# OVERSIGHT

# DEPT. OF ADMIN., STATE HEALTH CARE PLAN, PROCUREMENT PROCEDURE, 5/1/06

Alaska State Legislature

State Capitol, Room 102
Juneau, AK 99802
Phone: 465-2689
Fax: 465-3472
Toll Free (800) 665-2689
Representative_Paul_Seaton@legis.state.ak.us

345 W. Sterling Highway
Suite 102B
Homer, AK 99603
Phone: 235-2921
Fax: 235-4008

# House State Affairs Committee

**Rep. Paul Seaton, Chair**

**May 1, 2006**

**Below are a number of questions posed by the House State Affairs Committee to the Department of Administration regarding the Premera Blue Cross/ AENTA procurement process:**

- What is the justification for assigning different evaluators (with the exclusion of one) to the two bidders?

- Why were no expert heath care consultants hired to advise the state, as had occurred in previous contract awards?

- Don't these types major procurement procedures typically take 6-9 months? These bids were submitted late December and the decision was made late February. How did this shortened time allow for an adequate review process? Doesn't this compromise the ability for a smooth transfer of insurers for employees in July? Why didn't the State start the bid process earlier?

- What is the State's responsibility for loosing a portion of AETNA's bid when the documents were in the possession of the State?

- What will be the implication to the employees of the State and the State of Alaska if the appeal by AETNA is upheld?

- Why did the State not take AETNA's offer to extend the process a few months while the appeal process was underway?

- In the absence of a consultant, can you demonstrate that you have taken all costs into consideration to show an accurate comparison of the Premera Blue Cross and AETNA bids?

Representative Paul Seaton, Chair, House State Affairs Committee

May 2nd 2006 - EXECUTIVE SESSION - House State Affairs

- Jane Pierson
- Coby Rice
- Lonie Floyd
- Iris Matthews
-

→ Checklist

→ Leg. Chge to make committee decision

→ Policy Decision

Sec. 24.25.060. Oath and penalty for violation of oath.

The president of the senate and speaker of the house of representatives and the chairman of every committee of either body may administer an oath to a witness appearing before the respective bodies. A person who wilfully swears or affirms falsely concerning any matter material to the subject under investigation or inquiry is guilty of perjury and upon conviction is punishable by imprisonment for not less than one year nor more than five years.

Within the scope of size and complexness of procurement made while you are acting commissioner:

1. What was your personnel knowledge of the process?
2. How big was this State Active and Retiree Health Plan?
3. Discussed at Staff meetings?
4. Did you talk with the contract procurement personal about the process?
5. Who made the decision not to use health contract specialist to analysis the proposals?
6. When did you first become aware that one of the major proposals – the current contract holder – bid was incomplete?
7. Who made the decision to declare the bid non-responsive?
8. During staff of informal meetings, telephone conversations or email was it discussed by or with you if Aetna should be informed before starting private negotiations with the other bidder? Did you or someone else make a decision to negotiate privately with Premera Blue Cross to align their bid with any terms of the non-responsive Aetna bid to yield a better contract for the State?

Iris Mathe
Cody Rice
Ann Peshoe
Jane Pearson

Rule 22. Open and Executive Sessions.

(a) All meetings of a legislative body are open to all legislators, whether or not they are members of the particular legislative body that is meeting, and to the general public except as provided in (b) of this rule.

(b) A legislative body may call an executive session at which members of the general public may be excluded for the following reasons:

(1) discussion of matters, the immediate knowledge of which would adversely affect the finances of a government unit;

(2) discussion of subjects that tend to prejudice the reputation and character of a person;

(3) discussion of a matter that may, by law, be required to be confidential; (4) discussion of a matter the public knowledge of which would adversely affect the security of the state or nation, or adversely affect the security of a governmental unit or agency.

(c) When a legislative body desires to call an executive session in accordance with (b) of this rule, the body shall first convene as a public meeting and the question of holding an executive session shall be determined by a majority vote of the members present.

(d) The provisions of this rule may not be interpreted as permitting the exclusion of a legislator from an executive session, whether or not the legislator is a member of the body that is meeting. A legislator not a member of the body holding an executive session shall, however, be subject to the same rules of confidentiality and decorum as pertain to regular members of the body.

In the Press Conference held on March 7th, the Commissioner stated the Department of Administration would save almost $11 million dollars in future health care costs by comparing the 2005/2006 administrative fees charged by Aetna to the 2006/2007 bid price by Premera.

First, the comparison is not valid as the administrative costs currently charged by Aetna are not equivalent to those requested in the RFP bids due in part to the issue of payment for "claim runoffs" which is not included in the RFP bid for administrative costs.

Second, the comparison, at a minimum should have compared the bid numbers between the two companies, which would drastically reduce the difference as portrayed by the Department.

But the most important comparison should be the full cost that will be charged to the State under each bid.

There are three major "costs" to the State in this contract: administrative fees for processing claims, retention of pharmacy rebates, and retention of network savings.

The three are closely interrelated because costs may be easily shifted from one to the other. In fact, the change in Premera's bid from 2/14/2006 to 2/28/2006 shows just that sort of re-arranging. For that reason, the State has normally used its consultant to compare all cost variables so that the State can more accurately determine the best overall bid price.

Based upon documents that are now publicly available, Aetna estimates that Premera's bid price for administrative services was **$25,692,984**. Aetna's bid price was **$33,205,780** for a three year period. These costs consider all three of the important elements required to complete an effective cost analysis

If the State chooses to go to a plan design with more financial incentives to utilize network providers, Premera's retention will increase significantly, raising their cost further.

Without a competent analysis by a qualified consultant, the State cannot reasonably demonstrate any savings in Premera contract. In fact, it may cost the State more.

* Hand not provided by Aetn

Progression of Premera offer to the State of Alaska

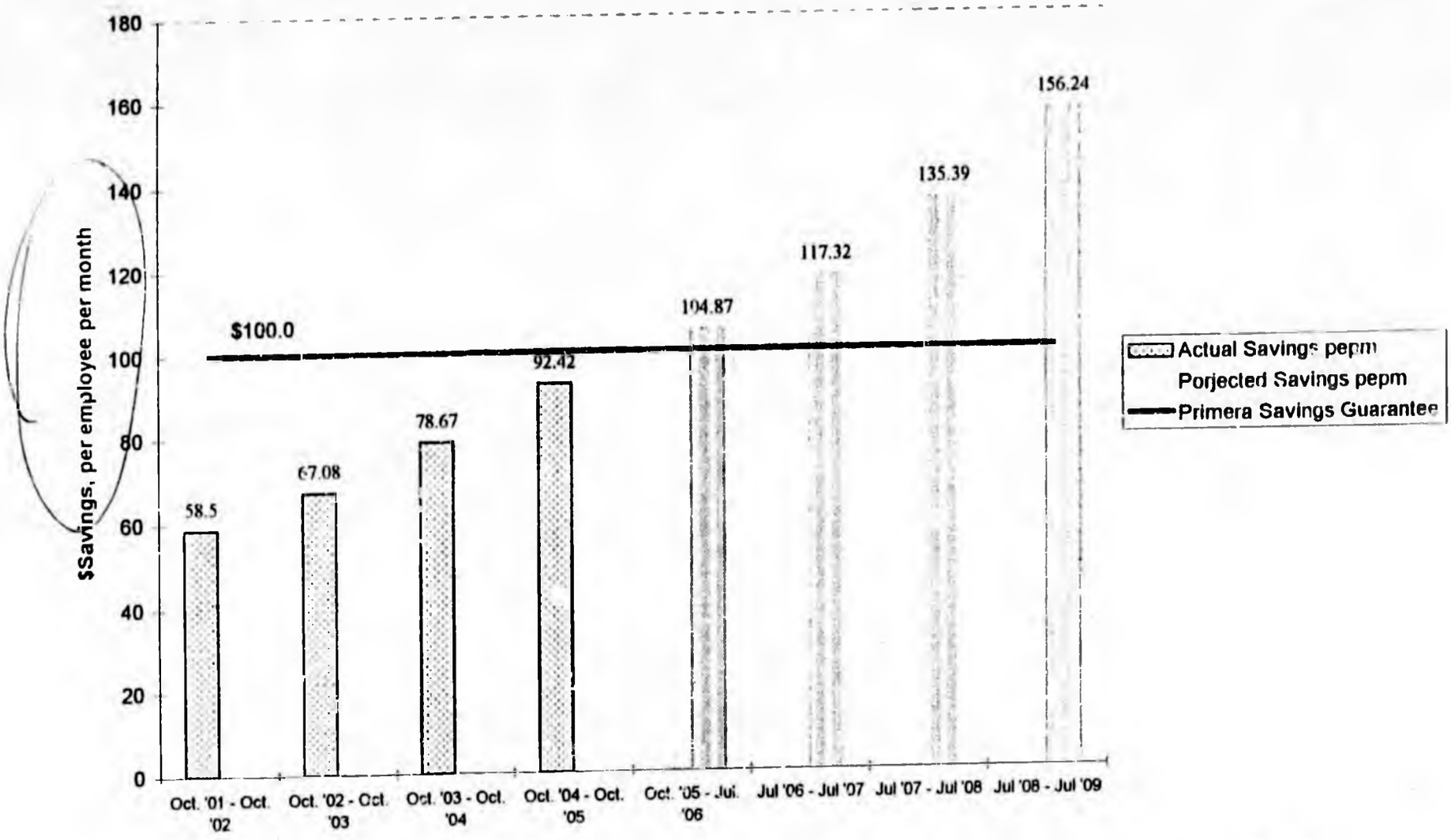
| As of February 14, 2006 | | |
|---|---|---|
| 3 year Fees: | $ | 30,951,035 |
| 3 year Network access fee: | $ | 6,880,513 |
| 3 year Rx Rebate guarantee | $ | (9,000,000) |
| 3 year network savings retained by Premera @ 12% | $ | 5,496,780 |
| Total cost to State of Alaska | $ | 34,328,328 |

| As of February 28, 2006 | | |
|---|---|---|
| 3 year Fees: | $ | 30,951,035 |
| 3 year Network access fee: | $ | - |
| 3 year Rx Rebate guarantee | $ | (9,000,000) |
| 3 year network savings retained by Premera @ 30% | $ | 13,741,949 |
| Total cost to State of Alaska | $ | 35,692,984 |

| Aetna Best and Final Offer to the State of Alaska | | |
|---|---|---|
| 3 year Fees: | $ | 32,054,652 |
| 3 year Network access fee: | $ | - |
| 3 year Rx Rebate guarantee | $ | (2,250,000) |
| 3 year network savings retained by Aetna* | $ | 3,401,127 |
| Total cost to State of Alaska | $ | 33,205,780 |

$ graph 2

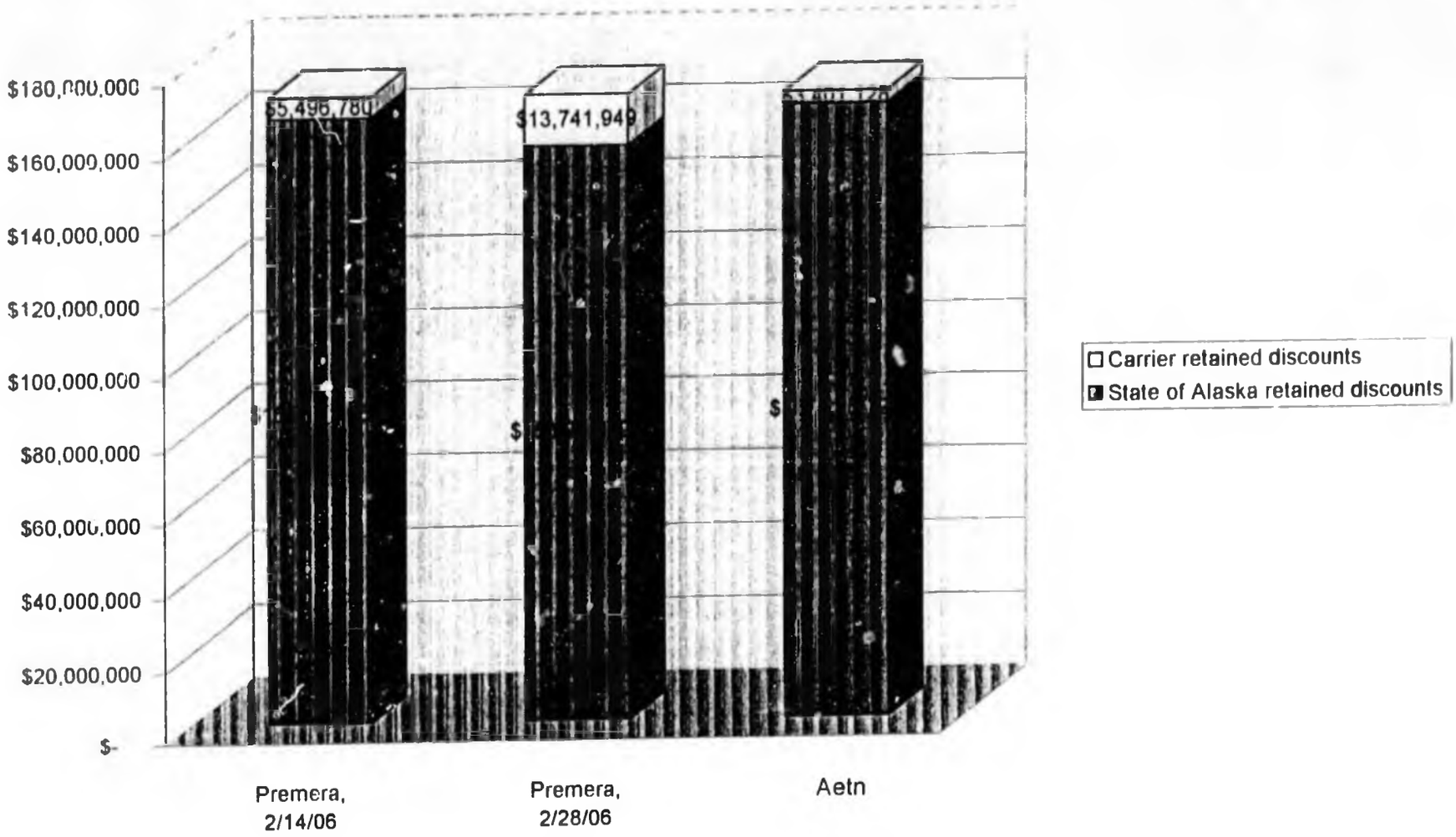
# State Of Alaska



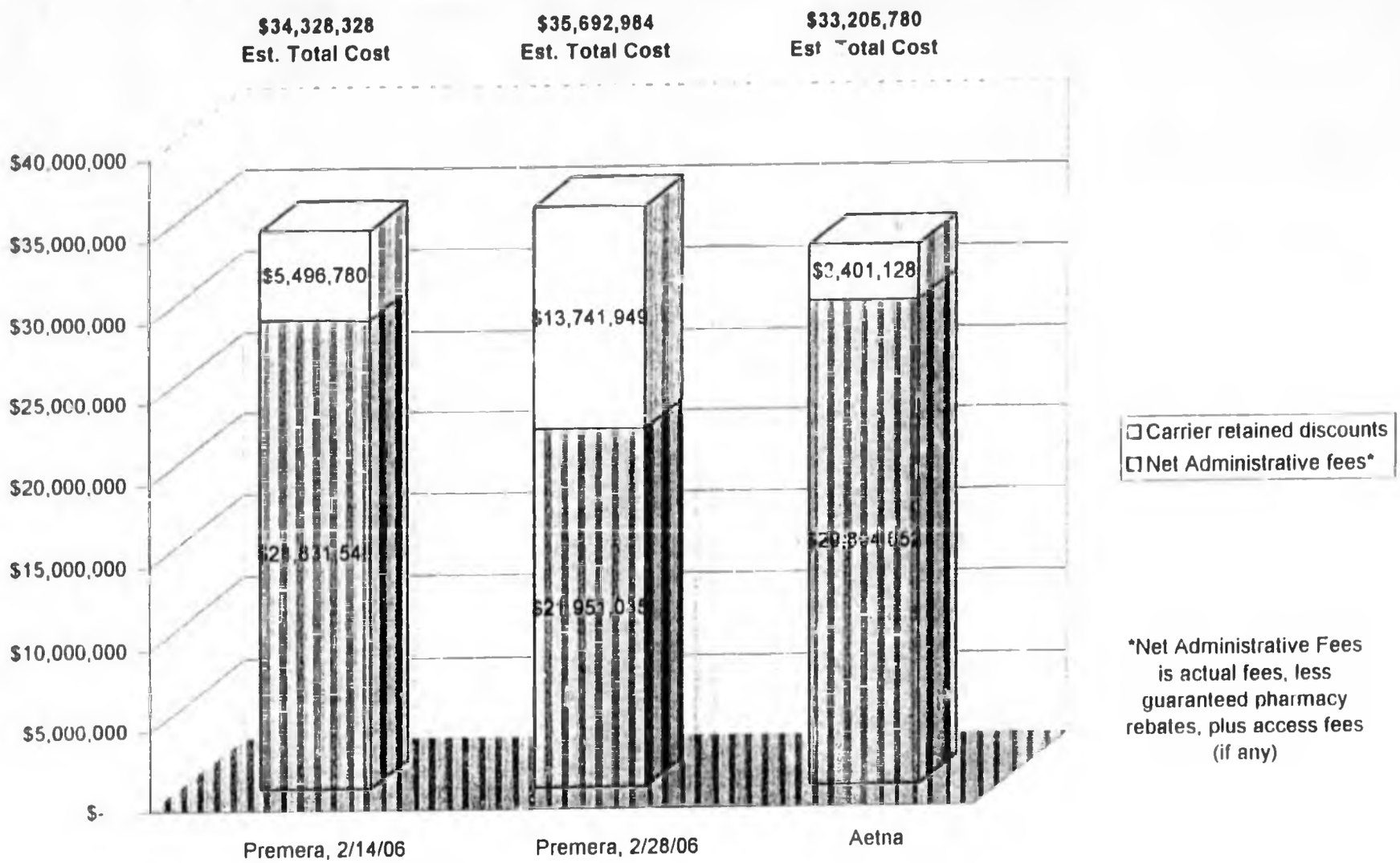



From Reed

## State of Alaska, Network Discount Savings Comparison, 3 year view



## State of Alaska, Carrier Compensation Breakdown, 3 year view




*Net Administrative Fees is actual fees, less guaranteed pharmacy rebates, plus access fees (if any)

| Savings to the State, Aetna deal | Amount retained by Aetna |
|---|---|
| $ 114.79 | $ 2.53 |
| $ 132.09 | $ 3.30 |
| $ 152.57 | $ 3.67 |

| | % increase in savings over prior period |
|---|---|
| 10/1/01-10/1/02 | N/A |
| 10/1/02-10/1/03 | 14.7% |
| 10/1/03-10/1/04 | 17.3% |
| 10/1/04-10/1/05 | 17.5% |
| 10/1/05-7/1/06 | 13.5% |
| 7/1/06-7/1/07 | 11.9% |
| 7/1/07-7/1/08 | 15.4% |
| 7/1/08-7/1/09 | 15.4% |

*Includes upside to fee g'tee plus NAP savings estimate

| | NAP: |
|---|---|
| *Current* | $ *602,485* |
| Year 1 | $ 695,268 |
| Year 2 | $ 802,339 |
| Year 3 | $ 925,899 |
| 3 year total: | $ 2,423,506 |

or meeting network savings g'tee

| | | |
|---|---|---|
| Year 1 | $ 325,874 | >> based on immature fees |
| Year 2 | $ 325,874 | >> assumed @ year 1 level, as no acutal g'tee was offered |
| Year 3 | $ 325,874 | >> assumed @ year 1 level, as no acutal g'tee was offered |
| 3 year total: | $ 977,622 | |

oined 3 year total: $ 3,401,128

| Network Savings Retained by Carrier |
|---|
| $ 5,496,780 |
| $ 13,741,949 |
| $ 3,401,128 |

Projected SOA discount savings PEPM

| Experience Period | Total $ Savings, PEPM | Savings to the State, Premera deal | Amount retained by Premera |
|---|---|---|---|
| 10/1/01-10/1/02 | $ 58.50 | $ - | |
| 10/1/02-10/1/03 | $ 67.08 | $ - | |
| 10/1/03-10/1/04 | $ 78.67 | $ - | |
| 10/1/04-10/1/05 | $ 92.42 | $ - | |
| 10/1/05-7/1/06 | $ 104.87 | $ - | |
| 7/1/06-7/1/07 | $ 117.32 | $ 100.00 | $ 5.20 |
| 7/1/07-7/1/08 | $ 135.39 | $ 100.00 | $ 10.62 |
| 7/1/08-7/1/09 | $ 156.24 | $ 100.00 | $ 16.87 |

| | Network savings totals | Retained by Premera | Retained by Aetna |
|---|---|---|---|
| Year 1 | $ 47,292,161 | $ 2,094,886 | $ 1,021,142 |
| Year 2 | $ 56,722,453 | $ 4,448,143 | $ 1,128,213 |
| Year 3 | $ 66,663,233 | $ 7,198,920 | $ 1,251,773 |
| | $ 170,677,847 | $ 13,741,949 | $ 3,401,128 |
| Total Savings | $ 170,677,847 | $ 170,677,847 | |
| Carrier retained Savings | $ 13,741,949 | $ 3,401,128 | |
| State of Alaska Retained S | $ 156,935,898 | $ 167,276,720 | |

| | Premera Lives | Aetna |
|---|---|---|
| Year 1 | 33,592 | |
| Year 2 | 34,913 | |
| Year 3 | 35,556 | |

Upside to fee f

Comb

| | Network savings totals | Retained by Carrier | Retained by SOA |
|---|---|---|---|
| Premera - Feb 14 | $ 170,677,847 | $ 5,496,780 | $ 165,181,067 |
| Premera - Feb 28 | $ 170,677,847 | $ 13,741,949 | $ 156,935,898 |
| Aetna | $ 170,677,847 | $ 3,401,128 | $ 167,276,720 |

| | Gross Fees | Rx Rebates | Access fee | Net fees |
|---|---|---|---|---|
| Premera - Feb 14 | $ 30,951,035 | $ (9,000,000) | $ 6,880,513 | $ 28,831,548 |
| Premera - Feb 28 | $ 30,951,035 | $ (9,000,000) | $ - | $ 21,951,035 |
| Aetna | $ 32,054,652 | $ (2,250,000) | $ - | $ 29,804,652 |

| | | | |
|---|---|---|---|
| 10/1/01 - 10/1/02 | | | |
| 10/1/02 - 10/1/03 | | | |
| 10/1/03 - 10/1/04 | | | |
| 10/1/04 - 10/1/05 | | | |
| 10/1/05 - 7/1/06 | | | |
| 7/1/06 - 7/1/07 | | | |
| 7/1/07 - 7/1/08 | | | |
| 7/1/08 - 7/1/09 | | | |
| | Actual Savi | Projected S. | Primera Savings Guarantee |
| Oct. '01 - Oct. '02 | $58.50 | | $100.00 |
| Oct. '02 - Oct. '03 | $67.08 | | $100.00 |
| Oct. '03 - Oct. '04 | $78.67 | | $100.00 |
| Oct. '04 - Oct. '05 | $92.42 | | $100.00 |
| Oct. '05 - Jul. '06 | | $ 104.87 | $100.00 |
| Jul '06 - Jul '07 | | $117.32 | $100.00 |
| Jul '07 - Jul '08 | | $135.39 | $100.00 |
| Jul '08 - Jul '09 | | $156.24 | $100.00 |

**Legislative Briefing on Health Care Cost Proposals**

During the hearing a series of questions were asked about certain cost elements of the evaluation, namely pharmacy rebates and network savings sharing. In response to the questions, Vern Jones indicated that rebates and network savings share were evaluated in the qualitative segment of the review process. On page 4 of his response to Aetna's appeal it appears that those items would be scored under items 7.15(Provider Discounts) and 7.18(Pharmacy Benefit Management Services). The combined weight of these two categories is 8%.

The Premera proposal involves significant dollars in pharmacy rebates and network savings share. It also appears that they may have intentionally moved money among categories in an effort to improve their scoring in the financial section while the overall cost to the State does not improve. This would allow Premera to score better in the financial evaluation where 40% of the overall weight is placed.

If you refer to the attached exhibit, you will see an estimate of the two Premera offers compared to Aetna's. This view includes administrative fees, pharmacy rebates and network savings share. A comprehensive evaluation must include all three of these categories to gain a full view of the cost picture. Failure to include all of these elements may allow a bidder to move money between the categories and improve their bid without actually improving the cost structure paid for by the State plans.

