result in a possible deprivation of substantive rights." *AT&T Corp. v. Mississippi Dep't of Info. Tech. Servs.*, 298 So. 3d 938, 953 (Miss. 2020) (internal cites and punctuation marks omitted). None of these four criteria are met here: (a) Change does not identify any exceptional circumstances, (b) the purported "facts" that Change seeks to add to the record are disputed, (c) Change has no reasoned argument that the DOM violated the statute, and (d) Change's argument relates solely to procedural rights, not substantive ones.

Third, Change has insufficient factual evidence to support its argument. Change merely presents speculation that the evaluators ***might have*** seen DOM's public notices identifying MedImpact as the low bidder and ***might have*** used that knowledge to link MedImpact's blinded technical proposal to MedImpact's blinded price proposal. There is no ***evidence*** that the evaluators did either of these things, and the Mississippi Supreme Court has made clear that "[a] reasonable inference cannot flow from a complete absence of proof and cannot be based on surmise, speculation, conjecture or supposition." *Smith v. Hardy Wilson Mem'l Hosp.*, 300 So. 3d 991, 999 (Miss. 2020); *Wallin v. Drewery*, 783 So. 2d 786, 790 (Miss. Ct. App. 2001) (appellate arguments failed because they were based on attenuated circumstantial evidence, which the Court of Appeals deemed "conjecture and mere speculation."); *see also McAfee v. Galvez*, 80 So. 3d 123, 124 (Miss. Ct. App. 2011) ("McAfee's argument contains no citations to the record or any supporting legal

authority. Consequently, his argument is procedurally barred from our review.").[3] Further, while the purpose of the failed arguments is for Change to imply that the committee deliberately tanked Change's technical proposal, the facts show that the technical proposal was the only section in which Change outscored MedImpact.

Fourth, even if (a) the DOM used the procedure that Change claims it did use, and (b) that procedure somehow amounted to a violation, then (c) those points do not end the inquiry. To the contrary, under this factual record, that procedural history would at most establish a non-substantive violation that this Board can and should waive. *E.g., Mississippi State Port Auth. at Gulfport v. Eutaw Constr. Co., Inc.*, 340 So.3d 303 (Miss. 2022); *Hill Bros. Const. & Engineering Co., Inc. v. Mississippi Transportation Commission*, 909 So.2d 58 (Miss. 2005) (agency properly disregarded technical irregularity that "did not alter the bidding process, did not provide any bidder with an advantage or benefit over any other bidder, did not prejudice the rights of any other bidder or the public, did not alter the price, quality or quantity of its bid, and . . . did not provide an opportunity for fraud or favoritism or affect the integrity of the competitive bidding process."); *Landmark Structures, Inc. v. City of Meridian*, 826 So.2d 746, 749 (Miss. 2002) (procurement laws are intended to secure economy in . . . the expenditures of public funds . . . to protect the public from collusive contracts; to prevent favoritism, fraud, extravagance, and improvidence in . . . procurement . . . and to promote actual, honest, and effective competition[.]"). Waiving any irregularity would be particularly appropriate here in the light of Change's poor proposal. That is, Change needed a nearly perfect score on its technical and management proposals to receive the highest score because it was so badly beaten on price, and its slipshod proposal, which was

[3] Based on these authorities, the Court should also reject Change's argument that the DOM did not properly redact MedImpact's proposal. Change argues that "[t]here is no sworn testimony or evidence in the record memorializing DOM's de-identification process", but ***Change*** bears the burden of proof on this issue.

chockfull of identifying information that had to be redacted, unsurprisingly did not achieve that necessary standard of perfection. It would be particularly unjust to allow Change yet another opportunity under these circumstances, as Mississippi procurement law is aimed at "coordinat[ing] and promot[ing] efficiency and economy in the purchase of commodities by the agencies of the state[,]" Miss. Code. Ann. § 31-7-3, and at achieving "increased economy", "quality", and "integrity" are the overriding goals. 12 Code Miss. R. Pt. 9, R. 1-101.

III. MedImpact's pricing was and is realistic.

In order to prepare its proposal, MedImpact utilized a thorough, multi-layered process. It first determined whether it had the experience required by the RFP. Exhibit, Excerpts of June 22, 2022 Transcript at pg. 120. As explained in the preceding section of this brief, MedImpact has that experience. MedImpact then applied that experience to evaluate the resources needed to meet the contract's deliverables. As Mr. Coppola has explained, MedImpact:

> took a look at all of the requirements that the state had, and these were enumerative numbers of potential projects that they wanted.
>
> So our -- our approach was to say we're going to give you [the DOM] this many resources and we'll work with the department to prioritize projects. MedImpact will work with Mercer to ensure they were deliverable. But there was no way that the state could do all of those projects at one time in which perhaps that would have led to way more staffing. So our approach allowed us to come in at a much more cost competitive nature. We had the ability to meet their requirements and flex to extend staffing as necessary.
>
> ***
>
> We build cost up. What does it take? What's the level of effort? What's my expenditures in hardware? Whatever it is I have to do and that's what I -- I apply my overhead which is a bit of profit and that's how I come at my price. I don't work down from what the budget would be.

Exhibit, Excerpts of June 22, 2022 Transcript at pg. 127-28. MedImpact also asked clarifying questions of the DOM, including information as to certain claim volume. Exhibit 4, Questions and Answers. Only then did MedImpact arrive at a price.

There is no support for Change's implication that MedImpact's first step should have been to review the DOM's fee estimate. By making its own pricing determination, MedImpact avoided the confirmation bias that could have resulted from reviewing the estimate first. Further, the propriety of MedImpact's pricing is confirmed by data available to the DOM: (1) "MedImpact's proposed pricing for preferred drug list and supplemental rebate services was in-line with pricing reflected in prior invoices for the same services when performed by another vendor[;]" and (2) "MedImpact' s proposed pricing for rate setting services is also consistent with the pricing provided by DOM's incumbent vendor for those same services." Exhibit, DOM Opinion.

To be sure, Change provides no data to show that MedImpact's pricing is unrealistic, and instead argues that it was the incumbent and best knew the appropriate price. Change, however, has no first-hand knowledge of MedImpact's internal costs, rendering its subjective belief as to MedImpact's financial capabilities immaterial. *Sauer v. Glidden Co.*, 211 F.3d 593 (5th Cir. 2000) (subjective belief cannot defeat summary judgment); *see also* Miss. R. Evid. 602 (testimony must be based on personal knowledge). There is also no legal or logical support for Change's proposed incumbent-knows-best rule. To the contrary, it would allow incumbents to overcharge the State and defeat lower bids by doing more than claiming incumbency. Further, Change's alleged superior knowledge was negated when DOM answered numerous questions about the amount of work that had been done under prior iterations of the contract. Exhibit, RFP Questions and Answers. Finally, while Change implies that contracting with MedImpact could be more costly to the State in the long run, it is not even clear that Change will remain in business, given that it received a failing score (a 33 out of 100) on the section designed to assess Change's financial stability.

IV. MedImpact has the experience required by the RFP.

MedImpact has at least "five years of experience servicing government accounts and has, within the last 48 months, been engaged in a contract or awarded a new contract with similar work in a state Medicaid program." This is definitively shown by MedImpact's redacted management proposal, which reflects, among other things, that MedImpact has: (1) "three decades of experience providing pharmacy programs and services to Medicaid programs and their beneficiaries[,]" Exhibit, Redacted Management Proposal at pg. 50; (2) more than twenty government contracts responsive to the RFP, *id.* at pgs. 117-120; (3) five references for its work on Medicaid-related projects, *id.* at pgs. 51-55; and (4) a well-experienced team for the project. *Id.* at pgs. 56-61; *see also* Exhibit 5, Redacted Technical Proposal at pgs. 2-4; 38-41.

