



FOLEY & LARDNER LLP

ATTORNEYS AT LAW

600 CONGRESS AVENUE, SUITE 3000
AUSTIN, TX 78701
512.542.7000 TEL
512.542.7100 FAX
WWW.FOLEY.COM

WRITER'S DIRECT LINE
512.542.7018
nbeaird@foley.com EMAIL

February 14, 2023

VIA E-MAIL

Kay Molina, Esq.
Deputy Executive Commissioner
Procurement and Contracting Services
Texas Health and Human Services Commission
HHSC_PCS_Protest@hhs.texas.gov

Re: Amerigroup Insurance Company's Protest to Texas Health and Human Services Commission Request for Proposals for STAR/CHIP Managed Care Services, RFP No. HHS0011152

Dear Deputy Executive Commissioner Molina,

Foley & Lardner, LLP represents Amerigroup Insurance Company ("Amerigroup") in connection with this protest of the Request for Proposals No. HHS0011152, released December 7, 2022, by the Texas Health and Human Services Commission ("HHSC") for STAR & CHIP Managed Care Services (the "STAR/CHIP RFP" or "RFP"). See <https://www.txsmartbuy.com/esbddetails/view/HHS0011152>. This protest to the specifications of the RFP is timely submitted,¹ in accordance with the requirements of 1 T.A.C. § 391.305. While Amerigroup challenges the specifications of the RFP and HHSC's ultimate authority to conduct the RFP as currently published through this protest, in an effort to ensure that its proposal is timely and will be fairly considered, Amerigroup will submit its proposal in accordance with the current deadline. Amerigroup urges HHSC to maintain the proposals submitted in response to the RFP sealed and unopened until such time as this specifications protest has been resolved, as the procurement flaws raised in this specification are likely to require revisions to the RFP and may necessitate the receipt of revised proposals.

For the reasons described herein, the RFP as currently published violates Texas and federal law and is anti-competitive. The RFP implicates both a Medicaid program and a non-Medicaid program; the STAR program is a Medicaid program that is governed by Texas and federal Medicaid law while the CHIP program is not a Medicaid program, and is governed by an entirely separate regulatory framework (Texas Health & Safety Code, Chapter 62 and Texas Government Code section

¹“(a) To be considered timely, the protest must be filed:(1) no later than the date that responses to a solicitation are due, if the protest concerns the solicitation...” Responses are due February 17, 2023.

AUSTIN
BOSTON
CHICAGO
DALLAS
DENVER

DETROIT
HOUSTON
JACKSONVILLE
LOS ANGELES
MADISON

MEXICO CITY
MIAMI
MILWAUKEE
NEW YORK
ORLANDO

SACRAMENTO
SAN DIEGO
SAN FRANCISCO
SILICON VALLEY
TALLAHASSEE

TAMPA
WASHINGTON, D.C.
BRUSSELS
TOKYO

February 14, 2023

Page 2

2155.144).² However, the RFP as currently drafted,³ cites Texas Government Code Chapters 531, 533 and 536, *and* section 2155.144 (best value) as the statutory provisions under which *the entire procurement* will be conducted. This is problematic because, under Texas law, the CHIP program *is not* subject to the mandatory award provisions in Texas Government Code section 533.004. As such, it appears that HHSC intends to award mandatory contracts pursuant to the RFP for both the STAR program (which section 533.004 applies to) *and* the CHIP program (which is not governed by section 533.004) in violation of the law and in an anti-competitive manner.

The improper intertwining of the two programs in the STAR/CHIP RFP violates Texas law because it would result in a hospital district Medicaid managed care organization (“MCO”)⁴ that receives a mandatory award under the STAR program pursuant to § 533.004 *also* receiving a mandatory award under CHIP. But, the CHIP program is governed by HHSC’s general procurement statutes, which require the award of contracts *only* on the basis of best value. To the extent that HHSC’s misapplication of section 533.004 to contracts under the CHIP program results in the award of a CHIP program contract to an MCO that does not represent the best value to the State as determined solely on the scoring of best value criteria, HHSC’s actions will *necessarily* violate governing Texas law. As this protest explains in detail, HHSC cannot, by fiat, effect a mandatory award provision on the CHIP side of the procurement when the Legislature has dictated that such contracts are instead to be awarded on the basis of best value.

I. EXECUTIVE SUMMARY OF PROTEST ARGUMENT

Amerigroup’s protest argument is simple and straightforward: HHSC does not have the legal authority to bundle STAR and CHIP into a single procurement that conducts evaluations and determines contract awards in a manner that results in HHSC awarding a hospital district Medicaid MCO a **mandatory CHIP award, regardless of the MCO’s relative ranking in the evaluations.**

² See Tex. Health & Safety Code §62.003. Sec. 62.003. NOT AN ENTITLEMENT; TERMINATION OF PROGRAM.

(a) This chapter does not establish an entitlement to assistance in obtaining health benefits for a child.