It appears Premera's initial bid (2/14/2006) involved administration fees and network access fees totaling $40,957,787. This was revised for their best and final offer (2/28/2006) to $30,951,035. Upon initial review this appears to be a significant reduction that would benefit the State. However, the initial proposal and subsequent contract include a network savings share arrangement that would allow Premera to recapture money if savings exceed a threshold. It appears that the savings share increased from 12% to 30% in conjunction with the revised administration fee. This allows Premera to recapture cost through a different mechanism. Aetna developed an estimate of what would likely be recaptured through this arrangement in both scenarios. While certain assumptions were made in developing this network share estimate, the assumptions are based upon Aetna's experience as the plan's long time administrator and established underwriting methods.

Using Aetna's estimate of network savings share it appears Premera would expect to recapture $5,496,780 with the initial offer. This increases to $13,741,949 with their best and final offer. It seems convenient that this arrangement allows them to recapture an additional $8,245,169 at a point where they claim to have reduced their fees by $10,006,752. While there was some overall improvement in the offer when all of the

necessary cost categories are considered, this combined view shows Aetna as having a superior overall offer.

By moving money between categories, it appears Premera benefited from having lower administration fees. This would allow them to score better in the cost category where 40% of the weight is placed. While they may have lost some points in the other categories, this approach certainly appears advantageous from a scoring standpoint. Unfortunately, the revised approach and improved score do not really lead to an improved cost structure for the state relative to the incumbent's (Aetna) offer.

The original basis for awarding the bid to Premera was significant cost savings. Certainly the significant disruption and turmoil caused by a short transition timeline might be justified for substantial savings. Unfortunately, the evaluation does not appear to have considered all of the relevant cost categories and a full cost comparison suggests Aetna's offer is superior.

FRANK H. MURKOWSKI, GOVERNOR

**DEPARTMENT OF ADMINISTRATION**

*DIVISION OF GENERAL SERVICES*

P.O. BOX 110210
JUNEAU, ALASKA 99811-0210
PHONE (907) 465-2250
FAX (907) 465-2189

March 21, 2006

Jon K. Tillinghast
Simpson, Tillinghast & Sorensen, P.C.
One Sealaska Plaza, Suite 300
Juneau AK 99801

Re: Protest and Request for Stay of Award
RFP 2007-0200-5946

Dear Mr. Tillinghast:

This is in response to the protest filed under AS 36.30.565, regarding Request for Proposals (RFP) 2007-0200-5946, filed by Simpson, Tillinghast & Sorensen on behalf of its client, Aetna. The protest was received by the state on March 10, 2006.

After careful review of the protest and examination of the RFP file, it is my decision to deny Aetna's protest and its request for a stay of award based on the following reasons.

Stay Request

Respecting the request for stay of the award, it is denied. AS 36.30.575 allows the procurement officer to stay an award if one of two conditions exist: 1) there is a reasonable probability that the protest will be sustained, or 2) stay of the award is not contrary to the best interests of the state. As discussed below, I do not believe Aetna's protest has merit and do not find there to be reasonable probability that the protest will be sustained. Further, the award of this contract is necessary, without delay, due to the immediacy of the need for Premera to implement the contract and because the current contract with Aetna has no authorized extensions. Thus, it is my decision that a stay of the award would be contrary to the best interests of the state.

Printed on recycled paper

Additionally, the contracting agency, Division of Retirement and Benefits, originally anticipated award of a contract resulting from the RFP would be made by February 1, 2006 (see RFP Amendment #6). It is my understanding from the contracting agency that an award needed to be made without delay in order for the winning contractor to meet the July 1, 2006 implementation date specified in the RFP. As such, the final contract award was made to Premera on March 13, 2006.

On a related point, Aetna implies that the state satisfied the requirement under AS 39.30.090(a)(5) by simply issuing the RFP and there is no deadline on completion of the RFP process. Aetna's Protest at 2. Aetna asserts that the state is thus free to extend its contract with Aetna. Aetna's citation to AS 39.30.090(a)(5) as authority to allow an extension with Aetna is off point. The issuance, evaluation and award of this RFP is required by the State Procurement Code (AS 36.30), procurement regulations (2 AAC 12), state policies and procedures, the RFP itself and the written agreement signed by Aetna (Exhibit A). Therefore, I disagree with Aetna's claim there is no deadline associated with the completion of this RFP; the state is not free to simply extend its contract with Aetna.

Protest Issues

The basis of Aetna's protest is that the state (1) violated basic principles of competitive bidding by assigning different evaluators to evaluate proposals submitted by Aetna and Premera, (2) treated the two offerors with substantial inequality in soliciting clarifications and improvements to the proposals, and (3) summarily rejected the option of awarding a stand-alone pharmaceutical claim management contract. I have responded to each section of the protest in the order presented:

**I. Introduction**

Response On page one, in footnote 1 of Aetna's protest, Aetna asserts that the "economic impact on Aetna of the loss of this long-standing business will be severe." However, Aetna fails to note that the state was required to solicit proposals for a replacement contract in accordance with the State Procurement Code (AS 36.30) because the current contract will expire on June 30, 2006, and there are no remaining renewal options. The potential for economic impact to Aetna was not caused by actions of the state, but rather by contract terms and statutory requirements to solicit competing offers and award a new contract pursuant to the procurement code.

**II. Overview**

Response: The RFP was issued November 30, 2005. It was amended six times. January 6, 2006, was set for deadline of receipt of proposals. Four proposals were received in response to the RFP. Sometime shortly after the RFP deadline, the state's original procurement officer determined that two of the proposals received were nonresponsive (Corsource and Walgreens). He also determined that critical sections were missing from Aetna's proposal and it was declared nonresponsive.

I became the procurement officer of record, on or about January 31, 2006. I reviewed the three binders (Financials, Exhibits and Samples and Brochures) known to me at that time as Aetna's proposal. I asked the previous procurement officer to ensure that the sections apparently missing from Aetna's proposal had not been overlooked or misplaced. After performing a search he assured me there were no other sections of Aetna's proposal in the state's possession. I then concurred with the prior decision that Aetna's proposal was nonresponsive as it failed to address all material items in the RFP.

On pages two and three of the Aetna's protest, Aetna implies the state should have simply called and asked "why there was such a gaping omission in its bid." Since 2 AAC 12.250 precludes the submittal of late proposals, and considering I had re-confirmed that Aetna's proposal was missing critical sections, the state did not contact Aetna because submission of missing sections after the deadline would have been contrary to regulation. As Aetna is aware, the missing sections of its proposal were contained in a separate binder and labeled "Questionnaire." This was subsequently located in a locked, sixth floor storeroom in the State Office Building where all the offers submitted in response to the RFP had been held prior to evaluation.[1] However, the separate matter of Aetna's missing binder is not a point included in the protest.

Also on page two, and throughout its protest, Aetna incorrectly refers to 60% as being the percentage that could be awarded at the discretion of the proposal evaluation committee (PEC) for non-cost factors. Per RFP Section 7.02, and RFP Attachment 1, the PEC could only subjectively evaluate 50% of the total available criteria in response to the technical sections of the proposals. The maximum percentage for cost was 40% and Alaskan Offerors received a 10% preference, both of which were calculated by the procurement officer.

[1] It was unfortunate that Aetna's binders were not labeled in a manner that would have informed the state as to the total number of binders constituting Aetna's offer (i.e., Aetna Proposal Binder 1 of 4, etc.)

The list of evaluation factors and corresponding maximum point percentages are provided below:

| | | |
|---|---|---|
| 1. Technical Proposal | | 50 percent |
| 7.03 Management Plan for the Project | 2% | |
| 7.04 Essential Administrative Services | 3% | |
| 7.05 Appeals Procedure | 1% | |
| 7.06 Vision Services | 1% | |
| 7.07 Usual, Customary and Reasonable (UCR) | 2% | |
| 7.08 Coordination of Benefits (COB) | 3% | |
| 7.09 Utilization Review | 4% | |
| 7.10 Employee Assistance Program and MMH | 3% | |
| 7.11 Reporting | 2% | |
| 7.12 Location of Work | 3% | |
| 7.13 Performance Standards | 2% | |
| 7.14 Health Flexible Spending Account (Health FSA) | 2% | |
| 7.15 Provider Discounts | 5% | |
| 7.16 Information Technology/Communication | 3% | |
| 7.17 Client Service/Experience | 3% | |
| 7.18 Pharmacy Benefit Management Services | 3% | |
| 7.19 Clinical Programs | 3% | |
| 7.20 Retail Network | 2% | |
| 7.21 Mail Order | 2% | |
| 7.22 High Deductible Health Plan and HSA Exp. | 1% | |
| 2. 7.23 Cost Proposal | | 40 percent |
| 3. 7.24 Alaska Offeror's Preference | | 10 percent |

**III. Allegation: The Division Rendered Its Non-Cost Evaluation Useless by Assigning One Evaluation Team to Grade Aetna, and then a Different Evaluation Team to Grade Premera.**

Discussion: When it was discovered that Aetna had submitted a complete proposal, the state and Aetna sought a means to have Aetna's proposal evaluated. It is not disputed that the situation was not ideal; however, the state proposed to reconstitute a PEC to the best of its ability. The paramount issue here is that Aetna signed an agreement (Exhibit A) that allowed different evaluation teams to evaluate proposals

submitted by Aetna and Premera. However, after seeing the results of such action, Aetna now attempts to disavow the process it agreed to.

On Wednesday, February 21, 2006, the day after Aetna's missing proposal binder was found, the state and representatives of Aetna and Premera discussed potential alternatives to accomplishing a meaningful evaluation of Aetna's proposal (after the initial award to Premera and Premera's price was disclosed). The fact that Aetna had the advantage of knowing Premera's best and final offer price was also discussed.

On February 21st, the day that Aetna's proposal binder was located, two of the original PEC members that evaluated and scored Premera's proposal in the initial evaluation process were unavailable (Sheri Gray and Michael Williams). One was out of the country for two weeks and another was out of the office for about a week. Another member of the original PEC (Kerry Jarrell) works for the Bering Strait School District in Unalakleet, Alaska. It was impractical to mail Aetna's proposal to Mr. Jarrell, as that would have delayed the evaluation process further. In the end, only two of the original five PEC members that had evaluated and scored Premera's proposal in the initial evaluation process were immediately available (Freda Miller and Pat Shier).

On February 23, 2006, Aetna signed an agreement that addressed, in part, the following areas:

- **Aetna's proposal would be evaluated by three state employees, two of whom were on the original PEC that scored Premera's proposal in the initial evaluation process.**

  As explained above, only two of the original PEC members that evaluated and scored Premera's proposal in the initial evaluation process were immediately available.

  Aetna agreed that a reconstituted, or different, PEC would evaluate and score its proposal. Freda Miller and Pat Shier were included since they were on the original PEC that scored Premera's proposal in the initial evaluation process and both were immediately available. Judy Porter, a state DOT PF employee in Juneau, was added to the committee. Mr. Shier, being an original member of the PEC that evaluated and scored Premera's offer (although he did not participate in the final round of scoring of that proposal), was familiar with the RFP and the evaluation criteria. And, he was available to immediately participate in the evaluation of Aetna's proposal as a member of the

reconstituted PEC. Mr. Shier had fully read and actually "scored" a substantial portion of the technical categories in Premera's offer. As such, he was considered by the state to be an evaluator of Premera who had been on the original PEC. And, under the circumstances of which the parties were attempting to have Aetna's proposal evaluated and scored as soon as practicable, utilizing as many of the original five PEC members was in the best interests of all involved, including Aetna.

Aetna's proposal received a total technical score of 2,030 out of 2,500 available points from the reconstituted PEC. The proposal submitted by Premera, previously scored by the original PEC, had an existing technical score of 2118.5. It is important to note that the net effect of using a newly comprised PEC to score Aetna's proposal occurred as a direct result of the proposal evaluation process Aetna agreed to in writing (Exhibit A). It is further notable that Aetna's technical score improved by only 21.5 points as a result of the best and final scoring process addressed below.

- **If, after evaluation and scoring, Aetna's proposal was determined to be responsive and reasonably susceptible for award, a date and time would be set for receipt of best and final offers from both Aetna and Premera.**

Aetna's proposal was determined to be reasonably susceptible for award on February 23, 2006. Tuesday, February 28, 2006, noon Alaska Time, was set for the receipt of best and final offers from both Aetna and Premera.

On page five of its protest, Aetna states it agreed to the evaluation process because 1) the evaluation did not involve direct comparability of scores between Aetna and Premera, but only passage of a "susceptibility" threshold; and 2) only one evaluator was being substituted from the original PEC, not two.

Response: It would not have been possible for the state to determine Aetna's "susceptibility for award" under 2 AAC 12.290 without the direct comparison of scores between Aetna and Premera since the RFP utilized a numerical rating system (see 2 AAC 12.260). Also, both Ms. Miller and Mr. Shier were on the original PEC that scored Premera's proposal in the initial evaluation process, as required by the agreement Aetna signed on February 23rd. Therefore, only one evaluator was added (Ms. Porter).

- **The state would disclose Aetna's exact proposal price to Premera and disclose Premera's exact price to Aetna.**

  Aetna and Premera agreed to the disclosure of certain pricing information not normally allowed. As Aetna is well aware, the state had previously disclosed Premera's price of approximately $34 million to Aetna after the initial notice of intent to award was issued by the state. The disclosure of Premera's best and final offer price to Aetna occurred the morning of February 21, 2006, shortly before the state found the final Aetna binder, which resulted in the Notice of Intent being rescinded. At that time, Premera's original proposal price and its best and final offer price was available for public inspection, Premera's proposal price was not disclosed to Aetna; only its best and final offer price. On page three of the protest, Aetna states that when best and final proposals were opened, the cost of the two responsive proposals (submitted by Aetna and Premera) "was virtually identical." I disagree. Premera's cost was $1,103,617 lower than Aetna's cost. This is a significant amount. As such, Premera received 2,000 points for cost and Aetna received 1,931 points. Cost points are determined by a mathematical formula as described in the RFP (see pages 18 and 19 of the RFP, copy attached.).

  It must be noted that Aetna's original cost proposal indicated a grand total for contract years one through three of (a) $49,163,735 based on mature service fees, and (b) $45,387,171 based on illustrative immature service fees. The state was unable to discern the difference between these two total prices. As such, Aetna was required to submit a single cost proposal in its best and final offer, which it agreed to do.

  After holding discussions authorized under AS 36.30.240 with both parties and with Aetna having the benefit of knowing Premera's price of $34,077,274, Aetna reduced its price offer from $49,163,735 / $45,387,171 (in its original proposal to $32,054,652 in its best and final offer).

- **Discussions under AS 36.30.240 with Aetna and Premera would occur Friday, February 24th and a date and time would be set for receipt of best and final offers from both offerors.**

  The state held discussions with both offerors pursuant to AS 36.30.240. Three pages of clarification discussion topics were sent to Aetna. On February 28th, Aetna submitted its best and final offer.

Only one page of clarification discussion topics was sent to Premera since, as Aetna knew the state had already held discussions with Premera once before. The three items discussed were:

RFP Section 7.23, Cost Proposal
Premera was allowed to submit another cost proposal.

RFP Section 7.03, Management Plan for the Project
The state asked Premera to provide a single list of costs and fees that would be billed separately from the fees contained in the cost proposal (Aetna was asked the same question during discussions).

RFP Section 7.15 Provider Discounts
The state asked Premera whether it could bill a fee associated with Premera's network discount in a different manner.

The last two items were not specifically addressed in the PEC evaluation form and scoring criteria contained in RFP Attachment J. Therefore, it was anticipated that Premera's cost proposal, if it chose to submit one, was the only section of its best and final offer that would require scoring.

- **After receipt of best and final offers from Aetna and Premera, both proposals would again be scored; a new notice of intent would then be issued to the winning offeror.**

Scoring occurred at this stage and a new Notice of Intent was issued to Premera based upon best and final offer scoring. Costs for each best and final offer were scored. Premera received 2,000 points for cost and Aetna received 1.931, as dictated by the scoring formula contained in the RFP.

. has been a longstanding practice that when the state receives best and final offers, only the changes addressed in the offer are scored (if required), not the entire proposal. As such, costs for each proposal were scored and the sections of Aetna's best and final offer that altered its technical proposal were scored by the reconstituted PEC, resulting in a 21.5 point total increase.

After the PEC scored Aetna's best and final offer and the procurement officer recalculated the points allotted to cost for both proposals, Premera's total score exceeded Aetna's total score by 136. It was not necessary for the PEC to score the technical section of Premera's best and final response.

Premera responded to all three items as requested by the state during discussions. That is, under RFP Section 7.15 Premera eliminated the network fee entirely and under RFP Section 7.03 Premera stated that there were no additional fees contained in the cost proposal. Under RFP Section 7.23 Premera submitted a new cost proposal which was scored by the procurement officer.

In addition, Premera guaranteed that the total pharmacy rebates received by the State of Alaska would be $3.0 million for each contract year, included an additional 45 hours of training and doubled the dollars at risk in the performance guarantees section. It was not necessary to score these sections since they resulted in substantial improvement to Premera's proposal and since Premera was already ahead of Aetna in scoring. Additionally, these items were not specifically addressed in the PEC evaluation form and scoring criteria in RFP Attachment 1, except for possibly the immaterial addition of 45 additional training hours (ref. RFP section 10.18 h).

I believe the state followed the evaluation process that is customarily performed, as well as being the process agreed to by Aetna and Premera.

Aetna states on page three of the protest, "Points were awarded based on how individual evaluators liked, or disliked, the proposer's approach to a host of issues". This is a misstatement of fact. Each PEC member awarded points based on their independent judgment and in accordance with the PEC evaluation form and scoring criteria in RFP Attachment 1. There is no evidence to the contrary and none is inferred. This is speculation by Aetna.

Aetna states on page five of the protest that it agreed the state would first make a threshold call as to whether Aetna's proposal was reasonably susceptible for award and if Aetna passed that test a subsequent evaluation of new "best and final offers" would be made. That is the exact process the state followed. There is no basis to find the state committed a legal or procedural error.

**IV. Allegation: The Division Created the Appearance of Coaching Premera to Improve Its Score, but it did not Extend Similar Courtesies to Aetna.**

Aetna alleges the state did not afford Aetna "fair and equal treatment with respect to any opportunity for discussion and revision of proposals" under AS 36.30.240(a) and didn't help "Aetna improve its proposal to the same extent as it already had with Premera."

Discussion: Throughout its protest, Aetna mischaracterizes the clarification and discussion processes outlined in the State Procurement Code and Alaska Administrative Code, as well as the process followed by the state with respect to this RFP.

Under 2 AAC 12.285, the state may communicate with offerors in order to clarify uncertainties or eliminate confusion concerning the contents of a proposal. Under AS 36.30.240, discussions may be conducted for the purpose of clarification to assure full understanding of, and responsiveness to, the solicitation requirements. Also, proposal revisions may be submitted under a best and final offer.

The state combined the clarification and discussion processes into a single phase when it held discussions initially with Premera and again when AS 36.30.240 discussions were held with both Premera and Aetna. In each instance, the PEC members developed the specific list of items that were clarified and discussed with each offeror based on their review and evaluation of the proposals. Additionally, before evaluating the proposals, each PEC member received instruction regarding the purpose and intent of Clarification of Offers (RFP Section 2.06) and Discussions with Offerors (RFP Section 2.07).

I believe Premera and Aetna were afforded "fair and equal treatment with respect to any opportunity for discussion and revision of proposals" as required by AS 36.30.240. However, that does not mean the state must discuss the exact items, or the same number of items with each offeror. Such an interpretation is unreasonable considering the variety of RFPs issued by the state and the fact that offerors respond to RFPs in different manners proposing a variety of solutions.

Further, as noted on the first page of Aetna's protest, it is reasonable to conclude that a PEC would have fewer items to clarify and discuss with Aetna, who is the current contractor and has been the provider of the services covered by the RFP for the last 24 years.

Aetna states on page 7 of its protest that the extensive discussions with Premera had the effect of giving Premera detailed advice on how to:

- retract portions of their proposal which, absent a retraction, would leave Premera's proposal unresponsive to the RFP;
- insert items required to be included in the RFP, but originally omitted by Premera, or
- suggest available contract administration measures that could result in lower cost, or increased evaluator attractiveness, and hence higher point scores.

This is an inaccurate portrayal of the state's discussions with Premera. The same conditions apply to the list of clarification and discussion items submitted to Aetna (Aetna protest attachment 3).

On page 7 Aetna also states, "The Division took 62 pages to suggest and elicit specific changes to Premera's original proposal; conversely, the Division made only three pages of minor, technical suggestions to Aetna." Here, liberties are taken to mix the facts. A table on page 8 of Aetna's protest includes this improper comparison.

While the evidence shows there were more items clarified and discussed with Premera than Aetna, the reference to three pages of suggestions to Aetna (attachment 3 to Aetna's protest), excludes Aetna's response. The reference of 62 pages of Premera's clarification to suggest and elicit changes to Premera's original proposal, attachment 4 to Aetna's protest, includes Premera's response.

Examples are provided on pages 9 - 11 of the brief in an attempt to show how apparent inequalities emerged during the state's discussions with Premera and how the state asked Premera to "clarify" points that needed no clarification because, according to Aetna, Premera "unequivocally rejected a condition of the RFP."

One example is specifically detailed on page 10 of the brief. That particular section of Premera's proposal is provided below:

---

a) Administration

i) Customer Service ☐Agree ☒ Disagree

Standard: 85% of telephone calls will be answered within 30 seconds in any given month.
Agree.

Measurement: The offeror will provide the State with its customer service telephone access reports on a monthly basis specifically identifying performance in this area.
Agree.

Amount at risk: $700 for each 1% deviation from target measured monthly, up to a maximum of $7,000 monthly.

Disagree. $7,500 for each 1% deviation from target measured annually, up to a maximum of $90,000.

---

As you can see, Premera checked the "disagree" box. However, immediately below the first item Premera typed "Agree." At the bottom, Premera apparently "disagreed" with the $700 amount at risk - offering $7,000, and "disagreed" with the $7,000 maximum penalty - offering $90,000. It seemed that Premera had agreed with the standard to answer 85% of the telephone calls within 30 seconds, but wanted to increase the penalty amount, which was in the state's best interest (i.e. Premera was subjecting itself to an even greater monetary penalty if it failed to meet this standard). Contrary to Aetna's assertion, this is a perfect example of an item that could be clarified or discussed.

A similar example is found in Aetna's original proposal. Under RFP Section 7.13 c), iv), Aetna checked the disagree box. Since Aetna currently pursues refund overpayments under the existing contract, the state asked Aetna the following question during discussions:

*Considering that Aetna is currently pursuing refund of overpayments in excess of $50, please clarify why Aetna disagreed with this section and proposed two performance guarantees in place of the guarantee outlined in this section.*

As a result of Aetna's response to this question in its best and final offer, Aetna received an additional 5 points.

Aetna mentions, in a similar vein, that Premera clearly declined to offer direct deposit in its original offer, but was convinced by the state to change its mind. Aetna's response to the same item, RFP Section 7.16 c), is provided below:

---

a) Can you offer direct deposit of participant benefit reimbursement?

If yes, for which benefits covered by this proposal?

Yes ☐ No ☒

---

Although, Aetna had "unequivocally rejected a condition of the RFP" (a term used to characterize the same action by Premera), the state asked Aetna the following question during discussions:

*Please clarify that although the No box was checked, that Aetna does currently offer EFT to providers in lieu of a mailed EOPP check and that under the Health FSA that the auto-debit payment method to providers could be utilized. Are these service included as part of Aetna's proposal?*

As a result of Aetna's response to this question in its best and final offer, Aetna received 10 additional points.

Additional examples are included in Mr. Wiggins' affidavit under items 23 – 28 in the apparent attempt to infer some form of impropriety concerning the state's discussions with Premera. However, these examples clearly fall under normal topics of clarification and discussion allowed under AS 36.30.240 and similarities can be found in the state's discussions with Aetna as to its proposal. Overall, this shows the offerors were treated equally as required under AS 36.30.240.

Page 10 of the protest states that the Division suggested some "re-packaging" of nearly $6 million of "network access fees" as some other kind of charge and that by agreeing to not call these charges "access fees," Premera was able to lower the cost side of its bid by $6 million.

Premera had initially proposed a network access fee of $5.51 per employee per month (PEPM) that would be billed as a claim charge. I have not researched Aetna's claim that the value of this PEPM charge would have totaled $6 million. In any event, the state's Benefits Manager was concerned that the $5.51 PEPM fee would artificially inflate the actual cost of claims and cause reporting issues. As such, during discussions the state asked Premera whether it was possible "to bill this fee or cost in a different manner, rather than adding the amount to a claim." Premera made adjustments in its best and final offer and was able to eliminate the fee entirely. This so called "re-packaging" is analogous to Aetna's reduction of pharmacy rebate guarantees in its best and final offer. Aetna originally proposed a $3.5 million minimum guarantee for pharmacy rebates. However, after discussions, Aetna reduced the state's guaranteed pharmacy rebate to $750,000 per year, which apparently enabled Aetna to reduce its cost proposal accordingly.