The management proposal also provides extensive detail regarding Mercer's work, and there is no real dispute that Mercer is experienced in rate-setting given that it performed those services for Mississippi under the prior contract. Redacted Management Proposal at pgs. 70-73. Indeed, Change asked Mercer to partner with it in making a proposal. Exhibit, June 22, 2022 Transcript at pg. 122.

Faced with the inability to refute these facts, Change blames DOM for opposing Change's record request and blames the Chancellor for granting MedImpact a protective order. The Board cannot revisit the protective order, but the DOM did nothing more than agree that MedImpact and Change were both entitled to shield their respective client lists. Change is the party who presented inconsistent arguments by initially arguing the identify of its public clients was confidential before later arguing that the identity of MedImpact's public clients was not confidential.[4] Change's

[4] Change's shifting positions also believe its argument that the Chancery Court must necessarily have determined that MedImpact did not have any contracts with public entities. If that were the case, Change also would not have been entitled to a protective order.

argument is all the more curious given that it rejected MedImpact's offer to disclose its client information while shielding its detailed pricing information. Presented with an absolute vacuum of any proof, Change resorts to two improper approaches.

As a threshold matter, Change inaccurately states that the RFP's requirements as to experience. The RFP merely required "a minimum of five years of experience servicing government accounts and has, within the last 48 months, been engaged in a contract or awarded a new contract with similar work in a state Medicaid program." Similar does not mean identical, and based on consolidation within the industry and the contract itself, there is every reason to find that DOM's flexible wording was both reasonable and intentional. Change also has not shown that MedImpact lacks pertinent experience because its sole "proof" in support of the argument are two documents that are not admissible.

Change first relies on a document purporting to be a compilation drawn from unknown sources, and an incomplete excerpt . Exhibit 23 to Change Brief. The document is inadmissible for multiple reasons. First, this appeal is limited to the record before the DOM, and Change did not submit the document in the DOM proceeding. *Riley v. Jefferson Davis County*, 669 So. 2d 748, 750 (Miss. 1996). Second, the document does not meet the requirements for judicial notice because Change does not identify the sources from which the data was drawn, much less establish that they are sources whose "accuracy cannot reasonably be questioned." Miss. R. Evid. 201(b)(1). Third, Rule 201 is never a vehicle to add new, disputed facts to an appellate record. *United States v. Okoronkwo,* 46 F.3d 426, 435 (5th Cir.1995) ("The record is completely devoid of any evidence of pretrial publicity. On appeal, Ezinwa appends to his brief a single Houston newspaper article which discusses the case and asks this Court to take judicial notice of the article. This constitutes an impermissible attempt to supplement the record on appeal. Neither this article nor any other

evidence of pretrial publicity was presented to the district court.") Fourth, Change has not satisfied Miss. R. Evid. 1006 because it has not provided "the originals or duplicates available for examination or copying, or both, by other parties at a reasonable time and place." Miss. R. Evid. 1006; *United States v. Aguirre*, 155 F. App'x 145, 149 (5th Cir. 2005) (examining the equivalent federal rule and determining that the court properly excluded evidence at issue where party "provided no original documentation to the Government either prior to or at the time of his attempt to introduce the exhibit, as provided by the rule.").[5]

Change also does not provide that MedImpact lacks the necessary experience when it refers to an incomplete document MedImpact submitted to Kentucky in 2018 related to an RFP in that state. First, Change refers to only one page of MedImpact's proposal, such that the document is inadmissible under the rule of completeness. Miss. R. Evid. 106. Second, the document does not indicate that MedImpact lacks pertinent FFS experience; it merely speaks to MedImpact's business ***focus***. The DOM fully addressed this latter point when it stated "[t]his document does not state in any way that MedImpact first began to operate in the Medicaid fee-for-service industry in 2017. Rather, as the document states, MedImpact had fee-for-service experience going back to 2001." Exhibit 12 to Change's Brief.

Furthermore, all of Change's arguments related to experience rest on the failed premise that a company's experience is static and does not change. To the contrary, a company's experience may change as it continues to hire new personnel with pertinent experience. For the reasons already explained, MedImpact's team is well-experienced in the areas that this contract will cover.

[5] The document states that Magellan has procured numerous fee-for-service contracts – and several of the key personnel on this project are employees Change hired away from Magellan. They did not forget how to do fee-for-service work when they left Magellan.

V. In the alternative, the Board should reinstate the DOM's original decision to award the contract to MedImpact because ruling in favor of Change would create an unfair competitive disadvantage.

The Board should affirm the DOM's decision based on the results reached by the second evaluation committee. In the alternative, however, the Board should reinstate the DOM's initial notice of its intent to award the contract award to MedImpact based on the scoring by the first evaluation committee. The DOM rescinded that notice based upon guidance from OPSCR related to limited identifying information in MedImpact's proposal. For the reasons explained in Section IV of this brief, this Board has the legal right to waive any such irregularity since the record evidence is that the first evaluation committee was not aware of MedImpact's identity. MedImpact incorporates by reference its prior briefing on that issue, as well as the DOM's decision.

Application of that principle is particularly appropriate given the inequities that would result if the solicitation were cancelled. As a threshold matter, the DOM determined that Change's proposal was non-responsive because it contained hundreds of instances of identifying information. The DOM later determined to award the contract to MedImpact and publicly disclosed MedImpact's price. If the process starts over again and Change is permitted to submit a new proposal now knowing MedImpact's pricing, it would have an unfair advantage. Mr. Coppola explained the issue, stating that "Change Health obviously understands how we [MedImpact] approached it or how we had to approach it in order to come at a low level", and:

> [I]f I'm Change Health, I'm obviously going to find a way to put a more competitive price bid in . . . they're going to come down and meet the price . . . we talked about the scoring, the scoring was 35 percent of the bid. And [due to pricing] they gave up [i.e., lost] . . . at least 17 points, or 17 and a half points. So they had to make that up on their technical writing. And that's where counsel was talking about they had to have almost a perfect score to overcome that gap. So they know what they have to do. And they probably -- the math here is that I would sit down if it were me and say okay, we have to up -- we can beat them by this many more points, so therefore, I put my price here. So it becomes a shell game instead of, you know, an actual contest to see who the best bidder is, the best prices.

Exhibit, June 22, 2022 Transcript at pgs. 130-131.

In summary form, if the contract is re-solicited, after flagrantly violating the applicable law and the requirements of the RFP, and after submitting an extraordinarily poor proposal, Change will be rewarded with competitive intelligence that helps it win. The Board should not permit such a result.

CONCLUSION

Change's appeal is supported by neither the facts nor the law. MedImpact has decades of experience that are relevant to the services sought by the RFP, and it submitted a quality proposal reflective of that experience. MedImpact's proposal also will save taxpayers millions of dollars. Under this record, it is hardly surprising that the DOM's procurement team, two evaluation committees, and executive director all determined that MedImpact's proposal should be selected. In response, Change offers no evidence and resorts to speculation. This is no surprise, either, since Change itself has repeatedly admitted that it does not have the facts for a successful bid protest. Change also seeks to substantially re-write the applicable law and the RFP, but this Board cannot approve or do either of those things.

