PPRB
PUBLIC PROCUREMENT REVIEW BOARD
SPECIAL MEETING MINUTES
Thursday, April 11, 2024
9:00 a.m.

Location:
Mississippi State Personnel Board Room
Regions Building
210 E. Capitol Street, Suite 250
Jackson, MS 39201

Board Members:
David Russell, Chair
Norman Katool, Vice-Chair
Norman McLeod
Billy Morehead
Rita Wray
Liz Welch

Staff Members:
Brittney Thompson
Liz Bolin, General Counsel
Jay Woods, Special Assistant Attorney General
Ross Campbell
Amelia Gamble
Carrie Boyd
Preston L. Pierce
Kimberly Burse
Danny Lynch
Shantina Christmas
Jonathan Dillard
Cathy White

Guests:
Tara Clark, President, Amerigroup Mississippi
Mark Garriga, Esq., Butler Snow
Benjamin Grossman, Esq., Butler Snow
Alex P. Hontos, Esq., Dorsey & Whitney, LLP
Mary Margaret Gay, Esq., Gay Jones, & Khun
Keri S. Henley, Esq., Gay, Jones, & Khun
Latrina McClenton, COO
Michael Parnell, CEO
Jennifer Y. Dukart, Esq., General Counsel
Brant Ryan, Esq., Gilchrist Donnell PLLC
Laura Gibbes, Esq., DOM Chief Counsel
Kayla McKnight, DOM Procurement Director

Maggie Middleton, Esq., DOM
Bryan Wardlaw, Esq., DOM
Tim Sensing, Esq., Watkins & Eager
Rusty Comley, Esq., Watkins & Eager
Phil Buffington, Esq., Adams and Reese
Tim Anzenberger, Esq. Adams and Reese
Richard Roberson, Esq., CEO, TrueCare
Roy Liddell, Esq., Wise Carter
George Ritter, Esq., Wise Carter

I. Call to Order

The meeting was called to order by David Russell Chair.

II. Consideration of Protest

A. Protest: In The Matter of The Mississippi Division of Medicaid
RFx Number: 3150003991
Request For Qualifications (RFQ) Number: 20211210
Mississippi Division of Medicaid Coordinated Care

1. **Amerigroup will have 30 minutes to present; may reserve up to 5 minutes for rebuttal.**

   • Mr. Grossman presented arguments on behalf of the Protester and reserved five (5) minutes for rebuttal.

2. **United will have 30 minutes to present; may reserve up to 5 minutes for rebuttal.**

   • Ms. Gay presented arguments on behalf of the Protester and reserved five (5) minutes for rebuttal.

3. **MS Division of Medicaid will have one hour to present.**

   •Mr. Ryan presented arguments on behalf of the Agency.

4. Break 11:10 – 1:15

5. **Magnolia will have 15 minutes to present.**

   • Mr. Sensing presented arguments on behalf of the Intended Awardee.

6. **Molina will have 15 minutes to present.**

   • Mr. Anzenberger presented arguments on behalf of the Intended Awardee.

7. **TrueCare will have 15 minutes to present.**

   • Mr. Ritter presented arguments on behalf of the Intended Awardee.

8. **Amerigroup will have up to 5 minutes for rebuttal.**

   • Mr. Grossman presented rebuttal for the Protester.

9. **United will have up to 5 minutes for rebuttal.**

   • Ms. Gay presented rebuttal for the Protester.

B. Record on Appeal

Amerigroup (Protestor)

UnitedHealthcare of Mississippi, Inc. (Protestor)

Mississippi Division of Medicaid (Agency)

Magnolia (Intended Awardee)

Molina (Intended Awardee)

TrueCare (Intended Awardee)

The protest documents are voluminous and not attached to these Minutes but are included by reference.

Action: A motion was made by Mr. McLeod to go into closed session only to discuss whether to go into executive session. The motion was seconded by Mr. Morehead and unanimously approved by all members present.

Mr. Russell excused the public so that the Board could consider going into Executive Session. Only DFA staff and Board members remained while Board members determined whether an executive session was appropriate.

Action: Mr. McLeod made a motion to go into Executive Session in accordance with Mississippi Code Section 25-41-7(4)(b) as strategy session with respect to prospective litigation where an open meeting would have detrimental effect on the litigating position of the Board. The motion was unanimously approved by all members present.

Executive Session

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

Action: A motion was made by Ms. Wray to deny the appeal and to uphold Medicaid's decision. The motion was seconded by Mr. McLeod and approved by Mr. Katool who voted nay.

Action: A motion was made by Mr. Morehead to exit the executive session and return regular session. The motion was seconded by Mr. McLeod and unanimously approved by all members present.

Open Session

Mr. Russell invited the public back into the meeting. He announced that in Executive Session, the Board voted to deny the protests to uphold Medicaid decision. The Orders are attached as **Exhibit A.**

Other Business

A. Mr. Russell announced the next Regular PPRB Meeting May 1, 2024 at 9:00 a.m.

III. Adjournment

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

These Minutes of the Public Procurement Review Board were approved by the members on the 3rd of July.

David Russell

David Russell, Chair

7/3/24

Date

Exhibit A

Orders Denying Protests

BEFORE THE MISSISSIPPI PUBLIC PROCUREMENT REVIEW BOARD

In the Matter of the Mississippi Division of Medicaid
RFx No. 315003991
Request for Qualifications (RFQ) No. 20211210
Mississippi Division of Medicaid Coordinated Care

ORDER OF THE PUBLIC PROCUREMENT REVIEW BOARD ON THE PROTEST APPEAL BY UNITED HEALTHCARE, INC.

THIS MATTER is before the Mississippi Public Procurement Review Board (PPRB or Board) on appeal of the Mississippi Division of Medicaid's protest decision in the above referenced procurement.

BACKGROUND AND PROCEDURAL HISTORY

On December 10, 2021, the Mississippi Division of Medicaid (DOM) published RFQ No. 2021120 seeking proposals for the implementation of the Mississippi Coordinated Access Network (MSCAN) and the Mississippi Children's Health Insurance Program (CHIP). Five providers submitted proposals.

- Amerigroup Mississippi, Inc. (Amerigroup)
- Magnolia Healthcare, Inc. (Magnolia)
- Mississippi True d/b/a TrueCare (TrueCare)
- Molina Healthcare of Mississippi, Inc. (Molina)
- United HealthCare of Mississippi, Inc. (United)

DOM accepted, evaluated, and scored all five proposals. Upon completion of the procurement, DOM issued a Notice of Intent to Award to Magnolia, Molina, and TrueCare. Subsequent to the Notice of Intent, United and Amerigroup submitted separate protests to DOM challenging the Notice. DOM considered each protest and rendered its decision on June 2, 2023, upholding its Notice. On June 8, 2024, United submitted a timely appeal to the PPRB. DOM and each of the other four offerors submitted briefs in response to which United submitted a reply.

STANDARD OF REVIEW

The Office of Personal Service Contract Review (OPSCR) Rules[1] are silent as to the standard of review when a protest is initially filed with the procuring Agency and subsequently appealed to the PPRB. However, the Rules provide that where the protest is filed directly with the PPRB (i.e., initially protested to PPRB rather than to the procuring Agency), the PPRB "shall decide whether the … award was made in accordance with the Constitution, statutes, rules and regulations, and the terms and conditions of the solicitation."[2] The Board finds that this is the appropriate framework to evaluate any protest which is pending before it – whether as a direct protest or an appeal of the procuring Agency's protest decision.