(b) The program established under this chapter terminates at the time that federal funding terminates under Title XXI of the Social Security Act (42 U.S.C. Section 1397aa et seq.), as amended, unless a successor program providing federal funding for a state-designed child health plan program is created.

(c) Unless the legislature authorizes the expenditure of other revenue for the program established under this chapter, the program terminates on the date that money obtained by the state as a result of the Comprehensive Settlement Agreement and Release filed in the case styled The State of Texas v. The American Tobacco Co., et al., No. 5-96CV-91, in the United States District Court, Eastern District of Texas, is no longer available to provide state funding for the program.

³ See Section 3.1.1. of the RFP at page 21.

⁴ Also referred to as a “hospital district MCO” or as “533.004-eligible.”

February 14, 2023

Page 3

The current structure of the RFP, which intertwines and intermingles the STAR and CHIP programs, will necessarily result in the mandatory award provisions applicable to STAR (as a Medicaid program subject to section 533.004) erroneously also being applied to the CHIP program despite the fact that the provisions of section 533.004 are facially inapplicable to the CHIP program. Not only is HHSC's proposed approach unsupported by Texas law, it is also anti-competitive (which violates the CHIP statute), violates HHSC's governing purchasing laws, and exceeds the authority granted to HHSC by the Legislature.⁵ If these deficiencies in the RFP are not remedied, they will expose the Executive Commissioner to a lawsuit for *ultra vires* action.

Furthermore, as currently constituted, the RFP specifications violate federal law, which requires HHSC use the same procurement methodology in its state/federal programs as it uses for other state procurements. *See* 45 C.F.R. §75.326, discussed herein. The Texas Health and Safety Code expressly requires the Executive Commissioner and HHSC in general to "...administer a state-designed child health plan program to obtain health benefits coverage for children in low-income families. The executive commissioner shall ensure that the child health plan program is designed and administered in a manner that qualifies for federal funding under Title XXI of the Social Security Act (42 U.S.C. Section 1397aa et seq.), as amended, and any other applicable law or regulations." *See* Texas Health & Safety Code section 62.051. Federal law applicable to programs, such as CHIP, that are funded in part by federal funds requires that a state conform to its own governing procurement law. Thus, in conducting CHIP procurements, HHSC must comply with applicable Texas procurement law, which requires full competition and procurement on the basis of best value. Applicable state law unequivocally *does not* include a mandatory preference under Texas Government Code section 533.004.

There is no mistaking the structural and legal infirmities in the STAR/CHIP RFP. Specifically, the RFP provides:

3.1.7.3 Service Area Assignment

SA assignments will be determined by the following method:

- a. **In each SA with only one Respondent with a Validated 533.004 Claim, the Respondent with the Validated 533.004 Claim will be assigned to the SA. (Emphasis added).**
- b. In each SA with more than one Respondent with a Validated 533.004 Claim, the Respondent with the highest Final Weighted Score of those Respondents with Validated 533.004 Claims in the SA will be assigned to that SA. All other Respondents with a Validated 533.004 Claim in the SA will be considered in the same

⁵ Such an approach would also potentially create a situation in which HHSC must, effectively, conduct *ad hoc* rulemaking to enforce the current terms of the STAR/CHIP RFP.

February 14, 2023

Page 4

- manner as Respondents without a Validated 533.004 Claim in the SA; and
- c. Following assignment of Respondents to SAs under **Section 3.1.7.3(a) and (b)**, Respondents will be assigned to SAs designated by its **Exhibit D Service Area Map and Selection Form** by order of ranked preference with a maximum total assignment of 7 SAs per Respondent except as provided in **Section 3.1.7.4 (Additional SA Assignment)**. Assignment of Respondents to SAs will proceed in descending order of Final Weighted Score, until the maximum number of MCOs per SA has been assigned as set forth in **Table 1: Maximum Number of MCOs per SA**.

See RFP at p. 30. Nothing in the foregoing takes into account the statutory provisions governing procurement under the CHIP program. The CHIP program is governed by Chapter 62, Texas Health & Safety Code, and there is no provision in Chapter 62 (or any other Texas law) that mandates award of a managed care contract for CHIP services to MCOs with a validated claim under section 533.004. Section 533.004 is instead, by its own terms and placement in the Government Code, specific to and applicable *only* to Medicaid programs such as the STAR program.

Moreover, although the Texas Health and Safety Code allows HHSC⁶ to “...coordinate the child health plan program with the Medicaid program” (*see* Tex. Health & Safety Code § 62.053(c)), the authorizing provision merely reflects that HHSC has some non-substantive administrative flexibility. By its plain terms, the coordination subsection of the statute does not and cannot bootstrap substantive requirements applicable to one program into the totally different substantive statutes applicable to another program. While HHSC may be permitted to “coordinate” the CHIP program with the Medicaid program, nothing in Texas law grants HHSC the authority to ignore substantive procurement laws governing the CHIP program in favor of applying inapplicable laws governing Medicaid procurements. The current structure of the RFP, however, results in HHSC imposing a mandatory award *on the CHIP side of the procurement* based on the substantive law governing *the STAR program*, a structure that will impermissibly disadvantage other bidders who, by law, are entitled to the award of a contract to provide CHIP services in a given service area because they provide the best value to the State in connection with those services.

