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Teresa Lowe
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#223

STATE OF FLORIDA
AGENCY FOR HEALTH CARE ADMINISTRATION

UNITEDHEALTHCARE OF FLORIDA, INC., a corporation organized under the laws of Florida, Petitioner, vs. STATE OF FLORIDA, AGENCY FOR HEALTH CARE ADMINISTRATION, Respondent.	**Case No.** _____ AHCA ITN 010-22/23 Statewide Medicaid Managed Care Program

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AGENCY CLERK

UNITEDHEALTHCARE OF FLORIDA, INC.'s
FORMAL WRITTEN PROTEST AND
PETITION FOR ADMINISTRATIVE HEARING

Respectfully submitted,

Robert Clayton Roesch
Florida Bar No. 0013931
Shuffield Lowman & Wilson, P.A.
1000 Legion Place, Suite 1700
Orlando, FL 32801
Tel: 407 581 9800
Croesch@ShuffieldLowman.com

Alex P. Hontos (MN 0388355)*
Christopher A. DeLong (MN 0398965)*
Dorsey & Whitney LLP
50 South Sixth Street, Suite 1500
Minneapolis, MN 55402
**Requested Qualified Representatives*

Attorneys for Petitioner UnitedHealthcare of Florida, Inc.

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INTRODUCTION

1. This protest arises from one of the most important procurements in Florida's history. Millions of vulnerable Floridians and tens of billions of tax dollars are at stake. It is important to every Floridian that the process to award contracts to operate the state's Medicaid program was transparent, fair, and complied with the rules established by the Legislature and the Agency for Health Care Administration ("AHCA" or the "Agency"). It was vital that AHCA get this procurement right and that the process was by the book. Unfortunately, based on Agency procurement records released to date, there were fundamental flaws in the procurement process. But the go-live for the program is still long off, and this protest is an opportunity for AHCA to take prompt, negotiated corrective action.

2. The Agency gave Petitioner UnitedHealthcare of Florida, Inc. ("United") the highest scores—by a large margin—in the scored evaluation process under the solicitation. But once the evaluation phase was complete, a new set of agency officials—the "negotiators"—decided that United's proposal was not superior to the other offerings after all, and that United did not even make the top five Respondents that were ultimately selected to receive contract awards. This stark contrast—and the Agency's internal inconsistency—exemplifies an arbitrary result arising from a flawed-and-unreasonable process. This is precisely what the State's procurement laws and the solicitation documents are designed to prevent.

3. Based on the limited public records AHCA has produced, AHCA's selection process was unreasonable, arbitrary, and violated the solicitation and Florida law. AHCA's intended awards are flawed for multiple, independent reasons:

- Contrary to Florida law and the solicitation, the negotiation team failed to apply mandatory statutory selection criteria and preferences in making its best-value determination;

- The negotiation team impermissibly used unstated evaluation criteria and recommended awards to Respondents that were non-responsible and non-responsive by the express terms of the ITN;
- AHCA improperly considered late and non-conforming proposals from certain Respondents;
- AHCA impermissibly allowed Respondents to match components of United's proposal during negotiations;
- AHCA failed to adequately document its decisions, including its best-value determination and its decision to non-select United; and
- AHCA frustrated United's protest rights by failing to timely and completely disclose to United (and the public) the Agency's internal records related to this procurement.

4. United, under Sections 120.569 and 120.57(1) and (3), *Florida Statutes*, and Rules 28-106 and 28-110, F.A.C., submits this Formal Written Protest and Petition for Administrative Hearing challenging AHCA's intended decisions to award contracts under AHCA ITN No. 010-22/23 - Statewide Medicaid Managed Care Program (the "ITN"), and based on the cited rules, statutes, authorities, and disputed material facts herein. United reserves its right to supplement this protest when the Agency complies with its legal obligations to make all responsive public records available to United.

5. The Agency can and should take voluntary corrective action now—either by awarding United contracts under the ITN, or by re-procuring the ITN. If the Agency does not, United requests that its Petition be set for hearing and that its Protest be sustained.

THE AHCA SMMC PROCUREMENT

6. On April 11, 2023, AHCA released the ITN, detailing its programmatic goals for managed care in Florida, the procurement process, requirements for Respondents and their proposals, the evaluation criteria and process, and the factors AHCA would consider in making its selection decisions.

7. The ITN was to award contracts to health plans and provider service networks ("PSNs") for capitated managed care plans to cover medical-assistance and long-term care recipients. *See* Ex. A, ITN, Attachment A at Sections A(7), (18). The anticipated contracts would extend through December 31, 2030. *Id.* at A(19).

8. The ITN contemplates statewide or regional contracts, but each region has a statutorily required minimum and maximum number of contract awards as follows:

TABLE 6
SMMC REGIONS

Region	Minimum/ Maximum	Total Anticipated Contract Awards
Region A	3 to 4	3
Region B	3 to 6	3
Region C	3 to 5	3
Region D	4 to 7	4
Region E	3 to 6	3
Region F	3 to 4	3
Region G	3 to 5	3
Region H	3 to 5	3
Region I	5 to 10	5

See id. at Section D(5)(g); *see also* Sections 409.974(1), .981(2), Fla. Stat.

9. AHCA may award additional contracts for plans that provide specialty services or represent the best value to the state. *See id.*

A. Material Amendments and Prior Protest of the ITN

10. The ITN was amended seven times, several of which adjusted the procurement timeline. *See* Exs. B-H, Addendum Nos. 1-7.

11. Following a protest filed by a PSN providing long-term care, AHCA amended the ITN to permit two MMA PSNs and two LTC PSNs to advance to negotiations even if determined non-responsible under the ITN's evaluation phase. *See* Ex. E, Addendum No. 4 at Item 2; Ex. F, Addendum No. 5 at Question 37.

B. ITN Submission Requirements

12. Respondents' proposals were due on October 25, 2023. *See* Ex. H, Addendum 7 at Item 1.

13. Proposals were to include specific information, the omission of which "may result in the rejection of a response," including, among other requirements: (1) an Original Proposal Guarantee payable to the State of Florida in the amount of $5 million per region in order to demonstrate a "firm commitment the respondent shall, upon the Agency's acceptance of its response, execute such contractual documents as may be required within the time specified," and (2) all Scored and Unscored Submission Requirements and Evaluation Criteria, regardless of plan type (discussed in more detail below). *See* Ex. A, ITN, Attachment A at Section B(2).

14. Respondents were directed that "[f]ailure to provide the required certifications and statements may result in the rejection of a response." *Id.* at Section D(3)(b).

15. The ITN contemplates "scored" and "unscored" requirements. The Unscored Submission Requirements covered six categories and included the first 12 Submission Requirement Components ("SRCs"), which required narratives addressing Birth Outcomes, Organizational Commitment, Expanded Benefits, Managed Care Experience, and Staff-to-

Enrollee Ratio, among other things. *See id.* at Section D(3)(d), Exhibit A-4. The Unscored Responses in ITN Exhibit A-4 were for use in negotiations. *See id.* at Section D(3)(d).

C. Scored Requirements and Evaluation Criteria

16. The Scored Requirements include a Financial Evaluation, Provider Comments, and a Technical Response. *See* Ex. A. ITN, Attachment A at Section D(4).

17. The Technical Response requirements addressed the same six categories in the Unscored Submission, but allowed Respondents to receive scores for 32 different SRCs (Nos. 13-44), which were collectively worth 5,950 points. *See id.* at (4)(c)(1), Table 4.

18. The narrative Technical Requirements were to be scored by at least three evaluators, "who collectively have experience and knowledge in the program areas and service requirements for which contractual services are sought by this solicitation." *Id.*

19. Non-narrative SRCs were to be "autoscored," meaning the score was determined mathematically based on the data Respondents entered. *See* Ex. A, ITN, Attachment A at Section D(4)(c); ITN at Exhibit A-5. Only the following criteria were scored by agency evaluators: SRCs 21, 28-30, 40, and 42-44. *See id.* at ITN at Exhibit A-5(A)-(F).

20. The ITN provides that the Total Point Score for each Respondent will be calculated by using the "sum of the average evaluators' scores for each Submission Requirement and Evaluation Criteria," and the following example is provided:

Evaluator SRC Score: (Maximum of 875)	675
Autoscoring SRC Template: (Maximum of 4,725)	4,000
Financial Information: (Maximum of 200)	100
Provider Comments: (Maximum of 100)	80
Total Point Score for Respondent 1 (Maximum of 5,950)	4,855

See id. at Section D(4)(e)(2); *see also* Ex. B, Addendum No. 1 at 4.

21. Proposals were then to be ranked using the Total Point Scores, with the ranking of one assigned to the highest Total Point Score. *See* Ex. A, ITN, Attachment A at Section D(4)(e)(2).

D. Responsive and Responsible Vendor Requirements

22. For a proposal to be "responsive" under the ITN, the proposal must conform to the ITN's requirements, and the Respondent must be "responsible." *See id.* at Section D(2). "A 'responsive reply' means a reply submitted by a **responsive and responsible vendor**, which conforms in all material aspects to the solicitation [Section 287.012(26), Florida Statutes]." *Id.* (emphasis and brackets in original).

23. A responsible vendor "means a vendor who has the capacity in all respects to fully perform the Contract requirements and the integrity and reliability that will assure good faith performance [287.012(25), Florida Statutes]." *Id.* (brackets in original).

24. The ITN provides that AHCA would negotiate only with Respondents who were responsible, as measured by an evaluation score above the 70% threshold. *See id.* at D(5)(h)(2) ("The threshold for responsibility is seventy percent (70%) of the total available points.").

E. Negotiation Process with the Highest Ranked Respondents (and Others)

25. After the scoring and ranking of proposals, the ITN contemplates a negotiation phase with the "ten (10) top-ranking respondents." *See id.* at Section D(5)(h)(1). "The scores from the evaluation process shall be used to determine the respondents with whom the negation team will negotiate." *Id.* at Section D(5)(a). But the "negotiation team **shall not** utilize the evaluation scores in determining best value." *Id.* (emphasis added).

26. The ITN provides that the threshold for responsibility is 70% of the total available points. *See id.* Nevertheless, the ITN was later amended to provide the following:

> If there are not two (2) MMA PSNs and two (2) LTC PSNs included in the top ten (10) ranked respondents listed above, the Agency will invite at least two (2) of each of the highest ranked, and <u>otherwise</u>

> responsible **(even if they score less than seventy percent (70%) of the total available points)** MMA PSNs and LTC PSNs to negotiations, to fulfill the requirements of Section 409.974(1), Florida Statutes, and Section 409.981(1)-(2), Florida Statutes, in each region.

See Ex. E, Addendum No. 4 at 2 (emphasis added).