PROTEST ARGUMENTS

Whether DOM's decision to allow Magnolia to supplement its response to RFQ Section 4.3.4 after the deadline for proposal submissions was lawful.

The RFQ deadline for proposals was March 4, 2022. (Record at 1.) Each of the five offerors submitted timely proposals. (Record at 2564.) DOM evaluated the proposals in two stages. (Record at 34, RFQ 3.2.2.1.) In Stage 1, DOM's Office of Procurement determined whether each proposal was responsive, that is, whether it was complete and complied with all RFQ requirements. (*Id.*) If deemed responsive, DOM moved the proposal to Stage 2 for an evaluation by DOM's Evaluation Committee. (*Id.*) The present issue is limited to Stage 1.

During its Stage 1 review DOM discovered that Magnolia's proposal lacked a response to RFQ Section 4.3.4, Management and Control. (Record at 2551.) Magnolia's proposal included an Executive Summary which, as the term suggests, provided an overview of the proposal. (Record at 6851.) This Executive Summary included a specific reference to Section 4.3.4.1: "Our Project Management Approach consists of five key elements, described in detail in our response to Section 4.3.4.1 of the RFQ: . . .." The summary went on to identify these five elements. (*Id.*)

[1] Miss. Admin. Code Title 12, part 9
[2] Rule 7-112.02.

DOM emailed Magnolia on March 31, 2022, to inquire if it had intentionally omitted Section 4.3.4 and, if the omission had been unintentional, to submit it by 2:00 p.m. that same day. Magnolia confirmed the omission was, in fact, not intentional and submitted the qualification by the 2:00 p.m. deadline. (Record at 2557-8.) DOM accepted the qualification as a supplement to Magnolia's original proposal, deemed the proposal fully responsive, and moved it to Stage 2.

DOM memorialized the basis for its decision in the Redactions and Cures Memo attendant to DOM's Stage 1 evaluation. (Record at 2551.) This Memo included DOM's analysis of its authority to: 1) seek clarification from Magnolia regarding the missing Section 4.3.4, and 2) allow Magnolia to supplement its original proposal with its Section 4.3.4 qualification. (*Id.*)

In making the first inquiry, DOM identified several RFQ Sections authorizing DOM discretion to seek clarifications and additional information from an offeror when it deemed necessary. ("If necessary, the Office of Procurement may request clarifications from the Offeror." (Record at 33, RFQ Section 3.2.1; see also Sections 1.6[3] and 2.2.4.)

Having answered this threshold question in the affirmative, DOM moved to consider whether to accept Magnolia's Section 4.3.4 qualification. (Record at 2551.) In consultation with OPSCR) staff, DOM identified two applicable OPSCR Rules: 3-204.01.3.3 and 3-204.03. (*Id.*) The first allows for a procuring agency to classify a proposal as "potentially acceptable." Such a designation brings into play several other rules, including 3-204.03. This rule addresses the discovery of mistakes after receipt of proposals but before an award. Subsection 3-204.03.3(c)(1) allows an offeror to correct a mistake when the mistake is "clearly evident on the face of the proposal or qualification."

As stated in its Redactions and Cures Memo, DOM concluded that Magnolia's reference to Section 4.3.4 in its Executive Summary "indicat[ed] an intention to have included Section 4.3.4 with its Management submission." (*Id.*) Accordingly, and as noted above, DOM accepted Magnolia's Section 4.3.4 supplement.

[3] DOM references Section 1.7 in the Memo. The RFQ contains no Section 1.7. We ascribe this mis-reference to scrivener's error.

United protests DOM's decision to allow Magnolia to supplement its proposal after the March 22, 2022, deadline. It asserts that late means late and that Magnolia's omission of Section 4.3.4 rendered it nonresponsive and that DOM's failure to reject it outright was contrary to the RFQ and OPSCR rules and regulations.

United cites RFQ Section 4 to support its position. "Failure to respond sufficiently to the requirements of this section, or other requirements named in this RFQ, *may* result in disqualification from the procurement." (Emphasis added.) While United may assert otherwise, Section 4 clearly allows DOM discretion in determining whether to disqualify an offeror under these circumstances. Section 4 goes on: "The Division has sole discretion in determining the responsiveness of any Offeror's submission." In addition to these allowances, the RFQ includes at least three others – Section 1.6 ("The Division reserves the right to request additional information or clarification . . . "); Section 2.2.4 ("After review, the Division may request necessary modification or clarification . . ."); and Section 3.2.1 ("The Office of Procurement will determine if an incomplete qualification is sufficiently responsive to continue to Stage Two. If necessary, the Office . . . may request clarifications . . .")

United addresses each of these Sections, but as with its reference to Section 4, it ignores the unambiguous discretionary language. The RFQ clearly authorized DOM the discretion to request clarifications and additional information from Magnolia in this instance.

As stated, United also challenges DOM's decision to allow Magnolia's supplement. In support, it cites OPSCR Rule 3-202.10.2 (prohibiting the acceptance of late bids unless lateness is the fault of the procuring agency). While this Rule may prohibit a procuring agency from accepting presumed late bids in the absence of agency fault, there are other Rules that, under certain circumstances, allow acceptance of otherwise late submissions. OPSCR Rule 3-202.01(f) opens the door. ("Correction or withdrawal of inadvertently erroneous bids before an award, or cancellation of awards or contracts based on erroneous bids shall be permitted in accordance with these regulations.")

DOM identified two such OPSCR regulations that, taken together, permit such acceptance: Rules 3-204.03.2 and 3-204.03.3(c)(1). (*Id.*) Rule 3-204.01.3.3 allows a procuring agency to deem a proposal as "potentially acceptable." Such potential, of course, can only be determined via clarification. If the clarification reveals a putative mistake, a procuring agency

may exercise the authority granted under Rule 3-204.03.3(c)(1) to accept additional information so long as "the mistake and the intended correct offer are clearly evident on the face of the proposal or qualification."[4] The path these two rules create is exactly the path DOM took in reaching its decision to allow Magnolia to supplement its proposal. (*Id.*)

Based on Magnolia's reference to the missing Section 4.3.4 in its Executive Summary, a document that in this case effectively served as the proposal's "face", DOM suspected a mistake and sought clarification. Once Magnolia confirmed the omission was inadvertent, DOM allowed Magnolia to supplement its proposal under OPSCR Rules. DOM's decisions were based on and in conformity with both the RFQ and OPSCR rules and regulations.

For the reasons stated above, the Board finds that DOM acted with full authority under applicable law. Accordingly, the Board finds United's protest without merit.

Whether DOM failed to adhere to the RFQ requirements for Consensus Scoring.

DOM's Evaluation Committee evaluated and scored the proposals using Consensus Scoring. (Record at 34, RFQ 3.2.2.1.) The RFQ's definition of the Consensus Scoring was twofold: 1) "Each member will independently evaluate each [proposal] . . ." and then 2) "convene to assign consensus scores . . .." (*Id.*) There were two rounds of Consensus Scoring – one for Technical Qualifications followed by one for Management Qualifications. (*Id.*) At the end of each round every Committee member certified his/her agreement with the final scores. (Record at 9117, 9198, 9279, 9437 (Technical); 9142, 9223, 9304, 9381, 9462 (Management).)