The problems with the RFP, as drafted, are reflected in the fact that HHSC has published the maximum number of awards it will make for each of its 13 service areas. *See* RFP at pp. 29-30. If

⁶ HHSC is the single Medicaid entity for Texas. HHSC is also the single CHIP administrator for the State of Texas. *See* 1 T.A.C. § 370.10. However, that does not mean that the *separate* substantive requirements applicable to the STAR and CHIP programs can be substituted for one another.

February 14, 2023

Page 5

the agency decides to continue its procurement, the only legal ways it can do so is (1) to amend the RFP to either separate STAR and CHIP awards in their entirety, or (2) to clarify that when a mandatory STAR contract is awarded to a section 533.004-eligible bidder that is not *also* in the required top tier of bidders of the affected service area (the top 3 to top 5 bidders, as applicable to each particular service area), that contract will not include CHIP services, and a separate CHIP contract will instead be awarded to the next highest-rated MCO in that service area. The applicable law makes clear that the Legislature does not intend for a higher scoring MCO to be removed from a service area award for CHIP in favor of a lower-scoring hospital district MCO, yet the current RFP terms provide for precisely that unlawful result.

II. THE PROTESTING PARTY

The name and address of the protesting parties are as follows:

Amerigroup Insurance Company
2505 N. Highway 360, Suite 300
Grand Prairie, TX 75050

For the purposes of this proceeding, all communications should be directed to Amerigroup's undersigned legal counsel, Nanette Beaird, nbeaird@foley.com, John Sepehri, jsepehri@foley.com, Robert Hosay, rhosay@foley.com, and Benjamin Grossman, bjgrossman@foley.com.

III. IDENTIFICATION OF THE PROCUREMENT AND CONTRACT

The RFP was posted to the Electronic State Business Daily on December 7, 2022, and seeks responses from qualified MCOs to provide services in the STAR and CHIP programs. As explained in Exhibit H to the RFP, the programs are described as follows (section headings omitted):

STAR is a Texas Medicaid managed care program in which HHSC contracts with Managed Care Organizations (MCOs) to provide, arrange, and coordinate preventive, primary, Acute Care, Behavioral Health (BH), Non-Emergency Medical Transportation (NEMT), and pharmacy Covered Services for pregnant women, newborns, children, and parents with limited income. STAR operates under Social Security Act § 1115 as part of a demonstration project to expand the Medicaid managed care delivery system statewide.

As of January 2021, contracted MCOs participating in STAR served an estimated 3,930,310 Members statewide.

February 14, 2023

Page 6

CHIP, also referenced as traditional CHIP and CHIP Perinatal Program, is a jointly funded State-federal program in which HHSC contracts with MCOs to help Texas families obtain affordable primary and preventive health care coverage for their uninsured children from birth through the month of their 19th birthday. CHIP operates under Title XXI of the Social Security Act.

In 1999, Senate Bill 445 (S.B. 445, 76th Texas Legislature, Regular Session, 1999) authorized the State's participation in the federal CHIP. The principal objective of the State legislation was to provide primary and preventative health care to low-income, uninsured children of Texas, including children with special health care needs who were not served by or eligible for other State-assisted health insurance programs. HHSC began operating CHIP in 2000. CHIP Members currently receive CHIP services through the managed care delivery model.

In 2005, Senate Bill 1, (Article II, Health and Human Services Commission, Rider 70, S.B. 1, 79th Legislature, Regular Session, 2005) authorized HHSC to expend funds to provide unborn children with health benefit coverage under CHIP.

In January 2007, for MCOs agreeing to provide the benefit, the CHIP Perinatal Program was added to their CHIP managed care contracts. This benefit allows pregnant women who are ineligible for Medicaid due to income or immigration status to receive prenatal care for their unborn children. Upon delivery, newborns in families with income at or below the Medicaid eligibility threshold move from CHIP Perinatal Program to Medicaid, where they receive 12 months of continuous Medicaid coverage. CHIP Perinate Newborns in families with incomes above the Medicaid eligibility threshold remain in CHIP Perinatal and receive CHIP benefits for a 12-month coverage period, beginning on the date of enrollment as an unborn child. CHIP Perinatal Members are exempt from the 90-day waiting period, the asset test, and all cost-sharing that apply to traditional CHIP Members, including enrollment fees and Copayments, for the duration of their coverage period.

February 14, 2023

Page 7

As of August 2021, contracted MCOs participating in CHIP served an estimated 213,213 Members statewide.

The eligible populations for CHIP are defined in 1 Tex. Admin. Code pt. 15, ch. 370, subchs. B and D.

Throughout this document references to "CHIP" apply to traditional CHIP and CHIP Perinatal Program, unless the context indicates otherwise.