F. Best-Value Criteria

27. The award decisions were to be made based on an assessment of "best value," as follows:

> Negotiation sessions will include discussions of the scope of service to be provided by the respondent until acceptable terms and conditions are agreed upon, or it is determined that an acceptable agreement cannot be reached.
>
> The Agency will negotiate the terms and conditions determined to be the best value to the State, including, but not limited to price/cost, quality, design, statewideness, and service delivery.

Ex. A, ITN, Attachment A at Section D(5)(c).

28. The ITN enumerates ten "best value selection criteria" **and** ten subfactors to be considered by the negotiation team. *See id.* at Section D(6)(a)-(j). Those criteria include, but are not limited to: (1) sufficient signed contracts with primary and specialty physicians and other essential providers; (2) programs and compensation for patient-centered medical homes; (3) performance of critical operational functions in Florida; (4) proven efficient programs for management of cancer and diabetes; (5) adequate claims payment processes; and (6) expertise and experiences serving aged and disabled persons. *See id.*

29. The ITN provides that AHCA's best-value criteria would be considered "in addition to the criteria established in sections 409.966(3)(c), 409.974(2), and 409.981(3), Florida Statutes." *See id.* Those Florida statutes set out specific criteria that must be considered when determining best value, as further explained below.

G. AHCA's Evaluation Team Ranked United First—By a Large Margin

30. United timely submitted its proposal on October 24, 2023. *See* Ex. I. Ten other Respondents also submitted proposals—some of which were incomplete or untimely, as explained below: Aetna Better Health of Florida, Inc. ("Aetna"), AmeriHealth Caritas Florida, Inc. ("AmeriHealth"), Florida Community Care, LLC ("FCC"), Humana Medical Plan, Inc. ("Humana"), ImagineCare LLC ("ImagineCare"), Molina Healthcare of Florida, Inc. ("Molina"), Sentara Care Alliance, LLC ("Sentara"), Simply Healthcare Plans, Inc. ("Simply"), South Florida Community Care Network, LLC d/b/a Community Care Plan ("CCP"), and Sunshine State Health Plan, Inc. ("Sunshine"). *See* Ex. J, March 27, 2024 Award Recommendation at 3.

31. AHCA determined that "[a]ll Respondents met the minimum mandatory response criteria of the ITN" to continue to the Evaluation phase. *Id.*

32. The ITN required a bifurcated evaluation and negotiation process, with an evaluation team made up of personnel different than the negotiation team. *See id.* at 3-5.

33. United's score for the Evaluation phase ranked it first—more than 125 points (2%) higher than the next ranked Respondent and nearly 1150 points (19%) higher than the Respondent with the lowest ranking:

Rank	Respondent	Final Total Score	Percent of Total Maximum Score	Type of Entity
1	**UnitedHealthcare of Florida, Inc.**	**4861**	**82%**	**HMO**
2	Sunshine State Health Plan, Inc.	4733	80%	HMO
3	Simply Healthcare Plans, Inc.	4641	79%	HMO
4	Aetna Better Health of Florida Inc.	4485	76%	HMO
5	Humana Medical Plan, Inc.	4463	76%	HMO
6	Molina Healthcare of Florida, Inc.	4353	74%	HMO
7	AmeriHealth Caritas Florida, Inc.	4150	70%	HMO

8	ImagineCare LLC	4136	70%	MMA & LTC PSN
9	South Florida Community Care Network, LLC d/b/a Community Care Plan (CCN-CCP)	4089	69%	MMA & LTC PSN
10	Florida Community Care, LLC	3778	64%	MMA & LTC PSN
11	Sentara Care Alliance, LLC	3714	63%	MMA PSN

See id. at 4; Ex. K.

34. Although three Respondents did not meet the "70% of total points" threshold for responsibility, the negotiation team invited all 11 Respondents to negotiate. *See* Ex. J. at 5.

35. The negotiation team consisted of three voting members and two statutorily required non-voting members (a purchasing analyst and a contract administrator). *See id.*

36. From December 8, 2023 to March 26, 2024, the negotiation team "held internal strategy sessions and conducted negotiations with Respondents." *See id.* at 5-6. After three rounds of negotiations, the Agency requested best and final offers ("BAFOs") from all Respondents. *See id.* Based on the first BAFOs, AHCA requested revised BAFOs from eight of the eleven Respondents—United, Sunshine, Simply, Aetna, Humana; Molina, CCP, and FCC.[1] *See id.* at 7. AHCA then held a final round of negotiations with the remaining eight Respondents. *Id.*

H. AHCA's Award Decisions

37. On April 12, 2024, AHCA posted, and United received, the Notice of Intent to Award, stating that AHCA "intends to award a Contract to" FCC, Humana, Simply, CCP, and Sunshine" (collectively the "Awardees"):

[1] AmeriHealth, ImagineCare, and Sentara were eliminated from consideration for an award prior to submission of the revised BAFOs. *See* Ex. J at 5.

Respondent	Plan Type	Specialty Plan Award			Statewide/Regional Award
		Child Welfare	HIV/ AIDS	Serious Mental Illness	
Florida Community Care, LLC*	Comprehensive Long-term Care Plus		✓	✓	Regions A, B, C, D, I
Humana Medical Plan, Inc.	Comprehensive Long-term Care Plus		✓	✓	Statewide
Simply Healthcare Plans, Inc.	Comprehensive Long-term Care Plus		✓	✓	Statewide
South Florida Community Care Network, LLC d/b/a Community Care Plan*	Comprehensive Long-term Care Plus			✓	Regions E, F, G, H, I
Sunshine State Health Plan, Inc.	Comprehensive Long-term Care Plus	✓	✓	✓	Statewide

* Awarded as a Provider Service Network per the requirements of section 409.974(1) and section 409.981(1)-(2), Florida Statutes.

See Ex. L, Notice of Agency Decision.

38. Despite being the top scorer by a material margin in the evaluation phase and agreeing to everything AHCA requested in the BAFOs (and more), United was inexplicably non-selected for an award. Agency records reveal that even the negotiation team lead, Pamela Hull, believed this outcome was not "fair." *See, e.g.*, Ex. M, 3/15/24 TR. at 5:1-9 ("[T]he only reason United and Aetna aren't getting next in line is because of the PSNs. . . . And I don't think it's fair . . . – that we omit them because of a statutory PSN requirement that they otherwise would be at the table for if it wasn't for FCC and CCP."). Nonetheless, the Agency accepted this outcome.

39. On April 12, 2024, United submitted public records requests seeking information about the Agency's procurement process, including the entire procurement file. *See* Ex. N.

40. On April 15, 23 and 24, 2024, the Agency made certain public records available to United, though the Agency's productions to date are incomplete.

41. On April 17, 2024, United timely filed its Notice of Protest pursuant to Section 120.57(3)(b), *Florida Statutes,* and Rule 28-110.003, F.A.C. *See* Ex. O.

UNITED'S PROTEST IS TIMELY

42. This Formal Written Protest and Petition for Administrative Hearing is timely and complies with all requirements of Section 120.57(3)(b), *Florida Statutes,* Rule 28-110.004, F.A.C, and ITN, Attachment A at Section D(8)(a). United may administratively challenge AHCA's intended contract awards and seek relief under Sections 120.569 and 120.57(1) and (3), *Florida Statutes*, and Rules 28-106 and 26-110, F.A.C.

UNITED'S SUBSTANTIAL INTEREST

43. United's substantial interests are and will be adversely affected by AHCA's decision to enter into contracts with the Awardees, and not with United. United submitted a responsive, responsible proposal in response to the ITN, and it invested significant time and resources in preparing that proposal and negotiating with the Agency. As a responsive, responsible, and qualified bidder, and the top scorer that submitted a response to the ITN, United is a party whose substantial interests have been determined in this procurement, and AHCA's intended award decisions are the injury that Florida law, including Section 120.57(3), *Florida Statutes,* is designed to remedy. Given its status as the top scoring Respondent, had the procurement not been marred by errors and violations of law, United had a substantial chance to receive an award.[2]

[2] *See, e.g.*, Ex. U, 3/25/24 TR. at 4:19-5:9 ("That is why it's so hard because they are the next – from United and Aetna, they're the next best two in our next line from a best value perspective.").

APPLICABLE LEGAL STANDARDS

44. "[F]air and open competition is a basic tenet of public procurement; that such competition reduces the appearance and opportunity for favoritism and inspires public confidence that contracts are awarded **equitably and economically**; and that **documentation of the acts taken and effective monitoring mechanisms are important** means of curbing any improprieties and establishing public confidence in the process by which commodities and contractual services are procured." Section 287.001, Fla. Stat. (emphasis added).

45. The public procurement laws provide a "check" on agency abuse of discretion and:

> serve the object of protecting the public against collusive contracts and prevent favoritism toward contractors by public officials and tend to secure fair competition upon equal terms to all bidders, [and] they remove temptation on the part of public officers to seek private gain at the taxpayers' expense, are of highly remedial character, and should receive a construction always which will fully effectuate and advance their true intent and purpose and which will avoid the likelihood of same being circumvented, evaded, or defeated.

Liberty County v. Baxter's Asphalt & Concrete, 421 So. 2d 505, 507 (Fla. 1982) (internal citation omitted).

46. An agency's procurement decision is reviewed to determine "whether the agency's proposed action is contrary to the agency's governing statutes, the agency's rules or policies, or the solicitation specifications" and "whether the proposed agency action was clearly erroneous, contrary to competition, arbitrary, or capricious." Section 120.57(3)(f), Fla. Stat.

47. Agency action is "clearly erroneous" when, for example, the agency's interpretation conflicts with the plain and ordinary intent of the law. *E.g.*, *Colbert v. Dep't of Health*, 890 So. 2d 1165, 1166 (Fla. 1st DCA 2004).

48. Agency action is "arbitrary if it is not supported by logic or the necessary facts," and "capricious if it is adopted without thought or reason or is irrational." *Hadi v. Liberty Behavioral Health Corp.*, 927 So. 2d 34, 38 (Fla. 1st DCA 2006).

49. To determine whether an agency acted arbitrarily or capriciously, courts analyze "whether the agency: (1) has considered all relevant factors; (2) given actual, good faith consideration to the factors; and (3) has used reason rather than whim to progress from consideration of these factors to its final decision." *Adam Smith Enter. v. Dep't of Envtl. Reg.*, 553 So. 2d 1260, 1273 (Fla. 1st DCA 1989); *see also Barton Protective Servs., LLC, v. Dep't of Transp.*, Case No. 06-1541BID, 2006 Fla. Div. Adm. Hear. LEXIS 329, at *157 (explaining that the central question when reviewing agency action is "whether the conclusions reached by the agency lacked a reasonable basis and were, therefore, arbitrary or capricious" (quoting *Avtel Servs., Inc. v. United States*, 70 Fed. Cl. 173, 187 (2005)).