Aetna asks on page 12 of the protest whether the state could have gotten the best deal by engaging in the same discussions with Aetna that it had with Premera, but then Aetna states "we've no idea because equality of treatment never occurred." Once again, the incorrect notion is advanced that the state must clarify and discuss the exact same items, or the same number of items with each offeror. Nowhere do our procurement statutes, regulations, policies, or past practice dictate that the state do so.

Also on page 12, Aetna characterizes the evaluation process as "doomed to inequity from the onset" because the state considered Premera the only qualified bidder up until Aetna's missing proposal binder was located, and one might expect a government agency to communicate exclusively with the only bidder who was qualified for the contract, as the state thought at the time. This observation must be viewed in light of the fact that before Aetna signed the agreement (Exhibit A) that allowed the evaluation

process to proceed as it did. And, Aetna knew the state had dealt exclusively with Premera as the only responsive offeror up to that point. There is basis to conclude the process was "doomed." The state proceeded in good faith under the process agreed to by the parties under Exhibit A.

Finally, an after-the-fact suggestion is made on page 13 of the protest. Aetna alleges the state should have retained a qualified consultant to make sure that a level playing field was created when the missing Aetna binder was found so it could conduct a fair and reliable comparison of the two bids. The day after Aetna's proposal binder was located the state openly developed an evaluation process with an agreed to jointly by Aetna and Premera. The goal was to enable the evaluation process to continue. Aetna was a party to those discussions and signed the final agreement. At no time (until the protest) did Aetna suggest participation of an outside consultant. This protest point is without merit.

**V. Allegation: The Division Failed to Separately Evaluate the Splitting-out of Pharmacy Claim Management Services under a Different Contract, with a Different Contractor.**

Discussion: Aetna is correct the state did not evaluate proposals submitted under Section 9 of the RFP, Pharmacy Network and Benefit Management only.

On February 27, 2006, in accordance with AS 36.30.350 and 2 AAC 12.860, the state properly rejected all proposals received for RFP 2007-0200-5946, Claims Administration and Pharmacy Benefit Management only, under Section 9 of the RFP (Exhibit B).

Under the RFP, offerors were allowed to submit proposals for each RFP Section under the following scenarios:

Section 7 - All Services, or
Section 8 - All Services except Pharmacy Network and Benefit Management, or
Section 9 - Pharmacy Network and Benefit Management only.

In essence, award could be made to a single offeror for Section 7, all services, or up to two contracts could be awarded for Sections 8 and 9. The RFP stated that each scenario would be evaluated for the best value to the state, considering price and technical factors, and that a PEC would score the proposals according to predetermined criteria.

However, the RFP scoring methodology is flawed. It was not possible to compare a proposal submitted for all services under Section 7 to two proposals submitted under the Section 8 and 9 combination.

The scoring criteria for each of the three RFP sections (Exhibit C) indicates that the total possible score for Section 7 is 5,000. However, the combined scores for Sections 8 and 9 total 10,000. The RFP does not describe how the PEC would reconcile this point difference when comparing a single proposal for Section 7 to separate proposals for Sections 8 and 9.

Further, Sections 8 and 9 contain duplicate scoring criteria for "Management Plan for the Project" and "Essential Administrative Services." Each proposal would have to be scored according to these criteria. Therefore, there would be four separate scores under the multiple award combination (Sections 8 and 9), but only two scores for the single award scenario (Section 7). In addition, the maximum possible score for these two areas is 250 points under Section 7, while the score could reach 1,100 points for the same criteria under Sections 8 and 9.

In addition to the scoring discrepancies cited above, there are multiple instances where the maximum possible scores for the same criteria are not equivalent:

| | |
|---|---|
| 7.07 Usual, Customary and Reasonable (UCR) | 100 |
| 8.07 Usual, Customary and Reasonable (UCR) | 150 |
| | |
| 7.11 Reporting | 100 |
| 8.11 Reporting | 150 |
| | |
| 7.12 Location of Work | 150 |
| 8.12 Location of Work | 200 |
| | |
| 7.13 Performance Standards | 100 |
| 8.13 Performance Standards | 150 |
| | |
| 7.14 Health Flexible Spending Account (Health FSA) | 100 |
| 8.14 Health Flexible Spending Account (Health FSA) | 150 |
| | |
| 7.16 Information Technology/Communication | 150 |
| 8.16 Information Technology/Communication | 200 |

| | |
|---|---|
| 7.18 Pharmacy Benefit Management Services | 150 |
| 9.05 Pharmacy Benefit Management Services | 350 |
| 7.19 Clinical Programs | 150 |
| 9.06 Clinical Programs | 500 |
| 7.20 Retail Network | 100 |
| 9.07 Retail Network | 450 |
| 7.21 Mail Order | 100 |
| 9.08 Mail Order | 450 |
| 7.22 High Deductible Health Plan and HSA Experience | 50 |
| 8.18 High Deductible Health Plan and HSA Experience | 150 |

It was not possible to reconcile these scoring discrepancies and compare these two scenarios without making a material change to the RFP evaluation criteria.

The RFP stated on page ten, "wherever possible, the State seeks to reduce administrative costs by awarding multiple features to a single contractor." In this instance, the award of a single contract would reduce costs when considering the burden of administering two separate contracts, one for Pharmacy Network and Benefit Management and one for all other services required under RFP 2007-0200-5946. This opinion is shared by the state's Benefits Manager.

For the record, the score sheets attached to the protest under Chart 1 are inaccurate. Some minor errors appear to be caused because a different averaging or rounding method was used. However, the second chart titled PREMERA'S FIRST EVALUATIONS SCORES lists an average of 1,379.5 points. That amount should be 1,489.5. It appears the error initially occurred on the following page because Williams' scores were not included in the calculation.

The table attached to the protest titled REBATES INTEGRATED PHARMACY Rx PREMERA – COMPARED TO AETNA INTEGRATED RX REBATES UNDER SECTION 9 is highly speculative at best. The reason is that Premera did not submit a separate proposal for RFP Section 9. In addition, any award under Section 9 would have been combined with an award under Section 8. In Aetna and Premera's initial proposals, both appeared to charge a premium for services provided under Section 8. Because of these discrepancies, the state did not validate the referenced rebates or annual estimates.

The state also did not validate the calculations and estimates used under the "Progression of Premera offer to the State of Alaska" document that was attached to the protest.

One final issue to be addressed is Mr. Wiggins affidavit where he asserts the state "has only provided us with evaluation notes that appear incomplete and confusing." My records show that on March 1, 2006, the state provided Aetna's lobbyist with a complete set of the score sheets and evaluation notes. On March 6th, Mr. Wiggins called and complained that the information provided to Aetna contained errors. The state offered to walk through the alleged errors with Mr. Wiggins in order to identify any discrepancies. Mr. Wiggins replied that he didn't have the copies available because they had been sent to his legal firm and he only had an email from the firm that discussed the errors. It appeared to the state, based on Mr. Wiggins' description of the errors, that Aetna had somehow mixed up the score sheets. In any event, that same day the state provided Mr. Wiggins with another complete and accurate set of the score sheets that had been verified by the state. One more complete and accurate set of the score sheets and evaluation notes are attached to this protest response (Exhibit C).

The Corrective Action Was Agreed To by Aetna; No Prejudice to Aetna; State Acted in Good Faith

The state took appropriate corrective action in this procurement when the error concerning the completeness of Aetna's proposal was discovered. And, it took the corrective action only after coming to an agreement with Aetna and Premera (Exhibit A). Further, the corrective action was performed in a manner that was not prejudicial to Aetna. In fact, Aetna can only be said to have benefited from the corrective action. It had the benefit of knowing Premera's first round of best and final price; a price that was approximately $13 million less than Aetna's originally proposed offer when it (Aetna) had the chance to make its best and final offer.

What Aetna has "not" argued or shown, is that the state's decision -- after going through the "agreed to" evaluation process and the second round of best and final offers - had no reasonable basis to support the award to Premera. In order to show that the state's action was arbitrary or capricious or otherwise inconsistent with law, Aetna must how that the state's action was prejudicial to Aetna. *SDS International v. United States*, 48 Fed. Cl. 742 (Feb. 21, 2001). Aetna also fails to note that the state is entitled to broad discretion in evaluating proposals in a "best value" procurement, as here. *Id.*

Also, Aetna has not shown that it would have been awarded the contract if the corrective action had not been taken. To show prejudice, Aetna must demonstrate that there was a reasonable likelihood that, absent the corrective action complained of here, it would have been awarded the contract. *Id., citing Alfa Laval Separation, Inc v. United States*, 175 F 3d 1365, 1367 (Fed Cir. 1999).

Aetna's complaint that it would have not participated had it known that Pat Shier's scores of were not part of the final tally of Premera's scores is also without merit. Aetna agreed to a "differently constituted" PEC and the state provided two of the original five that evaluated Premera's offer. The third member of the new PEC was entirely new to the process. Aetna has not proven that there was any bias in favor of Premera on the basis of the make-up of the reconstituted PEC. In fact, Aetna has asserted no credible evidence to support even a presumption of bias by the PEC or any individual member. *See Galen Medical Associates, Inc. v. United States*, 369 F 3d 1324, 1331 (2004) (to establish prejudice, protestor must show there was a "substantial chance it would have received the contract but for that error.") (citations omitted). Aetna apparently only wanted to participate in the corrective action process it agreed to (Exhibit A) only "if" it won the contract.

The *Galen* case is relevant to this protest in other respects, as follows: (1) the court held that even though two of the successful bidder's references were on the evaluation panel, that did not support a presumption of bias against the losing bidder (*Id.* at 1335); (2) the court found that the discussions with the winning offeror was allowable because the law provides for the agency to receive clarifying information from offerors during bidding process (*Id.* at 1332-33); and (3) and the court held that best and final offer materials submitted by the successful bidder which might have been received both before and after the BAFO request date did not prove bias on part of agency and late receipt was not necessarily improper (*Id.* at 1339).

Finally, Aetna has overlooked a basic premise of procurement law - the presumption that state officials acted in good faith. Absent evidence that the PEC acted in an arbitrary or capricious manner when evaluating the offers, the PEC is presumed to have acted in good faith and in compliance with law. *See Bruno v. Peterson*, 944 P 2d 43, 49 (Alaska 1997) (agency personnel and procedure are presumed to be honest and impartial until a [claimant] makes a showing of actual bias or prejudgment). Aetna has provided no evidence of actual misconduct by the PEC in this case; it only complains (after agreeing to a different make-up of the PEC - Exhibit A), that use of a different PEC is the reason it did not win the contract. However, this is speculation and it does not

overcome the presumption of honesty and impartiality of procurement officials. That presumption can be overcome only "[w]ith convincing evidence that 'a risk of actual bias or prejudgment is present'. In other words, any alleged prejudice on the part of the decision maker must be evident from the record and cannot be based on speculation or inference." *Navistar Int'l Transportation Corp. v. United States Environmental Protection Agency*, 941 F.2d 1339, 1360 (6th Cir. 1989)(citation omitted).

Conclusion

For the reasons set forth above, Aetna's protest and its request for a stay of award under AS 36.30.575 are denied in total. Aetna may file an appeal of this decision to the Commissioner of Administration within 10 days of receipt of this decision. AS 36.30.590. If an appeal is filed, a copy must be provided to the undersigned. Further, the appeal must contain the information required under AS 36.30.560 and include a copy of this decision and identify the factual and/or legal errors in the decision that form the basis of the appeal.

Sincerely,

Walt Harvey
Contracting Manager

cc: Margie Vandor
Assistant Attorney General

Exhibit A

Aetna

# Fax Cover Sheet

TO: Vern Jones, Chief Procurement Officer State of Alaska

FAX: (907) 465-~~5684~~ 2189

DATE: February 23, 2006

# PAGES: 2 + cover

Message:

Vern,

Per your request, I have reviewed and signed the process overview. Please call me with any questions.

Mike

2006 FEB 23 PM 4 52
DIVISION OF GENERAL SERVICES - SUPPLY

*Michael T. Robinson*
*Vice President*
*National Accounts – West*
*2526 Shadelands Dr.*
*Walnut Creek, CA. 94596*
*(925) 948-4205*
*(925) 948-4902*

Exhibit A

RFP No. 2007-0200-5946

Agreed upon process by State of Alaska (State), offeror Premera Blue Cross Blue Shield of Alaska (Premera), and offeror Aetna, per teleconference calls held between the parties' representatives on February 22 and 23, 2006:

**Modified Evaluation Process Steps:**

1. Thursday, February 23, 2006, Aetna proposal valuation and scoring process is underway, and is anticipated to be completed by the reconstituted Procurement Evaluation Committee (PEC) which consists of three members, two of whom were on the original PEC that scored Premera's proposal in the initial evaluation process. All PEC members are State employees.

2. If, after Step 1, it is determined by the State that Aetna's proposal is both responsive and reasonably susceptible for award, the following will occur as to disclosure of Aetna's original price and Premera's price upon which the original notice of intent to award was based (now rescinded) so that the State may proceed to conducting discussions with both offerors under AS 36.30.240:

a. Prior to release of Aetna's price, the State will ensure agreement with Aetna officials as to the accuracy of its offer (total figure) provided. Only the exact three-year price total provided in Aetna's proposal will be disclosed to Premera after confirmation from Aetna; and

b. The State will obtain confirmation from Premera as to their exact three-year price total upon which the original notice of intent to award was based, and provide that figure to Aetna.

3. Discussions under AS 36.30.240 with Aetna and Premera will occur Friday, February 24. During discussions, a date and time will be set for receipt of best and final offers from both offerors (tentatively set for Tuesday, February 28, noon Alaska Time).

4. After receipt of best and final offers from Aetna and Premera, both proposals will be scored and a new notice of intent to award will be issued. The State anticipates the notice of intent to award will be issued on or before March 2, 2006.

5. The normal protest and appeal process will be available after the new Notice of Intent to Award is issued as set out in Step. 4.

2006 FEB 23 PM 4 52
DIVISION OF GENERAL
SERVICES & SUPPLY

Exhibit A

The undersigned parties agree, and to take no exception to the process as set forth in Steps 1 through 5 above:

State of Alaska

By: _____ 2/24/06
Vern Jones Date
Chief Procurement Officer

Premera Blue Cross Blue Shield of Alaska

By. _____ _____
Yori Milo Date
Chief Legal Officer

Aetna

By: _____ 2-23-2006
Mike Robinson Date
Western Regional Head
National Accounts

Exhibit B

MEMORANDUM
STATE OF ALASKA
*Department of Administration*
*Division of General Services*

Phone Number: 465-2250
FAX Number: 465-2189
TDD Number: 465-2205

TO: Vern Jones
Chief Procurement Officer

DATE: February 27, 2006

FROM Walt Harvey
Contracting Manager

SUBJECT: Rejection of a Single Proposals for RFP 2007-0200-5946, Section 9

In accordance with AS 36 30 350 and 2 AAC 12 860, I recommend the rejection of all proposals received for RFP 2007-0200-5946, Claims Administration and Pharmacy Benefit Management, Section 9, "Pharmacy Network and Benefit Management only " By rejecting proposals submitted under Section 9, award can only be made to a single offeror under Section 7

You and I previously discussed this issue on February 22, 2006

Offerors were allowed to submit proposals for each section under the following scenarios

Section 7 - All Services, or
Section 8 - All Services except Pharmacy Network and Benefit Management, or
Section 9 - Pharmacy Network and Benefit Management only

In essence, award could be made to a single offeror for Section 7, all services, or two contracts could be awarded for Sections 8 & 9 The RFP stated that each scenario would be evaluated for the best value to the state, considering price and technical factors, and that a proposal evaluation committee (PEC) would score the proposals according to predetermined criteria The PEC score sheets were contained in three RFP attachments, one for each section.

Two offerors responded to Section 9, Aetna and Walgreens However, Walgreens proposal was determined to be nonresponsive as they did not possess a valid Alaska Business License at the time designated for opening of the proposals The single remaining proposal submitted by Aetna for Section 9 has not been evaluated by the PEC

It must also be noted that the rejection of a single proposal is permitted under 2 AAC 12 270 There are various reasons why it s in the state s best interest to reject the single proposal for Section 9

Exhibit B

- **The RFP scoring methodology is flawed**
  - The scoring criteria for each of the three RFP sections (see attached criteria) indicates that the total possible score for Section 7 is 5,000. However, the combined scores for Sections 8 & 9 total 10,000. The RFP does not describe how the PEC would reconcile this point difference when comparing a single proposal for Section 7 to separate proposals for Sections 8 & 9.

  - Sections 8 & 9 contain duplicate scoring criteria for "Management Plan for the Project" and "Essential Administrative Services." Each proposal would be scored according to this criteria. Therefore, there would be four separate scores under the multiple award combination (Sections 8 & 9), but only two scores for the single award scenario (Section 7). In addition, the maximum possible score for these two areas is 250 points under Section 7, while the score could reach 1,100 points for the same criteria under Sections 8 & 9.

  - In addition to the scoring discrepancies cited above, there are multiple instances where the maximum possible scores for the same criteria are not equivalent.

| | |
|---|---|
| 7.07 Usual, Customary and Reasonable (UCR) | 100 |
| 8.07 Usual, Customary and Reasonable (UCR) | 150 |
| 7.11 Reporting | 100 |
| 8.11 Reporting | 150 |
| 7.12 Location of Work | 150 |
| 8.12 Location of Work | 200 |
| 7.13 Performance Standards | 100 |
| 8.13 Performance Standards | 150 |
| 7.14 Health Flexible Spending Account (Health FSA) | 100 |
| 8.14 Health Flexible Spending Account (Health FSA) | 150 |
| 7.16 Information Technology/Communication | 150 |
| 8.16 Information Technology/Communication | 200 |
| 7.18 Pharmacy Benefit Management Services | 150 |
| 9.05 Pharmacy Benefit Management Services | 350 |
| 7.19 Clinical Programs | 150 |
| 9.06 Clinical Programs | 500 |
| 7.20 Retail Network | 100 |
| 9.07 Retail Network | 450 |
| 7.21 Mail Order | 100 |
| 9.08 Mail Order | 450 |
| 7.22 High Deductible Health Plan and HSA Experience | 50 |
| 8.16 High Deductible Health Plan and HSA Experience | 150 |

It would not be possible to reconcile these scoring discrepancies and ensure a fair and equal comparison of the two scenarios without making a material change to the RFP evaluation criteria.

Exhibit B

- **Single Award**
  The RFP stated, "wherever possible, the State seeks to reduce administrative costs by awarding multiple features to a single contractor." In this instance, I believe the award of a single contract would reduce costs when considering the burden of administering two separate contracts, one for Pharmacy Network and Benefit Management and one for all other services required under RFP 2007-0200-5946. This opinion is shared by the state's Benefits Manager.

- **Time Constraints**
  For various reasons, the award of a contract did not occur on February 1, 2006 as stated in RFP amendment #6. Considering that significant transition must occur if a company other than the current contractor is awarded the contract, coupled with the fact that implementation must occur on July 1, 2006 for both active and retirees, there is insufficient time to

  - evaluate and score the two proposals submitted under Section 7 (including discussions/best and final proposals) and determine a winner,
  - evaluate and score the proposals submitted under Sections 8 & 9 (including discussions/best and final proposals if warranted), and determine the winner(s),
  - attempt to compare the two scenarios to determine best value (which as previously stated is not possible), and
  - potentially negotiate and award two separate contracts under the Sections 8 & 9 scenario

- **Increased Costs**
  Cost was only one of the evaluation factors and proposals submitted for Sections 8 & 9 were not evaluated. However, it appears that the actual cost to the state could be greater under a combined Section 8 & 9 scenario than a single award under Section 7.

If approved, I will reject the single proposal submitted under Section 9 of the RFP.

[X] Approved [ ] Disapproved

Vern Jones
Chief Procurement Officer

2/07/06
Date

Exhibit B

## Section 7 - All Services

| | |
|---|---|
| 7.03 Management Plan for the Project | 100 |
| 7.04 Essential Administrative Services | 150 |
| 7.05 Appeals Procedure | 50 |
| 7.06 Vision Services | 50 |
| 7.07 Usual, Customary and Reasonable (UCR) | 100 |
| 7.08 Coordination of Benefits (COB) | 150 |
| 7.09 Utilization Review | 200 |
| 7.10 Employee Assistance Program and MMH | 150 |
| 7.11 Reporting | 100 |
| 7.12 Location of Work | 150 |
| 7.13 Performance Standards | 100 |
| 7.14 Health Flexible Spending Account (Health FSA) | 100 |
| 7.15 Provider Discounts | 250 |
| 7.16 Information Technology/Communication | 150 |
| 7.17 Client Service/Experience | 150 |
| 7.18 Pharmacy Benefit Management Services | 150 |
| 7.19 Clinical Programs | 150 |
| 7.20 Retail Network | 100 |
| 7.21 Mail Order | 100 |
| 7.22 High Deductible Health Plan and HSA Experience | 50 |
| 7.23 Cost Proposal | 2,000 |
| 7.24 Alaska Offeror's Preference | 500 |
| | 5,000 |

## Section 8 - All Services except Pharmacy Network and Benefit Management

| | |
|---|---|
| 8.03 Management Plan for the Project | 150 |
| 8.04 Essential Administrative Services | 200 |
| 8.05 Appeals Procedure | 50 |
| 8.06 Vision Services | 50 |
| 8.07 Usual, Customary and Reasonable (UCR) | 150 |
| 8.08 Coordination of Benefits (COB) | 150 |
| 8.09 Utilization Review | 200 |
| 8.10 Employee Assistance Program and MMH | 150 |
| 8.11 Reporting | 150 |
| 8.12 Location of Work | 200 |
| 8.13 Performance Standards | 150 |
| 8.14 Health Flexible Spending Account (Health FSA) | 150 |
| 8.15 Provider Discounts | 250 |
| 8.16 Information Technology/Communication | 200 |
| 8.17 Client Service/Experience | 150 |
| 8.18 High Deductible Health Plan and HSA Experience | 150 |
| 8.19 Cost Proposal | 2,000 |
| 8.20 Alaska Offeror's Preference | 500 |
| | 5,000 |

## Section 9 - Pharmacy Network and Benefit Management only

| | |
|---|---|
| 9.03 Management Plan for the Project | 250 |
| 9.04 Essential Administrative Services | 500 |
| 9.05 Pharmacy Benefit Management Services | 350 |
| 9.06 Clinical Programs | 500 |
| 9.07 Retail Network | 450 |
| 9.08 Mail Order | 450 |
| 9.09 Cost Proposal | 2,000 |
| 9.10 Alaska Offeror's Preference | 100 |
| | 5,000 |

# AlaskaCare

## Third Party Administrator
## Cost Proposals (3 year total)

### Original Cost Proposal (January 6, 2006)

This number should be net of Rx rebates taking it to $34,887,171

**Aetna -----** $49,163,734 / $45,387,171*
$3.5 million annual guarantee for pharmacy rebates

**Premera -** $34,390,750
No minimum guarantee for pharmacy rebates

Doens't include network acess fees of $6,880,513

* The state was unable to discern the difference between the two total prices offered by Aetna. Aetna was required to submit a single cost proposal in its best and final offer.

This is a customary way to show fees for an incumbant. It demonstartes the lack of expertiese among the reviewers and procurment

### Best and Final Cost Proposal (February 13, 2006)

**Premera -** $34,077,274 Doesn't include network access fees of $6,880,513
No minimum guarantee for pharmacy rebates

No refrence to network savings share of $5,496,780 (est)

### Best and Final Cost Proposal (February 28, 2006)

**Aetna -----** $32,054,652
$750,000 annual guarantee for pharmacy rebates

**Premera -** $30,951,035
$3.0 million annual guarantee for pharmacy rebates

No refrence to network savings share
Aetna - $3,401,127 (est)
Premera - $13,741,949 (est)

ALASKACARE

## Retiree and Active Health Plans
## Cost Containment Measures

- Utilize Network Savings TPA (FY05) .....$35.2 M
- Verify Dependent Eligibility (Est) ..... $14 M
- Qualified for Medicare Part D Subsidy .....$7 M
- Negotiated Pharmacy Rebate.....$4 M
- Utilize Generic Drugs.....$4 M
- Verified Eligibility for Full-time Students.....$3 M
- Awarded New TPA Contract to Premera Blue Cross (3 Yr Ave)...$3.6 M

Total Annual Savings = $70.8 M

# AlaskaCare

## Third Party Administrator
## Contract Fee Schedule
## Last Final Best Offer Figures

| Annual Contract Fees | Premera Proposal | Aetna Proposal | Difference |
|---|---|---|---|
| FY07 | $8.1 M | $7.2 M | $.9 M |
| FY08 | $10.9 M | $12.0 M | ($1.1 M) |
| FY09 | $11.6 M | $12.8 M* | ($1.2 M) |
| | | Savings | $1.4 M * |

It's not likely Premera committed to keeping costs flat from 2009-2013. How can they compare this accurately. Need to know basis for 2010-2013.

Note: The RFP process reduced the overall costs for Third Party Administration by $10.9 million when compared with existing contract fees.