See RFP Exhibit H, Scope of Work, at pp. 1 and 2, §§ 1.1 and 1.2. Medicaid operates under Title XIX of the Social Security Act. CHIP operates under Title XXI of the Social Security Act. CHIP and STAR have different eligibility requirements and operate under different program definitions.

IV. FACTUAL AND PROCEDURAL BACKGROUND

Amerigroup currently contracts with HHSC to provide STAR/CHIP services in nine out of the 13 managed care service areas. *See* the map published by HHSC and available online at <https://www.hhs.texas.gov/sites/default/files/documents/services/health/medicaid-chip/programs/managed-care-service-areas-map.pdf>.

Amerigroup provides services as the incumbent under a prior STAR/CHIP procurement. HHSC attempted a new procurement for services under the STAR and CHIP programs pursuant to RFP No. HHS0000636, released April 6, 2018. However, HHSC later announced on March 25, 2020, that it was starting over on its STAR/CHIP procurement, as well as on its STAR+PLUS procurement, as both procurements were plagued by endemic scoring and outlier problems.⁷ This RFP represents HHSC's latest attempt to reprocur the STAR and CHIP programs.

V. DISCUSSION OF RELEVANT TEXAS LAW ON STAR/CHIP CONTRACT AWARDS AND REASONS FOR THE PROTEST

Resolution of this protest requires little more than a review of governing Texas law. That law makes clear that HHSC lacks the authority to award a "mandatory" contract for the CHIP program based upon an entity's Texas Government Code section 533.004 qualified status, because section 533.004 does not apply to the CHIP program and the laws that actually do govern CHIP do not similarly call for a mandatory contract award. As currently configured, the RFP states that Texas Government Code chapters 531, 533, and 536 apply, as well as the best value criteria in Texas Government Code section 2155.144. While the list of applicable laws included in the RFP does not

⁷ *See* <https://www.texastribune.org/2020/03/25/texas-cancels-problem-plagued-medicaid-contracts/>.

February 14, 2023

Page 8

purport to identify every applicable law, this list notably omits Chapter 62 and its requirements. While the RFP's list of governing law may be correct with respect to the STAR program, it is incorrect with respect to the CHIP program: the RFP does not mention Chapter 62 of the Texas Health & Safety Code which directly applies to the CHIP procurement (in addition to the best value criteria in Tex. Gov't Code § 2155.144). Although Texas Government Code Chapter 531 provides for administrative *coordination* by HHSC, it cannot create, override, or replace the substantive statutes governing a CHIP procurement. Those statutes are discussed in greater detail below.

A. The STAR/CHIP RFP Improperly Attempts to Import from the STAR Program an Unauthorized *de facto* Mandatory Contract Award Requirement in the CHIP Program.

The CHIP program is governed by Chapter 62 of the Texas Health and Safety Code.⁸ These laws make clear that CHIP program contracts *must* be awarded on the basis of competitive procurements. The statutes are equally clear that they *do not* contain any provision contemplating the mandatory award of a contract to any plan simply because the plan submitted a proposal. The following requirements apply to CHIP under Chapter 62:

HHSC must ensure that all CHIP contracts with a child health plan under §62.155 are procured through a competitive procurement process in compliance with all applicable federal and state laws or regulations.⁹

Per Health & Safety Code 62.051 (e), HHSC must “conduct a review of each entity that enters into a contract under Section 62.055 or 62.155 to ensure that the entity is available, prepared, and able to fulfill the entity's obligations under the contract in compliance with the contract, this chapter, and rules adopted under this chapter [Chapter 62][.]”

HHSC must award a CHIP contract to a health plan provider¹⁰ under the requirements of § 62.155:

Sec. 62.155. HEALTH PLAN PROVIDERS. (a) The commission shall select the health plan providers under the program through

⁸ “Sec. 62.001. OBJECTIVE OF THE STATE CHILD HEALTH PLAN. The principal objective of the state child health plan is to provide primary and preventative health care to low-income, uninsured children of this state, including children with special health care needs, *who are not served by or eligible for other state assisted health insurance programs.*” (Emphasis added).

⁹ Tex. Health & Safety Code § 62.155 (f)(2).

¹⁰ Tex. Health & Safety Code § 62.002(3) “‘Health plan provider’ means an insurance company, health maintenance organization, or other entity that provides health benefits coverage under the child health plan program. The term includes a primary care case management provider network.”

February 14, 2023

Page 9

a competitive procurement process. A health plan provider, other than a state administered primary care case management network, must hold a certificate of authority or other appropriate license issued by the Texas Department of Insurance that authorizes the health plan provider to provide the type of child health plan offered and must satisfy, except as provided by this chapter, any applicable requirement of the Insurance Code or another insurance law of this state.

(b) A managed care organization or other entity shall seek to obtain, in the organization's or entity's provider network, the participation of significant traditional providers, as defined by commission rule, if that organization or entity:

(1) contracts with the commission or with another agency or entity to operate a part of the child health plan under this chapter; and

(2) uses a provider network to provide or arrange for health care services under the child health plan.