50. Agency action is "contrary to competition" if it unreasonably interferes with the objectives of competitive bidding:

> To protect the public against collusive contracts; to secure fair competition upon equal terms to all bidders; to remove not only collusion but temptation for collusion and opportunity for gain at public expense; to close all avenues to favoritism and fraud in various forms; to secure the best values for the [public] at the lowest possible expense; and to afford an equal advantage to all desiring to do business with the [government], by affording an opportunity for an exact comparison of bids.

Wester v. Belote, 138 So. 721, 723-24 (Fla. 1931).

51. Further, agency action is "contrary to competition" when it would (a) create the appearance and opportunity for favoritism; (b) reduce public confidence that contracts are awarded equitably and economically; (c) cause the procurement process to be genuinely unfair or unreasonably exclusive; or (d) there are abuses, *i.e.*, dishonest, fraudulent, illegal, or unethical.

See Section 287.001, Fla. Stat.; *Harry Pepper & Assoc., Inc. v. City of Cape Coral*, 352 So. 2d 1190, 1192 (Fla. 2d DCA 1977).

52. An agency must provide an explanation adequate for a tribunal to independently review and determine whether the agency was justified in reaching its decision. *See South Florida Jail Ministries, Inc. v. Dep't of Juvenile Justice*, Case No. 00-1366BID, 2000 Fla. Div. Adm. Hear. LEXIS 5340, at *75 ("[R]eviewing courts should be concerned with whether the contracting agency provided a **coherent and reasonable explanation of its exercise of discretion**. . . . Proof that the award lacked a reasonable basis generally establishes arbitrary and capricious action.") (emphasis added) (quoting *Latecoere Int'l, Inc. v. Dep't of the Navy*, 19 F.3d 1342, 1355-56 (11th Cir. 1994); *Affiliated Comput. Servs., Inc. v. AHCA*, Case No. 05-3676BID, 2006 Fla. Div. Adm. Hear. LEXIS 18, at *18 (same); *see also State Contracting and Eng'g Corp. v. Dep't of Transp.*, 709 So. 2d 607, 609 (Fla. 1st DCA 1998) (stating the object of the proceeding is to evaluate the action taken by the agency based upon the information that was available to the agency at the time took such action; *Adam Smith Enters.*, 553 So. 2d at 1273 (stating when reviewing an agency decision the focal point should be on the administrative record already in existence) (internal citation omitted). And "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142 (1973).

53. As to disputed facts, agency decisions receive no deference: "It is exclusively the administrative law judge's responsibility, as the trier of fact, to ascertain from the competent, substantial evidence in the record what actually happened in the past or what reality presently exists, as if no findings previously had been made." *Care Access PSN, LLC v. AHCA*, Case No. 13-4113BID, 2014 Fla. Div. Adm. Hear. LEXIS 60, at *81.

REQUIREMENT TO STAY PROCUREMENT

54. The Agency may not proceed, and awardees may not begin performance, until United's administrative challenge has concluded. *See* Ex. A, ITN, Attachment A at Section D(8)(b); Section 409.966(4), Fla. Stat.

55. After receipt of a timely filed protest, "the agency shall stop the solicitation or contract award process until the subject of the protest is resolved by final agency action," and may not proceed unless a separate determination is made in the best interest of the state. *See* Section 120.57(3)(c), Fla. Stat.

56. United respectfully requests that the Agency respect the statutorily mandated stay of procurement activities until United's Protest and Petition have been resolved.

UNITED'S PROTEST GROUNDS

57. AHCA's notice of intent to award, and the decisions that culminated in its issuance, violate the governing statutes, rules, policies, and the ITN. As the evidence will show, AHCA's decisions are clearly erroneous, contrary to competition, and arbitrary and capricious. United's Protest should be sustained for multiple, independent reasons.

58. AHCA may not act "contrary to the agency's governing statutes, the agency's rules or policies, or the solicitation specifications." Section 120.57(3)(f), Fla. Stat.

59. When an agency does, its action is unlawful and a protest should be sustained. *See, e.g.*, *Warley Park, Ltd. v. Florida Housing Finance Corporation*, Case No. 17-3996BID, 2017 Fla. Div. Adm. Hear. LEXIS 730, at *44, *adopted* 2017 Fla. Div. Adm. Hear. LEXIS 730 (Dec. 8, 2017).

60. Here, AHCA violated the law and the ITN in multiple, material ways, as explained below, and based on the cited rules, statutes, authorities, and disputed material facts.

Protest Ground 1: AHCA Violated Section 409.966(3)(C), *Florida Statutes,* By Failing To Apply The Legislature's Six Mandatory Preference Factors

61. The Legislature directed AHCA to not just consider, but to give "preference" to, six specific factors when making its "best value" determination. *See* Section 409.966(3)(c), Fla. Stat. The ITN similarly directs consideration of those (and other) factors. *See* Ex. A, ITN, Attachment A at Section D(6). AHCA's failure to consider and give preference to those factors means its award decision is contrary to law. *See id.*; Section 120.57(3)(f), Fla. Stat.

62. Section 409.966(3)(c), *Florida Statutes,* mandates that AHCA give preference to plans that:

> (1) Have signed contracts with primary and specialty physicians in sufficient numbers to meet the specific standards established pursuant to s. 409.967(2)(c).
>
> (2) Have well-defined programs for recognizing patient-centered medical homes and providing for increased compensation for recognized medical homes, as defined by the plan.
>
> (3) Are organizations that are based in and perform operational functions in this state, in-house or through contractual arrangements, by staff located in this state. Using a tiered approach, the highest number of points shall be awarded to a plan that has all or substantially all of its operational functions performed in the state. The second highest number of points shall be awarded to a plan that has a majority of its operational functions performed in the state . . . .
>
> (4) Have contracts or other arrangements for cancer disease management programs that have a proven record of clinical efficiencies and cost savings.
>
> (5) Have contracts or other arrangements for diabetes disease management programs that have a proven record of clinical efficiencies and cost savings.
>
> (6) Have a claims payment process that ensures that claims that are not contested or denied will be promptly paid pursuant to s. 641.3155.

Section 409.966(3)(c)(1)-(6), Fla. Stat.

63. By requiring AHCA to give these factors preferential weight in the best-value analysis, the Legislature emphasized the importance of the selection of plans, like United, with well-established operations in the state, strong provider networks, administrative capacity, and an ability to ensure access to care for members with the most acute healthcare needs.

64. **Yet there is no evidence or explanation showing that, for each Awardee selected, the Agency gave the factors preference over any other factors considered.** In fact, the evidence shows the Agency **weighted other factors over the preference factors, in direct violation of the law**.

65. The negotiation team created, apparently ad hoc, spreadsheets that purport to score Respondents based on the required best-value criteria. *See e.g.*, Ex. P. The spreadsheets confirm, however, that negotiators did not apply the mandatory preference to Section 409.966(3)(c) factors. *See id.* In fact, five of the six statutory preference factors were weighted **lower** than other non-statutory best-value criteria. *See id.* The negotiation team gave the maximum weight of five to just one of the factors, but that merely put that preference factor **in parity** with other non-statutory best-value criteria. *See id.* The negotiation team's spreadsheets are conclusive evidence that AHCA violated Section 409.966(3)(c), *Florida Statutes*, and deviated from the ITN.

66. Further, the BV Ranking Tool is the only evidence the negotiators even attempted to apply the preference factors. Neither the transcripts of the Agency negotiation team's meetings nor the Agency's March 27, 2024 Award Recommendation explain or document the Agency's analysis of how the plans, much less the Awardees, purportedly meet these six preference factors. There was no ranking of the six preference factors, no description of the weight that each of the six preference factors received, and no evidence of a common understanding of the six preference factors by the negotiation team.

67. The March 27, 2024 Award Recommendation simply recites the factors, with no explanation about how the Agency considered them in the "Best Value Analysis" or how any particular plan met them. *See* Ex. J. The Legislature determined that six preference factors are important—the **most** important—to determine which plan offered best value to the State and the vulnerable populations served by this program. The ITN acknowledges this as well. And yet, in conducting the procurement, AHCA failed to give those factors "preference" at all.

68. AHCA's "proposed action is contrary to the agency's governing statutes" and "solicitation specifications," and its intended awards must be rescinded. *See* Section 120.57(3)(f), Fla. Stat.

Protest Ground 2: AHCA Violated Section 409.966(3)(C)(3), *Florida Statutes*, By Failing To Assign Points According To The Mandatory Tiered-Approach

69. State law requires that AHCA assign preference points for Respondents operating in Florida according to a tiered scoring system, with up to three tiers. *See* Section 409.966(3)(c)(3), Fla. Stat. Points were to be awarded among the tiers according to whether health plans had all, a majority, or some less proportion of their operations in Florida. *See id.*

70. And yet there is no evidence that the Agency during this procurement process applied the tiered scoring system when considering Respondents' operational functions within the state. Neither the negotiation team's ad-hoc best-value spreadsheets nor the negotiation team's transcripts mention the statutorily required tiers or the system generally.

71. As a result, AHCA's "proposed action is contrary to the Agency's governing statutes," and its intended awards must be rescinded. *See* Section 120.57(3)(f), Fla. Stat.

Protest Ground 3: The Negotiation Team Was Inadequately Trained And Misunderstood And Misapplied The Mandatory Selection Criteria

72. The negotiation strategy session transcripts indicate that the negotiation team did not recall, did not understand, and did not uniformly apply the criteria required by the ITN and the

Florida Statutes. *See* Section 409.966(3), Fla. Stat. (providing quality selection criteria and preference factors); Section 287.012(4), Fla. Stat. (identifying four factors that must be considered as part of the best-value analysis); Section 120.57(3)(f), Fla. Stat. (requiring the Agency to comply with the specifications of its ITN). "[I]t is beyond peradventure that a contracting agency must treat all offerors equally, evaluating proposals evenhandedly against common requirements and evaluation criteria." *Banknote Corp. of Am. v. United States*, 56 Fed. Cl. 377, 383 (2003).