The Committee was comprised of seven individuals, each of whom possessed the relevant subject matter expertise necessary to evaluate the merits of the proposals. One of these Committee members was Evelyn Sampson. (Record at 2563-4.) She served on the committee as the information technology (IT) expert. (Record at 3032.) At least six of the twenty-one Technical Qualifications included IT components. (*Id.*) The present argument centers largely around Ms. Sampson's attendance at Consensus Scoring meetings for Technical Qualifications.

The Committee held seven days of consensus scoring for Technical Qualifications – May 9 – 13, 16-17, 2022. (Record at 9038 – 9043, 9053.) Ms. Sampson attended these meetings in person on May 9, 10, 16, and 17. She was unable to attend in person on May 11, 12, and 13.

[4] While DOM may or may not have considered it, OPSCR rule 3-204.03.2 also supports an agency's discretion in this regard.

(*Id.*) She also stated in an email on May 10, 2022, that she was "unprepared" to review two proposals of the four scheduled for evaluation that day. (Record at 3038.) In response, DOM "readjust[ed]" that day's plan. (*Id.*) In lieu of her in-person attendance at the May 11 – 13 meetings, Ms. Sampson provided her independent assessment notes for the Committee's consideration. (*Id.*) She returned to attend the May 16 and 17 meetings in person. (Record at 9038 – 9043, 9053.) At the conclusion of these seven days the Committee reached consensus on final scores, and each member signed off accordingly. (Record at 9117, 9198, 9279, 9437.)

The Evaluation Committee held five days of consensus scoring for Management Qualifications - July 11 – 15, 2022. (Record at 9044 – 9052.) Over this five-day period several members missed portions of meetings. Three members missed portions of July 11. One member missed a portion of July 12. And one member missed a portion of July 14. (*Id.*) At the conclusion of these five days the Committee reached a consensus on final scores and each member certified accordingly. (Record at 9142, 9223, 9304, 9381, 9462.)

United argues that DOM's execution of the Consensus Scoring method violated the RFQ requirements. It contends the term "convene" as used in RFQ Section 3.3.2.1 requires in-person attendance of all Committee members at all times at all scoring meetings. It also asserts that individual assessment notes are not sufficient or, indeed, even allowable substitutes for in-person participation under the RFQ. This is United's conception of Consensus Scoring. It is not the RFQ's.

The RFQ's definition included no requirement for attendance at all meetings. There was no mention of a quorum. There was no prohibition against the Committee's consideration of a member's written notes in lieu of personal attendance. There was no set minimum or maximum number of meetings. Nor was there a required time length for meetings. Looking further afield, the OPSCR Rules include no definition or even reference to consensus scoring. And the only relevant statutory requirement for evaluations of proposals, Miss. Code Ann. §31-7-419, lacks any mention of consensus scoring. Section (1) states: "The evaluation committee shall evaluate proposals or qualifications only in accordance with the methodology and weighting criteria described in the request for proposals or request for qualifications." DOM said it would use Consensus Scoring as defined in the RFQ. and it did.

Nevertheless, allowing for United's conception of consensus scoring as well as its contention that Ms. Sampson's notes were an insufficient proxy, the Evaluation Committee decidedly fulfilled its convening obligations. It met with a full contingent on four days for evaluations of Technical Qualifications. (Record at 9038 – 9043, 9053.) These four days allowed for true deliberations and consensus-building. If the Committee had determined it needed more than four days of deliberations on the merits of the offerors' Technical Qualifications, then it could have done so. The same option was available regarding the Management Qualifications. It determined no such need. It completed its work and certified the final scores.

United further contends that Ms. Sampson's declaration of unpreparedness on May 10, 2022, evinces another flaw undermining the integrity of the Consensus Scoring process. However, looking closely at the entire relevant email chain wherein this statement was made, it is apparent DOM took proactive steps and "readjust[ed] the plan" to ensure that the Committee continued its evaluations with minimum disruption. (Record at 3038.) Further, United offers no evidence that this circumstance had a true adverse impact on scoring.

Finally, United argues that Ms. Sampson's absences (and the intermittent partial absences of other members) violated a fundamental competitive procurement requirement that all proposals be evaluated by a common standard. In this case, United argues that the makeup of the Committee itself served as a required common standard and that DOM violated this requirement.

We agree with the principle that the makeup of an evaluation Committee must remain constant. However, United's attempted application of this principle to support its claims under the facts is misplaced. The makeup of the Committee remained constant throughout. There is no evidence that any member was replaced at any time, temporarily or permanently. There is no evidence that some scores (e.g. IT scores) were determined by only a partial contingent of the Committee while other scores were determined by the whole. Finally, it is undisputed that the *full, original* Committee determined *all* final consensus scores and only *after* all meetings concluded. (Record at 9117, 9198, 9279, 9437 (Technical); 9142, 9223, 9304, 9381, 9462 (Management).) DOM's evaluations did not suffer a lack of consistency among Committee members.

For the reasons set forth, the Board finds DOM abided by the rules of the RFQ and applicable law. Accordingly, it finds United's argument without merit.

Whether DOM failed to ensure blind scoring.

The RFQ required evaluators to blind score offerors' Technical Qualifications. (Record at 10, RFQ Section 1.2.3.3.1.) To ensure blind scoring the RFQ prohibited offerors from including any "identifying information" in proposals. (Id.) The RFQ defined "identifying information" in Section 1.2.3.3.2. (Record at 11.) DOM provided extensive training to the evaluators. (Record at 8958 - 9034.) This training included the definition of "identifying information." (Record at 9005.) It also admonished them to notify DOM's procurement facilitators immediately if they thought they had found any. (*Id.*) No evaluator reported such a discovery.

Failure to Disqualify the Four Other Offerors for Non-Compliance

During its Stage 1 review for responsiveness and compliance with the RFQ, DOM discovered identifying information in all five proposals, including United's. (Record at 9473 – 9479.) Under Section 1.2.3.3.1 DOM had three options: 1) reject outright the proposals and disqualify the offerors; or 2) remove the identifying information itself; or 3) give the offerors the opportunity to remove the identifying information. (Record at 10, RFQ 1.2.3.3.1.) DOM chose to remove the identifying information itself.

United argues DOM violated the RFQ by failing to exercise option 1and outright disqualify offerors who included identifying information in their original submissions. United points to a number of specific instances of this transgression in certain proposals. And while it acknowledges that all pre-scrubbed proposals included some identifying information, including its own, it argues that some were more egregious than others. In effect, it argues that DOM should have drawn a line at a certain number of violations. Such a line, of course, was not set down in the RFQ. Instead, the RFQ authorized DOM to accept offending proposals and cure violations before submitting them to the Evaluation Committee for blind scoring. (*Id.)* Accordingly, all blind scoring contentions rooted in the pre-scrubbed proposals are baseless.

Failure to Select Evaluators Who Had No Prior Knowledge of Offerors

United contends that DOM improperly chose evaluators who DOM knew were familiar with the offerors and their work. DOM chose its evaluators in conformity with Miss. Code Ann. §31-7-415(1) which reads in relevant part, "Persons appointed to an evaluation committee shall have the relevant experience necessary to evaluate the proposal or qualification."