(c) In selecting a health plan provider, the commission:

(1) may give preference to a person who provides similar coverage under the Medicaid program; and

(2) shall provide for a choice of at least two health plan providers in each service area.

(d) The executive commissioner may authorize an exception to Subsection (c)(2) if there is only one acceptable applicant to become a health plan provider in the service area.

(Emphasis added). There is simply nothing in any of the foregoing that imposes mandatory contract awards for bidders that do not provide Texas with best value on the CHIP program. Because the structure of HHSC's RFP does not separate awards, by program, in each service area it imposes an unlawful *de facto* mandatory award for the CHIP part of the RFP. Rather, as written, the RFP expressly calls for *a single, combined* award under *both* programs to at least one qualified 533.004-eligible MCO in a service area where such an MCO has bid. In doing so, it creates an unauthorized requirement for CHIP and violates Texas law.

B. The RFP as Designed is Anti-Competitive, Causes HHSC to Engage in *ad hoc* Rulemaking, and Puts the Executive Commission in the Position of Taking an Ultra Vires Action.

1. Applying an Unauthorized Mandatory Award Requirement to CHIP Prevents HHSC from Achieving Best Value for the State

Texas law unmistakably applies the best value standard to the CHIP program. See Tex. Gov't Code § 2155.144 (the best value statute). The Texas Government Code sets forth the specifics of a best value determination and provides that "[HHSC] shall acquire goods or services by any

February 14, 2023

Page 10

procurement method approved by the Health and Human Services Commission that provides the best value to the agency.” Tex. Gov’t Code § 2155.144(c) (emphasis added).¹¹ Additionally, the agency may consider “all relevant factors” in determining best value, including:

- (1) any installation costs;
- (2) the delivery terms;
- (3) the quality and reliability of the vendor’s goods or services;
- (4) the extent to which the goods or services meet the agency’s needs;
- (5) indicators of probable vendor performance under the contract such as past vendor performance, the vendor’s financial resources and ability to perform, the vendor’s experience and responsibility, and the vendor’s ability to provide reliable maintenance agreements;
- (6) the impact on the ability of the agency to comply with laws and rules relating to historically underutilized businesses or relating to the procurement of goods and services from persons with disabilities;
- (7) the total long-term cost to the agency of acquiring the vendor’s goods or services;
- (8) the cost of any employee training associated with the acquisition;
- (9) the effect of an acquisition on agency productivity;
- (10) the acquisition price; and
- (11) any other factor relevant to determining the best value for the agency in the context of a particular acquisition.

Tex. Gov’t Code § 2155.144(d). Furthermore, in making a best value determination for the State, “the purchase price and whether the goods or services meet specifications are principal considerations that must be balanced with other relevant factors.” Tex. Gov’t Code § 2155.074(b).¹² This fundamental principle – that HHSC must make CHIP awards that provide the state with best value – is emphasized repeatedly in HHSC’s rules and internal procurement policies. HHSC has promulgated rules in connection with its statutorily delegated purchasing authority. *See* 1 T.A.C. § 391.103(a). The purpose of HHSC’s rules is, in part, to “obtain best value when purchasing goods and services required by HHS [sic], in order to better serve Texas residents and businesses.” 1 T.A.C. § 391.011(3). In using the RFP method, HHSC’s rules specifically state that HHSC “makes an award

¹¹ Additionally, section 2155.074 requires that for any purchase of goods and services under Chapter 2155, each state agency “shall purchase goods and services that provide the best value for the state.”

¹² Notably, Chapter 2155 generally lists factors similar, but not identical, to those found in section 2155.144. *See* Tex. Gov’t Code § 2155.074(b-1). As the provision more specific to HHSC, section 2155.144 is likely to be deemed to control by a court.

February 14, 2023

Page 11

of a contract to the respondent whose proposal offers the best value for the state in accordance with Texas Government Code §2155.144.” 1 T.A.C. § 391.209(5).

The RFP states: “The goals of SA assignments are to provide best value to the State of Texas by providing Members a choice of plans in accordance with federal law, encouraging competition among plans to promote efficiency and quality of service delivery, and minimizing financial and operational risk to the State from plan performance issues or exit from the program. In order to achieve these goals, HHSC will follow the SA assignment methodology as provided by this section and **Section 3.1.7.3 (Service Area Assignment).**” *See* RFP at p. 30. Section 3.1.7.3, as written, creates an award methodology that impermissibly gives a 533.004-eligible bidder a mandatory contract not only in STAR, but also in CHIP.

As an illustration of the problems engendered by the RFP in its current form, consider the following hypothetical: The maximum number of STAR/CHIP bidders that will be awarded in the El Paso service area is three. *See* the RFP at pp. 29-30. Under the methodology set out in the current iteration of the RFP, if the El Paso hospital district MCO bids on the STAR/CHIP RFP, and is a qualified § 533.004 MCO, but does not generally rank among the top three of all bidders that applied to serve the El Paso service area, it will be awarded not only a mandatory STAR contract for the service area, but also a CHIP program contract, essentially piggybacking an illegal mandatory CHIP award onto the appropriate mandatory STAR award. Such a result does not meet the legal requirements applicable to a CHIP procurement, because at least one of the CHIP contractors would not have been procured on the basis of best value as the law requires.