73. For example, just days before its award recommendation, and after it had conducted negotiations with Respondents, the negotiation team[3] was confused about the definition of best value—the very thing it was supposed to be relying on to select the Awardees:

> PAM HULL: I think from -- if I were to walk into a courtroom, get deposed, **it's gonna be based on my interactions with these plans. I've been negotiating more than a bid submission**. I made my decisions on conversations -- they gave to me.
>
> MATT COOPER: Literally your assessment of their ability.
>
> PAM HULL: Right, responsive and responsible.
>
> TREY COLLINS: Yes. Going back to the definition of best value, it's a combination price quality design workmanship. It's not –
>
> MATT COOPER: **Where did that come from?**
>
> PAM HULL: Look like a salesman.
>
> MATT COOPER: **Solicitation. I could have used that.**
>
> TREY COLLINS: **It's in the training**. Go back and look -- that was I know it was like four months ago.
>
> ***
>
> MATT COOPER: I think it's a technical aspect of it. I'm still struggling with the duality of, you know, the -- well, yeah. Putting these decisions down in a mechanical, quantifiable way because you

[3] The voting members of the Negotiation Team were: Pam Hull, Assistant Deputy Secretary for Medicaid Operations; Matt Cooper, ADS, Health Care Data; and Melissa Vergeson, Bureau Chief, Medicaid Quality. *See* Ex. J at 5. Trey Collins is the procurement officer for the ITN. *See id.*

> really – even the numbers you assign to this stuff, the weights are what you're thinking.
>
> PAM HULL: **It's not exact science.**

Ex. Q, 3/21/24 Morning TR. 84:21-86:8 (emphasis added).

74. The negotiation team did not understand, even at that late juncture, that the ITN had expressly identified best-value factors, and the negotiation team did not recognize that all of those factors matter. *See, e.g.*, Ex. U, 3/25/24 TR. at 58:9-13 ("There's 20 million best value criteria. Am I supposed to go through each one? . . . [N]o, that's definitely not the expectation.")).

75. At this point, the negotiation team had already created and relied on its own "best value" matrix/spreadsheet:

> MS. VERGESON: Yeah, I agree. But I still think -- yeah. I don't -- does that preclude us from asking for executed agreements?
>
> MS. HULL: I wouldn't -- if they were to challenge it, I don't -- I'm not sure. But right now, I mean –
>
> MS. VERGESON: I mean, **we get to establish best value criteria**, right?
>
> MR. COOPER: Uh-huh.
>
> MS. VERGESON: **To some degree.** I mean, we look at what's here, but –
>
> . . .
>
> MR. COLLINS: Just one thing that's really important along those lines, anything additional to what's being -- what's not in the -- anything in addition to what's in the solicitation, we really need to put in our request for BAFO. So going into the BAFO, the vendors are clear on what criteria they're being judged against.

Ex. R, 2/29/24 TR. at 15:3-23 (emphasis added).

76. The negotiation team did not restrict themselves to considering the best value criteria set forth in the ITN and in the Florida statutes; in fact, the negotiation team did not track the express standards set forth therein—even going so far as to say it's not an "exact science" and

that they would just decide based on their "gut"—thereby indicating it was arbitrary. *See* Ex. Q, 3/21/24 Morning TR. at 86:8; Ex. S, 3/20/24 Morning TR. at 38:8-10 ("I have my gut thought about a lot of this stuff, but it's helpful to see some numbers or some values that back up my gut."). That three negotiators admittedly relied on their "gut" feeling to override the detailed Technical Response scoring by twelve evaluators that gave United the highest score confirms that this process was arbitrary.

77. Another example of the negotiation team's deviation from the ITN is its provider network weighting for long-term care providers. The ITN confirms the Agency's goals for "seniors to be able to live vibrant, fulfilling lives and age in their place of choice" and "independence." Ex. A, ITN, Attachment A at Section A(15). These stated goals demonstrate the Agency's commitment to focus on supporting members living in the community rather than facilities. Contrary to this goal, the negotiation team weighted assistant living facilities more than other providers, including home health agencies. *See* Ex. P

78. The negotiation team's deviation from the ITN best value criteria and from the statutorily required criteria requires that AHCA's intended awards be rescinded because the "agency's proposed action is contrary to the agency's governing statutes, the agency's rules or policies, or the solicitation specifications." *See* Section 120.57(3)(f), Fla. Stat.

Protest Ground 4: The Negotiation Team Impermissibly Used Unstated Evaluation Criteria

79. While the negotiation team was confused about or unaware of certain best-value criteria it was obligated to consider, contemporaneous documentation reveals that the negotiation team considered other factors—outside of those in the ITN—in violation of Florida law. *See* Section 287.057(c)(3), Fla. Stat. ("The criteria that will be used for determining the acceptability

of the reply and guiding the selection of the vendors with which the agency will negotiate **must be specified**." (emphasis added)).

80. An agency's use of unstated, secret evaluation criteria is a hallmark of arbitrary-and-capricious public procurement. *See Samsara Inc. v. United States*, 169 Fed. Cl. 311, 319 (2024) ("An agency decision is arbitrary and capricious if the decision is a product of the agency's application of unstated evaluation criteria."); *see also Aetna Better Health of Pa. Inc. v. Dep't of Human Servs.*, No. 351 M.D. 2016, 2016 Pa. Commw. Unpub. LEXIS 1120, at *6-8, 44 (explaining the agency's use of "secret evaluation criteria" to select state managed care plan undermined the credibility of the procurement). For example:

The Negotiators Improperly Considered Federal Enforcement Policy

81. The negotiation team considered new settlement requirements of a Department of Justice litigation monitor, even after they recognized that the requirements were not part of the ITN: "for me, I'm like, **while it's not a defined Agency goal**, this is a huge priority for the Agency. So if they want to move forward – **I consider that part of the best value**." *See* Ex. T, 1/18/24 AM TR. at 17:12-14 (emphasis added).

The Negotiators Improperly Considered Plans' Preferences, Membership Volume, and Incumbency

82. Certain negotiators considered which counties were the PSNs' apparent favorites, which is not a best value factor, giving Respondent FCC Dade County because it is "their baby . . . Just like CCP is Broward's baby." *See* Ex. U, 3/25/24 Afternoon TR. at 16:4-24.

83. The negotiation team also considered disruption of membership in a high-volume plan even though that is not a factor included in the ITN or Florida statutes. *See* Ex. V, 2/15/24 Pre-Post TR. at 46-48 ("We also don't disrupt; 1.5 million [members].").

84. Negotiators applied an incumbency factor for certain awards as well, such as crediting Sunshine for having been the contractor for child welfare services. *See* Ex. NN, 3/25/24 TR. at 77:5-21 ("And you think it's Sunshine just because, naturally, Sunshine. . . . [A]re we just ultimately awarding it to Sunshine . . . because it's easy and they've been doing it all along.").

The Negotiators Considered Administrative Expediency

85. Negotiators focused on benefits to the Agency, but that is not a best value factor in the ITN: "Well, instead of, you know, trying to force a comparison between apples, oranges, and bananas, what if you just -- can you kind of, like, take a higher level look and just -- does one plan stand out, or does the -- a few plans stand out as **appearing to be more willing and able to assist the agency**, ..." *See* Ex. W, 3/12/24 AM TR. at 15 (no line numbers provided) (emphasis added).

86. The Agency also considered potential future protest risks in making its awards, which is not a best value factor in the ITN or Florida statutes:

> MS. HULL: But I think we have to do our due diligence with these two newbies to really make sure that that is meeting the mark. But again, listen, we're not going to be awarding four PSNs, right?
>
> MR. GAFFNER: Right.
>
> MS. HULL: But just for argument's sake, say we did. I can assure you -- **I can speculate that FCC and CCP would probably litigate** and try to find out more information about these two companies, or at least question it. **They'll probably contest it** because, again, it's taking away from them. You know, I don't know. It's a very unusual, uncomfortable situation.

See Ex. X, 1/25/2024 "Pre and Post" TR. at 56:20-57:9 (emphasis added).

> MS. HULL: ... And I -- and at a minimum, I want to make sure I'm looking at the best value ones where they can move -- ... Like, that **gives us a little bit more leverage** and when we do an award, it's based on, like -- you know, **I'm still considering those other factors**, but the best value is the one that is up top.

See Ex. Y, 1/19/24 TR. at 151:21-152:4 (emphasis added).

MS. HULL: Right. So I think we just need to look at that because when we think about who we would like to, from a comprehensive and statewide perspective, thinking -- you know **there's going to be a protest. You know there's going to be settlements. Where would we then be able to allow some** –

MR. COOPER: Compromise?

MS. HULL: -- **compromise**. And it would be really regionally.

***

MS. VERGESON: · Did anybody who protested last time not get a concession?

MS. HULL: · Everyone got something.

***

MS. HULL: · So that's why I'm just thinking, when we think about the – the possibility and the reality of that happening –

MS. VERGESON: · Yeah.

MS. HULL: · -- they will look to us at some level for a recommendation of what regions we think we could give them as a concession, so I just --

MR. COOPER: · I guess that -- **protests, you know, is a secondary concern, which is important**.

MS. HULL: · Yeah

See Ex. Z, 3/8/24 PrePost TR. at 60:23-64:15 (emphasis added).

The Negotiation Team Devised Its Own Best-Value Criteria

87. The negotiation team also improperly determined its own best-value criteria. As set forth above, the negotiation team did not specifically analyze the best-value factors in the ITN or Florida Statutes. Instead, negotiators built their own best-value matrix at the same time they were considering each proposal:

MR. COOPER: . . . . But I'm just trying to think about **other elements that we're going to consider** and how we're going to frame those conversations and if we're thinking about doing it, you know, a similar tab or similar spreadsheet or if we're thinking about being more conversational, or, I mean, I'm just curious what you guys think.

MS. HULL: So I was just about to say that is something we need to determine, because based on the statute, reviewing that information, including but not limited to. **So we really do have to determine whether or not there's other items and criteria we want to consider**, but have to make sure that we outline that information because that will be questioned. And we'll have to show, you know, our proof **especially if we're using something, you know, that hasn't been stipulated**, which I'm fine with. But I -- I'm not really sure how to approach that just yet, Matt. I know that isn't the greatest answer.

See Ex. AA, 2/26/24 TR. at 28:19-29:15 (emphasis added).

MS. HULL: This one right here. So these are SRCs. Right here. This one speaks to that they have to have a PDL, and then they have to make sure they have an off process. I mean, it's just all stuff that **-- it's not SRC related, it's a contract requirement**. So I just -- contract requirement. On this one here, they have to accept prior auth requests electronically. Contract requirement. It's not an SRC. So I just wanted you to know why I didn't have an SRC on that one. And so scroll down one more . . .

MR. COOPER: It's the overall -- this is gonna sound silly. Is the overall point of identifying, you know, look at each of the statutory requirements and identifying where -- you know, how we're addressing it? It's just that's kind of -- **we're going to build this as we go**? And this is probably -- this could be all you've done.

See Ex. BB, 1/16/24 "Morning Session" TR. at 146:17-147:12 (emphasis added).

MS. HULL: How do you put a value on that? So they tell you, and then what's your next -- what's the end goal for us from a best value perspective? I mean, listen, I can talk to these plans all day long about all the cool things they're doing. At some point I just need to nail down what we think makes sense for best value. For the rest of it, wonderful, play out, do you. This is what we're asking them to do, and be innovative, and cool, and resourceful. But I just -- I think we have to -- again, any topic I could ask a million more questions. I'm just trying to level it to some extent.