The Board should reject Change's speculative, grasping protest and should affirm the DOM's decision.

Dated: March 3, 2023.

Respectfully submitted,

By Its Attorneys,

BAKER, DONELSON, BEARMAN,
CALDWELL & BERKOWITZ, PC

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EXHIBIT LIST

EXHIBIT NO.	DESCRIPTION
1	Excerpts of Transcript (June 22, 2022)
2	Management Proposal (September 23, 2021)
3	Excerpts of Transcript (December 13, 2022)
4	Questions and Answers
5	Redacted Technical Proposal (September 23, 2021)

Attachment B.viii

Change Healthcare's Reply

March 13, 2023

BEFORE THE MISSISSIPPI PUBLIC PROCUREMENT REVIEW BOARD
OFFICE OF PERSONAL SERVICE CONTRACT REVIEW

IN RE:
APPEAL OF THE FINAL DECISION OF THE MISSISSIPPI DIVISION OF MEDICAID ON CHANGE HEALTHCARE PHARMACY SOLUTIONS, INC.'S PROTEST OF THE NOTICE OF INTENT TO AWARD RFP #20210813 TO MEDIMPACT HEALTHCARE SYSTEMS, INC.

CHANGE HEALTHCARE PHARMACY SOLUTIONS, INC.'S REPLY IN SUPPORT OF ITS APPEAL OF THE MISSISSIPPI DIVISION OF MEDICAID'S FINAL DECISION TO AWARD RFP #20210813 TO MEDIMPACT HEALTHCARE SYSTEMS, INC.

COMES NOW Change Healthcare Pharmacy Solutions, Inc. ("Change Healthcare"), through undersigned counsel, submits this Reply in support of its Appeal of the Mississippi Division of Medicaid's ("DOM") Final Decision to Award RFP #20210813 to MedImpact Healthcare Systems, Inc. ("MedImpact").

Change Healthcare's Reply is timely filed in accordance with the Mississippi Public Procurement Review Board ("PPRB") instructions on or before March 13, 2023, within ten days of receipt of DOM's and MedImpact's responses to Change Healthcare's Appeal on March 3, 2023.

I. INTRODUCTION

As demonstrated by Change Healthcare's Appeal, DOM's decision to award the Pharmacy PDL and SR contract to MedImpact—an inexperienced offeror, proposing an unrealistically low price—was the result of a fundamentally flawed and illegal procurement. The public records released by DOM revealed a litany of errors in DOM's evaluation of proposals. New information subsequently released by DOM in its denial of Change Healthcare's protest and in the Response to Change Healthcare's Appeal to the PPRB confirms Change Healthcare's

allegations that there were numerous, prejudicial evaluation errors in this procurement. As a consequence, this procurement must be redone. Rather than acknowledge the serious issues reflected in its own procurement documentation and evaluation, DOM blames Change Healthcare for the fact that DOM has been unable to finalize this procurement for more than a year.[1] The errors identified in Change Healthcare's Appeal and additional errors identified below are of DOM's making, however. As Change Healthcare has demonstrated, this procurement has been characterized by defects from the beginning, including the following:

- After determining it was necessary to re-evaluate proposals, DOM hastily convened a new evaluation team of three (down from its initial evaluation team of seven). The credentials of the two scoring evaluators did not meet the RFP's requirements.

- By commingling offerors' price proposals with the offerors' technical and cost proposals after disclosing offeror prices, DOM violated the RFP's blinding procedures.

- DOM failed to evaluate whether MedImpact's glaringly low price was realistic in the light of the magnitude and complexity of DOM's requirements as anticipated by the RFP.

- After initially acknowledging that MedImpact lacked the required experience, DOM impermissibly relaxed the experience requirement for MedImpact by waiving the requirement to submit three corporate references for MedImpact.

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[1] DOM's response rehashes the novel judicial estoppel argument it made to the Chancery Court in support of MedImpact's Petition for a Protective Order. *See* DOM Response at 11-14. DOM's judicial estoppel argument is not relevant to this appeal. In addition, as Change Healthcare demonstrated in its opposition to MedImpact's Petition (at 15-16), the doctrine of judicial estoppel has not and cannot be applied to public records requests because the identity and motive of the requester in a public records case is not relevant under the Mississippi Public Records Act ("PRA"). The documents of a public body are either subject to public release or exempt from public release under one of the enumerated exemptions in the PRA. The identity or motive of the requester is not a factor whatsoever in a court's analysis of whether documents are subject to release under the PRA. In any event, the Chancery Court did not adopt DOM's judicial estoppel argument when it issued the Protective Order, and Change Healthcare has appealed the Chancery Court's decision to the Mississippi Supreme Court. *See Change Healthcare Pharmacy Solutions, Inc. v. MedImpact Healthcare Systems, Inc.*, No. 2023-TS-00180 (Miss. Feb. 16, 2023).

Fortunately, these numerous and compounding errors can be remedied. The PPRB has the opportunity, in accordance with its authority under Mississippi law, to examine this entire evaluation with a fresh perspective to ensure that DOM administers a fair and legal procurement.[2]

II. ARGUMENT

A. DOM's Response Reveals New Procurement Errors, Including Additional Instances of DOM's Failure to Evaluate Proposals in Accordance with the RFP Criteria

In its Appeal, Change Healthcare identified numerous flaws in this procurement and refers the PPRB to the factual background set forth in its Appeal. However, DOM's and MedImpact's responses and accompanying exhibits introduced new information about DOM's first and second evaluations of proposals and DOM's rationale in making award to MedImpact that not only confirm the allegations in Change Healthcare's Appeal, but reveal additional evaluation errors. In conjunction with the numerous procurement defects identified in Change Healthcare's Appeal, the following errors based on new information disclosed in DOM's and MedImpact's responses, underscore that redoing this procurement is necessary.

First, in its Response, DOM disclosed the results of the evaluation conducted by the first team of evaluators and emphasized that the first evaluation team awarded MedImpact a score of 5.09 out of 8 for its experience, indicating that MedImpact met the RFP's experience

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[2] DOM contends that certain of Change Healthcare's protest grounds are untimely. Contrary to DOM's contentions, Mississippi law provides that persons shall have a "reasonable amount of time, but in no event less than seven (7) working days after the production of the competitive sealed proposals, to protest the procurement or intended award prior to contract execution." Miss. Code. Ann. § 25-61-5(b)(2). There is no question that Change Healthcare filed its second supplemental protest challenging the numerous errors revealed in hundreds of pages of procurement records within a reasonable amount of time. For this reason, and to preserve the integrity of the procurement process, the PPRB should reject DOM's assertions.

requirements. DOM's assertion is misleading. The first evaluation team's scoring records attached to DOM's response show that the evaluators acknowledged that MedImpact lacked the required relevant experience to perform the contract under the RFP. Specifically, the first evaluation team determined:

> The Offeror's two corporate references did not support or validate corporate experience according to the core objectives of those projects listed by these references to support or validate work done on PDL presentations to P & T committee meetings, and supplemental rebate administration.

DOM Response, Ex. 2 at 14. Accordingly, the "comprehensive, fair, and impartial evaluation" conducted by the first evaluation team resulted in the conclusion that MedImpact lacked the requisite experience with the RFQ requirements based on its corporate references. *See* DOM Response at 6. The second evaluation team erroneously glossed over MedImpact's lack of experience.