Medicaid services is a highly complex industry requiring specialized knowledge and experience. DOM had a limited number of qualified individuals from which to select. It chose those whom it determined were most qualified. (Record at 9054-5.) To have done otherwise would not only have been in contravention of the statute but also in opposition to the State's best interests.

The question is not whether one or more Committee members may or may not have been able to determine identities based on their knowledge and experience. The question is whether they identified any offeror during the blind scoring based on the presence of identifying information as defined by the RFQ. It is United's burden to prove they did.

Failure to Remove Identifying Information

DOM chose to scrub the proposals of identifying information itself. United claims that DOM failed to fully accomplish this task. It points to several particulars to support this contention.

Partnerships

Partnerships are critical to the successful delivery of the wide variety of Medicaid services to recipients across the state. The RFQ established the use of local or community-based partnerships as one of DOM's central considerations. (Record at 5.) Indeed, the RFQ included the use of partnerships as a scored category. (Record at 37.)

Referencing partnerships in the proposals was governed by RFQ Section 1.2.3.3.2. It reads in relevant part:

> When a response requires description of a potential partnership with a community-based organization, the Offeror *may name that organization and describe the contemplated partnership.* The Offeror *must not describe any current or prior relationship with the organization,* and the Offeror must not reference any other line of business or any

relationship at all that the Offeror or its owner, subcontractors, subsidiaries, or other related entities has had, will have, or desires to have with a named community-based organization, other than the partnership contemplated for this qualification. (Emphasis added.)

Identifying contemplated partners and describing the purpose of the collaboration was essential. Identifying current or past partners and describing the purpose of that collaboration was prohibited. To be sure, the rule allowed an offeror to identify a contemplated partner even when that contemplated partner also happened to be a current or past partner in a separate enterprise. The key was to neither expressly identify a partner as a current one nor describe the current or past collaborative effort.

This was the extent of the rule. The rule did not state that if the offeror knows or should know that one or more DOM evaluators has prior knowledge of a current partnership the offeror may not include a reference to that partner. Yet this is what United asks us to believe. It inserts this additional requirement into the RFQ and uses it to attack DOM's removal decisions.

United points to instances wherein it claims DOM failed to remove impermissible named partners (e.g. Magnolia (AT&T) (Record at 7254.)); (e.g. Molina (You Matter Program), (Record at 4664.)) However, each of these allegations is rooted in prior evaluator knowledge. With respect to AT&T, United writes: ". . . and the committee knew that because *they were already aware* of the details of this partnership." (Record at 344.) With respect to the You Matter Program (and others) it states: "Each of the following examples would also have identified the offeror *to anyone familiar with the industry (like the evaluators)*. . .." (*Id.*) United points to no instances evincing DOM's failure to redact identifying partnerships as defined by the RFQ.

Finally, United argues that DOM failed to remove numerous uses of the present tense throughout proposals, including in reference to partnerships. During its Phase 1 review for compliance DOM did discover such uses. After consultation with OPSCR staff, DOM issued an instruction to the evaluators to disregard the use of the present tense and to make no inferences based on such use. (Record at 11154.)

DOM properly and effectively applied the RFQ's definition in reviewing the proposals to ensure blind scoring. It also acted appropriately in issuing instructions to the evaluators to

disregard and to not draw inferences from the use of the present tense throughout some proposals.

Molina Branding

United contends DOM failed to remove all identifying branding in Molina's proposal. One characteristic of Molina's branding is curved edges. (Record at 341.) As allowed by the RFQ, Molina included generic or "placeholder" marketing samples. (Record at 4652-7, 4975-80.) Though generic, these samples incorporated curved edges. (*Id.*) Recognizing that these curved edge marketing samples could possibly be identifying, DOM redacted the curved edges. DOM explained: ". . . the curved edges of some of the graphics are possibly identifying as branding. . . Alterations that have no substantive effect on the Offeror's proposal were made out of an abundance of caution." (Record at 2557.)

Molina also included "call out boxes" in its proposal. In fact, all five offerors did. (Record at 7004, 7037 (Magnolia); 1879, 1904 (United); 11511, 11517 (Amerigroup); 14169, 14182 (TrueCare). Call out boxes are used in proposals, presentations, and the like to emphasize or "call" the reader's attention to certain substantive text. The size, shape, and edges of call out boxes can vary, e.g. squares with hard edges, rectangles with rounded edges, and so on. Molina employed squares and rectangles with curved edges. (Record at 4601-2.)

United contends the curved edges of Molina's call out boxes constituted identifying branding information and takes exception to DOM's decision to redact the curved edges of Molina's marketing samples but not its call out boxes. It essentially argues that curved edges are curved edges regardless of the context in which they are used.

DOM's decision was a conscious one. It did consider context. It distinguished marketing samples from call out boxes, for unlike its marketing samples, Molina, like all offerors, used its call out boxes to inform not promote. DOM's decision did not violate or otherwise compromise the blind scoring requirement.

Text Exchange Between Two DOM Staff Non-Evaluators

United points to a text exchange between two *non-evaluators* serving as the procurement's facilitators. (Record at 3263.) It asserts this exchange is evidence that Evaluation

Committee members identified offerors during blind scoring. In this text exchange one facilitator writes to the other: "Also their *seemingly urge* to standup and shout I know who this is!" (*Id.*) (Emphasis added.) This vague hearsay statement is not evidence of evaluator knowledge. It is pure conjecture. The statement itself includes the qualifier "seemingly." It is therefore inherently speculative and not an assertion of fact. Further, if we remove the qualifier we are still left with supposition, not evidence, for no one can know the "urge" of another unless told. Finally, United points to no evidence that any evaluator reported finding identifying information to the facilitators or anyone else.

For the reasons set forth above, the Board finds DOM carried out its blind scoring obligations in conformity with the RFQ. Accordingly, we find United's arguments meritless.

Whether DOM's Scoring Was Consistent with the RFQ.

RFQ Section 3 set forth the rules by which the proposals were evaluated and scored. (Record at 33-9, RFQ 3.1 – 3.2.1.1.2.4.) United contends DOM failed to evaluate the proposals in conformity with these rules.

Rating Scale

As part of the Evaluation Committee's training, DOM provided a "Rating Scale" to assist it in assigning final consensus scores. (Record at 9030.) This Rating Scale was not included in the RFQ.

United argues that the Evaluation Committee was obligated to assign consensus scores using strictly the numerals appearing in the Rating Scale, i.e. using the Scale's numerical endpoints with no option of assigning scores in between any two endpoints. For example, out of a possible 50 points an evaluator could only assign points in increments of 10.

The Committee allotted numerous scores that fell within the various ranges of these endpoints. (Record at 2734, 2815, 2892.) This approach was wholly reasonable. The RFQ included a multitude of qualifications by which the proposals were to be scored. For example, RFQ Section 4.2.2.1, Member Services and Benefits, offered fifty possible points. This qualification included eight different categories. Within those eight categories there were a total of fifty-four specific sub-categories (Record at 33-9. RFQ 3.1 – 3.2.1.1.2.4.) To limit the Committee to a rating scale of multiples of ten or specific endpoints in a range would have been

to deny the State the benefit of these subject matter experts' abilities to draw subtle but critical distinctions between the quality of any two proposals' multi-faceted qualifications.