MS. VERGESON: We have to distill it down.

See Ex. CC, 1/31/24 "Pre Post" TR. at 41:20-2:7.

MS. HULL: Right. I just, you'll see in my note over there, those are FCC's, Melissa had mentioned it already, they have proposed

> these, and I feel, **I don't know if I feel super confident with FCC's aggressive approach,** not that I don't agree that should be the numbers but the idea, this is a new population for them-
>
> MS. VERGESON: **They just don't have the experience.**
>
> MS. HULL: So, it just makes me wonder, I don't want to put too much behind their numbers when they're not used to this population. That's my hesitancy. . . . .
>
> DR. COGLE: Yeah. I totally agree with that FCC, I know the medical affairs group there, **you're absolutely right, they don't have the experience.**

Ex. Q, 3/21/24 AM TR. at 51:2-23 (emphasis added).

88. The ITN does not establish weights for the best-value criteria—instead, the negotiation team developed its own weighting system, doing so apparently in late March 2024. *See, e.g.*, Ex. S, 3/20/24 Morning TR. at 26:18-21 ("Well, now I haven't weighted. Well, actually – I – but here, if I do this. I'm going to apply these weights. We can deal with the weights.") and 29:13-14 ("And also these weights are, I mean, like totally open for consideration.").

89. The negotiation team improperly considered "preparedness" and "readiness" during Negotiations as well:

> MR. COOPER: I mean, you know, an example might be like -- this is just a -- I'm just -- this is -- like, **do we have confidence that the plans can adequately prepare for** -- for this -- for the -- for the new contracts? **Do we have confidence that they are ready**, you know, or will be able to get ready in time? I know there's a readiness process, but more – not intangible but more things we get after speaking with the plans and hearing their proposals, and so less -- I would say in some ways, these are less concrete, meaning they're not, like . . . written out.
>
> . . .
>
> MS. HULL: No. **I think preparedness and readiness is a huge piece of it for me.**

See Ex. AA, 2/26/24 TR. at 29:22-31:14 (emphasis added); *see also* Ex. S, 3/20/24 Morning TR. at 17:25-18:2 (". . . do you have confidence they'll be able to implement or do what's being asked, right? Like have the ability to do it.").

90. And the negotiation team improperly considered their personal experiences with the incumbent Respondents.

> MR. COOPER: Okay. It helps to know, like, the history from your perspective. I'm not really aware of some of these things.
>
> MS. HULL: I will tell you, **they're very good partners for me. I mean, you know, I talk to them often. I talk to Tammy all the time**. When I -- you know.
>
> . . .
>
> MS. HULL: Yeah, I mean, they're -- **I feel like they could be a little needy at times**.
>
> . . .
>
> MS. HULL: Yeah, right. That's the thing. I feel like that's -- they can be somewhat high-maintenance at times for what they're bringing to us, but at the same time, like, **I appreciate the collaboration and them not doing things just on their own accord.** And then when you talk the market share of 1.5 million people, that makes a big difference. And so, you know, they do try to, like -- they've really tried hard to turn their act around from all that kind of stuff that happened with the merger and the negative connotation. I mean, they were dealing with it, too. They were constantly having to deal with it.

See Ex. DD, 1/30/24 Pre-Post TR. at 15:4-16:4 (emphasis added).

91. Even AHCA's March 27, 2024 Award Recommendation refers to unstated evaluation criteria—*i.e.*, criteria not identified in the ITN or the incorporated Florida statutes—specifically, that "the negotiation team placed emphasis on the Respondents' capabilities to manage whole-person care for all members of Florida's Medicaid population." *See* Ex. J at 9.

92. Moreover, to the extent the negotiation team may "determine the best value selection criteria," *see* Ex. A, ITN, Attachment A at Section D(6), the negotiation team did not describe or disclose all of the additional criteria in its Award Recommendation, despite that the

Recommendation purportedly identified all of the best-value criteria that were considered, making them unstated and impermissible. *See* Ex. J at 7.

93. AHCA's use of evaluation criteria that was not specified in the ITN in its negotiations and in its best-value determination was contrary to law, contrary to the ITN, and requires that the intended awards be rescinded. *See* Section 287.057(c)(3), Fla. Stat. ("The criteria that will be used for determining the acceptability of the reply and guiding the selection of the vendors with which the agency will negotiate must be specified."); *see also Bluewater Mgmt. Grp., LLC v. United States*, 150 Fed. Cl. 588, 614 (2020) (explaining that an agency's technical evaluation of potential vendors "must be consistent with the factors and procedures outlined in the solicitation" (internal citation omitted)); *NVE, Inc. v. United States*, 121 Fed. Cl. 169, 180 (2015) (stating that an offeror can challenge an agency's procurement decision as "arbitrary, capricious, or an abuse of discretion" when the agency relies on unstated evaluation criteria); *Poplar Point RBBR, LLC v. United States*, 147 Fed. Cl. 201, 219 (2020) (stating an agency must evaluate proposals and issue public contracts based on the criteria stated in the solicitation); *Magnum Constr. Mgmt. Corp. v. Broward Cnty. Sch. Bd.*, Case No. 04-4252BID, 2005 Fla. Div. Adm. Hear. LEXIS 916, *17-18, *39-40 (explaining that use of unstated evaluation criteria in public procurement is contrary to law and the solicitation specifications).

Protest Ground 5: The Negotiation Team Violated The ITN By Considering Respondents' Evaluation Scores During The Negotiation Process

94. While it failed to consider and give preference to the best-value factors that the Legislature mandated, and considered other unstated evaluation criteria that it was not to consider, the negotiation team undisputedly considered something that the ITN expressly prohibited: the Respondents' evaluation scores. This is another clear deviation from the ITN that requires the awards to be invalidated. *See, e.g., Bluewater Mgmt. Grp.*, 150 Fed. Cl. at 614 (explaining that a

procuring agency's technical evaluation "must be consistent with the factors and procedures outlined in the solicitation" (internal citation omitted)); *NVE, Inc.*, 121 Fed. Cl. at 180 (stating that an offeror can challenge an agency's analysis as "arbitrary, capricious, or an abuse of discretion" when the agency relies on unstated evaluation criteria); *Poplar Point RBBR, LLC*, 147 Fed. Cl. at 219 (stating an agency must evaluate proposals and make awards based on the criteria stated in the solicitation); *Magnum Constr. Mgmt. Corp.*, 2005 Fla. Div. Adm. Hear. LEXIS 916, at *17-18, 39-40 (explaining that use of unstated evaluation criteria is contrary to law and the solicitation specifications).

95. The ITN provides: "**The negotiation team shall not utilize the evaluation scores in determining best value.**" *See* Ex. A, ITN, Attachment A at Section D(5)(a) (emphasis added).

96. The Negotiation Team Training Presentation similarly provides: "**The negotiation team shall not utilize the evaluation scores in determining best value.**" *See* Ex. EE at 14 (emphasis added).

97. The procurement officer even reminded the negotiation team that they were not supposed to have seen or used the scores:

> MR. COLLINS: Okay. So just to clarify, to Matt's point, **we did not go into all of the individual scores** that were -- you know, we -- **you didn't look at the actual evaluator scores to see how each SRC was scored.** All the team was shown was the final total evaluation scores, which is in this table.
>
> ***
>
> MS. HULL: Because they were able to show us -- **oh, we couldn't use the scores.**
>
> ***
>
> MR. COOPER: Anyway. I don't think that's super important. **I just don't want people to think we saw scores.**

See, e.g., Ex. ZZ, 3/26/24 Afternoon TR. at 58:19-60:23 (emphasis added).

98. And yet the procurement file is filled with evidence that the negotiation team was aware of, and utilized, the evaluation scores in making its best-value award decision:

a. AHCA made available to the negotiators a "Negotiator Resources" file that contains many of the evaluation score charts, including automated scoring results. *See, e.g.*, Exs. FF-HH.

b. Negotiators repeatedly discussed evaluation scores during their negotiation sessions with Respondents, including comparisons of the Respondents' scores. *See, e.g.*, Ex. II, 1/31/24 Negotiations TR. at 21-22, 38-39 ("So this morning I want to talk to you about birth outcomes and then about child and adolescent mental health. I'm going to look at the scored SRCs for each of those areas, and then we'll dive a little bit more into the narrative. . . . Your overall score was 86 percent, which is just a tiny bit below the average of 87 percent. ... So you're the top rung of the low tier."); Ex. JJ, 2/13/24 Strategy TR. at 35:1-2 ("We've reviewed your narratives. Reviewed your SRC scores for the auto score criteria.").

c. The negotiation team's ad hoc best-value spreadsheets include scores for criteria that were not discussed in negotiations, such as "Incentivizing Value & Quality" and disease management, indicating the negotiation team relied on the SRC scores. *See* Ex. P.

d. The negotiation strategy session transcripts clearly demonstrate that the negotiation team used evaluation scores in making its award decisions. *See, e.g.*, Ex. U, 3/25/24 Afternoon TR. at 32:13-15 ("FCC got a low score in disease management. And CCP got a high score. Same thing for claims payment.");

Ex. KK, 1/22/24 "Strategy Meeting_1" TR. at 14:20-25 ("Like for overall score [on birth outcomes], Aetna got a 94. They're in the top tier. And then in the notes I indicate that the range for everybody was 95 to 7, and the average was 87. So you can kind of see how each plan scores as we're talking to each plan.").

99. As the negotiation team was not permitted to utilize the evaluation scores in determining best value, the negotiation team should not have been given access to or even made aware of the specific evaluation scores for each criteria, much less have been allowed to use them as a basis to make comparisons between the Respondents during the best-value assessment. And if the evaluators did take evaluation scores into account, then United's lack of award is arbitrary given that United had the highest evaluation score—by far. That United did not receive an award demonstrates that to the extent the negotiators used the evaluation scores, they did so only selectively, and thus arbitrarily.

100. The ITN prohibited negotiators from using evaluation scores during the best-value process; yet the record is clear that the negotiators used those scores. AHCA's "proposed action is contrary to the agency's governing statutes," and its intended awards must be rescinded. *See* Section 120.57(3)(f), Fla. Stat.

Protest Ground 6: The Negotiation Team Selected Non-Responsible Respondents For Awards

101. AHCA cannot award contracts to non-responsible Respondents. *See* Fla. Stat. § 287.057(c)(4); *Robinson Elec. Co. v. Dade Cnty.*, 417 So. 2d 1032, 1034 (Fla. Dist. Ct. App. 1982) (holding the purpose of competitive bidding is to secure the lowest responsible offer); *Remington Arms Co., LLC v. United States*, 126 Fed. Cl. 218, 233 (2016) (sustaining bid protest

where agency awarded contract to non-responsible offeror). Yet that is exactly what AHCA did by awarding contracts to FCC and CCP.