Second, DOM's Response confirms that it did not perform the evaluation required by the RFP to determine whether "a proposal has a high probability of not being accomplished for the cost proposed." Change Healthcare Appeal, Ex. 1 (RFP), § 7.1.3. In response to Change Healthcare's argument that DOM failed to comply with the RFP requirement for a blind technical proposal evaluation by commingling offerors' technical and price proposals, DOM argues vigorously that it satisfied blinding requirements by providing redacted price proposals to the evaluators as directed by the OSPCR. *See* DOM Response at 29. But this response only establishes that DOM failed to conduct any analysis whatsoever of offerors' understanding of the non-price requirements based upon the prices proposed, as required by the RFP because the evaluators evaluated price before they could access offerors' management proposals and never

revisited the issue of whether offerors' prices reflected "a high probability of not being accomplished for the cost proposed."[3]

Third, DOM revealed for the first time in its Response that, during the first evaluation, DOM misapplied the RFP's point scoring rubric, resulting in the assignment of additional points to MedImpact's proposal. While the score assigned to MedImpact by the first evaluation team is ultimately not relevant to this appeal because Change Healthcare's protest challenges the second evaluation team's award decision, DOM is apparently attempting to bolster its defective second evaluation with the results of its first evaluation. This effort is not only legally unsound, but unavailing because the new evidence is that ***the first evaluation also contained significant errors***.[4] Specifically, DOM explains (at 6) that in the first evaluation, the evaluators assigned MedImpact a total score of 81.83 out of 100. *See also* DOM Response, Ex. 2 (First Evaluation Committee Scoring Sheet for MedImpact). This score, however, was improperly inflated. The RFP provided that offerors' technical approaches would be scored out of 40 points as follows:

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[3] Notwithstanding that the RFP required evaluation of whether an offeror's price was "unrealistically low," Change Healthcare Appeal, Ex. 1, § 7.1.3, DOM disputes that a price realism analysis was required by the terms of the RFP. *See* DOM Response at 29-30. Even accepting DOM's argument that a price realism evaluation was not required, the record contains no evaluation of whether "a proposal has a high probability of not being accomplished for the cost proposed." *See id.* Therefore, DOM failed to conduct the analysis called for by the RFP, whether it is properly termed a price realism analysis or something else.

[4] MedImpact's assertion that the PPRB should reinstate the first evaluation committee's notice of award to MedImpact based on the scoring by this team should be squarely rejected by the PPRB. *See* MedImpact Response at 15. Setting aside that this is an implicit concession that the second evaluation team was unqualified and conducted a defective evaluation of Change Healthcare's and MedImpact's proposals, the record now shows that the first evaluation team's analysis was also flawed and deviated from the RFP evaluation criteria. Accordingly, neither evaluation committee's evaluations of offerors' proposals can stand; both the first and second round evaluation results must be thrown out.

Weight/Percentage 40pts/40%

Proposal Section	Maximum Score
Executive Summary/Understanding of Project	2pts/2%
Methodology	30pts/30%
Work Plan and Schedule	8pts/8%

In evaluating MedImpact's technical proposal, however, DOM improperly weighted MedImpact's "Executive Summary/Understanding of Project" by scoring that portion of its proposal based on a total score of eight points instead of two points. Accordingly, instead of awarding MedImpact 1.33 points out of 2 points as anticipated by the RFP, the evaluators awarded MedImpact 5.78 out of 8 points or 4.45 extra points than it was entitled to. *See* Change Healthcare Appeal, Ex. 1, § 7.1; DOM Response, Ex. 2.

The new information disclosed in DOM's response further establishes that DOM's evaluation was riddled with errors and confirms that the award to MedImpact must be rescinded.

B. DOM's Evaluators Lacked the Relevant Medicaid Experience

DOM has failed to rebut Change Healthcare's allegations that DOM relied on unqualified evaluators. DOM insists that information from the evaluators' LinkedIn profiles cited by Change Healthcare is not a "legitimate authority." DOM Response at 25. DOM, however, has not disputed the factual accuracy of these profiles or that they reflect the evaluators' relevant work history.

Applicable Mississippi law and regulations require that "[p]ersons appointed to an evaluation committee shall have the relevant experience necessary to evaluate the proposal or qualification." Miss. Code Ann. § 31-7-415(1); *see also* Miss. Admin. Code Pt. 9, R. 3-204.01.2 (same). The RFP also required the evaluation committee members to "have relevant experience in the Medicaid program." *See* Change Healthcare Appeal, Ex. 1, § 7.1. DOM's insistence that the evaluators possess the requisite experience is unpersuasive.

Change Healthcare does not dispute that the two scoring members—Mr. Ervin and Ms. Bradshaw—are well-qualified in their respective fields. However, nowhere in DOM's recitation of their credentials does DOM establish that these evaluators possess the required technical expertise and experience with work similar to that contemplated by the RFP, including relevant experience with a state Medicaid program.

DOM insists that Mr. Ervin's oversight of the Office of Pharmacy demonstrates his qualifications to serve as an evaluator for this RFP. However, as set forth in Change Healthcare's Appeal, Mr. Ervin lacks the specialized knowledge of and expertise in Mississippi Medicaid and DOM's pharmacy program that would enable him to evaluate an offeror's technical approach for administering the Mississippi SR program and developing and managing the PDL in accordance with the RFP requirements.

In addition, DOM has not disputed that Ms. Bradshaw lacks the required Medicaid experience. Instead, DOM suggests that Ms. Bradshaw's experience with other insurance programs is sufficient. This logic, however, ignores the unique nature of the Medicaid program, a distinction that the RFP acknowledged when it provided that it was seeking "an Offeror to coordinate all phases of preferred drug list (PDL) and supplemental rebate (SR) administration . . . and has, within the last 48 months, ***been engaged in a contract or awarded a new contract with similar work in a state Medicaid program***." Change Healthcare Appeal, Ex. 1, § 2.1 (emphasis added). While Ms. Bradshaw appears to have extensive experience with the State employees' health plan and workers' compensation, neither of these roles demonstrates that Ms. Bradshaw has knowledge of the state Medicaid program. As set forth in Change Healthcare's Appeal, there are significant differences between commercial health care plans and Medicaid. Change Healthcare Appeal at 17-18. The programs cover vastly different populations, are governed by

different rules and regulations, and have their own unique funding and cost considerations. All of these distinctions are fundamental to the administration of a pharmacy program. Accordingly, Ms. Bradshaw lacks the relevant experience to serve as a qualified evaluator on the evaluation committee for the PDL and SR RFP.

Finally, DOM seeks to bolster its position that it convened a qualified evaluation committee by emphasizing the credentials of Ms. Shaw. DOM Response at 24-25. Change Healthcare does not challenge Ms. Shaw's credentials, and her credentials are irrelevant to this Appeal. Ms. Shaw's role in the evaluation was limited to a review of offerors' audited financials, which constituted one point out of 100 points in the evaluation. Ms. Shaw was not involved in the evaluation of offerors' technical, management, or price proposals. As a result, Ms. Shaw's experience with Medicaid is not relevant and DOM cannot rely on it to bolster the otherwise deficient qualifications of its evaluation committee.

Because DOM failed to convene a qualified evaluation team to re-evaluate proposals, its award to MedImpact cannot stand. *See* Miss. Code Ann. § 31-7-415(1); *see also* Miss. Admin. Code Pt. 9, R. 3-204.01.2 (same); Change Healthcare Appeal, Ex. 1, § 7.1.