HHSC’s PCS Procurement and Contract Management Handbook (“Procurement Handbook”) also emphasizes the importance of obtaining best value for the state:

“Effective procurement and contract management is a critical part of quality contracting. This helps to ensure that the state receives the best value.” P. 11, PCS Procurement and Contract Management Handbook. In fact, the vendor selection phase is conducted to “[f]airly and objectively select the vendor that provides the best value to the state.” P. 28, PCS Procurement and Contract Management Handbook. Moreover, “[e]valuation criteria are the factors the agency uses to determine which of several competing proposals submitted in response to a solicitation offers the best value for the state and would best meet the agency’s needs” and effective criteria “[a]llow the agency to rank the proposals and ultimately select the best value.” P. 47, PCS Procurement and Contract Management Handbook.

February 14, 2023

Page 12

The agency's Procurement Handbook reiterates specific criteria set out in Chapter 2155:

Purchase price and evidence that goods and services meet specifications are the principal considerations when goods and services are procured through a competitive process. It is common for there to be three to five evaluation criteria which broadly address the following:

- a. Respondent's relevant qualifications, experience and past performance (15%).
- b. Proposed approach and work plan to meet solicitation requirements (30%).
- c. Adequate staffing, organization structure, subs, and key personnel to meet solicitation requirements (15%).
- d. Proposed Key Personnel's relevant qualifications, experience, and past performance (10%); and
- e. Cost/Price (30%).

Examples of additional and more detailed evaluation criteria may be found in the best value standards found in statute. Best value standards include, but are not limited to, the following: Sections 2155.074, 2155.144, 2156.007, 2157.003, 2254.003, and 2254.027 of the Texas Government Code.

See p. 49, PCS Procurement and Contract Management Handbook. The Handbook further states: "To select the respondent that provides best value to the state, HHS agency staff conduct an evaluation of the response in accordance with the evaluation procedure published in the solicitation."

See p. 108, PCS Procurement and Contract Management Handbook. It also states: "The outcome of contract negotiation will depend on the procurement method and the items being negotiated but will always be guided by obtaining the best value for the state." *See* p. 114, PCS Procurement and Contract Management Handbook (emphasis added).

Despite the numerous and repeated references to **best value** in the RFP (*see, e.g.*, RFP at 3.1.1; RFP at 3.1.4), under the provisions of Section 3.1.7.3 of the STAR/CHIP RFP, in a service area where there is only one qualified hospital district MCO competing, that MCO would be awarded a contract to provide both STAR and CHIP services regardless of whether that MCO provides "best value" in connection with the **CHIP** program, thereby effecting a "mandatory" CHIP award in contravention of state and federal law. The way the RFP is currently constructed, HHSC is, essentially, determining best value but then ignoring the required best value calculations when it

February 14, 2023

Page 13

applies section 533.004 to instead award a CHIP contract to a lower ranked bidder in a particular service area.

Because no mandatory provision equivalent to section 533.004 is applicable to the procurement of CHIP services, HHSC has no cause – and no legal authority – to deny Texas taxpayers or CHIP recipients the benefit of the best value plans.

Texas law has long recognized that a central purpose of competitive procurements is to stimulate competition to provide the procuring agency the opportunity to select the solution that offers the best value to the State. *See Texas Highway Com. v. Texas Asso. of Steel Importers, Inc.*, 372 S.W.2d 525, 528 (Tex. 1963). Texas courts have further provided that competitive procurements must treat all bidders fairly and must be conducted in a manner that is in the best interests of the taxpayers and those that will benefit from the contracts. The Court of Appeals in *Sterrett v. Bell*, 240 S.W.2d 516, 520 (Tex.Civ.App.—Dallas 1951, no writ) held that:

‘Competitive bidding’ requires due advertisement, giving opportunity to bid, and contemplates a bidding on the same undertaking upon each of the same material items covered by the contract; upon the same thing. It requires that all bidders be placed upon the same plane of equality and that they each bid upon the same terms and conditions involved in all the items and parts of the contract, and that the proposal specify as to all bids the same, or substantially similar specifications. Its purpose is to stimulate competition, prevent favoritism and secure the best work and materials at the lowest practicable price, for the best interests and benefit of the taxpayers and property owners. There can be no competitive bidding in a legal sense where the terms of the letting of the contract prevent or restrict competition, favor a contractor or material man, or increase the cost of the work or of the materials or other items going into the project.

HHSC has promulgated rules for its procurements in 1 T.A.C. § 391 *et seq.* that further these underlying purposes while also informing how HHSC must conduct its procurements. 1 T.A.C. § 391.101 provides that the purpose of the procurement rules are to:

- (1) provide transparency to the public, the legislature, state agencies, and vendors on the procedures followed by HHSC procurement personnel;

February 14, 2023

Page 14

(2) provide for consistent and uniform management of procurement and contracting processes; and

(3) obtain best value when purchasing the goods and services required by HHS, in order to better serve Texas residents and businesses.