*Third year costs for FY09 with Premera Blue Cross would also apply to contract renewal periods. For example, 4 one-year renewals at $1.2 M would result in Additional savings of $4.8 M in the out years of the contract compare to the Aetna proposal. In other words, the baseline contract cost ending in FY09 would allow additional accrual of savings for each one-year renewal.

Premera offered an annual $3.0 M Pharmacy Rebate Guarantee
Aetna offered an annual $750,000 Pharmacy Rebate Guarantee

ALASKACARE

## Third Party Administrator
## Contract Fee Schedule

| Annual Contract Fees | Premera Proposal | Aetna * Existing Contract | Difference |
|---|---|---|---|
| FY07 | $8.1 M | $13.9 M | $5.8 M |
| FY08 | $10.9 M | $13.9 M | $3.0 M |
| FY09 | $11.6 M | $13.9 M | $2.1 M |
| | | Savings | $10.9 M |

* Current contractor figures are based on FY06 amount, which are held constant for FY07, FY08 and FY09 for comparison purposes.

State Brief

BEFORE THE STATE OF ALASKA OFFICE OF ADMINISTRATIVE HEARINGS
ON REFERRAL BY THE COMMISSIONER OF THE DEPARTMENT OF ADMINISTRATION

| | |
|---|---|
| In the Matter of: Aetna Life Insurance and Aetna | OAH No. 06-0230-PRO<br>RFP No. 2007-0200-5946 |

**STATE OF ALASKA, DIVISION OF GENERAL SERVICES RESPONSE BRIEF**

This matter involves the procurement for claims administration and pharmacy benefit management for the Division of Retirement and Benefits. The contract for these services is one of the largest contracts of the State of Alaska. The service provider, frequently referred to as the "third-party administrator," is responsible for administering the health insurance benefits for over 29,000 retirees and 5,500 active employees.

Because the contract with the current third party administrator, Aetna, was set to expire on June 30, 2006, with no further extensions available, the Division of Retirement and Benefits issued a request for proposals on November 30, 2005.[1] At the end of the RFP process, the Division of General Services ("Division") determined that Premera was the successful bidder. The Division awarded the contract to Premera on March 13, 2006. The Division of Retirement and Benefits and Premera have begun the transition process and Premera will begin to perform under the contract on July 1, 2006.

[1] *See* RFP No. 2007-0200-5946, posted at: http://notes4.state.ak.us/pn/pubnotic.nsf/ad4f363a31408ea98925672a00607900/60f7691928714c18892570ca007faa6b?OpenDocument

ATTORNEY GENERAL, STATE OF ALASKA
DIMOND COURTHOUSE
P.O. BOX 110300, JUNEAU, ALASKA 99811
PHONE: 465-3600

The Division acknowledges that a mistake was made in the RFP process: a portion of Aetna's proposal was misplaced and during the time it was misplaced Aetna was declared to be non-responsive. The impact of this mistake, however, had a principally positive effect on Aetna's chances—Premera's cost proposal was disclosed to Aetna during the period of time that Aetna's proposal had been mistakenly declared non-responsive. Thus, through the mistake, Aetna was able to gain a competitive advantage in bidding that never happens in a RFP process.

Once the Division recognized its mistake, it immediately sought to salvage the process by getting the parties to agree to a procedure for the remainder of the process. The parties agreed, and the procurement officer then followed that agreed-to process. At the end of the day, however and despite the competitive advantage it had gained, Aetna's score was lower than Premera's.

Aetna now challenges the award to Premera on three grounds. First, Aetna challenges the process it agreed to. Second, Aetna challenges the cost factors set forth in the RFP, and urges that a different set of cost factors be utilized. Finally, Aetna contends that the Division unfairly coached Premera through the process.

Each challenge falls short. First, while a mistake in the process was made, it primarily benefited Aetna, and it was cured through the agreement of the parties. Second, the time for contesting the cost factors the Division elected to use in the RFP has long since past. Finally, as a factual and legal matter, the Division coached no party in this process.

ATTORNEY GENERAL, STATE OF ALASKA
DIMOND COURTHOUSE
P.O. BOX 110300, JUNEAU, ALASKA 99811
PHONE: 465-3600

Accordingly, the Division respectfully requests that the contract award to Premera be upheld and Aetna's appeal be dismissed.

## I. BACKGROUND

### A. The Request for Proposals

On November 30, 2005, the Division of Retirement and Benefits issued the RFP for claim management and pharmacy benefit services. The RFP comprehensively set forth the services sought, the procurement procedure and how the proposals were to be evaluated. *See* RFP No. 2007-0200-5946.

The RFP also set forth the schedule for the process. *Id.* at Sec. 1.02. If an offeror had questions regarding the RFP, they were to be submitted by December 18, 2005. *Id.* at Sec. 1.07.[2] The deadline for proposals was initially December 28, 2005 (Sec. 1.01), but was later extended to January 6, 2006. *See* Amendment No. 6.[3]

The RFP specifically advised offerors that if they had concerns about defects in the RFP they were to be made ten days prior to the deadline for proposals:

> Offerors should carefully review this solicitation for defects and questionable or objectionable material. Comments concerning defects and objectionable material must be made in writing and

---

[2] The deadline for questions was extended to December 19, 2005, by Amendment No. 1. *See* http://notes4.state.ak.us/pn/pubnotic.nsf/0/60f7691928714c18892570ca007faa6b/$FILE/2007-0200-5946+Amendment+1.pdf.

[3] Posted at: http://notes4.state.ak.us/pn/pubnotic.nsf/0/60f7691928714c18892570ca007faa6b/$FILE/2007-0200-5946++Amendment+6.pdf.

ATTORNEY GENERAL, STATE OF ALASKA
DIMOND COURTHOUSE
P.O. BOX 110300, JUNEAU, ALASKA 99811
PHONE: 465-3600

> received by the procurement officer at least ten days before the proposal opening. This will allow issuance of any necessary amendments. It will also help prevent the opening of a defective solicitation and exposure of offeror's proposals upon which award could not be made. *Protests based on any omission or error, or on the content of the solicitation, will be disallowed if these faults have not been brought to the attention of the procurement officer, in writing, at least ten days before the time set for opening.*

RFP, Sec. 1.06 (emphasis added). Prior to the deadline for proposals, several questions were asked. The Division issued amendments with the answers. *See* Amendment Nos. 1 -4. No offeror, however, objected to the content of the solicitation or to the manner in which the RFP proposed to score the proposals.

The RFP advised offerors that both communications and discussions would be permitted with offerors reasonably susceptible to award. RFP, Sec. 2.06 – 2.07. The purpose of communications was limited to clarification of uncertainties and to eliminate confusion regarding a proposal. RFP, Sec. 2.06. The purpose of discussions was to ensure full understanding of the requirements of the RFP and the proposal. RFP, Sec. 2.07. The RFP permitted proposal modifications following discussions. *Id.*

With respect to the evaluation of the proposals, the RFP provided that the "evaluation committee will be made up of the procurement officer and at least two active State employees and one PERS/TRS employer." RFP, Sec. 2.09. The RFP made no guarantee, however, that the individuals on the evaluation committee would stay the same throughout the process.

ATTORNEY GENERAL, STATE OF ALASKA
DIMOND COURTHOUSE
P.O. BOX 110300, JUNEAU, ALASKA 99811
PHONE: 465-3600

The RFP requested that offerors submit proposals describing services for three different scenarios: (1) all services; (2) all services except pharmacy network and benefit management; and (3) pharmacy network and benefit management. RFP, Secs. 7 – 9.[4]

The RFP provided for 5000 total points to score scenario one. The points were allocated as follows:

| | |
|---|---|
| Technical proposal: | 2500 points (50 percent) |
| Cost proposal: | 2000 points (40 percent) |
| Alaska offeror's preference: | 500 points (10 percent) |

*See* RFP, Secs. 7.01, 10. The technical proposal had twenty different criteria, each with multiple questions to be scored. The evaluation committee was to subjectively score the technical proposal. The cost proposal required the offeror to propose fees for five categories of service over the three years of the contract. RFP, Sec. 7.23. Scoring of this section was objective. The low bidder would get 2000 points, the other bidders would be scored according to the formula set forth in the RFP. RFP, Secs. 10.21, 2.14.

**B. Evaluation of the Proposals**

The Division received four proposals by January 6, 2006: Premera, Aetna, Coresource and Walgreens. The Division declared the proposals from Coresource and Walgreens to be non-responsive since they did not possess a valid Alaska business license. The proposal from Aetna was determined to be non-responsive because it was

[4] Ultimately, the Division did not evaluate the proposals for the second scenario and rejected all proposals for the third scenario. Accordingly, the scoring was based only on the proposals for the first scenario—all services.

ATTORNEY GENERAL, STATE OF ALASKA
DIMOND COURTHOUSE
P.O. BOX 110300, JUNEAU, ALASKA 99811
PHONE: 465-3600

thought to be incomplete. Thus, at the outset of the proposal evaluation process the Division believed it had only one responsive offeror—Premera. *See* Exhibit B at ¶ 3 (Affidavit of Walt Harvey).

For purposes of determining whether Premera's proposal was reasonably susceptible to award, the Division formed an evaluation committee and scored Premera's proposal. The evaluation committee was comprised of the following individuals: Sheri Gray, Kerry Jarrell, Freda Miller, Pat Shier and Mike Williams.[5] *See* Exhibit B at ¶ 4 (Affidavit of Walt Harvey). On February 6, 2006, the evaluation committee scored Premera's proposal as follows:

| | |
|---|---|
| Technical Proposal: | 1,490 |
| Cost Proposal: | 2,000 |
| Alaska Offeror's Preference: | 500 |
| Total: | 3,990 |

*See* Exhibit B at ¶ 5 (Affidavit of Walt Harvey).

Based on this score, the Division concluded that Premera's proposal was reasonably susceptible to award, and therefore the Division was permitted to engage in communications and discussions with Premera for the purpose of clarification and understanding. RFP, Secs. 2.06 – 2.07. *See* Exhibit B at ¶ 6-7 (Affidavit of Walt Harvey). The Division did engage in such communications and discussions. *Id.*

At the conclusion of those communications and discussions, Premera submitted its best and final offer on February 17, 2006. The evaluation committee (not including Pat Shier or Kerry Jarrell) scored Premera's proposal as follows:

[5] Pat Shier did not completely score the proposal, so his scores were not included.

ATTORNEY GENERAL, STATE OF ALASKA
DIMOND COURTHOUSE
P.O. BOX 110300, JUNEAU, ALASKA 99811
PHONE: 465-3600

| | |
|---|---|
| Technical Proposal: | 2,119 |
| Cost Proposal: | 2,000 |
| Alaska Offeror's Preference: | 500 |
| Total: | 4,619 |

*See* Exhibit B at ¶ 8 (Affidavit of Walt Harvey). Based on its evaluation of Premera's proposal, on February 18, 2006, the Division issued a notice of intent to award the contract to Premera. *See* Exhibit B at ¶ 9 (Affidavit of Walt Harvey).

Aetna then contacted the Division regarding the determination that its proposal was non-responsive. On February 21, because the notice of intent to award had been issued, the Division disclosed Premera's bid amount of $34 million to Aetna. Later that day, the Division found a set of binders that comprised the missing sections of Aetna's RFP. The Division immediately rescinded the notice of intent to award. *See* Exhibit B at ¶ 10-11 (Affidavit of Walt Harvey).

On February 22 and 23, Aetna, Premera and the Division held teleconferences to decide how to proceed. *See* Exhibit B at ¶ 8-15 (Affidavit of Vern Jones). At this point, it was clear that Aetna had gained a tremendous competitive advantage in the process because its cost proposal totaled $45 million, which was significantly higher than Premera's bid of $34 million. Aetna now had information to make its cost proposal competitive with Premera's.

The parties agreed to salvage the process through a modified evaluation process. First, the parties agreed that Aetna's proposal would be scored by the reconstituted evaluation committee made up of "three members, two of whom were on the original PEC that scored Premera's proposal in the initial evaluation process." *See* Exhibit A

ATTORNEY GENERAL, STATE OF ALASKA
DIMOND COURTHOUSE
P.O. BOX 110300, JUNEAU, ALASKA 99811
PHONE: 465-3600

(Modified Evaluation Process Agreement). The members of the reconstituted committee were Freda Miller, Pat Shier and Judy Porter.

Next, the parties agreed that if Aetna's proposal was determined to be reasonably susceptible to award, that Aetna's cost proposal would be disclosed to Premera. The purpose of this was to attempt to level the playing field between Aetna and Premera, given the disclosure of Premera's cost proposal to Aetna. *Id.*

Next, the parties agreed that the Division would enter into discussions with both parties to be followed by the submission of best and final offers. Finally, the parties agreed that the proposals would be scored and a new notice of intent to award would be issued. Aetna, Premera and the Division each signed this agreement. *See* Exhibit A (Modified Evaluation Process Agreement).

Following the signing of the agreement, the Division proceeded to implement it. First, the evaluation committee scored Aetna's proposal to determine whether it was reasonably susceptible to award. The evaluation committee scored Aetna's proposal as follows:

| | |
|---|---|
| Technical Proposal: | 2,030 |
| Cost Proposal: | 1,502 |
| Alaska Offeror's Preference: | 500 |
| Total: | 4,032 |

*See* Exhibit B at ¶ 12 (Affidavit of Walt Harvey). Based on this score, the Division determined that Aetna's proposal was reasonably susceptible to award.

Next, the Division disclosed Aetna's cost proposal to Premera, which as noted above was $45 million. The Division then entered into discussions with both Premera

ATTORNEY GENERAL, STATE OF ALASKA
DIMOND COURTHOUSE
P.O. BOX 110300, JUNEAU, ALASKA 99811
PHONE: 465-3600

and Aetna. Following this, Aetna and Premera each submitted best and final offers. Notably, Aetna's cost proposal decreased from $45 million to $32 million.

The evaluation committee then scored the changes to each proposal. The final results were:

Premera:

| | |
|---|---|
| Technical Proposal: | 2,120 |
| Cost Proposal: | 2,000 |
| Alaska Offeror's Preference: | 500 |
| Total: | 4,620 |

Aetna:

| | |
|---|---|
| Technical Proposal: | 2,048 |
| Cost Proposal: | 1,931 |
| Alaska Offeror's Preference: | 500 |
| Total: | 4,479 |

*See* Exhibit B at ¶ 15 (Affidavit of Walt Harvey). While the scores were very close, Premera's was nonetheless the high score. The Division issued a new notice of intent to award to Premera. *See* Exhibit B at ¶ 16 (Affidavit of Walt Harvey). Because the time to implement the contract was now only a slim few months away, the Division entered into a contract with Premera on March 13, 2006. *See* Exhibit B at ¶ 17 (Affidavit of Walt Harvey). Aetna filed a protest and the case was referred to this Office.

## II. ARGUMENT

Aetna challenges the award to Premera on three basic grounds. First, Aetna challenges the process it agreed to. Second, Aetna challenges the cost factors used to evaluate the proposals. Finally, Aetna contends that the Division unfairly coached Premera through the process. Aetna is wrong on all counts.

ATTORNEY GENERAL, STATE OF ALASKA
DIMOND COURTHOUSE
P.O. BOX 110300, JUNEAU, ALASKA 99811
PHONE: 465-3600

### A. The Modified Evaluation Process Did Not Disadvantage Aetna and Was Legally Permissible

Aetna challenges the modified evaluation process it agreed to. The modified evaluation process did not disadvantage Aetna and was legally permissible. There are three reasons why this is so.

First, Aetna gained a competitive advantage that it never would have had otherwise. It learned the bid of its only competitor. With this incredibly valuable information Aetna was able to lower its cost proposal from $45 million to $32 million, a 29 percent decrease. It is highly doubtful that Aetna would have been able to underbid Premera's original bid without the disclosure of this information.[6]

Second, the reconstituted evaluation committee was legally permissible. A leading treatise on procurement states that the composition of an evaluation committee may be changed during an evaluation process:

---

[6] A leading commentator confirms that this kind of disclosure to level the playing field is an appropriate approach: "When there has been an improper disclosure of pricing or technical information, the contracting officer must decide on a course of action to minimize the harm. The general rule stated by the Comptroller General is that the requirement for full and open competition overrides the prohibitions against improper disclosure." Ralph C. Nash, et al, Competitive Negotiation at 685 (2d ed. 1999).

Notably, however, the treatise states that a procurement officer would be justified in disqualifying an offeror that made use of a competitor's inadvertently disclosed costing data in its best and final offer. *Id.* at 686. The treatise also suggests that in inadvertent disclosure cases denying the parties the chance to make a best and final cost proposal would be appropriate. Thus, the Division had viable options before it that would have seriously reduced Aetna's chances. Instead, the Division chose to let Aetna proceed all the way through to the scoring of the best and final offer, even though it was obvious that Aetna used Premera's bid to make its best and final offer.

ATTORNEY GENERAL, STATE OF ALASKA
DIMOND COURTHOUSE
P.O. BOX 110300, JUNEAU, ALASKA 99811
PHONE: 465-3600

> Objectivity is generally sought by having the same evaluators review each proposal or portion of a proposal. However, if it is impractical to do so, proposals can be evaluated by different personnel. . . . Agencies may change evaluators during the course of a procurement, and changes have been permitted even when the RFP stated the composition of the evaluation team.

Ralph C. Nash, et al, Competitive Negotiation at 533 (2d ed. 1999) (citations omitted).

The treatise quotes the following from a federal procurement case:

> Generally, the composition of a technical evaluation board or committee is within the discretion of the contracting agency, and we will not question the composition of the board or committee unless there is evidence of fraud, bad faith, conflict of interest, or actual bias. . . . Further, even the fact that the composition of the evaluation committee or board *changes* during the course of a procurement does not automatically indicate anything improper, so long as the underlying evaluation is reasonable and consistent with the evaluation criteria.

*PADCO, Inc.*, Comp. Gen. Dec. B-270445, 96-1 CPD ¶ 142 (citations omitted; emphasis added). Thus, changes in an evaluation committee are permissible.

In this case, nothing in the RFP or in law prevented the Division from changing the composition of the evaluation committee, with or without the consent of the offerors. In this case, however, Aetna agreed to the change. *See* Exhibit A. Most importantly, there is no evidence of fraud, bad faith, conflict of interest or actual bias in this matter. The change in the composition of the evaluation committee was necessitated by the circumstances. The missing portion of Aetna's proposal had been located, and the parties wanted to move forward expeditiously.

Aetna challenges the use of Pat Shier on the reconstituted evaluation committee. Aetna contends that Mr. Shier was not qualified to be on the reconstituted committee

ATTORNEY GENERAL, STATE OF ALASKA
DIMOND COURTHOUSE
P.O. BOX 110300, JUNEAU, ALASKA 99811
PHONE: 465-3600

because his scoring of the first Premera proposal was not counted. In the modified evaluation agreement Aetna agreed to two members from "the original PEC that scored Premera's proposal in the initial evaluation process." Exhibit A. Mr. Shier was a member of the original PEC. Therefore he was qualified to be on the reconstituted evaluation committee.

Finally, the fact that the reconstituted evaluation committee did not completely rescore the two proposals following the submission of the best and final offers was permissible. A leading treatise on procurement law states:

> There is no requirement that each final proposal be totally rescored. . . It has been found proper for agency evaluators to assess the changes that a BAFO has made to the original proposal and report them to the source selection official . . . or to take the BAFO changes into consideration when making the source selection decision.

Ralph C. Nash, et al, Competitive Negotiation at 698 (2d ed. 1999) (citations omitted).[7]

In this case, the reconstituted evaluation committee was not legally required to completely rescore the proposals. Moreover, nothing in the modified evaluation process agreement requires complete rescoring. *See* Exhibit A.

In summary, the modified evaluation process did not disadvantage Aetna—to the contrary it conferred a tremendous competitive advantage upon Aetna. Moreover, the reconstituted evaluation committee was both legally permissible and agreed to by the

---

[7] Moreover, the treatise goes on to say, "[t]here is no requirement that the final proposals be evaluated by the same evaluators that scored the original proposals." *Id.* at 699.

ATTORNEY GENERAL, STATE OF ALASKA
DIMOND COURTHOUSE
P.O. BOX 110300, JUNEAU, ALASKA 99811
PHONE: 465-3600

parties. Finally, the scoring of only the changes in the best and final offer was both legally permissible and agreed to by the parties.

### B. Aetna Waived Its Challenge to the RFP's Cost Factors by Not Objecting Prior to the Deadline for Proposals

Aetna contends that the cost proposal scoring factors should now be changed to include "total costs" to the State. Aetna Appeal at 27, 33. Aetna supports its contention with lengthy affidavits that contain a variety of numerical calculations that are not part of the cost proposal. Aetna waived this argument by not raising it before the deadline for proposals.

The RFP clearly requires offerors to raise concerns with the RFP prior to the deadline for proposals: "Protests based . . . on the content of the solicitation, *will be disallowed* if these faults have not been brought to the attention of the procurement officer, in writing, at least ten days before the time set for opening." RFP, Sec. 1.06 (emphasis added). Aetna failed to raise its concerns with the cost proposal factors prior to the deadline for proposals. Therefore, it has waived this argument.

A leading treatise on procurement law confirms this conclusion:

> The opportunity to protest against RFP improprieties to the Comptroller General will be lost if the protest is not raised before the closing date for the receipt of proposals.

Ralph C. Nash, et al, Competitive Negotiation at 440 (2d ed. 1999).

In this case, the cost proposal, as designed, was straightforward and easy to understand and for the parties to complete. It was designed to permit objective scoring. No party objected prior to the deadline. Now Aetna seeks to change the cost proposal

ATTORNEY GENERAL, STATE OF ALASKA
DIMOND COURTHOUSE
P.O. BOX 110300, JUNEAU, ALASKA 99811
PHONE: 465-3600

and submits new calculations that may have a subjective element. Respectfully, the Division suggests that this Office may safely ignore such calculations. Aetna has waived this argument by not timely objecting to the cost proposal.

### C. The Division Coached No One – Communications and Discussions Were Permissible

Aetna contends that the Division's communications and discussions with Premera were improper and that the Division coached Premera. Aetna is wrong.

Alaska law permits communications and discussions with offerors reasonably susceptible to award:

> [D]iscussions may be conducted with responsible offerors who submit proposals determined to be reasonably susceptible of being selected for award for the purpose of clarification to assure full understanding of, and responsiveness to, the solicitation requirements. Offerors reasonably susceptible of being selected for award shall be accorded fair and equal treatment with respect to any opportunity for discussion and revision of proposals, and revisions may be permitted after submissions and before the award of the contract for the purpose of obtaining best and final offers.

AS 36.30.240; *see also* 2 AAC 12.285 -- .290. The Division recognized the requirements of this law in the RFP. RFP, Secs. 2.06 – 2.07.

Aetna characterizes the communications and discussions between the Division and Premera as improper. But the fact is that between opening of the proposals on January 6 and the discovery of the misplaced Aetna binders on February 21, the Division understood Premera to be the only offeror reasonably susceptible to award. Therefore, there was clearly no intent to coach Premera or show Premera any favoritism. All communications and discussions were designed to do precisely what the

ATTORNEY GENERAL, STATE OF ALASKA
DIMOND COURTHOUSE
P.O. BOX 110300, JUNEAU, ALASKA 99811
PHONE: 465-3600

statute, regulations and RFP allowed: clarify uncertainties, eliminate confusion and ensure full understanding. The law permits revisions to proposals during this process. When uncertainties are clarified, confusion eliminated and fuller understanding achieved, it should come as no surprise that an offeror's score will increase. That is exactly what the law contemplates and that is exactly what happened here.[8]

Once the Division realized it had misplaced a portion of Aetna's proposal, it afforded Aetna the same opportunity for discussions as it did Premera. In the modified evaluation process agreement, the parties agreed that "[d]iscussions under AS 36.30.240 with Aetna and Premera will occur Friday, February 24." *See* Exhibit A. Aetna had the opportunity to request extra time for discussions. It did not. It is now too late for Aetna to complain about not having enough time for discussions, when it had the perfect opportunity to do so two months ago.

In summary, the Division's communications and discussions with Premera were appropriate and legal. There is no appearance of impropriety. Aetna was given an equal and fair opportunity to have discussions, and agreed with the Division on the extent to which it would have such discussions.

ATTORNEY GENERAL, STATE OF ALASKA
DIMOND COURTHOUSE
P.O. BOX 110300, JUNEAU, ALASKA 99811
PHONE: 465-3600

[8] "The primary objective of discussions is to maximize the Government's ability to obtain best value, based on the requirement and evaluation factors set forth in the solicitation." FAR 15.306(d)(2), *quoted by*, Ralph C. Nash, et al, Competitive Negotiation at 647 (2d ed. 1999).

## III. CONCLUSION

A leading commentator on procurement law confirms that agencies have "broad discretion in the evaluation process." Ralph C. Nash, et al, Competitive Negotiation at 536 (2d ed. 1999). However, evaluations must not be irrational or arbitrary. The commentator concludes that "evaluations will not be overturned if they are based on errors which are merely minor or nonprejudicial." *Id.*

The Division does not dispute it made an error in this process by misplacing a portion of Aetna's proposal. This error, however, was corrected in a way that conferred a competitive advantage upon Aetna. The Division and the parties agreed to salvage the process in a legally sound and appropriate way. The Division followed the agreed-to process, and at the end of the process Premera won and Aetna lost. There was nothing irrational or arbitrary about the process, the scoring or the award.