Further, and crucially, the Committee applied its scoring method using the same scoring rubric across all proposals. The Committee scored no proposal using only the numerical endpoints of the Rating Scale.

Finally, as noted above, the Rating Scale was not part of the RFQ.

Individual Evaluator Assessments

United challenges the validity of many of the individual evaluator assessments and contends that these allegedly compromised assessments adversely impacted United's final consensus scores. For example, United asserts that some individual evaluator's tentative scores did not accurately reflect the evaluator's corresponding comments. It further claims some individual evaluator's tentative scores were not consistent across proposals. Also, it points out that some individual evaluators did not make assessment notes for all qualifications. United asserts that these lack of notes evinces DOM failure to sufficiently document its decisions.

United's focus on individual evaluator assessments is misplaced. The proposals were evaluated using consensus scoring. The RFQ defined Consensus Scoring as a twofold process: 1) "Each member will independently evaluate each [proposal] . . ." and 2) "convene to assign consensus scores . . .." (Record at 34, RFQ 3.3.2.) Under consensus scoring no one individual can assign a final "consensus" score. To be sure, individual assessments are important, for each evaluator is expected to share his or her well-informed analyses with the Committee for its benefit and consideration in reaching a true consensus.

The claim that some evaluators assigned tentative scores that did not comport with their comments is not evidence of arbitrary or violative consensus scoring. Nor is the claim that some may have been inconsistent across proposals. The fact that some individuals took notes, and some did not, is not evidence that DOM failed to adequately document its decisions. There are, in fact, almost 400 pages of evaluation and scoring documents. The vast majority contain comments. (Record at 2570-2966.)

United provides no evidence that any individual's evaluation, whether done in perfect harmony with all RFQ requirements or not, had an outsized or undue influence on the Committee's final scoring decisions, including United's.

Inequitable Treatment

Finally, United claims the Committee scored its proposal unfairly. It offers no evidence to support this allegation other than citing higher scores given to other offerors who proposed similar qualifications. It is well-established law that a higher tribunal, such as this Board, will not put itself in the shoes of the procuring agency, re-evaluate proposals, and effectively usurp the professional judgment of subject matter expert evaluators. (See *Mississippi True v. Dzielak*, 293 So. 3d 243 (2020)

For the reasons set forth above the Board finds United's claims meritless.

Whether DOM violated OPSCR Section 3-102.01.1 (Expiration of RFQ)

United argues that DOM violated OPSCR Rule 3-102.01.1:

3-102.01.1 Expiration of Solicitation

All competitive methods of procurement including but not limited to Invitations for Bids, Requests for Proposals and Requests for Qualifications shall expire one year from the date of opening bids, proposals and/or statements of qualification. Under no circumstances shall an issuance of a Best and Final Offer (BAFO) request extend beyond one (1) year from the date of opening.

In March 2023, DOM submitted a request to the Board for an exception to this rule pending the outcome of the administrative protest which at that time was before Medicaid. The Board granted the exception (Minutes of the March 2023 minutes can be found at: (https://www.dfa.ms.gov/sites/default/files/PPRB%20Home/Meeting%20Minutes/2023/3%20PPRB%20Agenda%20%26%20Minutes%203.1.23.pdf[5]) This decision by the Board is not reviewable under this Protest.

DOM erred in refusing to accept United's Supplemental Protests

[5] OPSCR 2-103.02: "The PPRB shall have the discretion to grant exceptions to these regulations when it is determined that it is in the best interest of the State to do so and in keeping with the requirements of Mississippi Code Annotated § 27-104-7."

United submitted Supplemental Protests to DOM arguably after the deadline for such submissions had passed. DOM refused to consider these additional protests citing the deadline. United is asking the PPRB to rule on whether DOM erred in its refusal.

Whether DOM should have accepted and considered the merits of United's supplemental protests has no bearing on its execution of the procurement. The Board is determining whether DOM conducted the procurement consistent applicable law. This issue falls outside the Board's purview in this matter.

Whether the procurement was compromised by outside influences.

United asserts that DOM's evaluators were influenced by a letter written to the DOM Executive Director from the Chairman of the Mississippi Senate Medicaid Committee endorsing TrueCare. United offers no evidence, only conjecture and innuendo, to indicate this communication had any influence on the evaluation of any proposal, including TrueCare's. Moreover, United points to no rule prohibiting the subject communication.

The Board finds this argument meritless.

CONCLUSION

Pursuant to the foregoing reasons, the Board finds that the Mississippi Division of Medicaid conducted Request for Qualifications No. 20211210 in accordance with all applicable laws, rules, and regulations. United's appeal is hereby DENIED.

SO ORDERED, ths ___ day of June, 2024.

Chair, Public Procurement Review Board

BEFORE THE MISSISSIPPI PUBLIC PROCUREMENT REVIEW BOARD

In the Matter of the Mississippi Division of Medicaid
RFx No. 315003991
Request for Qualifications (RFQ) No. 20211210
Mississippi Division of Medicaid Coordinated Care

ORDER OF THE PUBLIC PROCUREMENT REVIEW BOARD ON THE PROTEST APPEAL BY AMERIGROUP HEALTHCARE, INC.

THIS MATTER is before the Mississippi Public Procurement Review Board (PPRB or Board) on appeal of the Mississippi Division of Medicaid's protest decision in the above referenced procurement.

BACKGROUND AND PROCEDURAL HISTORY

On December 10, 2021, the Mississippi Division of Medicaid (DOM) published RFQ No. 2021120 seeking proposals for the implementation of the Mississippi Coordinated Access Network (MSCAN) and the Mississippi Children's Health Insurance Program (CHIP). Five providers submitted proposals.

- Amerigroup Mississippi, Inc. (Amerigroup)
- Magnolia Healthcare, Inc. (Magnolia)
- Mississippi True d/b/a TrueCare (TrueCare)
- Molina Healthcare of Mississippi, Inc. (Molina)
- United HealthCare of Mississippi, Inc. (United)

DOM accepted, evaluated, and scored all five proposals. Upon completion of the procurement, DOM issued a Notice of Intent to Award to Magnolia, Molina, and TrueCare. Subsequent to the Notice of Intent, Amerigroup and United submitted separate protests to DOM challenging the Notice. DOM considered each protest and rendered its decision on June 2, 2023, upholding its Notice. On June 9, 2024, Amerigroup submitted a timely appeal to the PPRB. DOM and each of the other four offerors submitted briefs in response to which Amerigroup submitted a reply.

STANDARD OF REVIEW

The Office of Personal Service Contract Review (OPSCR) Rules[1] are silent as to the standard of review when a protest is initially filed with the procuring Agency and subsequently appealed to the PPRB. However, the Rules provide that where the protest is filed directly with the PPRB (i.e., initially protested to PPRB rather than to the procuring Agency), the PPRB "shall decide whether the … award was made in accordance with the Constitution, statutes, rules and regulations, and the terms and conditions of the solicitation."[2] The Board finds that this is the appropriate framework to evaluate any protest which is pending before it – whether as a direct protest or an appeal of the procuring Agency's protest decision.

PROTEST ARGUMENTS

Whether DOM's decision to allow Magnolia to supplement its response to RFQ Section 4.3.4.1 after the deadline for proposal submissions was lawful.