C. DOM's Response Confirms that It Violated the RFP's Blinding Procedures

DOM has not and cannot rebut Change Healthcare's allegations that DOM violated the RFP's blinding procedures by commingling offerors' price proposals with the offerors' technical and cost proposals following disclosure of offerors' pricing.

The RFP provided for the blind evaluation of offerors' technical proposals. Change Healthcare Appeal, Ex. 1, § 6.4.2. Accordingly, all "identifying information" was required to be removed from offerors' proposals. The RFP broadly defined "identifying information" as "including, ***but is not limited*** to, any prior, current and future names or addresses of the offeror,

any names of incumbent staff, any prior, current and future logos, watermarks, and company colors, any information, which identifies the offeror as an incumbent, ***and any other information, which would affect the blind evaluation of technical or cost factors***." *Id.* (emphasis added).

As set forth in Change Healthcare's Appeal, by providing the evaluators with offerors' technical, cost, and price proposals together and at the same time, DOM introduced identifying information into the evaluation. This is because information about MedImpact's price proposal was already public on DOM's procurement website.[5] Specifically, DOM publicly disclosed MedImpact's price of $7,771,641 in its notice of award and posted the July 15, 2022 decision of the Administrative Hearing Officer recommending that DOM proceed with award to MedImpact, which revealed that "Change's price was nearly double MedImpact's." Change Healthcare Appeal, Ex. 7, at 7. As a result, for purposes of the re-evaluation, offerors' price proposals constituted "information, which would affect the blind evaluation of technical or cost factors." Change Healthcare Appeal, Ex. 1, § 6.4.2. Therefore, even if DOM properly scrubbed each offeror's proposal of any other identifying information (colors, logos, experience information, etc.) as it asserts, identifying information (offerors' prices and the offerors' relative competitive pricing position) was still associated with the blinded portions of the technical and cost proposals –violating the RFP's blinding procedures and tainting the evaluation.

DOM does not dispute that public information was available about the disparity between MedImpact's price proposal and Change Healthcare's. Instead, DOM relies solely on the fact that MedImpact's best and final offer included in DOM's initial notices of award ($7,771,641) is different than the price in MedImpact's price proposal ($8,199,492). DOM's reasoning ignores

[5] *See* Division of Medicaid, Procurement, https://medicaid.ms.gov/resources/procurement/.

that the information that Change Healthcare's price proposal was nearly double MedImpact's was already public—and available on DOM's own website. This information made clear whose price was whose. Notwithstanding the difference in the initial awarded price and MedImpact's price proposal, the stark price disparity between the offerors' prices remained; there was a 56 percent difference between MedImpact's proposal price and Change Healthcare's. In light of the significant price differential between the offers, the fact that MedImpact's best and final offer from the first evaluation was the price made public is not relevant.

Finally, DOM also suggests that Change Healthcare must prove that the evaluators acted in bad faith and improperly sought out information about the offerors' prices. In doing so, DOM is, without basis, attempting to heighten Change Healthcare's burden of proof, but this effort should be rejected as DOM is mischaracterizing the purpose of the blinding requirements. The purpose of requiring a blind evaluation is to ensure the objectivity of evaluators regardless of the evaluators' intentions. A violation of the blinding requirement does not require that evaluators actively seek out information to identify the blind portions of proposals. Here, information about offerors' price proposals was readily available on DOM's public procurement website, as was information about the convoluted history of this procurement, including the two prior award and cancellation notices. It defies logic that even with the best of intentions the DOM evaluators were completely ignorant of the Pharmacy PDL and SR procurement developments and offerors' proposed prices. As a result, the PPRB should direct DOM to redo this procurement.

D. DOM Concedes that It Did Not Evaluate Whether MedImpact's Price Was Realistic

DOM's response once again confirms that it did not conduct any evaluation of whether MedImpact's price, which was approximately half the amount of DOM's estimated budget, was

realistic. In doing so, DOM continues to ignore the language in the RFP that expressly provided for an assessment of whether offerors' prices were realistic:

> Any bid price determined by DOM to be unrealistically or unreasonably low may not be considered acceptable, as such a proposal has a high probability of not being accomplished for the cost proposed. The Offeror may be required to produce additional documentation to authenticate the proposal price.

See Change Healthcare Appeal, Ex. 1, § 7.1.3.[6]

Instead, the record confirms that DOM never considered whether MedImpact's proposed price was consistent with its technical and management approaches. DOM concedes that it only performed a mathematical calculation of offerors' proposed prices using the formula set forth in the RFP: "the price is scored according to a formula found in § 7.1.3 of the Pharmacy RFP . . . ***[t]he scoring of the price factors is a straight mathematical calculation***." *See* DOM Response at 33 (emphasis added); *id.*, Ex. 5, at 12; *see also* Change Healthcare Appeal, Ex. 12 (DOM Decision on Change Healthcare Protest) at 17. Contrary to DOM's contentions, the record is devoid of any evidence that evaluators assessed whether offerors' technical approaches were consistent with their price proposals. Moreover, because the evaluators evaluated offerors' proposed prices (by merely applying the RFP's mathematical formula) ***before*** they could access offerors' management approaches (rather than after as anticipated by the RFP), the record confirms that the evaluators did not consider whether offerors' management approaches (i.e.,

[6] DOM, without basis, suggests that Change Healthcare's argument that DOM failed to evaluate whether offerors' proposed prices were too low was raised for the first time on appeal. DOM Response at 30. DOM's argument mischaracterizes the allegation raised in Change Healthcare's supplemental protests. Change Healthcare has never asserted that DOM was obligated to employ a specific price realism evaluation technique, only that it was obligated to evaluate whether offerors' prices were too low to realistically reflect successful performance of the requirements.

staffing, resources, supervision) were feasible at the proposed price, or whether offerors would instead be forced to cut corners.[7]

For its part, MedImpact has confirmed that its proposed price reflects a significant assumption that jeopardizes successful contract performance—***specifically, that DOM will ultimately not require MedImpact to perform all the work anticipated by the RFP.*** MedImpact included with its response brief select portions of the transcript from the hearing on DOM's cancellation of the solicitation. During the hearing, MedImpact explained how its proposed price was so much lower than DOM's budgeted amount of $15.5 million:

> So, I mean for us it was really working with the partner to understand, you know, what commitments they are going to have to make. We took a look at all of the requirements that the state had and these were enumerative numbers of potential projects that they wanted.
>
> So, our – our approach was to say we're going to give you this many resources and ***we'll work with the department to prioritize projects***. MedImpact will work with Mercer to ensure they were deliverable. ***But there was no way the state could do all of those projects at one time in which perhaps that would have led to way more staffing.***

MedImpact Response, Ex. 1, at PDF p. 10 (emphasis added). In short, MedImpact's pricing approach assumed that DOM would not require MedImpact to perform numerous projects at one time, and instead MedImpact would be able to prioritize projects to accommodate a minimal staffing approach. As set forth in Change Healthcare's appeal, such an approach is plainly inconsistent with the magnitude and breadth of complex requirements for the PDL and SR RFP, requiring the contractor to (among other things):

- Be present on-site for ***each*** P & T Committee meeting;

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[7] DOM repeatedly emphasizes that the OSPCR directed it to evaluate price blindly. To the extent it is DOM's position that this directive prevented it from evaluating whether offerors' proposed prices were realistic as anticipated by the RFP (which it does not), DOM was required to amend the RFP to advise offerors of the changed evaluation criterion.