//

//

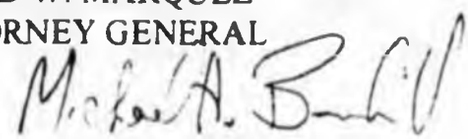
///

ATTORNEY GENERAL, STATE OF ALASKA
DIMOND COURTHOUSE
P.O. BOX 110300, JUNEAU, ALASKA 99811
PHONE: 465-3600

Accordingly, the Division respectfully requests that this Office sustain the award to Premera and dismiss Aetna's appeal.

DATED this 28th day of April, 2006.

DAVID W. MÁRQUEZ
ATTORNEY GENERAL

By: 
Michael Barnhill
Assistant Attorney General
Alaska Bar No. 9311063

ATTORNEY GENERAL, STATE OF ALASKA
DIMOND COURTHOUSE
P.O. BOX 110300, JUNEAU, ALASKA 99811
PHONE: 465-3600

Exhibit A
page 1 of 2

RFP No. 2007-0200-6946

Agreed upon process by State of Alaska (State), offeror Premera Blue Cross Blue Shield of Alaska (Premera), and offeror Aetna, per teleconference calls held between the parties' representatives on February 22 and 23, 2006:

**Modified Evaluation Process Steps:**

1. Thursday, February 23, 2006, Aetna proposal evaluation and scoring process is underway, and is anticipated to be completed by the reconstituted Procurement Evaluation Committee (PEC) which consists of three members, two of whom were on the original PEC that scored Premera's proposal in the initial evaluation process. All PEC members are State employees.

2. If, after Step 1, it is determined by the State that Aetna's proposal is both responsive and reasonably susceptible for award, the following will occur as to disclosure of Aetna's original price and Premera's price upon which the original notice of intent to award was based (now rescinded) so that the State may proceed to conducting discussions with both offerors under AS 36.30.240:

   a. Prior to release of Aetna's price, the State will ensure agreement with Aetna officials as to the accuracy of its offer (total figure) provided. Only the exact three-year price total provided in Aetna's proposal will be disclosed to Premera after confirmation from Aetna; and

   b. The State will obtain confirmation from Premera as to their exact three-year price total upon which the original notice of intent to award was based, and provide that figure to Aetna.

3. Discussions under AS 36.30.240 with Aetna and Premera will occur Friday, February 24. During discussions, a date and time will be set for receipt of best and final offers from both offerors (tentatively set for Tuesday, February 28, noon Alaska Time).

4. After receipt of best and final offers from Aetna and Premera, both proposals will be scored and a new notice of intent to award will be issued. The State anticipates the notice of intent to award will be issued on or before March 2, 2006.

5. The normal protest and appeal process will be available after the new Notice of Intent to Award is issued as set out in Step. 4.

2006 FEB 23 PM 4 52
DIVISION OF GENERAL
SERVICES & SUPPLY

Exhibit A
page 2 of 2

The undersigned parties agree, and to take no exception to the process as set forth in Steps 1 through 5 above:

State of Alaska

By: _____ 2/24/06

Vern Jones
Chief Procurement Officer

Premera Blue Cross Blue Shield of Alaska

By: _____ _____

Yori Milo
Chief Legal Officer

Aetna

By: _____ 2-23-2006

Mike Robinson
Western Regional Head
National Accounts

BEFORE THE STATE OF ALASKA OFFICE OF ADMINISTRATIVE HEARINGS
ON REFERRAL BY THE COMMISSIONER OF THE DEPARTMENT OF ADMINISTRATION

| | |
|---|---|
| In the Matter of: Aetna Life Insurance and Aetna | OAH No. 06-0230-PRO<br>RFP No. 2007-0200-5946 |

**AFFIDAVIT OF WALT HARVEY**

Walt Harvey, being first duly sworn upon oath, deposes as says:

1. I am a procurement officer within the Department of Administration, Division of General Services. I have been a procurement officer for 22 years. I have the highest level of professional procurement certification issued by the National Institute of Governmental Procurement.

2. I assumed principal responsibility for RFP No. 2007-0200-5946, claims administration and pharmacy benefit management, on January 31, 2006.

3. When I began work on the RFP, my understanding was that the Department of Administration had received only one responsive proposal. The only responsive offeror was Premera.

4. My first task was to direct the evaluation committee to determine whether Premera's proposal was reasonably susceptible to award. Prior to my taking responsibility for this RFP, the following individuals had been selected to be on the committee: Sheri Gray, Kerry Jarrell, Freda Miller, Pat Shier and Mike Williams. All of these individuals were State of Alaska employees, except Kerry Jarrell who was a representative from the Bering Strait School District in Unalakleet, Alaska.

ATTORNEY GENERAL, STATE OF ALASKA
DIMOND COURTHOUSE
P.O. BOX 110300, JUNEAU, ALASKA 99811
PHONE: 465-3600

5. The evaluation committee scored Premera's proposal. The average of their scores was:

| | |
|---|---|
| Technical Proposal: | 1,490 |
| Cost Proposal: | 2,000 |
| Alaska Offeror's Preference: | 500 |
| Total: | 3,990 |

I decided to not include Pat Shier's score in the average since he did not completely score the proposal.

6. Based on this score, I determined that Premera's proposal was reasonably susceptible to award.

7. Between February 6 and February 17, I engaged in communications and discussions with Premera as permitted by the RFP and Alaska law. At no time did I ever intend to coach Premera. My intention was solely to clarify uncertainties, eliminate confusion and ensure full understanding, as well as to get the best possible offer for the State of Alaska. My communications and discussions with Premera were no different than any other communications and discussions I have conducted with offerors in my over 20 years of experience as a procurement officer.

8. On February 17, Premera submitted its best and final offer. The evaluation committee scored the BAFO as follows:

| | |
|---|---|
| Technical Proposal: | 2,119 |
| Cost Proposal: | 2,000 |
| Alaska Offeror's Preference: | 500 |
| Total: | 4,619 |

9. On February 18, 2006, I issued a notice of intent to award the contract to Premera.

ATTORNEY GENERAL, STATE OF ALASKA
DIMOND COURTHOUSE
P.O. BOX 110300, JUNEAU, ALASKA 99811
PHONE: 465-3600

10. On February 21, representatives from Aetna contacted me to inquire why their proposal had been declared non-responsive. Aetna's lobbyist, Reed Stoops, also asked what Premera's cost proposal was. Because the notice of intent to award had been issued, that information was now public, and so I disclosed that Premera's bid was approximately $34 million.

11. On the afternoon of February 21, we discovered that a portion of Aetna's proposal had been misplaced. I rescinded the notice of intent to award the contract to Premera.

12. On February 23, I was directed to implement the modified evaluation process agreement that the parties agreed to. I proceeded to do so. I first directed the evaluation committee to complete the scoring of Aetna's proposal to determine if it was reasonably susceptible to award. The evaluation committee scored Aetna's proposal as follows:

| | |
|---|---|
| Technical Proposal: | 2,030 |
| Cost Proposal: | 1,502 |
| Alaska Offeror's Preference: | 500 |
| Total: | 4,032 |

13. Based on this score, I determined that Aetna's proposal was reasonably susceptible to award.

14. Following the submission of the best and final offers, I directed the evaluation committee to score the changes to the proposals. In my experience, we never re-score an entire proposal following the submission of best and final offers unless the

ATTORNEY GENERAL, STATE OF ALASKA
DIMOND COURTHOUSE
P.O. BOX 110300, JUNEAU, ALASKA 99811
PHONE: 465-3600

entire proposal has changed. My understanding was that the parties had not requested that the proposals be entirely re-scored.

15. The final results of the evaluation committee were:

| | |
|---|---|
| Premera: | |
| Technical Proposal: | 2,120 |
| Cost Proposal: | 2,000 |
| Alaska Offeror's Preference: | 500 |
| Total: | 4,620 |
| Aetna: | |
| Technical Proposal: | 2,048 |
| Cost Proposal: | 1,931 |
| Alaska Offeror's Preference: | 500 |
| Total: | 4,479 |

16. I then issued the notice of intent to award the contract to Premera.

17. On March 13, 2006, the State entered into the contract with Premera for third party administrator services.

Further your affiant sayeth naught.

DATED: 4/28/06

Walt Harvey
Procurement Officer

SUBSCRIBED AND SWORN TO before me this 28 day of April 2006.

STATE OF ALASKA
OFFICIAL SEAL
Rebecca C Allison
NOTARY PUBLIC
My Commission Expires 4/2/17

Notary Public In and For Alaska

ATTORNEY GENERAL, STATE OF ALASKA
DIMOND COURTHOUSE
P.O. BOX 110300, JUNEAU, ALASKA 99811
PHONE: 465-3600

Protest Report

# STATE OF ALASKA

FRANK H. MURKOWSKI, GOVERNOR

**DEPARTMENT OF ADMINISTRATION**

*DIVISION OF GENERAL SERVICES*

PO BOX 110210
JUNEAU, ALASKA 99811-0210
PHONE (907) 465-2250
FAX (907) 465-2189

April 28, 2006

Chris Kennedy
Administrative Law Judge
Department of Administration
Officer of Administrative Hearings
550 S. 7th Ave., Suite 1780
Anchorage AK 99501

Re: Protest Report – Aetna Protest
RFP 2007-0200-5946

Dear Hearing Officer Kennedy:

This is the state's protest report for RFP 2007-0200-5946, submitted in accordance with AS 36.30.605. It is being submitted to you, under the delegation issued by Commissioner Nordstrand, Aetna's appeal of the procurement officer's protest decision was received by the state on March 28, 2006. The date of submission of this protest report was agreed to by the parties and your office per our order of April 4, 2006.

Aetna raises two principal points on appeal: (1) that the state violated AS 36.30.250(a) and 2 AAC 12.260(a) by using different evaluation teams to score the proposals; and (2) that the state violated AS 36.30.240 and 2 AAC 12.290, and created an appearance of impropriety that affected the outcome of the procurement by engaging in prolonged and complex negotiations with Premera.[1]

Aetna raises a new issue under this appeal that Premera's cost is actually $2.48 million higher than Aetna's cost based on a new analysis generally contained in the affidavit of Matt McGuinnes attached to the appeal. That argument and the analysis were not included in Aetna's protest and should not be considered at the appeal stage. However, for the record, the state address this matter.

[1] Aetna raised a third issue in its protest—that the state failed to separately score Aetna's proposal to provide pharmaceutical claim services only. But Aetna has not appealed that issue. Aetna Appeal, p.7 n.5.

printed on recycled paper

The state believes Aetna's entire appeal should be denied for the reasons discussed below.

## I. Background

Discussion: At this juncture, it is undisputed by the parties that Aetna submitted a responsive proposal and that one set of Aetna's proposal binders was unknowingly misplaced during the proposal evaluation process The procurement officer's protest decision (page 3) adequately addresses why the state could not simply contact Aetna to inquire about missing sections of the proposal. Additionally, the separate matter of Aetna's missing set of binders is not a point included in the protest or this appeal.

- On page two of the appeal Aetna states that the "initial award to Premera was predicated on the erroneous conclusion that Premera was the sole responsive bidder." (Emphasis added.)

Response: There was never an "initial award" to Premera. The state issued a "Notice of Intent" to award a contract (ref. AS 36.30.365) to Premera on February 18, 2006, but no initial award was made. Further, before Aetna signed the agreement (Exhibit A, state's protest decision) that allowed the "agreed-to" evaluation process proceed, it knew that Premera's proposal had met all the RFP criteria, it was scored and the state moved to discussions followed by a best and final offer (Jones Affidavit at ¶ 12). Aetna was fully aware that the state had considered Premera to be the sole responsive bidder at that time.

- Aetna continues to mischaracterize the state's evaluation of Premera's proposal. On page two of the appeal Aetna states, "Shortly thereafter, the Division began extensive private communications with Premera aimed at improving its offer."

Response: The state's communications with Premera were authorized by law and properly conducted under AS 36.30.240 and 2 AAC 12.290. That same process was used by the state to discuss various aspects of Aetna's proposal. Aetna states on page two of the appeal that Premera answered the state's 21 pages of questions in a "49-page reply on February 13, 2006. *Attachment 4(b) at 7-56*" However, please note that these pages include both Premera's restatement of the questions and its response.

- On page three of the appeal, Aetna attempts to attach legal significance to the fact that Premera had no competition when its proposal was initially evaluated by the state.

Response: Premera was not made aware that it was the sole offeror until after the first Notice of Intent was issued on February 18, 2006. At no time prior to that date during evaluation, scoring, discussion or the best and final phase did the state inform Premera that it had submitted the only responsive proposal. A.S 36.30.230 prohibits the state from disclosing the contents of proposals to competing offerors or releasing the register of proposals until after the Notice of Intent is issued.

- Reference is made on page three of the appeal that Premera's score for the non-cost factors increased by 629 points, to a total of 2119 points, after the state scored its best and final offer on February 16 - 17, 2006.

Response: Premera received 629 additional points for the non-cost technical factors when its best and final offer was scored. When the first Notice of Intent was issued on February 18th, Premera had a total score of 4,619 points:

| Awarded Points | Available Points |
|---|---|
| 1,490 Awarded Feb. 6th (original proposal) | 2,500 - Technical Proposal |
| 629 Awarded Feb. 17th (1st best & final) | |
| 2,000 | 2,000 - Cost |
| 500 | 500 - Alaska Offeror's Preference |
| **4,619 total score Premera** | |

Aetna's point total was 4,032 after its proposal was scored by the reconstituted committee on February 23, 2006, but before the submittal of its best and final offer:

| Awarded Points | Available Points |
|---|---|
| 2,030 | 2,500 - Technical Proposal |
| 1,502 | 2,000 - Cost |
| 500 | 500 - Alaska Offeror's Preference |
| **4,032 total score Aetna** | |

A total of 587 points separated Aetna and Premera at this juncture, before the submittal of best and final offers on February 28, 2006. It was mathematically impossible for Aetna to overcome Premera's lead in the scoring process during the best and final round based solely on non-cost factor improvements to its technical proposal.

Even if Aetna's technical proposal achieved a perfect score in the best and final round and increased from 2,030 points to 2,500, which was unlikely and in fact Aetna gained only 21.5 additional points during that process, Aetna would still be 117 points behind Premera.

Therefore, the only way Aetna could prevail would be to dramatically reduce the cost of its proposal (RFP Section 7.23). Here, as a result of this protracted procurement , and before submitting its best and final offer Aetna knew that Premera had submitted an original cost proposal of $34,077,274. This was a significant competition benefit to Aetna.

After discussions authorized under AS 36.30.240 with both parties on February 24, 2006, and with Aetna having the benefit of knowing Premera's original cost proposal, Aetna reduced its cost proposal by at least $13 million, from $45,387,171 in its original proposal to $32,054,652 in its best and final offer. As such, Aetna garnered an additional 429 points for cost. However, even with the substantial increase in cost points Aetna was unable to exceed Premera's total score.

- On pages four and five of the appeal Aetna continues to advance the incorrect notion that a "reasonably susceptible for award" determination regarding its proposal could have been made without the comparison of scores. On page four, footnote two in the appeal incorrectly states that scoring does not occur in order for the state to determine which proposals are reasonably susceptible for award, but rather "a look at the intrinsic strengths and weaknesses of a proposal, so as to see whether, if improved, it might plausibly become the best and final offer."

Response: The agreement (Exhibit A, state's protest decision) provides under Item 1 that Aetna's proposal would first be evaluated and scored. Then, the next step in the process, Item 2, references the "reasonably susceptible for award" determination. Since the evaluation of this RFP was based on a numerical rating system, the only way to make a "reasonably susceptible for award" determination was to compare scores. The state previously dealt with this subject on page 6 of the protest response, but provides this additional explanation and analysis of the issue. 2 AAC 12.290(a) states:

*Offerors of proposals reasonably susceptible for award as determined in the evaluation conducted under 2 AAC 12.260 may be offered the opportunity to discuss their proposals with the procurement officer or evaluation committee at the discretion of the procurement officer. (Emphasis added.)*

Therefore, whether a proposal is "reasonably susceptible for award" is determined by the evaluation method conducted under 2 AAC 12.260 for the procurement in question. 2 AAC 12.260(b) states:

> *The evaluation must be based only on the evaluation factors set out in the request for proposals. The relative importance or weighting value of each evaluation factor shall be set out in the request for proposals. Numerical rating systems may be used, but are not required. If a numerical rating system is not used, the procurement officer, or each member of the evaluation committee, as applicable, shall explain his or her ranking determination in writing. (Emphasis added.)*

Since the relative importance or weighting value of each evaluation factor set out in RFP 2007-0200-5946 was based on a numerical rating system, the only way to determine whether Aetna's proposal was reasonably susceptible for award was to compare its score to Premera's existing score. It was not legally possible to simply "look at the intrinsic strengths and weaknesses of a proposal" in order to make the reasonably susceptible for award determination, as alleged by Aetna.

- Aetna states on pages four and five of the appeal that the state first breached the agreement when it appointed only one common evaluator to the reconstituted committee, but then Aetna alleges a second breach occurred because an identical review committee (the reconstituted committee) did not score both proposals. One, the state disagrees it breached the agreement. Two, if the intent of the agreement was to have the reconstituted committee score each proposal "from top to bottom," it wouldn't have mattered who was on the committee.

On pages five and six of the appeal, Aetna discusses its understanding of the final evaluation process that was agreed to by the state, Premera and Aetna.

Response: The state acknowledges this procurement was atypical. However, after locating Aetna's missing binder prior to award of the contract, the state immediately sought to develop an "agreed-to" process in cooperation with the interested parties that was in the state's best interest and as fair to both parties as possible under the circumstances (Jones Affidavit at ¶ 11). The parties, including Aetna, agreed to the process and agreed to waive a protest of the process.

## II. Aetna's Protest Introduction

- On page seven of the appeal, Aetna claims that the evaluation process for this procurement failed to comply with 2 AAC 12.260(a), which refers to an "evaluation committee" not committees. This is a new argument not raised in Aetna's protest.

Response: In its protest, Aetna alleged the state "violated basic principles of competitive bidding by assigning different evaluaters to award discretionary points to two different bidders," not that the state failed to comply with 2 AAC 12.260(a). Aetna was fully aware that the third member of the reconstituted PEC was entirely new to the process. One of Aetna's representatives even recalls her name (Judy Porter) from meetings with the state that culminated in the "agreed-to" evaluation process (Reed Stoops Affidavit at ¶ 6). Not only did Aetna fail to raise this issue in its protest, it agreed in writing to a "differently constituted" PEC. The state provided two of the original five PEC members that evaluated Premera's offer and Aetna signed an agreement that allowed different evaluation teams to evaluate the proposals submitted by Aetna and Premera. As such, Aetna is barred from raising this new issue.

## III. Aetna's Request for a Stay of Award

- Aetna maintains the state never ruled on its request for a stay of award, pursuant to AS 36.30.575, before simply going ahead and signing the contract, without notice of any kind to Aetna.

Response: Here, Aetna misinterprets AS 36.30.575. There are no notice requirements in this statute Further, the statute does not require a written determination by the procurement officer if a stay is not granted. AS 36.30.575 reads:

> *If a protest is filed the award may be made unless the procurement officer of the contracting agency determines in writing that a*
>
> *(1) reasonable probability exists that the protest will be sustained; or*
> *(2) stay of the award is not contrary to the best interests of the state.*

In this case, the procurement officer ruled on Aetna's stay request before the contract with Premera was signed. Aetna's protest was received by the state on March 10, 2006. The state was already aware of a portion of Aetna's objections as put forth in a letter from Aetna to the state on March 6, 2006 (Exhibit 1). After the receipt of

Aetna's protest, and before the contract was awarded to Premera, the state's procurement officer spent two and a half full days researching the merits before deciding that a stay would be contrary to the best interests of the state and a reasonable probability did not exist that the protest would be sustained. These actions by the procurement officer occurred before Premera received the award on March 13, 2006.

**IV. The Procurement Officer's Response to Aetna's Protest; Identification of Erroneous Factual Findings and Resultantly Erroneous Legal Conclusions**

Discussion: The procurement officer's protest decision stands alone and does not comport with Aetna's view on the principal findings and conclusions on page eight of the appeal. Aetna mischaracterizes the procurement officer's conclusion regarding communications. The PO's conclusion were as follows:

> *I believe Premera and Aetna were afforded "fair and equal treatment with respect to any opportunity for discussion and revision of proposals" as required by AS 36.30.240. However, that does not mean the state must discuss the exact items, or the same number of items with each offeror. Such an interpretation is unreasonable considering the variety of RFPs issued by the state and the fact that offerors respond to RFPs in different manners proposing a variety of solutions.*
>
> *Further, as noted on the first page of Aetna's protest, it is reasonable to conclude that a PEC would have fewer items to clarify and discuss with Aetna, who is the current contractor and has been the provider of the services covered by the RFP for the last 24 years.*

Communications with Aetna and Premera under AS 36.30.240 could not be the "same." The matters needing clarification were based upon the individual offers. However, Premera and Aetna were afforded "fair and equal treatment with respect to any opportunity for discussion and revision of proposals." Discussions under AS 36.30.240 are held for "the purpose of clarification to assure full understanding of, and responsiveness to, the solicitation requirements..." Fair treatment does not mean the state has to spend an equal amount of time with each offeror, discuss the same areas or number of questions, or submit the same number of pages to each offeror. Discussions are customized to address each offeror's proposal.

Cibinic/Nash, *Formation of Government Contracts* (3rd edition; 1998) pg. 900 states:

> "Discussions are tailored to each offeror's proposal, and shall be conducted by the contracting officer with each offeror within the competitive range."

Page 901 of *Formation of Government Contracts* states:

> "Thus, it is proper to conduct detailed discussions with offerors whose proposal contain technical deficiencies while affording those with technically acceptable proposals only an opportunity to submit a final proposal."

That is what occurred here. The state simply had more items to discuss with Premera than with Aetna (who has provided these services to the state for the past 24 years). Such action by the state does not violate AS 36.30.240. It is neither improper, nor constitutes a basis for an "appearance of impropriety" finding.

## V. The Nature of the Contract Being Awarded

Discussion: Under this section of the appeal Aetna provides a brief background of the contract. Aetna states on page ten that when the best and final proposals were opened (February 28, 2006), "the cost of the two responsive proposals appeared virtually identical" and that Premera was awarded 2,000 points for cost while Aetna received 1,930 cost points.

Response: The state disagrees that costs were virtually identical. Premera's best and final cost proposal submitted under RFP Section 7.23, which was used to calculate the points allocated for cost, was over $1 million lower than Aetna's cost proposal. In addition, Premera's third-year costs of $11,769,483 would apply to the contract renewal periods and Aetna's third-year costs of $12,839,123 exceed Premera's costs by over $ 1 million. Therefore, the four one-year renewals of a contract with Premera's, at $1 million savings each year, would result in total savings of $4 million when compared to a new contract with Aetna. Further, a comparison of Aetna's annual pharmacy rebate guarantee of $750,000 vs. Premera's annually guarantee of $3 million in pharmacy rebates reveals even more savings to the State of Alaska during the firm term of the contract and each renewal period. RFP Section 3.08 states, "administrative fees will be offset monthly by a percentage of the guaranteed yearly drug rebate..." In sum, the points allocated to cost under this RFP were based on each offeror's administrative fees submitted under Section 7.23, as calculated according to the objective formula described in RFP Section 2.14.

- Aetna raises a new argument in the appeal (page 10 at ¶ 1), that Premera's cost is higher than Aetna's cost because some of Premera's large costs should have been included as part of its administrative fees. In this paragraph of the appeal, Aetna is discussing the best and final cost proposals submitted February 28, 2006.

Response: The "large costs" that Premera should have included in the administrative fees, as alleged by Aetna, is based on the 30% figure, above Premera's medical network guarantee of $100 per employee/per month, which could be retained by Premera (McGuinness' Affidavit, page 5 at ¶ 1).

The RFP did not require such amounts, potentially retained by the contractor, to be included in the administrative fees, nor did the cost schedule under RFP Section 7.23, upon which the cost points were calculated, reference such amounts.

Further evidence these amounts were not included in the administrative fees is the fact that Aetna's retained amounts (McGuinness' affidavit at 29) are made up of two components; a "bonus" of up to 5% of medical fees that Aetna can earn for exceeding its network savings guarantee and fees related to Aetna's National Advantage Program (NAP). Neither of these two components are included in Aetna's administrative fees under RFP Section 7.23. Indeed, Aetna's "bonus" of up to 5% of medical fees that Aetna might earn for exceeding its network savings guarantee is included in a confidential section of its proposal, not in the administrative fees. Likewise, Aetna did not include the NAP fees under its "administrative fees," but instead they are located in the "Financial Assumptions" section of Aetna's proposal. That section states, "The fees for the National Advantage Program and Facility Charge Review are based on a percentage of savings achieved by the program(s) and are not included in the per employee/per month fees." (Emphasis added.)