The RFQ deadline for proposals was March 4, 2022. (Record at 1.) Each of the five offerors submitted timely proposals. (Record at 1.) DOM evaluated the proposals in two stages. (Record at 34, RFQ 3.2.2.1.) In Stage 1, DOM's Office of Procurement determined whether each proposal was responsive, that is, whether it was complete and complied with all RFQ requirements. (*Id.*) If deemed responsive, DOM moved the proposal to Stage 2 for an evaluation by DOM's Evaluation Committee. (*Id.*) The present issue is limited to Stage 1.

During its Stage 1 review DOM discovered that Magnolia's proposal lacked a response to RFQ Section 4.3.4, Management and Control. (Record at 648.) Magnolia's proposal included an Executive Summary which, as the term suggests, provided an overview of the proposal. (Record 6424.) This Executive Summary included a specific reference to Section 4.3.4.1: "Our Project Management Approach consists of five key elements, described in detail in our response to Section 4.3.4.1 of the RFQ: . . .." The summary went on to identify these five elements. (*Id.*)

DOM emailed Magnolia on March 31, 2022, to inquire if it had intentionally omitted Section 4.3.4 and, if the omission had been unintentional, to submit it by 2:00 p.m. that same

[1] Miss. Admin. Code Title 12, part 9
[2] Rule 7-112.02.

day. Magnolia confirmed the omission was, in fact, not intentional and submitted the qualification by the 2:00 p.m. deadline. (Record at 11854-5; see also 648.) DOM accepted the qualification as a supplement to Magnolia's original proposal, deemed the proposal fully responsive, and moved it to Stage 2.

DOM memorialized the basis for its decision in the Redactions and Cures Memo attendant to DOM's Stage 1 evaluation. (Record at 2204.) This Memo included DOM's analysis of its authority to: 1) seek clarification from Magnolia regarding the missing Section 4.3.4, and 2) allow Magnolia to supplement its original proposal with its Section 4.3.4 qualification. (*Id.*)

In making the first inquiry, DOM identified several RFQ Sections authorizing DOM discretion to seek clarifications and additional information from an offeror when it deemed necessary. ("If necessary, the Office of Procurement may request clarifications from the Offeror." (RFQ Section 3.2.1; see also Sections 1.6[3] and 2.2.4.)

Having answered this threshold question in the affirmative, DOM moved to consider whether to accept Magnolia's Section 4.3.4 qualification. In consultation with the Office of Public Service Contract Review (OPSCR) staff, DOM identified two applicable OPSCR Rules: 3-204.01.3.3 and 3-204.03. (*Id.*) The first allows for a procuring agency to classify a proposal as "potentially acceptable." Such a designation brings into play several other rules, including 3-204.03. This rule addresses the discovery of mistakes after receipt of proposals but before an award. Subsection 3-204.03.3(c)(1) allows an offeror to correct a mistake when the mistake is "clearly evident on the face of the proposal or qualification."

As indicated in its Redactions and Cures Memo, DOM concluded that Magnolia's reference to Section 4.3.4 in its Executive Summary indicat[ed] and intention to have included Section 4.3.4 with its Management submission." (Record at 2204.) Accordingly, DOM accepted Magnolia's Section 4.3.4 supplement.

Amerigroup protests DOM's decision to allow Magnolia to supplement its proposal after the March 22, 2022, deadline. It argues this decision unfairly gave Magnolia additional time to prepare its Section 4.3.4 response. In support of its argument, Amerigroup offers OPSCR Rule

[3] DOM references Section 1.7 in the Memo. The RFQ contains no Section 1.7. We ascribe this mis-reference to scrivener's error.

3-203.11. ("Any proposal or qualification, withdrawal, or modification received after the established date is late.") Amerigroup also points to Rule 3-202.10.2. ("No late bid, late modification, or late withdrawal will be considered unless receipt would have been timely but for the action or inaction of agency personnel directly involved with the procurement activity.") While these Rules may prohibit a procuring agency from accepting presumed late bids, there are other Rules that, under certain circumstances, allow acceptance of otherwise late submissions. OPSCR Rule 3-202.01(f) opens the door. ("Correction or withdrawal of inadvertently erroneous bids before an award, or cancellation of awards or contracts based on erroneous bids shall be permitted in accordance with these regulations.")

DOM identified two such OPSCR regulations that, taken together, permit such acceptance: Rules 3-204.03.2 and 3-204.03.3(c)(1). (*Id.*) Rule 3-204.01.3.3 allows a procuring agency to deem a proposal as "potentially acceptable." Such potential, of course, can only be determined via clarification. If the clarification reveals a putative mistake, a procuring agency may exercise the authority granted under Rule 3-204.03.3(c)(1) to accept additional information so long as "the mistake and the intended correct offer are clearly evident on the face of the proposal or qualification."[4] The path these two rules create is exactly the path DOM took in reaching its decision to allow Magnolia to supplement its proposal. (*Id.*)

Based on Magnolia's reference to the missing Section 4.3.4 in Magnolia's Executive Summary, DOM suspected a mistake and sought clarification regarding the omission. Once Magnolia confirmed the omission was inadvertent, DOM offered Magnolia the opportunity to supplement its proposal under OPSCR rules. DOM's action and ultimate decision were based on and in conformity with both the RFQ and OPSCR rules and regulations.

For the reasons stated above, the Board finds that DOM acted with full authority under applicable law. Accordingly, the Board finds Amerigroup's protest meritless.

Whether DOM failed to adhere to the RFQ requirements for Consensus Scoring.

[4] While DOM may or may not have considered it, OPSCR rule 3-204.03.2 also supports an agency's discretion in this regard.

The DOM Evaluation Committee evaluated and scored the proposals using Consensus Scoring. (Record at 34, RFQ 3.3.2.1) The RFQ's definition of the Consensus Scoring was twofold: 1) "Each member will independently evaluate each [proposal] . . ." and then 2) "convene to assign consensus scores . . .." (*Id.*) There were two rounds of Consensus Scoring – one for Technical Qualifications followed by one for Management Qualifications. At the end of each round every Committee member certified his/her agreement with the final scores. (Record at 11421, 11502, 11583, 11660, and 11741.) (Technical) (Record at 11446, 11527, 11608, 11685, 11766.) (Management)

The Committee was comprised of seven individuals. (Record 2563-4.) Each possessed the relevant subject matter expertise necessary to evaluate the merits of the proposals. One of these Committee members was Evelyn Sampson. (*Id.*) She served on the committee as the information technology (IT) expert. (Record at 11340.) At least six of the twenty-one Technical Qualifications included IT components. (Record at 11340, RFQ Section 4.1 – 4.3.) The present argument centers largely around Ms. Sampson's attendance at Consensus Scoring meetings for Technical Qualifications.

The Committee held seven days of consensus scoring for Technical Qualifications – May 9 – 13, 16-17, 2022. (Record at 11341-47, 11357.) Ms. Sampson attended these meetings in person on May 9, 10, 16, and 17. She was unable to attend in person on May 11, 12, and 13. (*Id.*) She also stated in an email on May 10, 2022, that she was "unprepared" to review two of the four proposals scheduled for evaluations that day. (Record at 27995-6.) In response DOM "readjust[ed]" that day's plan. (*Id.*) In lieu of her in-person attendance at the May 11 – 13 meetings, Ms. Sampson provided her independent assessment notes for the Committee's consideration. (*Id.*) She returned to attend the May 16 and 17 meetings in person. At the conclusion of these seven days the Committee reached consensus on final scores and each member signed off accordingly. (Record at 11421, 11502, 11583, 11660, 11741.)