102. As discussed above, the ITN provides that Respondents must receive a minimum evaluation score to be determined "responsible" under this ITN: "The threshold for responsibility is seventy percent (70%) of the total available points." *See* Ex. A, ITN, Attachment A at Section D(5)(h)(2).

103. Although the ITN was amended to allow the PSNs to continue to the negotiation phase even if they did not meet the minimum evaluation score, *see* Exhibits D-E, Addendum Nos. 3 and 4 respectively, the ITN still provides that:

> The awards must include at least one PSN, **if they are responsible**, in each of the nine (9) regions outlined in this subsection. Such PSN awards may be satisfied by one (1) PSN if it serves on a statewide basis.

Ex. A, ITN, Attachment A at Section D(7)(d) (emphasis added).

104. Similarly, Florida law requires that an award be made only to a responsible Respondent: "After negotiations are conducted, the agency **shall award** the contract to the **responsible and responsive vendor** that the agency determines will provide the best value to the state, based on the selection criteria." Section 287.057(c)(4), Fla. Stat. (emphasis added).

105. The Agency did not amend the ITN provision that required a Respondent to score 70% of the total points available to be considered "responsible" under this ITN. *See* Ex. A, ITN, Attachment A at Section D(5)(h)(2) ("The threshold for responsibility is seventy percent (70%) of the total available points.").

106. The Agency reinforced that requirement via its answers to Respondents' questions. *See* Ex. F, Addendum No. 5 at Question 56 (confirming that despite the amendments to the ITN, "the threshold for responsibility is seventy percent (70%) of the total available points"); Addendum

No. 5 at Question 62 (declining to confirm that "any respondent who is invited to negotiations is thereby considered 'a responsive and responsible vendor'").

107. The negotiation team lead explained that Respondents need to be "otherwise responsible," regardless of the amendment to the ITN permitting Respondents who scored below the 70% responsibility threshold to be selected for negotiation. *See* Ex. LL, 3/26/24 Afternoon TR. at 48:3-12.

108. The negotiation team knew the purpose of the evaluation scores was to make sure the Respondents were capable: "you also have to remember those SRCs were based on certain contract selections. . . : – it's such a different snapshot to just make sure that they're actually – . . . capable." *See* Ex. LL, 3/26/24 Afternoon TR. at 53:24-54:19. While the amended ITN allows the Agency to **negotiate** with Respondents that did not meet the responsibility threshold, the Agency did not amend the ITN's responsibility requirement to permit an **award** to sub-70% Respondents because they are not considered responsible under the express terms of the ITN.

109. The result was a flawed procurement process in which AHCA negotiated with and ultimately awarded contracts to Respondents that were expressly disqualified, contrary to Section 287.057(c)(4), *Florida Statutes.*

110. Two of the Respondents selected for an award—FCC and CCP—did not have evaluation scores that were 70% or more of the total available points, and therefore they were not considered to be "responsible" under this ITN, **even as amended.**

111. Further, as explained by the negotiation team:

> MS. HULL: That is why it's so hard because they are the next -- from United and Aetna, they're the next best two in our next line from a best value perspective. And so I kind of just, like, played that scenario out. And I think -- and also -- how you guys feel, this is kind of where I've landed, is that if you -- **the only reason United and Aetna aren't getting next in line is because of the PSNs.**

MR. COOPER: Agreed.

MS. HULL: **And I don't think it's fair –**

MR. COOPER: Agreed.

MS. HULL: **-- that we omit them because of a statutory PSN requirement that they otherwise would be at the table for if it wasn't for FCC and CCP.**

MR. COOPER: I agree with you completely.

Ex. U, 3/25/24 Afternoon TR. at 4:19-5:10 (emphasis added).

112. The awards to the PSNs are even more troubling when the following exchanges are considered:

MS. HULL: Right. I just, you'll see in my note over there, those are FCC's, Melissa had mentioned it already, they have proposed these, and I feel, **I don't know if I feel super confident with FCC's aggressive approach,** not that I don't agree that should be the numbers but the idea, this is a new population for them-

MS. VERGESON: **They just don't have the experience.**

MS. HULL: So, it just makes me wonder, I don't want to put too much behind their numbers when they're not used to this population. That's my hesitancy. . . . .

DR. COGLE: Yeah. I totally agree with that FCC, I know the medical affairs group there, **you're absolutely right, they don't have the experience.**

Ex. MM, 3/11/24 AM TR. at 51:2-23 (emphasis added).

MS. HULL: Trust me, the PSN stuff has been frustrating from day one.

MR. COOPER: It's not best value for members to have that structure in place. It doesn't make sense, but – everything's about best value except for this, just --

Ex. NN, 3/25/24 Morning TR. at 107:24-108:4.

> MR. COOPER: And especially for -- my concern with CCP was always the scope and scale and -- that they're prepared for and working toward it.
>
> MS. HULL: But also, the same concern for FCC was set of the scope and scale.
>
> MR. COOPER: Fortunately we've got Humana, Simply and Sunshine.

Id. at 147:7-14.

113. Compounding the problem, FCC's evaluation scores were inflated. For SRC 22, Respondents were required to provide a quantity of provider agreements in each region and across specialties. *See* Ex. A, ITN, Attachment A at Exhibit A-5-b. But a Respondent could only count a provider contract once, so if a provider fit more than one specialty, Respondent could only report for one. *See* Ex. B at 53 ("Each provider agreement should only be reported once. The respondent should reply in a manner that it believes best addresses the requirements of the solicitation."). Nevertheless, FCC and Sunshine double counted providers. FCC reported the same number of providers for three pairs: "Therapist (Physical)" and "Therapist, Pediatric (Physical)"; "Therapist (Respiratory)" and "Therapist, Pediatric (Respiratory)"; and "Therapist (Occupational)" and "Therapist, Pediatric (Occupational)." *See* Ex. AAA. Had FCC appropriately reported its provider agreements, its evaluation scores would have been even lower.

114. The negotiation team felt compelled to award contracts to the non-responsible PSN Respondents because of the requirement to contract with at least one PSN in each region. *See* Section 409.974(1), Fla. Stat. But a PSN does not get a free pass—the Legislature demands that PSNs "must be capable." Section 409.966(1), Fla. Stat. The negotiation team had deep concerns about the capability of the PSN Respondents. The reasonable and rational course was to re-procure, rather than award to incapable health plans.

115. Accordingly, the negotiation team's awards to the PSNs that did not score 70% of the total possible Evaluation score are invalid (and unsupported by the proposals submitted), and the ITN must be re-procured. *See* Section 287.057(c)(4), Fla. Stat. (stating that the agency "shall award" contracts only to "responsible and responsive vendors").

Protest Ground 7: AHCA Improperly Considered Late and Non-Conforming Offers

116. The ITN requires that all responses be submitted by October 25, 2023. *See* Ex. H, Addendum No. 7.

117. The ITN provides that the Agency "will not consider responses received after the date and time specified . . . ." *See* Ex. A, ITN Attachment A at Section C(1)(b)(3)(e). Further, under the law, a proposal that fails to conform "in all material respects to the solicitation" is non-responsive. *See* Section 287.12(26), Fla. Stat. (defining responsive bids, proposals, and replies); *see also* Section 287.012(27), Fla. Stat. (defining responsive vendor as a vendor that submitted a "bid, proposal, or reply that conforms in all material respects to the solicitation").

118. There are few procurement-law principles more basic than (1) proposals must be complete and submitted on time, and (2) substantive post-submission revisions by a single respondent are impermissible. **Late means late**. *See Naval Sys. v. United States*, 153 Fed. Cl. 166, 172 n.1 (2021) ("The 'late is late' rule prohibits an agency from accepting a proposal, proposal modifications, or revisions after the deadline for proposals established by the agency in a solicitation."); *Labatt Food Serv., Inc. v. United States*, 577 F.3d 1375, 1381 (Fed. Cir. 2009) (A late proposal "is tantamount to no proposal at all"); *Criterion Sys., Inc. v. United States*, 144 Fed. Cl. 409, 415 (2019) ("Ninety seconds late may appear to be a minimal infraction, but deadlines are set for a reason, and an agency's strict adherence to a deadline places all bidders on an equal footing and avoids the sorts of issues Criterion is seeking to raise here.").

119. In a section entitled "Mandatory Response Content," the Agency's solicitation directs that "The respondent shall include the documents listed in this sub-section with the submission of the Original Response." Ex. A, ITN, Attachment A at Section B(2). Failure to include requirement submissions warranted rejection of the proposal. *See id.*

120. Yet, AHCA awarded **three Contracts to Respondents that submitted incomplete, non-conforming, or late proposals**, contrary to law and the ITN:

a. Simply did not timely submit its Original Proposal Guarantee, which was a mandatory requirement, and should have caused its disqualification. *See* Ex. OO; *see also* Ex. A, ITN Attachment A at Section B(2). Then, Simply submitted a non-conforming Proposal Guarantee that AHCA said was "inconsistent with the ITN 010-22/23 requirements of Attachment A . . . ." Ex. OO. But instead of disqualifying Simply, AHCA permitted Simply to submit a conforming Original Proposal Guarantee on November 14, 2023—**three weeks late**. *See id.*

b. Sunshine also submitted a non-conforming proposal. Sunshine's submission for SRC #23, concerning synchronous telemedicine, was incorrectly submitted on the basis of asynchronous telemedicine. *See* Ex. PP. In other words, Sunshine failed to submit required information for a mandatory SRC, and its score on SRC #23 was based on incorrect data.

c. FCC failed to include native Microsoft Excel files in violation of ITN, Attachment A at Section C(1)(c)(4), which provides that "the following

attachments and exhibits shall[4] be submitted in Microsoft Excel 2016 or later, utilizing the Agency-provided templates, and shall be saved on the USB flash drive . . . ." *See* Ex. A. FCC did not submit the required files until November 6, 2023 – **nearly two weeks after the deadline**. *See* Ex. QQ. Despite FCC's failure and late submission, AHCA did not disqualify FCC – it intends to award FCC a contract.

121. AHCA's acceptance of late and non-conforming offers violated the law and the ITN's specifications, requiring that the intended awards to Sunshine, Simply, and FCC be rescinded. *See Magnum Constr. Mgmt. Corp.*, 2005 Fla. Div. Adm. Hear. LEXIS 916, *17-18, 39-40 (explaining that use of unstated evaluation criteria is contrary to law and the solicitation specifications); *see also Data Gen. Corp. v. Johnson*, 78 F.3d 1556, 1561 (Fed. Cir. 1996) ("The rule [that AHCA will not consider responses received after the date and time specified] is designed to prevent a bidder from gaining an unfair advantage over its competitors by making its bid more favorable to the government in a context where the other bidders have no opportunity to do so.").