The state objects to the analysis by McGuinness. The analysis was not included in the protest, it is based on uncertain criteria clearly not included in the evaluation of cost for this RFP, and it is based on speculative assumptions and subjective judgments. Also, the $13.74 million figure used for Premera (McGuinness Affidavit, page five at ¶ 1) is significantly different than the $11.95 million calculated by Aetna in its protest for this same item. That is, the "3 year network savings retained by Premera @ 30%" (Attachment 1 to Supplemental Affidavit of Mike Wiggins). The Supplemental Affidavit of Mike Wiggins is attached to the appeal as well.

The inclusion of these items in the cost evaluation would be improper and contrary to the evaluation criteria contained in this RFP, and violates AS 36.30.210(c) which states, in part, "The request must provide a description of the factors that will be considered by the procurement officer when evaluating the proposals received, including the relative importance of price and other evaluation factors," and 2 AAC 12.260(b) which states, in part, "The evaluation must be based only on the evaluation factors set out in the request for proposals."

Aetna has offered no evidence that these items were required to be included in the administration fees, or considered as part of the cost evaluation, and the RFP language belies such arguments. Further, Aetna itself didn't include its "retained discounts" in the administrative fees.

- On page six of the affidavit, Mr. McGuinness mentions that the "State of Alaska should have taken these factors into consideration when judging the proposals."

Response: RFP Section 1.06 provided the opportunity for Aetna to review the solicitation for "defects and questionable or objectionable material" and submit such comments in writing to the procurement officer at least ten days before the proposal opening. See AS 36.30.565(a). Neither Mr. McGuinness, an Underwriting Manager employed by Aetna, nor any other Aetna representative objected to the evaluation criteria, or suggested the aforementioned changes to the cost evaluation criteria at that time, or during meetings with the state to negotiate an agreement that would allow the evaluation process to proceed forward. This protest appeal point is clearly untimely.

**VI. The Department Violated AS 36.30.250(a) and 2 AAC 12.260(a) by Using Different Evaluation Teams to Score the Two Applicants, Making it Impossible to Determine Which Proposal was "Most Advantageous to the State." The Division Erred in Finding that: (a)' Aetna Had Agreed to this Process; and (b) any Error did not Affect the Outcome of the Procurement.**

- On page ten of the appeal, Aetna states, "In the absence of any agreement, the use of different evaluation teams to score different proposals is unlawful, and in this case affected the outcome of the procurement."

Response: The agreement signed by Aetna, under item 1, stipulates that Aetna's proposal would be scored by "the reconstituted Procurement Evaluation Committee (PEC)." Aetna knew that the reconstituted PEC was different than the original PEC that scored Premera's proposal. Under item 2, the agreement stated that if, after scoring,

Aetna's proposal was responsive and determined to be "reasonably susceptible for award" the expedited evaluation process would move forward. Aetna cannot argue that it did not agree to the use of different evaluation teams to score different proposals because that is the only way the "reasonably susceptible for award" determination could be made by the state under 2 AAC 12.290(a) and 2 AAC 12.260(b). And, at no time during discussions with Aetna did the state agree to use a single PEC to completely evaluate both proposals, nor did Aetna request such action during the discussions (Jones Affidavit at ¶ 14).

- On pages 11 and 12, Aetna discusses how points were awarded for non-cost factors, a chart is included that represents the evaluators' final scores for Aetna and Premera, and finally Aetna reaches a conclusion that Pat Shier's point spread when compared to the highest score posted by Freda Miller plainly affected the outcome.

Response: Here, and later in the appeal, Aetna seems to suggest, "If only Pat Shier's scores had been included for Premera - things would be different." However, in the state's view, the evidence indicates Premera's lead over Aetna would have increased further. Mr. Shier had fully read and scored a substantial portion of the technical categories in Premera's proposal. The RFP allowed PEC members to subjectively score sections 7.03 – 7.22, expressed as 10.01 – 10.20 in the PEC score sheets (RFP Attachment 1, Proposal Evaluation Form). Mr. Shier only scored 10.01 through 10.15, or 75 percent of Premera's response. However, as indicated below, if his scores are included in the average, Premera's total score for those sections would have increased.

///

///

///

Premera's First Evaluation Scores

| Technical Proposal | Gray | Jarrell | Miller | Williams | Shier |
|---|---|---|---|---|---|
| 10.01 | 40 | 55 | 25 | 75 | 50 |
| 10.02 | 81 | 67.5 | 83.5 | 80 | 80 |
| 10.03 | 50 | 25 | 25 | 45 | 40 |
| 10.04 | 26.5 | 14 | 4 | 20 | 40 |
| 10.05 | 40 | 55 | 40 | 60 | 80 |
| 10.06 | 62 | 85 | 51 | 125 | 110 |
| 10.07 | 166.5 | 91 | 127 | 190 | 140 |
| 10.08 | 127.5 | 85 | 87 | 120 | 140 |
| 10.09 | 80 | 32.5 | 11 | 90 | 60 |
| 10.10 | 67 | 60 | 50 | 100 | 90 |
| 10.11 | 75 | 42.5 | 63.5 | 75 | 60 |
| 10.12 | 84 | 45 | 54 | 85 | 60 |
| 10.13 | 191 | 155 | 171 | 200 | 200 |
| 10.14 | 135 | 90 | 72 | 125 | 110 |
| 10.15 | 104 | 50 | 62.5 | 65 | 110 |
| **Total** | **1,329.5** | **952.5** | **926.5** | **1455** | **1370** |

Premera's average score for 10.01 – 10.15 **without** Pat Shier:
1,329.5
952.5
926.5
1,455
4,663.5 / 4 PEC members = 1,166 points

Premera's average score for 10.01 – 10.15 **with** Pat Shier:
1,329.5
952.5
926.5
1,455
1,370
6,033.5 / 5 PEC members = 1,207 points

Indeed, at this stage Mr. Shier's scores were second highest among the original five-member PEC. The inclusion of his scores results in a 41 point increase for Premera for items 10.01 – 10.15.

Further, the difference of 855 points between the low score for Aetna (Shier – 1585) and the high score (Miller – 2,440), resulting in a 54% increase from the low score to the high score is not that unusual. When proposals are evaluated and scored by a number of state evaluators, it is not uncommon for them to arrive at widely different scores.

Nash/Cibinic/J./O'Brien, KR (1999) *Competitive Negotiation: The Source Selection Process*, 2nd ed., @534:

> "Frequently, the same factors are evaluated by a number of evaluators who arrive at a different assessment of the merits of the proposal and different scores. The Comptroller General has stated, 'Since evaluating proposals involves subjective as well as objective judgments, it is not unusual for individual evaluators to reach disparate conclusions,' *Mounts Eng'g*, 65 Comp. Gen. 476 (B-218489.4) 86-1 CPD ¶ 358. In *EBA Ernest Bland Assocs.*, Comp. Gen.Dec. BBB-270496, 96-1 CPD ¶ 148, the Comptroller General found nothing unusual or improper in the fact that two individual agency evaluators gave widely divergent scores to the same proposal."

Exhibit 2 summarizes the scores of individuals who evaluated and subjectively scored proposals submitted in response to RFP 2005-9900-4755 Statewide Travel Agency Services, issued August 13, 2004. The evaluators are identified by initial only; KG, DJ, ML, JP, and JS. The percentage increase from the low score to the high technical score subjectively awarded for each proposal ranged from 44.78% to 69.46%. Even when comparing the second lowest score to the high technical score, percentage increases range from 16.42% to 53.14%.

Exhibit 3 represents the evaluation of a more recent state procurement, RFP 2006-0600-5772 Lease of Approximately 30,846 Square Feet of Office Space in Anchorage, issued January 31, 2006. The percentage difference between the high and low technical scores subjectively awarded by the evaluators was between 44% and 92%.

It is not unusual for individual evaluators to reach disparate conclusions. Such was the case in this procurement. In essence, Aetna seems to argue that it received one low score (Shier) and two high scores (Miller and Porter). However, it must be noted that since Aetna agreed to the use of a "different constituted" PEC, this combination of one low and two high scores could have occurred as a natural result of introducing a new PEC member (Judy Porter). Further, Aetna has not proven that there was any bias in

favor of Premera on the basis of the make-up of the reconstituted PEC. In fact, Aetna has asserted no credible evidence to support even a presumption of bias by the PEC or any individual member.

- On page 12 of the appeal, Aetna alleges it did not agree to the evaluation process conducted by the state and proceeds through page 15 to discuss how the state breached the evaluation process outlined in the agreement.

Response: The state did not breach the process outlined in the agreement. This protest report has previously addressed the issues that formed the backdrop of the agreement. It was not possible to reconvene the original PEC and there was insufficient time to start over (Jones Affidavit at ¶ 7, 8 & 9).

- Aetna asserts on page 13 it "is not true" that Pat Shier was a member of the evaluation team that "scored Premera's proposal," but then under footnote ten refers to Mr. Shier's score sheets that are found at Attachment 5(c) to its protest.

Response: The state admits that Mr. Shier did not completely score Premera's proposal, however he was a member of the "original PEC that scored Premera's proposal in the initial evaluation process" as stated under item 1 in the agreement signed by Aetna.

Other than Ms. Miller, Mr. Shier was the only remaining member from the original PEC that was available to perform an expedited review of Aetna's proposal. In addition, Mr. Shier was a scoring member of the PEC for this very contract the last time it was solicited by the state (RFP 2001-0200-2140, dated September 29, 2000).

The state logically chose Mr. Shier to be a member of the reconstituted PEC instead of introducing a second new PEC member that had not read nor knew anything about the RFP and scoring criteria.

- On pages 13 and 14, Aetna says that it "insisted that a majority of the reconstituted team be comprised of employees who had scored Premera's proposal" (Robinson Aff., ¶ 7, Fifth Wiggins Aff., ¶ 7, Stoops Aff., ¶ 6) and that "Premera's first and second scores were not affected in the slightest by Shier..."

Response: A close reading of those sections of the affidavits confirms that the Aetna representatives did not insist on anything related to the makeup of the PEC. Further, as previously mentioned, the evidence reveals Premera's lead would have increased further had Mr. Shier's scores been included.

- On pages 14 and 15, Aetna alleges the state breached its promise that "both [final] proposals will be scored" by the "reconstituted evaluation committee" and the proposals were not scored "from top to bottom, by the same people."

Response: At no time did the state agree to completely evaluate and score both proposals "from top to bottom" with a single PEC, nor did either Aetna or Premera request such action (Jones Affidavit at ¶ 14). With respect to the scoring of best and final offers, the agreement stated:

> *After receipt of best and final offers from Aetna and Premera, both proposals would again be scored; a new notice of intent would then be issued to the winning offeror.*

Scoring did occur at this stage and a new Notice of Intent was issued to Premera based upon best and final offer scoring (state's protest decision, pages eight and nine). Costs for each best and final offer were scored. Premera received 2,000 points for cost and Aetna received 1,931, as dictated by the scoring formula contained in RFP Section 2.14.

Premera's total proposal score of 4,619 points, which existed before best and final offers were submitted on February 28, 2006, was determined by the original PEC in accordance with 2 AAC 12.260. Premera's existing score was used to determine whether Aetna was "reasonably susceptible for award" per 2 AAC 12 290(a) and would be offered the opportunity to discuss their proposal with the state. Thus, the importance of Premera's total score previously determined by the original PEC is revealed, it was used as a benchmark to determine whether Aetna was allowed to participate further in the evaluation process. Aetna's fate hinged on how its score, developed by the reconstituted PEC, compared to Premera's existing score developed by the original PEC. If Aetna was not "reasonably susceptible for award" the state could have ended the process at that point and proceeded to make the award to Premera, based on the total score developed by the original PEC.

Despite the importance of Premera's score that existed immediately before best and final offers were submitted, Aetna alleges the agreement required the state to throw it out and start over. But, the agreement does not require that. The agreement states that "After receipt of best and final offers from Aetna and Premera, both proposals would again be scored..." And, both proposals were scored. The state followed the process it follows in every other RFP procurement, that is, after the receipt of best and final offers, only the changes addressed in the proposal are scored (if required), not the entire

proposal. The practice of having a PEC thoroughly evaluate all aspects of a best and final offer is not required by statute, regulations or administrative policy, nor has it ever been the state's practice (Jones Affidavit at ¶ 14). There is no requirement, nor has it ever been the state's practice to score an entire proposal after receipt of a best and final offer (BAFO) unless the entire proposal has been changed.

The state treated Aetna's and Premera's BAFO in the same manner, only looking at changes each BAFO made to the original proposals. Proposed costs for each BAFO changed and were therefore objectively scored according to the RFP cost evaluation criteria. The sections of Aetna's best and final offer that altered its technical proposal were scored, resulting in a 21.5 point total increase. It was not necessary to score the best and final changes to Premera's proposal since such changes would have only affected scoring in an immaterial manner (see state's protest response, page nine).

The following quote is taken from Aetna's initial protest:

> *And so it agreed, first, to make a threshold call as to whether Aetna's proposal was "reasonable susceptible for award." Wiggins Aff., ¶17; Attachment 2. If Aetna passed that first test (which it did), a subsequent evaluation of new "best and final offers" would be made.*

That is the exact process the state followed. Cibinic/Nash, *Formation of Government Contracts* (3rd edition; 1998) pg. 914, *citing Northwest Regional Educ. Lab.*, Comp. Gen. Dec. B-222591.3, 87-1 CPD ¶ 74:

> "There is no requirement that each BAFO be totally rescored. Thus, it has been found proper for agency evaluators to assess the changes which a BAFO has made to the original proposal and report them to the source selection official."

There is no basis to find the state committed a legal or procedural error when the best and final offers were evaluated, or that its actions failed to comply with its agreement with Aetna.

**VII. The Department Violated AS 36.30.240 and 2 AAC 12.290, and Created an Appearance of Impropriety that Actually Affected the Outcome of the Procurement. By Engaging in Prolonged and Complex Negotiations with Premera, But Only Perfunctory Correspondence with Aetna, Before Soliciting "Best and Final Offers." The Division Erred in Finding that: (a) the Communications with Aetna and Premera Were Equivalent; (b) any Difference did not Raise an Appearance of Impropriety or Influence the Outcome of the Procurement.**

- On page 15 of its appeal, Aetna alleges that the state violated AS 36.30.240 and 2 AAC 12.990, creating an appearance of impropriety affecting the outcome of the procurement when the state engaging in prolonged and complex negotiations with Premera, but only perfunctory correspondence with Aetna. On page 25, Aetna summarizes that the state should have helped "Aetna improve its proposal to the same extent as it already had with Premera."

Response: The state's protest decision addressed this issue in detail on pages 10 - 15, and as noted in that decision, Aetna continually mischaracterizes the discussion and clarification processes under AS 36.30.240 and 2 AAC 12.290. In fact, in the title of this section of Aetna's appeal it refers to "prolonged and complex negotiations with Premera." However, negotiations, (allowed under 2 AAC 12.315), were not conducted with Premera until completion of the evaluation process and issuance of the Notice of Intent on February 28, 2006. And, the state's negotiations with Premera were held for the sole purpose of finalizing the contract and occurred after the Notice of Intent was issued.

All discussions between the state and Premera, except for the three items discussed on February 24th, occurred before all parties signed the agreement. Further, before Aetna signed the agreement it knew that the state had already evaluated Premera's proposal, moved to discussions and that Premera had submitted a best and final offer.

Aetna's theory is that the state should have helped Aetna improve its proposal on par with Premera and that the discussions process is something of a numbers game. That is, the same approximate number of items, or pages of questions, must be discussed with each offeror, or the additional points awarded each offeror after scoring best and final proposals must be approximately equal. However, such action is not what's required under state procurement statutes and regulations.

The fact is that Aetna submitted a complete and thorough proposal, which is logical since Aetna is the current contractor and has been providing these services to the state for the past 24 years. As such, there was little need to clarify or discuss items in order to assure Aetna's "full understanding of, and responsiveness to, the solicitation requirements" per AS 36.30.240.

The state had numerous items to clarify and discuss with Premera. Premera's technical score increased by 629 after its best and final offer was scored on February 17, 2006. However, differences in the number and type of items clarified and discussed with one offeror versus another does not result in an appearance of impropriety finding and subsequent cancellation of the procurement. In fact, there is absolutely no evidence in Aetna's appeal that the PEC members, who actually developed the list of items to discuss with each offeror, acted improperly.

Alternatively, looking at the points allocated to cost before and after the best and final scoring round, Aetna's cost points increased from 1,502 to 1,931, but Premera's cost points remained the same. Since Aetna received 429 additional points for cost, but Premera's total (2,000) remained the same, does an appearance of impropriety exist? No. Just because Premera received substantially more non-cost points than Aetna after its best and final offer was scored does not amount to an appearance of impropriety finding.

- In its protest, Aetna alleged the state created an "appearance of coaching" Premera to improve its score. On page 16 Aetna seeks to bolster its "appearance of impropriety" argument.

Response: The reference to *Paul Wholesale* on page 16 is off-point. The procurement under that case involved bids, not proposals, and there was no PEC that subjectively evaluated offers. Therefore, no discussions occurred under the authority of AS 36.30.240. Any "alleged *ex parte* communications between one party and DOT&PF" in Paul Wholesale has nothing to with proposal discussions under AS 36.30.240 properly conducted under this RFP. Likewise, *Dick Fisher* involved bids for a construction project, not proposals. The appearance of impropriety finding in that case involved *ex parte* communications between former state Commissioner Rudd and a one time agent of Fisher. Such communications are patently different than authorized proposal discussions held under AS 36.30.240 for this RFP.

The *J&S Services* case did in fact involve proposals. However, the "extensive *ex parte* communications between a member of the evaluation committee and one proposer" occurred outside of any discussions held under AS 36.30.240 and without the procurement officer's knowledge.

*Keco Industries* holds that claims for recovery of bid preparation costs must be reviewed under the deferential arbitrary and capricious standard. *Keco Indus., v. United States,* 492 F.2d 1200 (Ct. Cl. 1974). The court held that simple negligence by the reviewing agency was insufficient to award bid preparation damages. *Id.* at 1206-07.

These cases have no bearing on the facts of this procurement. Premera, through proper discussions with the state and the submittal of a best and final offer, was able to garner more points related to its technical proposal than Aetna as specifically allowed by AS 36.30.240 and 2 AAC 12.290 and longstanding state practice.

Aetna's conclusion of this argument at the bottom of page 16 of their appeal that "there exist specific statutory and regulatory prohibitions on precisely the kind of one-sided, *ex parte* communications in which Premera and the Division engaged" is without merit.

- Next, beginning on pages 16, Aetna alleges that the state was unfair and did not help "Aetna improve its proposal to the same extent as it already had with Premera." However, on page 17 Aetna spends almost a half page in the footnote section attempting to show that as a result of the state's "extensive discussions" with Premera, the changes made to its best and final offer were "material and substantive, and beyond the scope of 2 AAC 12.825."

Response: On page ten of the protest decision, the state explained that the clarification and discussion processes for this procurement were combined in a single phase under AS 36.30.240. That section of law specifically permits "clarification to assure full understanding of, and responsiveness to, the solicitation requirements" and allows the submittal of best and final offers. (Emphasis added). Therefore, the prohibition under 2 AAC 12.825 against "material and substantive" changes to a proposal does not apply since clarifications in this procurement fell under AS 36.30.240.

- On pages 17 and 18, Aetna states that the "Division held extensive discussions with Premera which had the effect of giving Premera detailed advice on how to:

    - Retract portions of their proposal which, absent a retraction, would leave Premera's proposal unresponsive;

    - Insert items required to be included in the RFP but originally omitted by Premera; and

    - Suggest available contract administration measures that could result in lower cost, or increased evaluator attractiveness, and hence higher point scores."

Response: On page 11 of the protest decision, the state objected to this inaccurate portrayal of the state's discussions with Premera, but stated that similarities could be found regarding the questions posed to Aetna during discussions. Some of the state's direct questions to Aetna (Aetna appeal attachment 3 and as highlighted below) fall into these same categories:

- Retract portions of their proposal which, absent a retraction, would leave Premera's proposal unresponsive;

> **RFP Section 7.16 c), Page 8 – Information Technology/ Communication**
>
> Please clarify that although the No box was checked, that Aetna does currently offer EFT to providers in lieu of a mailed EOPP check and that under the Health FSA that the auto-debit payment method to providers could be utilized. Are these service included as part of Aetna's proposal?
>
> Aetna responded as follows in its best and final offer:
>
> *Yes, we have a very successful Electronic Funds Transfer (EFT) process that we currently administer to some State of Alaska providers in lieu of a mailed check. Both the EFT and Electronic Remittance Advice (ERA) products are rolled out together and providers must sign up for both simultaneously in order to receive payment by electronic transfer. Provider sign up requires an ERA/EFT enrollment form to be filled out and a 10-day pre-note period applies for EFT.*

*Aetna also offers EFT to participants in the FSA in lieu of receiving a check. We are also able to suppress EOP to receive an email notification. Employees are able to request EOP suppression via Aetna Navigator.*

*Auto Debit is available with our FSA product and will pay the provider at the point of service.*

- Insert items required to be included in the RFP but originally omitted by Premera; and

**RFP Section 7.17 e), Page 5 – Client Service/Experience**

Please clarify that although 5 client references were requested, Aetna responded with only 4 client references.

Aetna responded as follows in its best and final offer:

*We are providing an additional reference, OPERS, a client with 20,000 employee participants.*
*OPERS*

*Ms. Lynne Hamilton*
*Health Care Insurance Specialist*
*Ohio Public Employees Retirement System*
*277 East Town Street*
*Columbus, OH 43215*

- Suggest available contract administration measures that could result in lower cost, or increased evaluator attractiveness, and hence higher point scores.

**RFP Section 7.13 c), iv), Page 5 – Performance Standards**

Considering that Aetna is currently pursuing refund of overpayments in excess of $50, please clarify why Aetna disagreed with this section and proposed two performance guarantees in place of the guarantee outlined in this section.

Aetna responded as follows in its best and final offer:

*In most overpayment situations Aetna recovers the funds from providers and members and credits the recovered dollars back to the State of Alaska. In many circumstances, it is difficult to determine fault for the overpayment which adds to the complexity of tracking. The proposed performance guarantees Aetna submitted in response*

*in the State of Alaska's RFP are standard within the industry and as a company we have assigned significant dollars to assure the State that we will achieve these metrics of accuracy and timeliness of payment.*

- On pages 18 and 19 of the appeal, Aetna advances its argument that the state gave Premera a "clear road map" of how to re-package $6.88 million in costs to the state into a category that was not counted as a proposed cost, resulting in a $6.88 million understatement of its final cost. On page 22 of the appeal, Aetna uses the Wiggins and McGuinness affidavits to show how Premera lowered its "cost proposal" and states that Premera's initial proposal was understated because the "$34 million bid did not include $6.88 million in 'Network Access Fees" related to the state's use of Premera's medical network.

Response: First, it must be noted that the RFP specifically stated that access fees related to an offeror's medical network would be subjectively evaluated by the PEC and that such fees were not to be included in the cost proposal. That is why none of Premera's "cost proposals," properly submitted in accordance with RFP Section 7.23, included the network access fees. Nor did Aetna include its fees for the National Advantage Program in the administrative fees (RFP Section 7.23) and Aetna specifically stated that such fees "are not included in the per employee/per month fees."

Section 7.15(d) of the asked the offerors the following question:

*d) Is there any additional fee for using any of the networks described above?*

Section 10.13(d) of the score sheet used by PEC members to subjectively evaluate proposals provided the following criteria to subjectively evaluate any "network access fees":

*d) To what extent did the offeror indicated there is an additional fee for using any of the networks described above? Are the fees acceptable?*

Further, RFP Sec. 7.13 Cost Proposal itself did not require offerors to include fees that applied to the state's use of its medical network. At the bottom of Section 7.23, offerors were asked to itemize various components of their administration fees, including pharmacy network/administration and vision network/administration (active employees only), but any component fees for the medical network are not included. And, in any

event Premera's original offer of $5.51 per employee/per month for network access, calculated to be $6.88 million by Aetna, was eliminated in Premera's last best and final offer.

Aetna alleges the state gave Premera a "clear road map" of how to re-package $6.88 million in costs to the state into a category that was not counted as a propo ed cost. That is not true. The state previously addressed this matter on page 14 of the protest decision. The state's Benefits Manager was concerned that Premera's proposed network access fee, capped at $5.51 per employee per month, would artificially inflate the actual cost of claims and cause reporting issues. As such, during discussions the state asked Premera the following question:

> *In response to RFP Sec. 7.15 d), Premera proposed a network access fee of $5.51 per employee per month that is billed as a claim charge. This fee is associated with Premera's network discount. Is it possible for Premera to bill this fee or cost in a different manner, rather than adding the amount to a claim?*

That is hardly a "clear road map" of how to re-package $6.88 million in costs to the state into a category that was not counted as a proposed cost, resulting in a $6.88 million understatement of its final cost. Moreover, network fees were not included in the distribution of cost points for this RFP anyway.