The Committee held five days of consensus scoring for Management Qualifications - July 11 – 15, 2022. (Record at 11348-56.) Over this five-day period several members missed portions of meetings. Three members missed portions of July 11. One member missed a portion of July 12. And one member missed a portion of July 14. (*Id.*) At the conclusion of these five

days the Committee reached a consensus on final scores and each member certified accordingly. (Record at 11446, 11527, 11608, 11685, 11766.)

Amerigroup contends DOM did not adhere to the RFQ requirements for Consensus Scoring. It claims two primary transgressions. First, it argues Committee members failed to follow evaluation "instructions." These so-called instructions were provided to the members via internal documents collectively titled "CCO Procurement: Evaluation Information." (Record at 11339.) The documents included material such as "Reminders from Training" and "For Your Information." They also included "Best Practices." (*Id.*) None of this information was included in the RFQ. Nor is it found in the OPSCR rules and regulations.

Let us assume, however, that these "Best Practices" were, in fact, included in the RFQ or were otherwise obligatory. One of these "Best Practices" was the admonition not to communicate outside of Consensus Scoring meetings. (*Id.*) Amerigroup points out that two members exchanged several texts concerning an offeror's proposal outside of scoring meetings. (Record at 666.) It contends this exchange compromised the integrity of the scoring. However, Amerigroup presents no evidence that this brief and largely observational exchange prejudiced or otherwise unduly influenced final consensus scores in any way.

Amerigroup also argues that certain members' lack of in-person attendance at all Consensus Scoring meetings violated the RFQ and precluded the Committee from reaching a true consensus. Just as the RFQ's definition of Consensus Scoring included none of the internal "instructions" submitted to the Committee, neither did it include a requirement for attendance at all meetings. In fact, there was no mention of a quorum. There was no prohibition against the Committee's consideration of a member's written notes in lieu of personal attendance. There was no set minimum or maximum number of meetings. Nor was there a required time length for meetings. (Record at 34, RFQ 3.2.2.1.)

Looking further afield, the OPSCR Rules include no definition or even reference to consensus scoring. And the only relevant statutory requirement for evaluations of proposals, Miss. Code Ann. §31-7-419, lacks any mention of consensus scoring. Section (1) states only that "The evaluation committee shall evaluate proposals or qualifications only in accordance with the methodology and weighting criteria described in the request for proposals or request for qualifications." DOM said it would use Consensus Scoring as defined in the RFQ, and it did.

Nevertheless, allowing for Amerigroup's conception of Consensus Scoring, the Evaluation Committee still fulfilled its obligations. It convened with a full contingent on four days, four days for true deliberation and consensus-building. (Record at 11341-43, 11357.) If the Committee had determined it needed more than four days of fully attended meetings to discuss the merits of the offerors' Technical Qualifications, then it could have done so. The same option was available regarding the Management Qualifications. It determined no such need. It completed its work and certified the final scores.

Finally, Amerigroup contends that Ms. Sampson's declaration of unpreparedness on May 10, 2022, evinces another flaw undermining the Consensus Scoring process. However, looking closely at the entire relevant email chain wherein this statement was made, it is apparent DOM took proactive steps and "readjusted the plan" to ensure that the Committee continued its evaluations with minimum disruption. (Record at 27995-96.) Further, Amerigroup offers no evidence that this circumstance had a true adverse impact on scoring.

For the reasons set forth, the Board finds that DOM abided by the rules of the RFQ and applicable law. Accordingly, it finds Amerigroup's argument without merit.

Whether DOM failed to ensure blind scoring.

The RFQ required evaluators to blind score offerors' Technical Qualifications. (Record at 10, RFQ Section 1.2.3.3.1.) To ensure blind scoring the RFQ prohibited offerors from including any "identifying information" in proposals. (Id.) The RFQ defined "identifying information" in Section 1.2.3.3.2. (Record at 11.) The RFQ required evaluators to blind score offerors' Technical Qualifications. (Record at 10, RFQ Section 1.2.3.3.1.) To ensure blind scoring the RFQ prohibited offerors from including any "identifying information" in proposals. (Id.) The RFQ defined "identifying information" in Section 1.2.3.3.2. (Record at 11.) DOM ensured that its evaluators understood this definition and admonished them to notify DOM's procurement facilitators immediately if they thought they had found any. (Record at 11309.) No evaluator reported such a discovery.

Failure to Disqualify the Four Other Offerors for Non-Compliance

During its Stage 1 review for responsiveness and compliance with the RFQ, DOM discovered identifying information in all five proposals, including Amerigroup's. (Record at

2202-08). Under Section 1.2.3.3.1 DOM had three options: 1) reject outright the proposals and disqualify the offerors; or 2) remove the identifying information itself; or 3) give the offerors the opportunity to remove the identifying information. (Record at 10, RFQ 1.2.3.3.1.) DOM chose to remove the identifying information itself.

Amerigroup argues that DOM violated the RFQ by failing to exercise option 1and outright disqualify offerors who included identifying information in their original submissions. It points to a number of specific transgressions in the other four proposals and claims it alone satisfied the blind requirement, that it alone played by the rules, and but for DOM's failure to adhere to RFQ Section 1.2.3.3.1 and reject the other proposals it would have won the day.

This argument dissolves in the face of the same RFQ Section 1.2.3.3.1. As noted above, this Section expressly authorized DOM to accept offending proposals and cure violations before submitting them to the Evaluation Committee for blind scoring. Accordingly, all blind scoring contentions rooted in the pre-scrubbed proposals are baseless.

Failure to Remove Identifying Information

DOM chose to scrub the proposals of identifying information itself. Amerigroup claims DOM failed to fully accomplish this task. It points to several particulars to support this contention.

Partnerships

Partnerships are critical to the successful delivery of the wide variety of Medicaid services to recipients across the state. The RFQ established the use of local or community-based partnerships as one of DOM's central considerations. (Record at 5.) Indeed, the RFQ included the use of partnerships as a scored category. (Record at 37.)

Referencing partnerships in the proposals was governed by RFQ Section 1.2.3.3.2. It reads in relevant part:

> When a response requires description of a potential partnership with a community-based organization, the Offeror *may name that organization and describe the contemplated partnership.* The Offeror *must not describe any current or prior relationship with the organization*, and the Offeror must not reference any other line of business or any

relationship at all that the Offeror or its owner, subcontractors, subsidiaries, or other related entities has had, will have, or desires to have with a named community-based organization, other than the partnership contemplated for this qualification. (Emphasis added.) (Record at 11.)