Protest Ground 8: AHCA Improperly Allowed Other Respondents to Match Key Components of United's Proposal During the Revised BAFO Process

122. AHCA engaged in impermissible technical leveling when it included certain expanded benefits in the Revised BAFO process.

123. A procuring agency may not engage in "technical leveling" during its procurement process. *See CACI Field Servs. v. United States*, 13 Cl. Ct. 718, 731 (1987). Technical leveling

[4] The ITN provides certain requirements or conditions "from which a material deviation may not be waived," which are indicated by the use of "shall," "must," or "will." *See* Ex. A, ITN, Attachment A at Section B(1)(b). A deviation is material if it "is not in substantial accord with [the ITN's] requirements, provides a significant advantage to one respondent over another, or has a potentially significant effect on the quality of the response or on the cost to the Agency." *Id.*

occurs when the agency helps "an offeror to bring its proposal up to the level of other proposals through successive rounds of discussion, such as by pointing out weaknesses resulting from the offeror's lack of diligence, competence, or inventiveness in preparing the proposal." *Id.* (citation omitted).

124. Unfairness in negotiations, such as sharing proprietary information of one offeror with a competitor, warrants corrective action, up to and including cancellation of awards. "[A] procurement official may not disclose one bidder's competition-sensitive proposal features . . . to a competing bidder in an ongoing procurement." *SAGAM Sécurité Sen. v. United States*, 154 Fed. Cl. 653, 663 (2021); *Mantech Telcoms. & Info. Sys. Corp. v. United States*, 49 Fed. Cl. 57, 76-79 (2001) (explaining that discussions may be used to improve a proposal for the government's benefit, but may not be used to disclose proprietary or sensitive competitive information).

125. Here, AHCA used negotiations to have underperforming Respondents level their proposals with top-scoring United. The negotiation team acknowledged that "we can get some best value and get folks to kind of mimic others with their best practices or quicker turnaround time frames . . . ." *See* Ex. RR, 1/11/24 TR. at 23:1-10.

126. For example, expanded benefits were a crucial part of the ITN. Two Unscored portions of the ITN asked Respondents to discuss their expanded benefit offerings, and both Round 2 and Round 3 of the negotiation phase included expanded benefits. *See* Ex. A, ITN, Attachment A at Section D(3)d); Ex. J at 5-6.

127. United proposed several innovative, expanded benefits in its response to the ITN, including but not limited to reducing copayments and a longer continuity-of-care enrollment period. Ex. VV, 3/20/24 Afternoon TR. at 67:18 -69:20 (stating the following, among other things, regarding the 180-day continuity of care proposed by United: "That's a lot. I mean that's, wow.").

128. AHCA impermissibly took United's competencies and programs to support enrollee health outcomes, and demanded the same from other Respondents. For example, United committed to reducing copayments as an expanded benefit. AHCA then demanded all Respondents commit to this program in their BAFOs. *See, e.g.*, Ex. WW at 6.

129. Similarly, United offered to extend continuity-of-care timeframes for all MMA and Specialty Plan enrollees to 180 days to support transitions and enhance enrollee and provider experience. AHCA demanded in its revised BAFOs that the Managed Care Plan "shall be responsible for the costs of continuation of such course of treatment, without any form of authorization and without regard to whether such services are being provided by participating or non-participating providers for up to ninety (90) days after the effective date of enrollment. The Managed Care Plan shall reimburse non-participating providers at the rate they received for services rendered to the enrollee immediately prior to the enrollee transitioning for a minimum of sixty (60) days, unless said provider agrees to an alternative rate." *See id.* at 7.

130. AHCA's movement of the goal posts for all Respondents undermined the competitiveness of United's proposal.

131. AHCA may not proceed with contract awards when a Respondent gained an unfair competitive advantage, through "[a]ccess to information that is not available to the public and would assist the vendor in obtaining the contract." Section 287.057(19)(b)(1)-(2), Fla. Stat.

132. AHCA and the negotiation team's use of improper technical leveling and disclosure of United's offering to competitors tainted AHCA's intended award decisions and was contrary to competition, requiring that the intended awards be rescinded. *See* Section 120.57(3)(f), Fla. Stat.; *Mantech Telcoms.*, 49 Fed. Cl. at 76-79.

Protest Ground 9: AHCA Failed to Adequately Document its Decisions Relating to this ITN

133. The April 12, 2024 notice of intended awards lacks explanation or rationale for AHCA's decision to select the Awardees and to non-select United. *See* Ex. L. The Agency's March 27, 2024 Award Recommendation similarly lacks explanation or substantive analysis of Respondents' responsiveness, responsibility, and whether and which Respondents offer the "best value" to the State. *See* Ex. J.

134. An agency must provide adequate explanation for its decision for a tribunal to be able to independently review and determine whether the agency was justified in reaching its decision. *See South Florida Jail Ministries, Inc.*, 2000 Fla. Div. Adm. Hear. LEXIS 5340, at * 75 ("[R]eviewing courts should be concerned with whether the contracting agency provided a coherent and reasonable explanation of its exercise of discretion . . . ." (quoting *Latecoere Int'l, Inc. v. Dep't of the Navy*, 19 F.3d 1342, 1355-56 (11th Cir. 1994)); *Affiliated Comput. Servs., Inc.*, 2006 Fla. Div. Adm. Hear. LEXIS 18, at *18 (same).

1. The award decision and award recommendation lack adequate explanation of AHCA's best-value determination.

135. Procuring agencies must document and adequately explain their procurement decisions. Section 287.057, *Florida Statutes*, provides:

> The contract file for a vendor selected through an invitation to negotiate **must contain a short plain statement that explains the basis for the selection of the vendor** and that sets forth the vendor's deliverables and price, pursuant to the contract, **along with an explanation of how these deliverables and price provide the best value to the state.**

Section 287.057(c)(5), Fla. Stat. (emphasis added).

136. This requirement is not just lip-service; the Legislature in this State has determined that "documentation of the [award decisions]" and "**detailed justification of agency decisions** in

. . . procurement" is an "important means of curbing any improprieties and establishing public confidence in the process by which commodities and contractual services are procured." *See* Section 287.001, Fla. Stat.; *South Florida Jail Ministries, Inc.*, 2000 Fla. Div. Adm. Hear. LEXIS 5340, at *75 ("[R]eviewing courts should be concerned with whether the contracting agency provided a coherent and reasonable explanation of its exercise of discretion . . . . Proof that the award lacked a reasonable basis generally establishes arbitrary and capricious action." (emphasis added) (internal quotation omitted).

137. As discussed above, the April 12, 2024 Notice of AHCA's intent to award contracts contains **no** explanation or documentation about why the awardees were chosen. *See* Ex. L. The notice declares, without explanation or analysis, that AHCA "intends to award a Contract" to five of the Respondents. *See id.*

138. Similarly, the Award Recommendation offers only the following conclusory statements as to Awardees and the number of awards: "When determining best value to the State, the negotiation team placed emphasis on the Respondents' capabilities to manage whole-person care for all members of Florida's Medicaid population," and "the negotiation team recommends the minimum number of Managed Care Plans necessary to provide the best care to Medicaid members across all regions." *See* Ex. J at 9.

139. Whether a Respondent could provide "whole-person care" is not among the mandatory statutory factors for determination of best value. And there is no explanation of how the Awardees' proposed solutions represented best value to the State, much less better value than other Respondents' proposals.

140. Further, the Award Recommendation fails to indicate whether the Agency considered the additional required best-value factors under Section 287.012(4), *Florida Statutes*.

141. The inadequate explanation appears, from contemporaneous Agency records, to have been intentional: the negotiation team expressly refused to adequately explain its rationale in writing, even after the statutory requirement was explained. *See* Ex. U, 03/25/24 Afternoon TR. at 53:20-60:22; 63:6-64:5.

142. For example, the negotiation team lead expressed objections to providing best-value reasoning in writing for the Award Recommendation:

- "I thought I could just put my plans there. I didn't know I had to write out why we think they're best value. That's a conversation."
- "Like if somebody -- if the secretary wants to meet with me or legal wants to meet with me about best value, that's the conversation we would have. Why would I be writing it all down? I just don't know how you capture something like that."
- "There's 20 million best value criteria. Am I supposed to go through each one?" (To which Mr. Collins responded: ". . . no, that's definitely not the expectation.")
- "I'm not doing that. They'd have to wait another week."
- "Not doing that for 11 -- eight plans. Like, it just -- there's no way that's not feasible. And we're just going to back ourself [sic] into something if we have to do that. I don't feel comfortable doing that."

See id.

143. Another negotiator eventually agreed to "try to write a paragraph," *see id.* at 60:23-25, but as the negotiation team lead seemingly recognized, boilerplate language that merely parrots back the statutory criteria "means nothing." *See id.* at 58:19-59:2. United could not agree more: the Award Recommendation lacks an adequate explanation of the best-value determination required by law.

144. AHCA failed to provide an adequate explanation of the best-value criteria found in the ITN or any of the criteria in the Florida Statutes that were incorporated by reference into the ITN. AHCA also failed to explain the basis for the selection of any individual Respondent or an explanation of how that Respondent's proposal provides the best value to the state.

145. The boilerplate language that, according to one AHCA negotiator, "means nothing" and merely recites some of the best value criteria does not satisfy the requirements of Section 287.057, *Florida Statutes*. *See also Getty v. Fed. Sav. & Loan Ins. Corp.*, 805 F.2d 1050, 1055 (D.C. Cir. 1986) ("Stating that a factor was considered . . . is not a substitute for considering it."); *Gerber v. Norton*, 294 F.3d 173, 185 (D.C. Cir. 2002) ("And stating that a factor was considered—or found—is not a substitute for considering or finding it." (quotation omitted)); *Gresham v. Azar*, 950 F.3d 93, 103 (D.C. Cir. 2020) ("Nodding to concerns raised by commenters only to dismiss them in a conclusory manner is not a hallmark of reasoned decisionmaking."); *Wages & White Lion Invs., L.L.C. v. U.S. Food & Drug Admin.*, 16 F.4th 1130, 1137-38 (5th Cir. 2021) (rejecting agency's "statement [as] conclusory, unsupported, and thus wholly insufficient"); *United Techs. Corp. v. U.S. Dep't of Def.*, 601 F.3d 557, 562-63 (D.C. Cir. 2010) ("[W]e do not defer to the agency's conclusory or unsupported suppositions." (internal quotations omitted)).

146. Accordingly, AHCA failed to comply with its duty to adequately document and explain its award decision for this procurement.