Also, on page 19 of the appeal Aetna alleges Commissioner Nordstrand was forced to admit that the playing field was "not entirely level" because Premera's answers were the equivalent of a second offer. (*Attachment 12 at 24)* Here, Commissioner Nordstrand's comments are taken out of context. He did not state that the playing field was unlevel due to Premera's answers. Instead, the Commissioner was commenting on the fact that the "competitive nature of the process is lost" because "Aetna knows what Premera's best and final number is." The Commissioner stated:

> *One other caveat was that we would tell Premera what Aetna's original number was so they'd be on a level playing field in that regard. Not entirely level, because Premera actually had made sort of a second offer. And I can tell you that in our discussions, trying to reach an agreement to follow this path, Premera was very concerned that they'd already sort of bid against themselves once and were unhappy.*

As one can see, the Commissioner was discussing Premera's best and final cost offer, not its answers to the state's discussion questions. Also, he was commenting on the fact that Premera was unhappy since it had to "bid against themselves" (i.e. Premera had already lowered its cost in a best and final offer).

- On page 20, Aetna uses a chart to demonstrate the additional points that were awarded as a result of the state's discussions with Aetna and Premera.

Response: What's missing from the table are some critical details. For example, 62 pages of combined questions and answers are included for Premera, but only "three pages of questions" are referenced for Aetna. Aetna's answers consisted of 16 additional pages. Also, the table does not include the points for cost that changed as a result of the best and final offers after Aetna had the benefit of seeing Premera's cost which was $13 million less. As previously mentioned, after seeing Premera's cost Aetna reduced its cost proposal and received an additional 429 points, Premera received 0 additional points since it remained the lowest priced offer. Aetna had a clear advantage in this situation because of the knowledge that its costs were dramatically higher than Premera's, even though the state tried to "level the playing field" by sharing Aetna's price with Premera, which is what Commissioner Nordstrand was referring to. If any offeror was disadvantaged here it was Premera.

On page 21 of the appeal, Aetna objects to the wording of the state's questions to Premera and references how the state asked Premera to clarify something that did not need clarification. On page 22 of the appeal, Aetna attempts to show the state's disparate treatment between Aetna and Premera during discussions and again raises the "re-packaging" argument. That is, Premera improperly "re-packaged" its best and final offer.

Response: AS 36.30.240 clearly allows of "clarification to assure full understanding of, and responsiveness to, the solicitation requirements." The state has previously addressed the "re-packaging" statement in the protest response and this report.

**VIII. The Appropriate Remedy Here is to: (a) Re-Score the Parties' Previously-submitted Final Proposals in their Entirety, Using a Three-Person Team Comprised of Uninvolved, Qualified and Unbiased Personnel Assisted by a Mutually-Agreeable Consultant With Expertise in Evaluating Health Claim Management Service Proposals; (b) Have the Evaluation Team Include Total Costs (as Defined in this Section) in the Cost Proposal Required by Section 7.23 of the RFP; and (c) Cancel Premera's Existing Contract, and Award the Contract to Aetna, if the new Evaluation Committee Finds Aetna's Final Proposal to be Most Advantageous to the State.**

Discussion: This procurement has been completed, prices are exposed and Aetna lost. Aetna now wants the two proposals to be re-evaluated by a completely new PEC, including a mutually-agreeable consultant, using different criteria to determine cost. With respect to the evaluation of cost, Aetna's footnote 18 on page 27 states that total cost includes "program administration fees, pharmacy rebate sharing arrangements, network savings sharing arrangements, run out fees in the event of termination, banking arrangements, and other terms that affect cost." This is different from the previously requested protest remedy that the best and final offers be "evaluated by a qualified evaluation team that includes one consultant" and no mention is made of the other cost factors mentioned in the appeal.

The time has passed for Aetna to question, object, or suggest changes to the evaluation process. Section 1.06 of the RFP, titled "Required Review," provided the opportunity for Aetna to review the solicitation for "defects and questionable or objectionable material" and submit such comments in writing to the procurement officer at least ten days before the proposal opening. Aetna did not object to the evaluation criteria or suggest the aforementioned changes to the cost evaluation criteria at that time, or during meetings with the state to negotiate an agreement that would allow the evaluation process to proceed forward, even though its very proposal included these costs in other sections. Further, Aetna was familiar with the method of awarding cost points based solely on the administrative fees. Aetna's current contract for these services was based on the evaluation and award of RFP 2000-0200-2140, issued September 29, 2000. In response to that RFP, Aetna submitted a total cost of $29,950,035 (Exhibit 4) for the administrative fees (years 1 – 3) under a cost proposal schedule extremely similar to the cost proposal section of this RFP (Section 7.23). Aetna was awarded 50 cost points based on its administrative fees (Exhibit 5).

Sec. 36.30.210(c) states that a RFP must include "a description of the factors that will be considered by the procurement officer when evaluating the proposals received, including the relative importance of price and other evaluation factors." RFP 2007-0200-5946 met that requirement; RFP Section 7.23 set forth the cost proposal to be used by each offeror and Section 10.21 of the Proposal Evaluation Form (RFP Attachment 1) stated that the cost proposal, outlined in Section 7.23, could receive a maximum of 2,000 points. Further, RFP Section 2.14 stated that the lowest cost proposal would receive the maximum number of points allocated to cost and that cost points for other proposals would be determined through a mathematical formula.

2 AAC 12.260(b), concerning the evaluation of proposals, states that "price must be an evaluation factor and the proposal with the lowest price must receive the highest available rating allocated to price." That regulation also states that a proposal with a higher price must receive a lower rating for price. The evaluation of RFP 2007-0200-5946 met those requirements. Every speculative, uncertain or other estimated cost "trended forward" that could have affected the contract in some manner does not have to be included, but rather "price must be an evaluation factor." which it was in this RFP.

Also, Aetna's request that a third-party consultant be included in a new evaluation was not brought to the state's attention prior to the opening of proposals, or during meetings with the state to negotiate the "agreed-to" evaluation process.

The state carefully evaluated all aspects of the two competing proposals to ensure that award was made to the firm with the best overall offer. After considering the points raised by Aetna in its appeal, the state continues to believe award was made to the firm with that submitted the most advantageous offer.

Aetna's proposd remedy is contrary to law and would result in substantial costs to the state. The comment on pages 31 and 32 of the appeal that "Aetna stands ready to continue to provide those services at the existing contract rates..." would result in an administrative fee increase to the state of $479,957 each month if its contract were extended. Provided below is a chart of Aetna's current administrative fees, as previously shown on page eight of this report, and an updated chart that indicates the final fees awarded to Premera for the first year. An additional cost of almost a half million dollars would be incurred by the state, each month, if Aetna's contract were extended:

| Chart #1<br>Aetna's Current Contract | Monthly Fee | | # of lives | | Monthly Contract Rate |
|---|---|---|---|---|---|
| Per employee per month (PEPM) | $43.02 | X | 5,464 | = | $235,061 |
| Per retiree per month medical | $29.22 | X | 28,128 | = | $821,9[illegible] |
| Per retiree per month DVA | $4.43 | X | 20,725 | = | $91,812 |
| Per retiree per month LTC | $0.47 | X | 19,011 | = | $8,395 |
| Per employee per month Health FSA | $3.90* | X | 1,358 | = | $5,296 + $70 |

*$3.90 is the admin fee only. $35 ea is also charged for 2 BU's.

Total Monthly Fee **$1,162,534**

| Chart #2<br>Premera's Proposed Fees | Monthly Fee | | # of lives | | Monthly Contract Rate |
|---|---|---|---|---|---|
| Per employee per month (PEPM) | $24.79 | X | 5,464 | = | $135,453 |
| Per retiree per month medical | $16.95 | X | 28,128 | = | $476,770 |
| Per retiree per month DVA | $2.78 | X | 20,725 | = | $57,616 |
| Per retiree per month LTC | $0.42 | X | 19,011 | = | $7,985 |
| Per employee per month Health FSA | $3.50 | X | 1,358 | = | $4,753 |

Total Monthly Fee **$682,577**

## IX. Conclusion and Request for Relief

For the reasons set forth above, the state requests that Aetna's appeal of the procurement officer's decision be denied.

Sincerely,

Walt Harvey
Contracting Manager

cc: Michael Barnhill
Assistant Attorney General

EXHIBIT 1

Aetna

aetna
601 Union Street
Suite 810
Seattle WA 98101

Mike Wiggins
Vice President
National Accounts
(206) 701-8106
Fax (206) 701-8125

2006 MAR 9 PM 4 28
DIVISION OF GENERAL SERVICES

March 6, 2006

Mr. Walt Harvey
Alaska Department of Administration
Division of General Services
Seventh Floor, State Office Building
Juneau, Alaska 99811-0210

RE: RFP #2007-0200-5946

Dear Mr. Harvey:

Thank you for your letter of this morning, which provided responses to my questions contained in my March 3 letter.

Based on your answers to questions 8 and 9, there appears to be an assumption that the process used to evaluate the last and final offers from Aetna and Premera was the same as discussed in the February 23 conference call.

During that conference call, it was stated that, for purposes of determining whether Aetna's bid was reasonably susceptible to award, Aetna's review team would be comprised of: (1) two of the presons who originally scored Premera's bid, and (2) one other person. This is confirmed in the memo that followed the conference call (attached).

This, however, did not happen. Instead, only one of Premera's evaluators was included on Aetna's team (Frieda Miller). The other two Aetna evaluators, Pat Shier and Judy Porter, were never included in any Premera evaluation scoring.. According to the evaluation summaries you have provided us, the evaluators who scored Premera's original proposal were Freda Miller, Mike Williams, Kerry Jarrell and Sheri Gray. It is our understanding that while Pat Shier began to score the original Premera proposal, he didn't complete the evaluation and therefore his scores were never used in any Premera evaluation results.

Therefore, the State did not use two of the three evaluators whose score was used to evaluate the Premera proposal at the "reasonably susceptible to award" stage. It only used one of three, which makes it impossible to fairly compare the two proposals for the purpose of bid scoring.

In the second evaluation (the comparison of the best and final offers), Primera's proposal was evaluated by Freda Miller, Sheri Gray and Mike Williams. Aetna's best and final offer was evaluated by Freda Miller, Pat Shier and Judy Porter.

As to this "best and final offer" evaluation, it was our understanding that the same three individuals would perform that evaluation for both Aetna and Premera, and there is nothing in the letter that is inconsistent with that understanding.

In summary, the process used for the first "reasonably susceptible to award" evaluation was inconsistent with our understanding of the procedures laid out in both the conference call and follow up letter. Aetna would not have agreed to a process that involved evaluation of its suitability for award with only one of three common evaluators. The process used for the "best and final offer" evalution was even further inconsistent, in that it involved a direct comparison of Aetna's and Premera's scores by different individuals, something that we would have never consented to

Also, in response to question # 4, you indicate that DOA is "unwilling to make an agreement to preserve the status quo at this time". I strongly urge the Department to (1) at least consider the merits to be contained in our protest, before electing to move forward in any manner so that Aetna may receive a fair hearing, and (2) not to prejudge matters to which you have not yet given a fair hearing.

Thank you.

Sincerely,

Mike Wiggins

Mike Wiggins
Vice President
National Accounts

EXHIBIT 2

**Name and Number of RFP**
RFP 2005-9900-4755
Statewide Travel Agency Services

**Date of PEC**
October 6th, 2004

**Proposers in Alphabetical Order**

| Cyndi's Cruise & Travel | | | | | | |
|---|---|---|---|---|---|---|
| **Names of PEC Members** | **KG** | **DJ** | **ML** | **JP** | **JS** | |
| Response to Deliverables (150) | 90 | 68 | 94 | 43 | 75 | |
| Experience & Qualifications (150) | 70 | 44 | 145 | 30 | 82 | % Diff |
| Total | **160** | **112** | **239** | **73** | **157** | **69.46%** |

| Managed Air | | | | | | |
|---|---|---|---|---|---|---|
| **Names of PEC Members** | **KG** | **DJ** | **ML** | **JP** | **JS** | |
| Response to Deliverables (150) | 92 | 68 | 84 | 91 | 52 | |
| Experience & Qualifications (150) | 95 | 72 | 120 | 60 | 55 | % Diff |
| Total | **187** | **139** | **204** | **151** | **107** | **47.55%** |

| TQ3Navigant | | | | | | |
|---|---|---|---|---|---|---|
| **Names of PEC Members** | **KG** | **DJ** | **ML** | **JP** | **JS** | |
| Response to Deliverables (150) | 98 | 66 | 94 | 131 | 108 | |
| Experience & Qualifications (150) | 70 | 45 | 90 | 70 | 85 | % Diff |
| Total | **168** | **111** | **184** | **201** | **193** | **44.78%** |

| USTravel | | | | | | |
|---|---|---|---|---|---|---|
| **Names of PEC Members** | **KG** | **DJ** | **ML** | **JP** | **JS** | |
| Response to Deliverables (150) | 104 | 74 | 148 | 128 | 86 | |
| Experience & Qualifications (150) | 100 | 74 | 145 | 105 | 93 | % Diff |
| Total | **204** | **148** | **293** | **233** | **179** | **49.66%** |

EXHIBIT 3

RFP 2006-0610-5772

| | Offeror 1 | Offeror 2 | Offeror 3 | Offeror 4 | Min | Max | Diff | Pct |
|---|---|---|---|---|---|---|---|---|
| Eval 1 | 18 | 18 | 25 | 13 | 13 | 25 | **12** | 92% |
| Eval 2 | 18 | 18 | 27 | 22 | 18 | 27 | **9** | 50% |
| Eval 3 | 20 | 22 | 26 | 23 | 20 | 26 | **6** | 30% |
| Eval 4 | 21 | 21 | 26 | 14 | 14 | 26 | **12** | 86% |
| Eval 5 | 19 | 23 | 23 | 16 | 16 | 23 | **7** | 44% |

EXHIBIT 4



**State of Alaska**
10.02 Proposed Service Fees

## Introduction

Offerors must use the form and format of Section Ten for their proposal. Offerors may respond directly using the pages of the RFP, or may reproduce their responses on their own paper. Section Ten is available on computer diskette and copies may be obtained by contacting Laura Wallrath at Laura.Wallrath@admin.state.ak.us or you may download a copy from the internet at (http://www.state.ak.us/local/akpages/ADMIN/drb/home.htm).

This section of the RFP requests offeror's service fees for all active plans for the period July 1, 2001, through June 30, 2004 and for the retiree plans for the period January 1, 2002 through December 31, 2004. The estimated number of lives are for comparison purposes only.

**10.02**
**Illustrative *Immature* Service Fees**

| Service fees | # of lives | | Year 1 | | |
|---|---|---|---|---|---|
| Per employee per month (PEPM) | 4,775 | x | $29.81 | = | $1,708,113 |
| per retiree per month medical | 22,000 | x | $19.25 | = | $5,082,000 |
| per retiree per month DVA | 15,000 | x | $3.58 | = | $644,400 |
| per retiree per month LTC | 10,300 | x | $0.32 | = | $39,552 |
| PEPM HCRA | 2,000 | x | $3.30 | = | $79,200 |
| | | | **Total Year 1** | = | $7,553,265 |

| Service fees | # of lives | | Year 2 | | |
|---|---|---|---|---|---|
| Per employee per month (PEPM) | 4,775 | x | $39.94 | = | $2,288,562 |
| per retiree per month medical | 23,100 | x | $27.15 | = | $7,525,980 |
| per retiree per month DVA | 15,750 | x | $4.02 | = | $759,780 |
| per retiree per month LTC | 10,800 | x | $0.35 | = | $45,360 |
| PEPM HCRA | 2,000 | x | $3.45 | = | $82,800 |
| | | | **Total Year 2** | = | $10,702,482 |

| Service fees | # of lives | | Year 3 | | |
|---|---|---|---|---|---|
| Per employee per month (PEPM) | 4,775 | x | $41.94 | = | $2,403,162 |
| per retiree per month medical | 24,300 | x | $28.51 | = | $8,313,516 |
| per retiree per month DVA | 16,550 | x | $4.22 | = | $838,092 |
| per retiree per month LTC | 11,350 | x | $0.39 | = | $53,118 |
| PEPM HCRA | 2,000 | x | $3.60 | = | $86,400 |
| | | | **Total Year 3** | = | $11,694,288 |

| **Grand Total (years 1-3)** | $29,950,035 |
|---|---|

EXHIBIT 5

# TABULATED SCORE SUMMARY

**PROPOSAL EVALUATION COMMITTEE**
**HEALTH PLAN THIRD PARTY ADMINISTRATOR**
**RFP 2000-0200-2140**

**Administrative Services (35% paragraph 8.03)**

| Evaluator: | Aetna | Blue Cross |
|---|---|---|
| Arteaga | 0 | 0 |
| Bell | 61 | 58 |
| Borg | 54 | 49 |
| Couzin | 51 | 61 |
| Hertz | 63 | 66 |
| Parker | 67 | 60 |
| Shier | 58 | 40 |
| Wellington | 63 | 1 |
| **Average Score** | 52 13 | 51.88 |
| **Total** | 417 | 415 |

**Provider Discounts (10% paragraph 8.04)**

| Evaluator: | Aetna | Blue Cross |
|---|---|---|
| Arteaga | 0 | 0 |
| Bell | 2 | 4 |
| Borg | 3 | 5 |
| Couzin | 4 | 5 |
| Hertz | 4 | 5 |
| Parker | 4 | 5 |
| Shier | 4 | 5 |
| Wellington | 4 | 5 |
| **Average Score** | 3 13 | 4 25 |
| **Total** | 25 | 34 |

**Information Technology/Communication (10% paragraph 8.05)**

| Evaluator: | Aetna | Blue Cross |
|---|---|---|
| Arteaga | 0 | 0 |
| Bell | 17 | 17 |
| Borg | 16 | 15 |
| Couzin | 14 | 17 |
| Hertz | 19 | 20 |
| Parker | 20 | 19 |
| Shier | 17 | 16 |
| Wellington | 18 | 18 |
| **Average Score** | 15.13 | 15 25 |
| **Total** | 121 | 122 |

**Experience and Qualifications (10% paragraph 8.06)**

| Evaluator: | Aetna | Blue Cross |
|---|---|---|
| Arteaga | 0 | 0 |
| Bell | 17 | 16 |
| Borg | 15 | 15 |
| Couzin | 7 | 12 |
| Hertz | 16 | 19 |
| Parker | 17 | 15 |
| Shier | 18 | 19 |
| Wellington | 17 | 19 |
| **Average Score** | 13 38 | 14 38 |
| **Total** | 107 | 115 |

| | Aetna | Blue Cross |
|---|---|---|
| **Grand Totals--Technical** | 670 | 686 |
| Divided by 8 evaluators | 83 75 | 85 75 |
| Lowest Cost Proposal → | 29,950.035 | 29,950.035 |
| divided by COST | 29,950.035 | 32,410,092 |
| x cost scoring factor | 1 00 | 0 92 |
| x 50 max points | 50 | 50 |
| → | 50 00 | 46 20 |
| Admin Services (Max 70) | 52 13 | 51 88 |
| Provider Discounts (Max 20) | 3.13 | 4 25 |
| Info Tech/Communication (Max 20) | 15.13 | 15.25 |
| Experience and Qualifications (Max 20) | 13 38 | 14 38 |
| Subtotal Technical (Max 130) | 83.75 | 85.75 |
| Cost (Max 50) | 50 00 | 46 20 |
| AK Off Pref (20) | 0 00 | 0 00 |
| Total Score | 133.75 | 131.95 |

**BEFORE THE STATE OF ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL BY THE COMMISSIONER OF THE DEPARTMENT OF ADMINISTRATION**

| | | |
|---|---|---|
| AETNA LIFE INSURANCE and AETNA, | ) | |
| v. | ) | |
| DIVISION OF GENERAL SERVICES. | ) | OAH No. 06-0230-PRO |
| | ) | RFP No. 2007-0200-5946 |

**AFFIDAVIT OF VERN JONES**

Vern Jones, being first duly sworn upon oath, deposes and says:

1. I am the State of Alaska's Chief Procurement Officer. I have been employed with the Department of Administration and held this position since October 1992. I supervise the procurement of supplies, services, and professional services for all Executive Branch Departments as part of my duties. My statutory responsibilities are set forth in AS 36.30.010.

2. I am familiar with RFP No. 2007-0200-5946 Claims Administration and Pharmacy Benefit Management (hereafter "RFP") issued by the Department of Administration for the Division of Retirement and Benefits, dated November 30, 2005. This procurement was conducted under my authority delegated to the Department of Administration (DOA).

3. During December 2004, I was advised that Victor Leamer, a Procurement Specialist in the DOA and the procurement officer of record for the RFP,

ATTORNEY GENERAL, STATE OF ALASKA
DIMOND COURTHOUSE
P.O. BOX 110300, JUNEAU, ALASKA 99811
PHONE: 465-3600

was concurrently serving as the procurement officer for several important projects at DOA, notably (1) this RFP "Claims Administration and Pharmacy Benefit Management," (2) RFP 2006-0200-5914 "Human Resources Payroll Systems Replacement," and (3) RFP 2006-0200-5915 "Data Warehouse Project." All of these procurements are complex and time consuming for the procurement officer of record. In addition, Mr. Leamer serves as the DOA's lead procurement official and is required to provide procurement assistance to all divisions and agencies within the DOA.

4. On approximately January 31, 2006, I asked Walt Harvey, Contract Manager on my staff, to assume the procurement officer of record responsibilities for RFP No. 2007-0200-5946 Claims Administration and Pharmacy Benefit Management. Mr. Harvey has over 20 years of procurement experience with the State of Alaska and has managed the state's central purchasing section since May 1995. He possesses the highest level of professional procurement certification issued by the National Institute of Governmental Procurement, and is the most experienced procurement professional available to me.

5. With respect to this RFP, I was made aware that on February 18, 2006, the state issued a Notice of Intent to Award a Contract to Premera Blue Cross, and that Aetna's proposal was declared nonresponsive. I was also aware that Mr. Leamer, the former procurement officer of record for this RFP, had previously declared Aetna's proposal nonresponsive because it was incomplete. Further, Mr. Harvey, after assuming the responsibility for this RFP, directed Victor Leamer to ensure that no sections of Aetna's proposal had been overlooked or misplaced. I know

ATTORNEY GENERAL, STATE OF ALASKA
DIMOND COURTHOUSE
P.O. BOX 110300, JUNEAU, ALASKA 99811
PHONE: 465-3600

that after performing the search, he assured Mr. Harvey there were no other sections of Aetna's proposal in the state's possession.

6. On February 21, 2006, Mr. Harvey advised me that Reed Stoops, a lobbyist for Aetna, called regarding the Notice of Intent to Award to Premera, and that he (Mr. Harvey) disclosed Premera's cost proposal of approximately $34 million to Mr. Stoops. Because the Notice of Intent had been issued, Premera's proposal and its cost was considered public information under AS 36.30.230. Later that same day, Mr. Harvey advised me the state had located the binder containing the missing portion of Aetna's proposal in a 6th floor storeroom in the State Office Building. Aetna's complete proposal was made up of four binders. The Notice of Intent to Award to Premera was subsequently rescinded later that evening

7. On February 21, 2006, after Aetna's missing proposal binder had been found, I met with Mr. Harvey and representatives from DOA's Commissioner's Office, the Division of Retirement and Benefits, and the Attorney General's Office to discuss how the state could proceed forward and evaluate Aetna's proposal. As a result of those discussions, it was determined that (1) time was of the essence to act with respect to evaluating Aetna's proposal, (2) it was not possible to reconvene the original proposal evaluation committee (PEC) in a timely manner, (3) there was insufficient time to start over and evaluate both proposals using a completely new PEC, and (4) the state should immediately arrange for a joint meeting with representatives of Aetna and Premera to pursue and develop a mutually acceptable process that would allow the evaluation of Aetna's proposal to proceed forward.

ATTORNEY GENERAL, STATE OF ALASKA
DIMOND COURTHOUSE
P.O. BOX 110300, JUNEAU, ALASKA 99811
PHONE: 465-3600

8. During the February 21 meeting, there was discussion concerning the makeup of a new or reconstituted PEC for evaluation of Aetna's proposal. The original PEC consisted of four state employees (Freda Miller, Sheri Gray, Michael Williams and Pat Shier) and one representative from the Bering Strait School District in Unalakleet, Alaska (Kerry Jarreil). Both Ms. Gray and Mr. Williams were out of the office and unavailable. It was impractical to include Mr. Jarrell in an expedited evaluation process since Aetna's proposal binders (four binders), would have to be mailed to Unalakleet and Mr. Jarrell's attendance in PEC meetings would be telephonic (versus the in-person process he participated in earlier with the Premera proposal). That left Ms. Miller and Pat Shier as the only viable members left from the original PEC who could be immediately available to evaluate Aetna's proposal. Judy Porter, a Human Resource Specialist at the Department of Transportation and Public Facilities was suggested as a potential PEC member due to her long-term employment with the state and considerable knowledge of the subject matter addressed in this RFP.