- Produce systematic clinical reviews for each therapeutic class or specific drugs for ***all*** P & T committee meetings;

- Provide a ***weekly*** PDL data file to ensure appropriate PDL indicators are assigned to new drugs, necessary for inclusion in the claims processing system;

- Develop periodic articles for the MS Medicaid Provider bulletin and assist DOM staff with developing articles and presentations;

- Be available for onsite presentations ***as requested*** by DOM

- Provide gross verses net spend trending report and an estimated cost savings report on a ***quarterly*** basis, and provide ***all ad hoc*** reports requested by DOM;

- Develop recommendations for enhancing rebates and/or lowering overall pharmacy costs;

- Respond to ***all*** inquiries from labelers and manufacturers related to supplemental rebates;

- Generate invoices for and collect supplemental rebates, including resolving ***all*** disputes;

- Implement a plan to ensure it is able to respond to DOM within one business day to changing circumstances in the drug marketplace that require any prices to be adjusted in the system;

- Audit pharmacy claims, including, but not limited to high-dollar and high-cost disease state claims for payment accuracy, billing anomalies, correction and intervention with pharmacy providers and Medicaid's Program Integrity Office;

- Produce a Super Utilizer Report that identifiers top users of pharmacy, medical, and combined services relative to percentage of total spend;

- Provide key pharmacy program statistics that provide comprehensive pharmacy metric calculations over a minimum of eight quarters across all delivery systems.

Change Healthcare Appeal, Ex. 1, §§ 2.1.1.2, 2.1.2.2, 2.2.2, 2.3.2 (emphasis added). As the above-referenced requirements indicate, the work under the RFP consisted of ongoing, sustained responsibilities, not discrete projects or tasks that could be prioritized to compensate for an understaffed technical approach.

DOM, however, ignored this blatant discrepancy between MedImpact's price proposal and the RFP's complex and numerous requirements. In addition, if DOM intended to permit

offerors to provide a low-cost, bare bones approach to meeting DOM's requirements, it was required to amend the RFP to reflect DOM's actual needs. Instead, the RFP reflected robust and complex requirements and the RFP's evaluation criteria warned offerors that an unrealistically low price that jeopardized contract performance could be rejected. DOM plainly failed to follow the RFP evaluation criteria and on this basis the award to MedImpact should be rescinded.

E. MedImpact Lacks the Requisite Experience

In its response, DOM continues to insist that MedImpact met the RFP's experience requirements. As demonstrated in Change Healthcare's Appeal, DOM's decision to relax the RFP's experience requirements for MedImpact was arbitrary and capricious. *See Hemphill Constr. Co., Inc. v. City of Laurel,* 760 So. 2d 720, 724 (Miss. 2000) (emphasizing the well-established principle that each bid must be evaluated "with all other bids upon the same basis[.]").

The RFP provided that the contractor must "coordinate all phases of the preferred drug list (PDL) and supplemental rebate (SR) administration . . . with a minimum of five years of experience servicing government accounts and has, ***within the last 48 months***, been engaged in a contract or awarded a new contract with ***similar work in a state Medicaid program***." Change Healthcare Appeal, Ex. 1, § 2.1 (emphasis added). Because Mississippi has a Unified PDL, ***similar work*** is inclusive of both fee-for-service (FFS) and managed care program experience.

As Change demonstrated in its appeal (at 26), MedImpact has not managed Medicaid FFS programs in any state in the last 48 months as required by the RFP. MedImpact's own characterization of its experience in a proposal submitted in response to a recent RFP for Kentucky's Medicaid program confirms that MedImpact only began focusing and investing in providing FFS Medicaid solutions as required in the RFP in 2017. Despite MedImpact's stated shift in focus to FFS, a review of publicly available information demonstrates that MedImpact

does not serve as the vendor responsible for managing any state's PDL for the state's Medicaid FFS benefit. *See* Change Healthcare Appeal, Ex. 23 (Chart of Pharmacy Vendors Supporting Medicaid FFS Benefit by State).

DOM's first evaluation team also recognized the deficiencies in MedImpact's experience:

> The Offeror's two corporate references did not support or validate corporate experience according to the core objectives of those projects listed by these references to support or validate work done on PDL presentations to P & T committee meetings, and supplemental rebate administration.

DOM Response, Ex. 2 at 14. This evaluation conducted by the first evaluation team, including the above-referenced evaluation conclusion, was the evaluation that DOM holds up as a "comprehensive, fair, and impartial evaluation procedure." DOM Response at 6.

DOM's Response also represents an about-face from its January 23rd decision denying Change Healthcare's protest in which it acknowledged this RFP requirement for FFS experience, but erroneously concluded that MedImpact had the requisite FFS experience:

> This language indicates "further" and "enhanced" development of fee-for-service resources, not the initial implementation of them. None of this language supports Mr. Hardin's allegation that MedImpact had no experience or inadequate experience in Medicaid fee-for-service prior to 2017. Instead, the plain language speaks to MedImpact's collaborative experience in fee-for service since 2001 and 2017 respectively.

Change Healthcare Appeal, Ex. 12 (DOM Decision on Change Healthcare protest), at 10.

Now DOM insists in its response that FFS experience was not required. *See* DOM Response at 37-38.[8] As an initial matter, the PPRB should not afford DOM's changed interpretation of its own RFP any deference. Moreover, DOM's new and convenient

[8] DOM asserts that it is a "giant leap" for Change Healthcare to assume that MedImpact's proposal did not include government contracts experience because the Court determined MedImpact's list of projects was confidential. DOM Response at 37. It is not a giant leap to assume that the Court's Protective Order was consistent with the PRA and only protected information that was not otherwise public.

interpretation of the RFP's experience requirement makes no sense in light of the RFP's requirements. As Change Healthcare explained in its Appeal (at 27-28), FFS experience is critical to contract performance because the contractor will be responsible for financial models that can accurately capture the actual impact of reimbursement costs, and the contractor's financial models must recognize the downstream impact of gross reimbursement costs on managed care expenditures and, in turn capitation. *See* Change Healthcare Proposal at 44. In a carved-out Medicaid pharmacy program, gross reimbursement amounts are minimally consequential to the state since they pay 100% of the claim and receive 100% of the rebate. *Id.* With a Unified FFS-MCO PDL, however, the reimbursement amount takes on additional importance because the consideration of the downstream impact of the reimbursement amount is more complex. DOM, however, ignored this material noncompliance in evaluating MedImpact's proposal, and continues to do so in responding to this appeal.

F. DOM Treated Offerors Unequally by Relaxing the Requirement to Submit Three Corporate References for MedImpact

Finally, DOM goes to great lengths to criticize Change Healthcare's alleged failure to include corporate references in the hard copy submissions of its proposal. DOM insists that it was under no obligation to evaluate the corporate references Change Healthcare submitted in an electronic copy of its proposal. However, DOM's position only confirms that DOM treated Change Healthcare and MedImpact unequally.

MedImpact only submitted two corporate references for itself instead of three and supplied two references for its subcontractor Mercer. The RFP, however, provided that offerors were to submit three corporate references in Appendix C of their proposals. *See* Change Healthcare Appeal, Ex. 1, § 6.4.4.1.3. Separately, the RFP provided that offerors were to "provide references and qualifications of proposed subcontractors." *Id.*, § 6.4.4.2. The first

evaluation team's scoring spreadsheet confirms that, contrary to the RFP requirements, MedImpact submitted only two corporate references for itself and two for its subcontractor Mercer. In the second evaluation, however, DOM relaxed the RFP requirement for corporate references and gave MedImpact credit for each corporate reference while downgrading Change Healthcare for failing to provide these references in the hard copy of its proposal. *See* DOM Response, Ex. 5, at 14; *id.*, Ex. 6, at 14. By relaxing the corporate reference requirement for one offeror (MedImpact) only, DOM treated the offerors in a disparate and unequal manner, providing another basis to sustain Change Healthcare's protest.