In addition, for requests for proposal procurements, HHSC expressly requires that the evaluation and selection process provide for the “fair consideration of [the] proposals.” 1 T.A.C. § 391.209(3).

Unless HHSC, in conducting its evaluation of all bidders (including those claiming a section 533.004 status), sets out a fair evaluation process, and applies it uniformly to *every* bidder for a CHIP award in a manner fair to all bidders, HHSC is not engaging in competitive bidding in its CHIP procurement, as it is required to do by Texas Government Code section 2155.063 and Texas Health & Safety Code section 62.055(f)(2). By bootstrapping the mandatory award provisions for Medicaid programs into CHIP, and not allowing for separate awards in each service area for the distinct programs under their respective separate substantive rules, HHSC’s RFP has failed to adhere to its own governing laws or the general mandate that fair competitive procurements be conducted.

2. The De Facto Imposition of a Mandatory Award Affecting which MCOs get a CHIP Award is Inherently Anti-competitive and, as such, Violates State and Federal Law.

As described above, governing law mandates that HHSC must award CHIP contracts on a competitive basis (*see* section 62.055(f)(2)), and on a “best value” basis, as required by Texas Government Code section 2155.144. Imposition of an unsanctioned mandatory award provision is inherently anti-competitive, and, with regard to the CHIP and best value statutes, inconsistent with the governing law. Nothing in the CHIP-applicable statutes and rules allows HHSC to “trump” a best value standard. To be certain, invoking the Texas Government Code section 533.004 mandatory provisions in the CHIP context is completely unsupported – by its own terms, that statute is applicable only to the provision of “health care services *through Medicaid managed care.*” CHIP simply *is not* “Medicaid managed care.”

Because nothing in Chapter 62 of the Texas Health & Safety Code, in Texas Government Code section 2155.144, or in other Texas law authorizes HHSC to make a mandatory award with regard to CHIP program contracts without regard to the MCO’s ranking as a result of HHSC’s best value evaluation and other CHIP contracting requirements, HHSC has not only exceeded its statutory authority, it has (perhaps inadvertently) designed an anti-competitive RFP, which will necessarily violate Texas and federal law. As noted, Texas Health & Safety Code section 62.051 requires HHSC to “...administer a state-designed child health plan program to obtain health benefits coverage for children in low-income families. The executive commissioner shall ensure that the child health plan

February 14, 2023

Page 15

program is designed and administered in a manner that qualifies for federal funding under Title XXI of the Social Security Act (42 U.S.C. Section 1397aa et seq.), as amended, and any other applicable law or regulations.”

Applicable federal law at 45 C.F.R. § 75.326, requires that that “[w]hen procuring property and services under a Federal award, a state **must follow the same policies and procedures it uses for procurements from its non-Federal funds**. The state will comply with § 75.331 and ensure that every purchase order or other contract includes any clauses required by § 75.335. All other non-Federal entities, including sub-recipients of a state, will follow §§ 75.327 through 75.335.” (Emphasis added). Both STAR (Title XIX) and CHIP (Title XXI) involve federal funds, so this federal requirement is applicable to the STAR/CHIP procurement. And, because HHSC’s procurement of CHIP services under the RFP as currently written will violate Texas state law (as described further herein), it will necessarily violate federal law as well.

3. The RFP as Currently Constructed, Exceeds HHSC’s Statutory Authority, is not included in HHSC’s “Implied Powers,” and Constitutes Prohibited Ad Hoc Rulemaking.

The RFP has other legal infirmities in addition to its anti-competitive design. As explained in *Cities of Corpus Christi v. Public Utility Com’n of Texas*, 188 S.W.3d 681, 689-690 (Tex. App.—Austin 2003, pet. denied), “[e]ven if the legislature intends that an agency created to centralize expertise in a certain regulatory area ‘be given a large degree of latitude in the methods it uses to accomplish its regulatory function,’ **an agency may not, in the guise of implied powers, exercise what is effectively a new power, or a power contrary to a statute, on the theory that such exercise is expedient for the agency’s purpose, nor may it contravene specific statutory language, run counter to the general objectives of the statute, or impose additional burdens, conditions, or restrictions in excess of or inconsistent with the relevant statutory provisions.**” (Emphasis added, internal citations omitted).

If HHSC attempts to, despite the statute’s facial inapplicability, impose the mandatory contract awards provision in Texas Government Code section 533.004 on the award of a CHIP contract in any service area, it would arguably be engaging, at a minimum, in impermissible *ad hoc* rulemaking (by somehow determining it has the authority to apply Medicaid requirements to CHIP), and not only that, it would be engaging in rulemaking that expressly violates the applicable statutes, which instead require that CHIP contracts be procured on the basis of best value. See *El Paso Hosp. District v. Texas Health and Human Services Com’n*, 247 S.W.3d 709, 713-715 (Texas 2008).