2. AHCA failed to adequately explain and document its decision to non-select United.

147. United had the highest total evaluation score. *See* Ex. J at 4. United accepted AHCA's demands in negotiation and in the BAFO and revised BAFO phases. *See* Ex. XX, YY. In fact, United made commitments beyond AHCA's demands. *See, e.g.*, Ex XX. In addition, United had a top-end financial offering. That United was non-selected, despite being the top-

scorer and a good faith negotiator, reveals arbitrary-and-capricious conduct that is contrary to competition.

148. AHCA has provided no document explaining its rationale to non-select United—an independent decision that the Agency made during the negotiation process. That non-selection decision lacks a reasonable basis, and is arbitrary and unreasonable. *See South Florida Jail Ministries, Inc.*, 2000 Fla. Div. Adm. Hear. LEXIS 5340, at *75 ("[R]eviewing courts should be concerned with whether the contracting agency provided a coherent and reasonable explanation of its exercise of discretion . . . . Proof that the award lacked a reasonable basis generally establishes arbitrary and capricious action.").

3. AHCA did not adequately document or explain its decision to award only the minimum number of contracts.

149. Sections 409.974 and 409.981, *Florida Statutes,* grant AHCA discretion to choose how many contracts to award, but bracket that discretion within a specified minimum and maximum number of contracts for each region. *See* Sections 409.974(1), 409.981(2), Fla. Stat.

150. Although AHCA has discretion to make that determination, its decision cannot be arbitrary and must be explained adequately. *See Sci. Games, Inc. v. Dittler Bros., Inc.*, 586 So. 2d 1128, 1131 (Fla. Dist. Ct. App. 1991) (stating a public body has wide discretion when based on an honest exercise of that discretion); *see also Barton Protective Servs., LLC*, 2006 Fla. Div. Adm. Hear. LEXIS 329, at *157 (explaining that the central question when reviewing an agency decision is "whether the conclusions reached by the agency lacked a reasonable basis and were, therefore, arbitrary or capricious"); *Social Sentinel, Inc., v. State of Florida, Dep't of Educ.*, Case No. 19-0754BID, 2019 Fla. Div. Adm. Hear. LEXIS 236, at *34 (quoting *Centech Grp., Inc. v. United States*, 554 F.3d 1029, 1037 (Fed. Cir. 2009) (recognizing that "a reviewing court may set aside a procurement action if the procurement official's decision lacked a rational basis")).

151. The Agency provided no rationale for its decision to only award the minimum contracts required. Instead, it appears that the negotiation team was **instructed** to award only the minimum number of contracts required for each region. *See, e.g.*, Ex. SS, 03/01/24 TR. at 90:24-91:1 ("But we're trying to -- we've been tasked with picking the minimum amount for each region"); Ex. TT, 2/21/24 TR. 104:4-8 ("Not only do we have to select the minimum amount of plans, we also have to decide whether or not we think that they're capable of moving forward with being a plus assignment."); Ex. AA, 2/26/24 TR. at 45:1-6 ("[W]e need to select the minimum amount of plans."); Ex. ZZ, 3/26/24 Morning TR. at 83:2-17 ("Almost not want to get into the line by line . . . Just keep them high level, you know, because we were directed to pick the minimum.").

152. The objectives of the ITN include the "freedom to choose" a managed care plan, services, and programs that best suit participants' needs and the "freedom to choose" to participate in programs that will improve their health. *See* Ex. A, ITN, Attachment A at Section A(13).

153. Those objectives are not advanced by awarding the minimum number of contracts. Instead, participants will necessarily be given more freedom to choose if AHCA makes the maximum number of awards. This is "contrary to competition," as fewer contract awards "reduce[s] public confidence that contracts [we]re awarded . . . economically" and has "cause[d] the procurement process to be . . . unreasonably exclusive," Section 120.57(3)(f), Fla. Stat., because United, as the highest-scoring Respondent, will be denied the opportunity to ensure access to high-quality medical care for enrollees, who will be required to depend on the minimum number of contractors, two of which were deemed non-responsible by the express terms of the ITN and should not be awarded a contract.

154. AHCA's decision to award only the minimum number of contracts is contrary to law, arbitrary and capricious, and contrary to competition, requiring that its decision be rescinded. *See* Section 120.57(3)(f), Fla. Stat.

Protest Ground 10: AHCA Frustrated United's Protest Rights by Failing to Timely Produce the Entire Procurement File

155. United is entitled to administratively challenge AHCA's intended contract awards and to relief under Section 120.569 and 120.57(1) and (3), *Florida Statutes*, and Rules 28-106 and 26-110, F.A.C.

156. However, at this time, United has limited information regarding the Agency's selection and non-selection decisions because AHCA has not produced the entire procurement file or fully responded to United's public records requests.

157. On Friday, April 12, 2024, after AHCA's posting of the Notice of Intent to Award, United expeditiously submitted requests for public information to AHCA. *See* Ex. N.

158. On Monday, April 15, 2024, AHCA produced a tranche of public records, without any explanation other than that the records were "responsive." The records included folders of records related to "Solicitation Development," "Addenda", "Evaluation," "Negotiations," "Solicitation Questions Inbox" and proposals. The production appears to be a pre-assembled compilation of records, not collected based on responsiveness to United's public records requests.

159. As of this filing, AHCA has not explained whether it has produced all responsive records, withheld any records, or explained what efforts it undertook to search for and produce responsive records.

160. United identified several gaps in AHCA's production. There are several documents referenced in produced records that have not been produced—and the documents may be critical

to examining whether the Agency's decision-making is contrary to law, contrary to competition, or arbitrary and capricious.

161. On April 19, 2024, United sent a letter to AHCA inquiring about the completeness of the document production and requesting that AHCA provide the identified missing documents and any other documents responsive to the requests that were intentionally withheld or otherwise not produced. *See* Ex. UU.

162. On April 22 and 24, 2024, AHCA produced additional records, but still did not produce the "Best Value" folder referenced in the negotiation transcripts, among other items. *See, e.g.*, Ex. VV, 3/20/24 Afternoon TR. at 145:21-22.

163. The transcripts produced by AHCA also show that the negotiation team was communicating via email regarding the proposals, but the Agency has not produced any of those records. *See, e.g.*, Ex. LL, 3/26/24 Afternoon TR. at 102:5-16 ("Did my email on Aetna's bed hold days make sense?").

164. The Agency also collected all of the documents that were created and shared by the negotiation team in making their award decision, but United has been unable to locate most of those records in the document production to date:

> MR. COOPER: Do you want me to send you the versions of everything?
>
> MR. COLLINS: Yeah. That's fine. They need to be part of the record -- yeah, if you send them to me --
>
> ***
>
> MS. BRUCKERT: Trey, I'll send you over a new version that flags Aetna's waived copays as bed-hold days just so it matches kind of what you guys just did for rankings, too.
>
> MR. COLLINS: Perfect. Yes. All of this will be requested so it will be good to have all staged –

See, e.g., Ex. ZZ, 3/26/24 Morning TR. at 87:24-88:19

165. AHCA's failure to produce public records promptly and to produce records showing the bases for its decisions (to the extent such documents exist) have frustrated United's right to protest AHCA's intended awards under the ITN. *See* Section 120.57(3), Fla. Stat.

166. Bid protests provide a fundamental "check" on agency abuse of discretion, "are of highly remedial character, and should receive a construction always which will fully effectuate and advance their true intent and purpose and which will avoid the likelihood of same being circumvented, evaded, or defeated." *Liberty County*, 421 So. 2d at 507 (internal citation omitted).

167. Accordingly, United should be entitled to the full scope of civil discovery in the formal proceeding to adjudicate this process.

RESERVATION OF RIGHT TO AMEND AND SUPPLEMENT PROTEST GROUNDS

168. United has submitted a public records request to AHCA pursuant to the Florida Sunshine Law, Chapter 119, *Florida Statutes*, seeking documents and information relevant to the procurement and this Protest. AHCA has not, to date, produced all requested records. In addition, discovery in this action may lead to additional information. United reserves the right to amend and supplement this Protest as additional facts become known through public records or discovery.

REQUEST FOR DESIGNATION OF QUALIFIED REPRESENTATIVES

169. Pursuant to Rule 28-106.106, Florida Administrative Code, United respectfully requests that Alex Hontos and Christopher DeLong be named qualified representatives of United in the above captioned administrative proceeding. United is aware that it can be represented by counsel as defined in Rule 28-106.106, and may also elect such representation.

170. Mr. Hontos's address is 50 South 6th St. #1500, Minneapolis, MN 55402. His telephone number is (612) 492-6634 and his email is hontos.alex@dorsey.com.

171. Mr. DeLong's address is 50 South 6th St. #1500, Minneapolis, MN 55402. His telephone number is (612) 492-6759 and his email is delong.christopher@dorsey.com.

172. United respectfully requests that the AHCA grant its request to name Alex P. Hontos and Christopher A. DeLong as Qualified Representatives.

REQUESTED RELIEF

173. In light of the foregoing, Petitioner UnitedHealthcare of Florida, Inc. respectfully requests:

a. That the procurement and contracting process be stayed pending resolution of this Protest as required by Sections 120.57(c) and 409.966(4) *Florida Statutes*;

b. An opportunity to resolve this Protest through mutual agreement, as required by Section 120.57(3)(d), *Florida Statutes*, including the Agency's voluntary corrective action to award United a contract under the ITN or to reprocure the ITN;

c. If this Protest is not resolved by mutual agreement, a formal administrative proceeding and hearing to resolve the disputed issues of material fact, pursuant to Section 120.57(3), *Florida Statutes*;

d. A decision that AHCA's intended awards to Awardees are contrary to AHCA's governing statutes, rules, and policies, the ITN, or clearly erroneous, contrary to competition, or arbitrary and capricious, and that the awards arising from the ITN cannot proceed; and

e. Such other and further relief as the Agency deems necessary, just and proper, including costs awarded pursuant to Section 287.042(2)(c), *Florida Statutes*.

Dated: April 26, 2024

Respectfully submitted,

SHUFFIELD LOWMAN & WILSON, P.A.

/s/Robert Clayton Roesch

Robert Clayton Roesch
Florida Bar No. 0013931
Shuffield Lowman & Wilson, P.A.
1000 Legion Place, Suite 1700
Orlando, FL 32801
Tel: 407 581 9800
Fax: 407-581-9801
Croesch@ShuffieldLowman.com

Alex P. Hontos (MN 0388355)*
Christopher A. DeLong (MN 0398965)*
DORSEY & WHITNEY LLP
50 South Sixth Street, Suite 1500
Minneapolis, MN 55402
Telephone: (612) 340-2600
hontos.alex@dorsey.com
delong.christopher@dorsey.com
**Requested Qualified Representatives*

Attorneys for Petitioner UnitedHealthcare of Florida, Inc.