III. CONCLUSION

As demonstrated in Change Healthcare's Appeal and above, the PPRB can and should take a new look at this flawed procurement. Both individually and collectively, the errors identified by Change Healthcare establish conclusively that DOM's award decision must be revisited. Accordingly, Change Healthcare respectfully requests that the PPRB:

1) Declare that the proposed award to MedImpact is in violation of applicable statute and regulation and set aside DOM's January 23, 2023 final agency decision denying Change Healthcare's protest and affirming DOM's award of the contract under the RFP to MedImpact; and either

2) Cancel the solicitation for failure to comply with Miss. Code Ann. § 31-7-417(2), requiring proposals to be evaluated by the evaluation committee without identifying information; or

3) Cancel the proposed contract award to MedImpact in accordance with Miss. Admin. Code Pt. 9, R. 5-205 and

    a. award the contract under the RFP to Change Healthcare; or

    b. conduct an audit of DOM's conduct of this procurement in accordance with Miss. Admin. Code Pt. 9, R. 3-602(a) based on the complete Agency Procurement File (as defined in Miss. Admin. Code Pt. 9, R. 1-201.01(c)) and hold a hearing in accordance with Miss. Admin. Code Pt. 9, R. 5-203.01, allowing Change Healthcare an opportunity to participate; or

c. Direct DOM to re-open the procurement, convene a new qualified evaluation committee "with relevant experience in the Medicaid program," solicit revised proposals, and conduct an evaluation in a manner consistent with the RFP and in accordance with applicable statute and regulation; and

4) Award such other relief as the PPRB deems appropriate.

DATED: March 13th, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Mary Margaret Gay, do hereby certify that on the 13th day of March 2023, I have served the foregoing document on the following by electronic mail:

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Attention: Aubrey Leigh Goodwin, JD, CPPB
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Exhibit C

Order Denying Protest

BEFORE THE PUBLIC PROCUREMENT REVIEW BOARD

IN THE MATTER OF THE MISSISSIPPI DIVISION OF MEDICAID
RFx Number: 3120002271
REQUEST FOR PROPOSALS (RFP) FOR PHARMACY SERVICES

ORDER DENYING PROTEST

THIS MATTER, Change Healthcare Pharmacy Solutions, Inc.'s ("Change Healthcare") appeal of the Mississippi Division of Medicaid's ("MDOM") Protest Decision regarding its Intent to Award a contract to MedImpact Healthcare Solutions, Inc. ("MedImpact") as a result of the MDOM Request for Proposals ("RFP") for pharmacy services, came to be administratively reviewed and heard April 17, 2023, at a Special Called Meeting of the Public Procurement Review Board ("PPRB") pursuant to Rule 7-112.02 "Protest Decision"[1] of the PPRB Office of Personal Service Contract Review (OPSCR) Rules and Regulations. This Protest Decision is based on evidence presented for the record including oral arguments and the written pleadings referenced below:

1) January 30, 2023, Change Healthcare's Appeal of Protest and Exhibits;
2) March 3, 2023, MDOM's Response and Exhibits;
3) March 3, 2023, MedImpact's Brief and Exhibits; and
4) March 13, 2023, Change Healthcare's Reply.

Board Members Rita Wray (Chair), Billy Morehead, Norman McLeod, Norman Katool, and Liz Welch met establishing a proper quorum throughout the proceedings. Appearing on behalf of Change Healthcare was Mary Margaret Gay, Counsel, Keri S. Henley, Counsel, Zack Beasley, Managing Senior Counsel, and Paige Clayton, On-Site Clinical Pharmacist. Appearing on behalf of MDOM were Janet McMurtray, Counsel, Laura L. Gibbes, Chief Counsel, Kristen Jones, Special Assistant Attorney General, Kayla McKnight, Procurement Director, Bryan Wardlaw, Contracts Officer, and Jennifer O. Wentworth, Deputy Administrator for Finance. Appearing on behalf of MedImpact was D. Sterling Kidd, Counsel, Steffanie Mathewson, Associate General Counsel, and Rob Coppola, Senior Director. Oral arguments were presented by counsel for all parties.

Pursuant to Rule 7-112.02, PPRB must decide "whether the ...award was in accordance with the Constitution, statutes, rules and regulations, and terms and conditions of the solicitation". After having considered the written submissions and oral arguments in support of and in opposition to the Protest, and being fully advised of the premises, this Board finds that Change Healthcare failed to establish that MDOM violated the Constitution,

[1] Unless indicated otherwise, all references to rules and regulations are to the PPRB's Office of Personal Service Contract Review Rules and Regulations.

statutes, rules and regulations, or terms and conditions of the solicitation for pharmacy services.[2]

I. Change Healthcare alleges the evaluation committee lacked the necessary relevant experience with the Medicaid program and Medicaid pharmacy benefit.

Change Healthcare argues that MDOM selected evaluators who lacked relevant qualifications contrary to statute and regulation. Specifically, Change Healthcare cites Rule 3-204.01.2 which states, "Persons appointed to an evaluation committee shall have the relevant experience necessary to evaluate the proposal or qualification. . . ." The language of the RFP also required the committee to include "members who have relevant experience in the Medicaid program." RFP § 7.1. Change Healthcare argues that the evaluation committee was not as qualified both in number and experience.

Change Healthcare's position that the evaluation committee's evaluators lacked experience is based on the evaluators' personal LinkedIn profiles. They argue that based on the information provided on his LinkedIn profile, the first evaluator, Mr. Ervin, only has a background in government relations, legislative affairs, and public policy and has occupied his MDOM Deputy Administrator of Health Policy and Services for less than two years. They also argue that based on the information provided on her LinkedIn page, the second evaluator, Ms. Bradshaw, only has experience with the operations of self-funded insurance plans and no Medicaid experience. MDOM argues that the evaluators are well qualified because Mr. Ervin is the administrator who is responsible for MDOM's Pharmacy Division and has relevant experience to evaluate the pharmacy program contained in the RFP, and Ms. Bradshaw, while not employed by MDOM, has years of experience "procuring and overseeing vendor contracts" for pharmacy benefits. MDOM further argues that the language of the RFP only requires the committee include members with Medicaid experience and not that *all* members are required to have Medicaid experience.

This Board finds there is no requirement in the rules for a particular number of evaluators per committee, and furthermore, Rule 3-204.01.2 does not define "relevant experience." MDOM is in the best position to determine what "relevant experience" means for its procurement, and PPRB will not substitute its own judgment where the agency has discretion. The Board was not persuaded by Change Healthcare that MDOM made that determination in an arbitrary or capricious manner.

II. Change Healthcare alleges MDOM failed to evaluate offerors' technical proposals blind, free of information identifying the offeror.

[2] At oral argument, Change Healthcare raised for the first time its allegation that MDOM violated the terms and conditions of the solicitation by having evaluators on the committee who were not MDOM staff as required by Section 7.1 of the RFP. The PPRB OPSCR Rules are silent on whether a party can raise a new issue for the first time before PPRB. This issue was not fully briefed; however, this Board acknowledges that the requirement that the evaluation committee had to be comprised only by agency staff is not required by statute or by the rules and regulations of PPRB OPSCR. Furthermore, an agency has discretion to waive the terms and conditions of its solicitation if each offeror is treated fairly. Here, both offerors were evaluated by the same committee, and this amounts to harmless error.