4. Attempting to Impose an Extra Statutory Requirement on Bidders, if Enforced by the Executive Commissioner, would also Constitute an Ultra Vires Act, because it would Violate the Operative Statutes.

February 14, 2023

Page 16

If the Executive Commissioner of HHSC imposes the section 533.004 Medicaid mandatory contract provision on the procurement of CHIP services, she would be acting *ultra vires*. “Action without legal authority occurs when ‘a government officer with some discretion to interpret and apply a law...exceeds the bounds of his granted authority **or if his acts conflict with the law itself.**” *Phillips v. McNeill*, 635 S.W.3d 620, 628 (Texas 2021) (emphasis added).

The agency, and the Executive Commissioner, does not, merely for the convenience of the agency, have the authority to substantively rewrite the CHIP program requirements. It simply has no discretion to make, through the specifications of its RFP, fundamental substantive changes to Texas law that alter how CHIP contracts are legally required to be awarded and dramatically alter the flow of billions of dollars. By displacing bidders who can provide best value in favor of other bidders who do not provide such value, simply because the unqualified bidders may qualify for a mandatory award in *a different* program, and when no statute gives HHSC the authority to do so, the Commissioner is clearly acting *ultra vires* and thereby casting aside her sovereign immunity shield. As explained in *Phillips*, “...an action to determine or protect a private party’s rights against a state official who has acted *ultra vires*—that is, without legal or statutory authority—is not a suit against the State that sovereign immunity bars.” See *Phillips* at 635 S.W.3d, 628 (internal citations omitted).

VI. AMENDMENT & SUPPLEMENTATION OF PROTEST

As noted above, Amerigroup timely submits this specifications protest based upon its good faith knowledge, belief, and the information currently available to it. Amerigroup reserves its rights to amend or supplement this protest based on additional information it may receive from HHSC or otherwise. In that regard, Amerigroup has submitted a Public Information Act request to obtain information regarding this procurement and reserves the right to amend this protest upon the receipt of additional relevant information from HHSC or another reliable source.

VII. RELIEF SOUGHT

Amerigroup is entitled to relief pursuant to 1 T.A.C. Chapter 391, Subchapter C and the statutes under which the rules in such subchapter were promulgated, together with the established decisional law of Texas courts and state agencies, because the terms, conditions, and specifications of HHSC’s RFP improperly conflate the substantive and procedural requirements of the STAR program with the separate and distinct substantive and procedural requirements applicable to the CHIP program – even though the legal requirements for such programs *notably differ from one another*. As such, HHSC’s STAR/CHIP RFP, as currently written, would violate state and federal law, fails to comply with the applicable state (and federal) requirements for competitive bidding, and awarding under the RFP as currently written would thus be clearly erroneous, contrary to

February 14, 2023

Page 17

competition, arbitrary, or capricious, contrary to HHSC's governing statutes, rules, or policies, and/or not in the best interests of the State of Texas and its citizens.

WHEREFORE, based upon the foregoing, Amerigroup respectfully requests:

A. That the RFP process, including the deadline for submission of bids, be stayed pending resolution of this protest;

B. That HHSC revise the terms of the RFP to comply with state and federal statutes and other legal requirements applicable to both the STAR and CHIP programs, and that HHSC thereafter proceed with its competitive solicitation in a manner that appropriately complies with both the STAR program and the CHIP program's respective governing statutes, regulations, rules, and policies, as applicable, affording bidders sufficient opportunity to consider any amendments of the RFP terms before submitting their bids in response to the revised RFP;

C. Alternatively, that HHSC determine that any contract award based on the RFP as written is arbitrary, capricious, and contrary to the STAR and CHIP programs and/or HHSC's governing statutes, rules, and policies (and other applicable state or federal requirements);

D. That HHSC provide Amerigroup an opportunity, pursuant to 1 T.A.C. § 391.07 to resolve this protest by mutual agreement of the parties;

E. That, if the protest cannot be resolved, the protest be subjected to the appeals process under Chapter 391; and

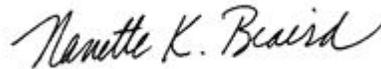
F. That Amerigroup be granted such other and further relief as is just and allowed by law.

[Remainder of page is intentionally left blank.]

February 14, 2023

Page 18

Respectfully submitted,



Nanette K. Beaird
John Sepehri
Foley & Lardner LLP
600 Congress Avenue, Suite 3000
Austin, TX 78701
Email: nbeaird@foley.com
Email: jsephri@foley.com
Tel: (512) 542-7018
Fax: (512) 542-7100



Robert H. Hosay
Benjamin J. Grossman
Foley & Lardner LLP
106 East College Avenue, Suite 900
Tallahassee, FL 32301
Email: rhosay@foley.com
Email: bjgrossman@foley.com
Tel: (850) 513-3382
Fax: (850) 561-6475

Counsel for Amerigroup