Amerigroup points to instances wherein it claims DOM failed to remove impermissible named partners (e.g. Magnolia (Aledade) (Record at 6841, 6850); , TrueCare (Health Information Exchange ["HEI"]) (Record at 16472, 16510); Magnolia (AT&T) (Record at 18011, 18156); Molina (Hearty Helpings Food Pantry) (Record at 7451, 7614.) However, each of these allegations is rooted in prior evaluator knowledge. In fact, Amerigroup states, ". . . The Division's ineffective cure process for removing identifying information in the qualifications, *coupled with the evaluators' knowledge of and experience with the incumbent offeror*, makes it even clearer that the evaluators were able to identify the offerors during the blind evaluation." (Emphasis added.) (Record at 325.) Amerigroup's argument relies on a phantom requirement, i.e., a prohibition against naming contemplated partners in cases where the offeror knows or should know that one or more DOM evaluators has prior knowledge of said partnership. Absent such a rule in the RFQ, Amerigroup does not provide evidence of DOM's failure to remove impermissible named partners.

Amerigroup argues DOM failed to remove numerous uses of the present tense throughout proposals, including in reference to partnerships. During its Phase 1 review for compliance DOM did discover such uses. After consultation with OPSCR staff, DOM issued an instruction to the evaluators to disregard the use of the present tense and to make no inferences based on such use. (Record at 29665.)

DOM properly and effectively applied the RFQ's definition in reviewing the proposals to ensure blind scoring. It also acted appropriately in issuing instructions to the evaluators to disregard and to not draw inferences from the use of the present tense throughout some proposals.

Molina Branding

Amerigroup contends that DOM failed to remove all identifying branding in Molina's proposal. One characteristic of Molina's branding is curved edges. (Record at 7391.) As

allowed by the RFQ, Molina included generic or "placeholder" marketing samples. (Record at 7519, 7521.) Though generic, these samples incorporated curved edges. (*Id.*) Recognizing these curved edge samples could possibly be identifying, DOM redacted the curved edges. DOM explained: ". . . the curved edges of some of the graphics are possibly identifying as branding. . . Alterations that have no substantive effect on the Offeror's proposal were made out of an abundance of caution." (Record at 649.)

Molina also included "call out boxes" in its proposal. In fact, all five proposals did. (Record at 17692, 17694 (Magnolia); 19720, 19725 (United); 13815, 13821 (Amerigroup); 16304, 16328 (TrueCare). Call out boxes are used in proposals, presentations, and the like to emphasize or "call" the reader's attention to certain substantive text. The size, shape and edges of call out boxes can vary, e.g. squares with hard edges, rectangles with rounded edges, and so on. Molina employed squares and rectangles with curved edges. (Record at 7447, 7448.)

Amerigroup contends the curved edges of Molina's call out boxes constituted identifying information and takes exception to DOM's decision to redact the curved edges of Molina's marketing samples but not its call out boxes. It essentially argues that curved edges are curved edges regardless of the context in which they are used.

DOM's decision was a conscious one. It did consider context. It distinguished marketing samples from call out boxes, for unlike its marketing samples, Molina, like all offerors, used its call out boxes to inform not promote. DOM's decision did not violate or otherwise compromise the blind scoring requirement.

Text Exchange Between Two DOM Staff Non-Evaluators

Amerigroup points to a text exchange between two *non-evaluators* serving as the procurement's facilitators. It asserts this exchange is evidence that Evaluation Committee members identified offerors during blind scoring. (Record at 610.) In this text exchange one facilitator writes to the other: "Also their *seemingly urge* to standup and shout I know who this is!" (*Id.*) (Emphasis added.) This vague hearsay statement is not evidence of evaluator knowledge. It is pure conjecture. The statement itself includes the qualifier "seemingly." It is therefore inherently speculative and not an assertion of fact. Further, if we remove the qualifier we are still left with supposition, not evidence, for no one can know the "urges" of another unless

told. Finally, Amerigroup points to no evidence that any evaluator reported finding identifying information to the facilitators or anyone else.

Evaluator Training

Finally, contrary to Amerigroup's assertion otherwise, DOM provided adequate, indeed extensive, training to the evaluators in all aspects of their role. (Record at 11262 - 11338.) As noted above, this training included not only the RFQ's definition of identifying information but also the express admonition to notify the facilitators immediately if they thought they had found identifying information. (Record at 11309.) No evaluator reported finding identifying information in any of the proposals.

For the reasons set forth above, the Board finds DOM carried out its blind scoring obligations in conformity with the RFQ. Accordingly, we find Amerigroup's arguments meritless.

Whether DOM conducted its scoring equitably.

Amerigroup claims the Committee scored its proposal unfairly. It offers no evidence to support this allegation other than citing higher scores given to other offerors who proposed similar qualifications. It is well-established law that a higher tribunal, such as this Board, will not put itself in the shoes of the procuring agency, re-evaluate proposals, and effectively usurp the professional judgment of subject matter experts. (See *Mississippi True v. Dzielak*, 293 So. 3d 243 (2020)

For the reasons set forth above the Board finds Amerigroup's claims meritless.

DOM erred in refusing to accept Amerigroup's Supplemental Protests

Amerigroup submitted two Supplemental Protests to DOM arguably after the deadline for such submissions had passed. DOM refused to consider these additional protests citing the deadline. Amerigroup is asking the PPRB to rule on whether DOM erred in its refusal.

Whether DOM should have accepted and considered the merits of Amerigroup's supplemental protests has no bearing on its execution of the procurement. The Board is determining whether DOM conducted the procurement consistent with applicable law. This issue falls outside the Board's purview in this matter.

Whether the procurement was compromised by outside influences.

Amerigroup asserts that DOM was influenced by a letter written to the DOM Executive Director from the Chairman of the Senate Medicaid Committee endorsing TrueCare. (Record at 689, Letter.) Amerigroup offers no evidence to indicate this communication had any influence on the evaluation of any proposal, including TrueCare's. In fact, it concedes that "While it may be true that, at this time there is no known evidence that an evaluator viewed the letter . . .." (Record at 345.) It also concedes it is not "*per se* improper for a public official, who is not directly involved in the procurement process, to express his/her opinion on a matter of public interest . . .." (Record at 21445.) Amerigroup's contention is baseless.

Amerigroup also alleges that DOM's decision to remove pharmacy benefit administrator services from the RFQ was improperly influenced. Amerigroup offers only supposition to support this contention. It points to internal communications regarding a wholly separate matter and asks us to consider this as evidence of impropriety.

Amerigroup's contention that DOM's execution of the procurement and the development of the RFQ was improperly influenced by uninvolved third parties is meritless.

DOM erred by not disqualifying Magnolia and Molina for issuing press releases regarding the procurement.

RFQ Section 2.1 stated, in part: "No public disclosure or news release pertaining to this procurement shall be made without prior written approval of the Division. Failure to comply with this provision may result in the Offeror being disqualified."

After DOM announced the awards, both Magnolia and Molina issued press releases related to the announcement. Neither obtained DOM's approval. Amerigroup asserts that DOM failed to abide by the RFQ by not disqualifying both offerors for this violation of the rule.

RFQ Section 2.1 authorizes DOM discretion to either disqualify offerors on this ground or not. DOM properly exercised this discretion in not disqualifying either awardee.

The Board finds Amerigroup's argument meritless.

CONCLUSION

Pursuant to the foregoing reasons, the Board finds that the Mississippi Division of Medicaid conducted Request for Qualifications No. 20211210 in accordance with all applicable laws, rules, and regulations. Amerigroup's appeal is hereby DENIED.

SO ORDERED, this ___ day of June, 2024.

Chair, Public Procurement Review Board