Change Healthcare argues MDOM failed to comply with statutory blinding requirements because "the price evaluation introduced identifying information into the evaluation of technical proposals." Rule 3-203.01(g) requires technical and cost factors to be blind, and the language of the RFP states "the technical proposal shall have no identifying information. . . ." RFP § 6.4.2.[3] Change Healthcare argues that the technical proposal was provided with the cost and price proposals to the evaluation committee, and therefore, the evaluation was not blind because "MedImpact's price (and the fact it was lower than Change Healthcare's) was already public." This procurement has a complex procedural history which involved, among other events, a prior Notice of Intent to Award being published and later cancelled – revealing that there was significant discrepancy in the prices submitted by Change Healthcare and MedImpact. Change Healthcare also argues that there is no evidence in the record to suggest that MDOM de-identified MedImpact's proposal prior to the second evaluation.[4]

MDOM argues that MDOM fully complied with statutory requirements regarding blinding. To support its argument, MDOM references Section 6.2 of the RFP which states,

> The Offeror is responsible for ensuring that the sealed Technical Proposal and Cost Proposal have no identifying information as defined in Section 6.2.1 of this subsection. If this requirement is not followed, then the Offeror may be immediately rejected as non-responsive. As a precautionary measure, DOM will review the proposals for any additional identifying information prior to distribution to the evaluation committee for the evaluation process.

MDOM argues that although the Offeror was responsible for de-identifying their proposals, MDOM, in consultation with OPSCR, made the decision to de-identify both proposals for evaluation. MDOM also argues that there is no evidence to suggest that the evaluators were aware of any information outside of the proposals or were aware of any information published on MDOM's website. In fact, MedImpact's price presented to the evaluation committee was different than what had been published on the website. MDOM further argues that while the cost/price proposals were provided with the technical proposals, MDOM only provided blind copies of each in compliance with Rule 3-203.01(g)(2) and the proposals could be evaluated in any order by the language of the RFP.

This Board finds that in order to prove that the price proposals were identifiable, one would have to prove that the evaluators went outside the offerors' proposals. Because there is no evidence in the record to show that the evaluators relied on any information outside the four-corners of the blind proposals, MDOM's decision to provide the blind technical and cost proposals along with the blind price proposal was not arbitrary or capricious.

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[3] The requirement for "blind" evaluation, or evaluation without the identity of the offeror being known, is derived from Miss. Code Ann. §§ 31-7-413 and 31-7-417.

[4] MDOM argues that that these issues were not raised in the protest at the Agency and are being raised for the first time on appeal before PPRB and that they are procedurally barred. The PPRB OPSCR Rules are silent on whether a party can raise a new issue for the first time before PPRB. Because this issue was fully briefed, PPRB has decided to entertain this argument.

III. Change Healthcare alleges MDOM failed to evaluate whether MedImpact's price was unrealistically low in accordance with the requirements of the RFP.

Change Healthcare argues that MDOM failed to evaluate whether MedImpact's price was unrealistically low as required by the RFP. Section 7.1.3 of the RFP states "any bid price determined by DOM to be unrealistically or unreasonably low may not be considered acceptable, as such a proposal has a high probability of not being accomplished for the cost proposed." Change Healthcare argues that MedImpact's price is unrealistically low in light of the price MDOM used in its Petition for Relief and that MDOM should have inquired into whether the price was realistic based on the technical proposals. In response, MDOM argues that there is no requirement in Mississippi law to conduct a "price realism" analysis, and the language of the RFP only gives MDOM "the right to reject any proposal that on its face appears unrealistically low." Additionally, the price provided in the Petition for Relief was merely an estimate that MDOM was not bound by, and MedImpact provided detailed pricing information that satisfied evaluators.

This Board finds that the language of the RFP does not impose a duty for the agency to perform a detailed analysis of the price; nor do the rules, regulations, or relevant statutes. It is merely a warning for vendors that an unrealistically low bid *may* be determined to be unresponsive. MDOM is in the best position to determine what an "unrealistically or unreasonably low" bid price means for its procurement, and PPRB will not substitute its own judgment where the agency has discretion. Change Healthcare has not proven that MedImpact could not perform the contract for its proposed price, and MDOM's determination that the contract price was not unrealistically or unreasonably low is not arbitrary or capricious.

IV. Change Healthcare alleges that MDOM failed to evaluate MedImpact's experience in accordance with the RFP, where MedImpact lacks experience performing similar work for any state Medicaid program.

Change Healthcare argues that MDOM failed to evaluate MedImpact's experience in violation of the RFP. Section 2.1 of the RFP required,

> an Offeror to coordinate all phases of preferred drug list (PDL) and supplemental rebate (SR) administration that is consistent with both federal and state law with a minimum of five years of experience servicing government accounts and has, within the last 48 months, been engaged in a contract or awarded a new contract with similar work in a state Medicaid program.

Change Healthcare maintains that "similar work" means both fee-for-service ("FFS") and managed care program experience, and they assert that MedImpact has not managed any FFS program in any state in the last 48 months based on publicly available information. MDOM argues that Change Healthcare places too much emphasis on FFS programs where the RFP does not. Section 2.1 of the RFP does not require specific experience in FFS programs, and the RFP sought an offeror to coordinate a number a services in the PDL and

managed any FFS program in any state in the last 48 months based on publicly available information. MDOM argues that Change Healthcare places too much emphasis on FFS programs where the RFP does not. Section 2.1 of the RFP does not require specific experience in FFS programs, and the RFP sought an offeror to coordinate a number a services in the PDL and SR administration. MDOM argues that MedImpact met these qualifications through a sub-vendor with prior experience and provided detailed information in the staffing portions to show experience in all facets of the RFP.

This Board finds that it is not prohibited for an offeror to meet experience thresholds by using sub-vendors or individuals on staff. MDOM is in the best position to determine what experience is necessary for its procurement and whether an offeror meets those requirements, and PPRB will not substitute its own judgment where the agency has discretion. MDOM's determination that MedImpact met the relevant experience requirements of the RFP was supported by evidence in the record and therefore was not arbitrary or capricious.

V. Change Healthcare alleges MDOM was arbitrary and capricious in failing to score Change Healthcare's corporate references.

Change Healthcare's final argument is that MDOM's failure to evaluate Change Healthcare's references was arbitrary and capricious. Change Healthcare admits its references were submitted in a manner that did not fully conform with the requirements of the RFPbut argues that MedImpact's references were likewise noncompliant with the RFP. It was within MDOM's discretion to submit the proposals to the evaluation committee in the same format they were submitted to the agency. It is undisputed that Change Healthcare's references were not provided in the manner required in the RFP. As to the scoring of the references provided by MedImpact, the evaluation committee had the discretion to consider the references and assign points accordingly. The first issue is one of Change Healthcare's failure to adhere to the submission requirements, while the issue of evaluation of references by the committee is a subjective opinion of the adequacy of the reference.Therefore, this issue is without merit.

NOWTHEREFORE, IT IS ORDERED, that Change Healthcare failed to establish that MDOM violated the Constitution, statutes, rules and regulations, or terms and conditions of the solicitation for pharmacy services, and Change Healthcare's Appeal of MDOM's Protest Decision is hereby denied.

SO ORDERED, this the 26 day of May 2023.

Rita Wray

Rita Wray, PPRB CHAIR