9. On February 22 & 23, 2006, the state held teleconferences with representatives of Aetna and Premera. I led the discussions and stated that the purpose of the meetings was to bring the parties together and explain where we were at in the proposal review process. I also stated we could not turn back the clock as to the disclosure of Premera's best and final offer price, and there was not enough time to start the evaluation process over again.

ATTORNEY GENERAL, STATE OF ALASKA
DIMOND COURTHOUSE
P.O. BOX 110300, JUNEAU, ALASKA 99811
PHONE: 465-3600

10. In developing a process that would allow the evaluation of Aetna's proposal and have the procurement move forward to award, I advised Aetna and Premera of two conditions that must be agreed upon. First, that moving forward with the process was in the state's best interest, and second, that the process be as fair to both parties as could be accomplished under the circumstances.

11. During the initial meetings with Premera and Aetna representatives, I presented the following facts: (1) that Premera's proposal had met all the RFP criteria, (2) it had been scored, and (3) the state moved to discussions followed by a best and final offer. I also stated that Premera's best and final cost proposal had been disclosed to an Aetna representative before the missing sections of Aetna's proposal were located and before the Notice of Intent was rescinded. I further stated that time was of the essence and it was impossible to reconvene the original PEC in a timely manner.

12. All parties to this teleconference agreed to the revised evaluation process which provided for members of the PEC to be Freda Miller, Pat Shier, and Judy Porter. Aetna signed the agreement on February 23, 2006 (Attachment A) and Premera signed the agreement on February 24 (Attachment B).

13. Throughout these meetings with Aetna and Premera, I stressed the fact that time was of the essence. At no time did I state that a single PEC would evaluate both proposals (i.e., a rescore of Premera, and an initial score of Aetna). In fact, neither Aetna nor Premera requested such action. The agreed upon process was for Aetna's proposal to be evaluated and scored by the reconstituted PEC, with best and

ATTORNEY GENERAL, STATE OF ALASKA
DIMOND COURTHOUSE
P.O. BOX 110300, JUNEAU, ALASKA 99811
PHONE: 465-3600

final offer discussions to follow with the procurement officer (not the PEC). The practice of having a PEC evaluate all aspects of a best and final offer is not required by statute, regulations or administrative policy, nor has it ever been the state's practice.

14. Further, because Aetna already knew the price of Premera's best and final offer (released to Aetna earlier when the February 18 Notice of Intent to Award was issued), the agreed upon process with Aetna and Premera (Attachments A and B), provided that Premera would be allowed to provide a revised best and final offer.

15. I believe the state followed the process discussed by the parties and described in the agreement signed by Aetna and Premera, that the process was in the state's best interests, and it was as fair to both parties as possible under the circumstances.

Further your affiant sayeth naught.

DATED: 4/28/06

Vern Jones
Chief Procurement Officer

SUBSCRIBED AND SWORN TO before me this 28th day of April 2006.

Patricia L. Yeaple
Notary Public In and For Alaska

STATE OF ALASKA
OFFICIAL SEAL
Patricia L. Yeaple
NOTARY PUBLIC
My Commission Expires 9-27-07

ATTORNEY GENERAL, STATE OF ALASKA
DIMOND COURTHOUSE
P.O. BOX 110300, JUNEAU, ALASKA 99811
PHONE: 465-3600

Exhibit A

RRP No. 2007-0200-6946

Agreed upon process by State of Alaska (State), offeror Premera Blue Cross Blue Shield of Alaska (Premera), and offeror Aetna, per teleconference calls held between the parties' representatives on February 22 and 23, 2006:

**Modified Evaluation Process Steps:**

1. Thursday, Feoruary 23, 2006, Aetna proposal evaluation and scoring process is underway, and is anticipated to be completed by the reconstituted Procurement Evaluation Committee (PEC) which consists of three members, two of whom were on the original PEC that scored Premera's proposal in the initial evaluation process. All PEC members are State employees.

2. If, after Step 1, it is determined by the State that Aetna's proposal is both responsive and reasonably susceptible for award, the following will occur as to disclosure of Aetna's original price and Premera's price upon which the original notice of intent to award was based (now rescinded) so that the State may proceed to conducting discussions with both offerors under AS 36.30.240:

a. Prior to release of Aetna's price, the State will ensure agreement with Aetna officials as to the accuracy of its offer (total figure) provided. Only the exact three-year price total provided in Aetna's proposal will be disclosed to Premera after confirmation from Aetna: and

b. The State will obtain confirmation from Premera as to their exact three-year price total upon which the original notice of intent to award was based, and provide that figure to Aetna.

3. Discussions under AS 36.30.240 with Aetna and Premera will occur Friday, February 24. During discussions, a date and time will be set for receipt of best and final offers from both offerors (tentatively set for Tuesday, February 28, noon Alaska Time).

4. After receipt of best and final offers from Aetna and Premera, both proposals will be scored and a new notice of intent to award will be issued. The State anticipates the notice of intent to award will be issued on or before March 2, 2006.

5. The normal protest and appeal process will be available after the new Notice of Intent to Award is issued as set out in Step. 4.

2006 FEB 23 PM 4 52
DIVISION Of GENERAL SERVICES & SUPPLY

Exhibit A

The undersigned parties agree, and to take no exception to the process as set forth in Steps 1 through 5 above:

State of Alaska

By: _____ 2/24/06
Date

Vern Jones
Chief Procurement Officer

Premera Blue Cross Blue Shield of Alaska

By: _____ _____
Date

Yori Milo
Chief Legal Officer

Aetna

By: _____ 2-23-2006
Date

Mike Robinson
Western Regional Head
National Accounts

2/24/06

RRP No. 2007-0200-5946

Agreed upon process by State of Alaska (State), offeror Premera Blue Cross Blue Shield of Alaska (Premera), and offeror Aetna, per teleconference calls held between the parties' representatives on February 22 and 23, 2006:

**Modified Evaluation Process Steps:**

1. Thursday, February 23, 2006, Aetna proposal evaluation and scoring process is underway, and is anticipated to be completed by the reconstituted Procurement Evaluation Committee (PEC) which consists of three members, two of whom were on the original PEC that scored Premera's proposal in the initial evaluation process. All PEC members are State employees.

2. If, after Step 1, it is determined by the State that Aetna's proposal is both responsive and reasonably susceptible for award, the following will occur as to disclosure of Aetna's original price and Premera's price upon which the original notice of intent to award was based (now rescinded) so that the State may proceed to conducting discussions with both offerors under AS 36.30.240:

a. Prior to release of Aetna's price, the State will ensure agreement with Aetna officials as to the accuracy of its offer (total figure) provided. Only the exact three-year price total provided in Aetna's proposal will be disclosed to Premera after confirmation from Aetna: and

b. The State will obtain confirmation from Premera as to their exact three-year price total upon which the original notice of intent to award was based, and provide that figure to Aetna.

3. Discussions under AS 36.30.240 with Aetna and Premera will occur Friday, February 24. During discussions, a date and time will be set for receipt of best and final offers from both offerors (tentatively set for Tuesday, February 28, noon Alaska Time).

4. After receipt of best and final offers from Aetna and Premera, both proposals will be scored and a new notice of intent to award will be issued. The State anticipates the notice of intent to award will be issued on or before March 2, 2006.

5. The normal protest and appeal process will be available after the new Notice of Intent to Award is issued as set out in Step. 4.

2006 FEB 24 AM 9 52
DIVISION OF GENERAL SERVICES & SUPPLY

The undersigned parties agree, and to take no exception to the process as set forth in Steps 1 through 5 above: (Premera does not waive exception to a determination that Aetna proposal is responsive and reasonably susceptible for award).

State of Alaska

By: _____ 2/24/06
Vern Jones Date
Chief Procurement Officer

Premera Blue Cross Blue Shield of Alaska

By: _____ 2/24/06
Yoa Milo Date
Chief Legal Officer

Aetna

By: _____
Mike Robinson Date
Western Regional Head
National Accounts

Exhibit B page 2 of 2

Premera Brief

Robert K. Stewart, Jr.
Davis Wright Tremaine LLP
701 W. Eighth Avenue, Suite 800
Anchorage, Alaska 99501
(907) 257-5300
(907) 257-5399 (Facsimile)

Attorneys for Premera Blue Cross Blue Shield of Alaska

BEFORE THE ALASKA DEPARTMENT OF ADMINISTRATION
OFFICE OF ADMINISTRATIVE HEARINGS

| | | |
|---|---|---|
| In the Matter of: | ) | |
| | ) | |
| Aetna Life Insurance Company and Aetna, Inc., | ) | |
| | ) | |
| | ) | |
| Appellants. | ) | DGS Solicitation No. 2007-0200-5946 |
| | ) | OAH No. 06-0230-PRO |

PREMERA BLUE CROSS BLUE SHIELD OF ALASKA'S STATEMENT OF POSITION CONCERNING AETNA LIFE INSURANCE COMPANY AND AETNA, INC.'S BID PROTEST APPEAL

Premera Blue Cross Blue Shield of Alaska ("Premera") respectfully submits this statement of position in the above-captioned bid protest appeal filed by Aetna Life Insurance Company and Aetna, Inc. (collectively "Aetna").

## I. INTRODUCTION

Premera was awarded a contract for the administration of the State of Alaska's ("State") health care benefit program based upon a determination by the Department of Administration, Division of General Services ("Division") that its proposal was superior to that submitted by Aetna in terms of both cost and technical components.

The award resulted from a modified evaluation process which was necessitated

when the Division inadvertently misplaced a portion of Aetna's original proposal. In discussing that oversight with Aetna, the Division also disclosed Premera's best and final cost proposal. Aetna obviously gained the ultimate competitive advantage, knowledge of its only competitor's best and final price, by that disclosure. To address both of those issues, Aetna, Premera and the Division negotiated and agreed upon an expedited process designed to evaluate Aetna's technical proposal and attempt to minimize the adverse effect on Premera resulting from the disclosure of its best and final cost proposal.

Aetna now seeks relief because, notwithstanding the tremendous competitive advantage it obtained, the outcome of the process it agreed upon was not as it hoped. Aetna's challenge to the award to Premera is nothing more than an attempt to gain both the opportunity to exercise that competitive advantage and a chance to start over now that it has been unsuccessful.

Under the circumstances, the procedures the Division used to evaluate Aetna's proposal and the discussions it conducted with Aetna were fair and reasonable. More importantly, those procedures comported with the agreement reached among the Division, Premera, and Aetna. The arguments Aetna makes in support of its protest are points that were or could have been raised and addressed during the negotiations that led to the modified evaluation process. Aetna variously ignores that agreement or offers disingenuous interpretations based on its "assumptions" or other after the fact rationalizations.

The Division acted properly in implementing the agreement. Fundamentally, Premera's proposal was determined to be and is superior to Aetna's proposal on both cost

and technical items. Premera provides significantly better value to the State and its employees and retirees. The Division treated Aetna fairly and reasonably. Its actions should be upheld and its decision denying Aetna's protest should be affirmed.

## II. STATEMENT OF FACTS

### A. Request for Proposals No. 2007-0200-5946.

Request for Proposals No. 2007-0200-5946 ("RFP") solicited administrative services for the State's self-funded health care benefit program. The procurement was conducted pursuant to Alaska Stat. § 36.30.240, which authorizes discussions with responsible offerors and the revision of proposals prior to submittal of best and final offers. RFP § 2.07.

On December 28, 2005, both Premera and Aetna submitted proposals in response to the RFP.[1] Premera submitted a cost proposal in the amount of $34,390,750. Affidavit of Jeff Davis ("Davis Aff."), ¶ 2. Aetna submitted alternative cost proposals of $49,163,735 for mature service fees and $45,387,171 for immature service fees. Davis Aff., ¶ 16. However, because a portion of Aetna's proposal was inadvertently misplaced, the Division determined that Aetna was not responsive and, therefore, not reasonably susceptible of being selected for award. Aetna Attachment 6.

### B. The Division's Discussions with Premera.

Believing Premera to be the sole qualified bidder, the Division moved forward with the procurement process and conducted discussions with Premera. On February 7,

[1] Two other proposers, Coresource and Walgreens, were deemed to be non-responsive and have not protested those determinations. Aetna Attachment 6.

2006, the Division sent Premera an e-mail with questions on twenty-one areas of Premera's technical proposal Later the same day, the Division asked Premera a few additional questions and requested assurance that all components of its program would be administered for the stated fees. Davis Aff., ¶ 3.

On February 13, 2006, Premera responded in writing to the Division's questions and submitted a best and final cost proposal of $34,077,274 over 3 years. Id., ¶ 4. The Division e-mailed two pages of additional clarification requests to Premera on February 14, 2006. Premera responded to those requests the same day. Id., ¶ 5.

On February 18, 2006, the Division accepted Premera's best and final offer and issued a Notice of Intent to Award a Contract ("Notice of Intent") to Premera. Aetna Attachment 6.

C. The Agreement Regarding Revised Best and Final Offers, Evaluation and Scoring Procedures.

After issuance of the Notice of Intent and during conversations between the Division and Aetna to which Premera was not a party, the Division discovered it had overlooked part of Aetna's proposal. Davis Aff., ¶ 6. The Division also disclosed the total amount of Premera's best and final cost proposal to Aetna. Aetna Attachment 7, p. 4. As a result, on February 21, 2006, the Division issued an Amended Notice of Intent to Award a Contract, rescinding the prior notice. Aetna Attachment 7, p. 1.

The Division then conducted a series of telephone conferences with Aetna and Premera on February 22 and 23, 2006. During those conferences, the Division outlined what had happened and how it planned to remedy the situation. It stated it intended to

proceed with the procurement process in the following manner: 1) evaluate Aetna's proposal and, assuming the Aetna proposal was determined to be responsive and reasonably susceptible for award; 2) share Aetna's original cost proposal with Premera in an attempt to put the parties in as comparable a position as possible (given the Division's earlier disclosure of Premera's best and final cost proposal)[2]; 3) solicit new best and final offers from both Premera and Aetna; 4) conduct discussions with offerors; and 5) after reviewing the final offers, issue a new notice of intent to award a contract. Davis Aff., ¶¶ 6, 7.

The Division, Aetna and Premera discussed the nature of the disclosure that had been made of Premera's cost proposal and agreed to confirm what had been disclosed and provide for mutual disclosures of some type of Premera's and Aetna's cost proposals. In a discussion of options to the process outlined by the Division, Premera proposed a process whereby Aetna would submit a preliminary best and final offer, to be disclosed to Premera, followed by final best and final offers from both parties. Id., ¶ 9.

The parties also discussed at length the makeup of the proposal evaluation committee that would evaluate Aetna's proposal. The Division shared the names of the individuals who would be responsible for the evaluation--Freda Miller, Pat Shier, and Judy Carter--and described their job titles and responsibilities. Id., ¶ 10.

Because they did not reach agreement that first day, the parties reconvened by

---

[2] The parties recognized there was an inherent inequity created by the disclosure of Premera's best and final cost proposal. Aetna knew the reduced price Premera had submitted after exercise of the discipline necessary to generate a best and final offer. Disclosure of Aetna's original offer to Premera would not provide it with the same level of information. The Division explicitly recognized that it "could not level the playing field" to remove this competitive disadvantage to Premera. Davis Aff., ¶ 8.

conference call the next morning, February 23, 2006. Aetna stated that it recognized this was a challenging situation and that, while it did not view the proposed process as ideal, it was willing to agree to the Division's original proposal. Id., ¶ 11. Premera suggested a modification to the Division's proposal similar to the alternative that it had articulated the prior day. It proposed that Aetna submit an initial best and final proposal, and only if that cost proposal was less than Premera's existing cost proposal, would the parties go to final best and final offers. Premera based this approach on a desire not to be required to bid against itself should Aetna not submit a superior cost proposal. Id., ¶ 12.

Following a caucus, the Division declined Premera's proposal. After additional discussions, the parties reached an agreement which was memorialized in a memorandum drafted by the Division and signed by the parties ("Agreement"). Id., ¶ 13.

At several points during the calls on February 22 and 23, the Division solicited questions from Premera and Aetna and provided answers to any questions raised. There was more than ample time and opportunity for the parties to ask questions, offer suggestions, discuss issues and explore alternate solutions. Id., ¶ 14. During those calls, Aetna did not raise any questions as to the areas where they now challenge the Division's actions. Id., ¶ 15.

For example, at the time of the negotiations, Aetna knew that the Division had already scored Premera's original best and final offer. At no time during the several conference calls and extensive questioning and discussions which took place on February 22 and 23, 2006, was there any proposal by Aetna for discussion of, much less agreement to, the Division starting all over with a new technical evaluation of both proposals after

the submission of the final best and final offers. Nor was there any statement by the Division that the technical evaluation of Aetna's proposal would be conducted by an evaluation team constituted exactly the same as that which had evaluated Premera's technical proposal. Id. Again, the composition of the evaluation committee was shared by the Division. Also, the schedule the parties agreed upon, which provided for two days or less between submission of final best and final offers and notice of award, left no time for another round of complete evaluations.

D. The Division's Subsequent Discussions with Aetna and Premera.

About or shortly after the execution of the Agreement, the Division completed its initial evaluation of Aetna's proposal as provided for in Paragraph 1 of the Agreement. It determined that Aetna's proposal was responsive and reasonably susceptible for award. Pursuant to paragraph 2 of the Agreement, the Division confirmed the cost proposal contained in Premera's initial best and final offer, $34,077,274, and those contained in Aetna's proposal, $49,163,735 and $45,387,171, and exchanged that information with both bidders. Id., ¶ 16.

The Division next sent questions to both parties concerning their proposals and conducted a bidder's conference with each. The Division posed three questions to Premera and 12 questions to Aetna. Id., ¶ 17. Aetna responded with 11 pages of financial proposal and 16 pages of answers to the technical questions. Aetna Best and Final Offer.

E. Premera's New Best and Final Offer.

On February 28, 2006, Premera submitted a new best and final offer to the State.

Premera reduced its administrative cost proposal to $30,951,035. It also provided a guaranteed pharmacy rebate of $3 million per year, based on a minimum number of pharmacy claims, doubled the amount of dollars Premera put at risk on the performance guarantees and eliminated the network access fee. The revised financial proposal increased from 24% to 30% the percentage Premera would pay to the State in case it did not meet the guaranteed network savings amount of $100 per member per month and similarly increased from 12% to 30% the amount Premera would be paid by the State for amounts saved above the guaranteed savings. Premera reaffirmed its promise to save the State $15 million per year compared to its current claims costs. Davis Aff., ¶ 18, Exhibit 1.

F. The Division's Best Interest Determination.

Premera's revised best and final cost proposal was in the amount of $30,951,035, as compared to its prior best and final offer of $34,077,274. Aetna submitted a best and final cost proposal in the amount of $32,054,652, as compared to its original alternative proposals of $49,163,735 and $45,387,171. Aetna Attachment 8. Again, Premera's final price was more than $1 million better than that of Aetna. The only reason Aetna reduced its bid by over $13 million was because it knew Premera's price. Even with that advantage, Premera's price was materially better than Aetna's.[3]

The Division then conducted the review of the two best and final offers as required by Paragraph 4 of the Agreement. It evaluated Aetna's proposal and assigned additional

[3] Aetna is wrong in its assertion that the amounts of the respective bids submitted by Aetna and Premera were "virtually identical". Aetna Appeal, p. 10. Despite Aetna's attempt to gloss over the fact that Premera submitted the superior cost proposal, it is clear that $1 million is a meaningful difference.

points based on the responses to Aetna's answers to the Division's questions.[4] It determined that Premera's proposal was superior to Aetna's on both the cost and technical components. Premera scored 4,618.5 points to Aetna's 4,482.5. Based on Premera's superior proposal, the Division issued a new Notice of Intent to Award to Premera on February 28, 2006. On March 13, 2006, the Division and Premera entered into a contract ("Contract") for performance of this work. Davis Aff., ¶ 19, Aetna Attachment 6.

G. Premera's Implementation of the Contract.

Premera has been working diligently to implement the Contract, so as to ensure a smooth transition of administrative responsibilities from Aetna to Premera. In particular, Premera wants to make certain that the State's employees and retirees do not have a disruption in service and that Premera meets its contractual commitments. Due to the short time between contract award and the date services are to begin[5], Premera has mobilized a dedicated team including representatives from all areas of its business to meet the implementation timeline. Davis Aff., ¶ 20.

As of April 28, 2006, the date of filing of this statement of position, Premera will have spent or irrevocably committed to the expenditure of over $1.2 million for implementation of the State's business. By May 15, 2006, the date by which a final decision in this case is expected, the amount incurred by Premera will be approximately

[4] Walt Harvey stated in his decision denying Aetna's protest that the Division did not rescore Premera's proposal following its submission of its final best and final offer since Premera's technical score was already higher than Aetna's. Decision, p. 9.

[5] The original date planned for the issuance of the Contract was February 1, 2006. RFP Amendment 6. Since the Contract was not signed until March 13, 2006, 6 weeks was lost.

$2.3 million. Id., ¶ 21.

Examples of Premera's implementation work as of April 28 include: 1) completed implementation project planning; 2) hired various personnel, including operations manager, care facilitation specialists, customer service representatives; 3) designed members' identification card; 4) developed membership and billing procedures; 5) purchased Ingenix PHCS System for provider reimbursement; 6) established banking arrangements, including appropriate accounts; 7) worked on finalizing contracts with vendors; 8) established toll-free numbers for 24-hour per day healthline and employee assistance program (EAP) provider; 9) held frequent meetings with the State to reach agreement on implementation details; 10) initiated system changed necessary to support the State's program; 11) developed required reports; and 12) entered into a letter of intent to lease office space in Juneau and started to build out that space. Id. As a result, Premera will be prepared to administer the Contract by the July 1 effective date for the commencement of services because it has diligently executed its duties under the Contract with the State. Id., ¶ 22.

## III. LEGAL DISCUSSION

### A. The Methods Of Proposal Evaluation And Scoring Utilized By The Division Complied With The Agreement Of The Parties And Applicable Law.

Aetna contends the Division committed two errors relating to the technical evaluation of its proposal. First, it argues that it was improper for the three member committee which evaluated its proposal to contain only one, as opposed to two, persons

who had actually scored Premera's best and final technical offer. Second, Aetna argues that Premera's best and final technical offer should have been completely rescored a third time by the same three member committee which e luated its technical proposal. Neither of those arguments have merit.

1. The Parties Agreed to Evaluation of Aetna's Proposal by a Three Member Committee and Discussed the Composition of that Committee Prior to Reaching Agreement.

Over the course of two days, February 22 and 23, 2006, the Division, Aetna and Premera discussed various alternative procedures by which Aetna's technical proposal might be evaluated. The Division was candid with Aetna and Premera, disclosing that some members of the evaluation committee were unavailable, thus necessitating replacement. The Division specifically identified the three persons whom it proposed would evaluate Aetna's proposal: Freda Miller, Pat Shier and Judy Porter. Id., ¶ 10. Aetna chose not to inquire as to the level of involvement of those persons in the evaluation of Premera's technical proposal. Id., ¶ 15.

Aetna and Premera agreed to the Division's approach, which was subsequently memorialized in the Agreement:

> Thursday, February 23, 2006, Aetna proposal evaluation and scoring process is underway, and is anticipated to be completed by the reconstituted Procurement Evaluation Committee (PEC) which consists of three members, two of whom were on the original PEC that scored Premera's proposal in the initial evaluation process. All PEC members are State employees.

Agreement, ¶ 1 (emphasis supplied).

The Division's technical evaluation of Aetna's proposal complied with the Agreement. As is evidenced in the scoring sheets which the Division has produced from the procurement file, both Ms. Miller and Mr. Shier were members of the original evaluation committee which evaluated Premera's proposal. Aetna Attachment 5c.

As the Division explained in its decision denying Aetna's protest, Ms. Miller and Mr. Shier were both familiar with the RFP, the evaluation process and were immediately available. Decision, pp. 5-6. There was certainly a common interest among the Division, Aetna and Premera, as evidenced by the accelerated schedule embodied in the Agreement, in expediting the remedial evaluation process in order to clarify the ultimate successful bidder to permit implementation in a timely manner. Reconstituting the evaluation committee with the other original members, Sheri Gray, Michael Williams or Kerry Jarrell, could have injected a week to two weeks delay into the process, an outcome none of the parties favored.

2. There Was No Agreement Among the Parties that Premera's Second Best and Final Offer Would Be Completely Reevaluated by the Same Persons Who Evaluated Aetna's Best and Final Offer.

The Agreement also governed the process to be followed after Aetna and Premera submitted best and final offers on February 28, 2006:

> After receipt of best and final offers from Aetna and Premera, both proposals will be scored and a new notice of intent to award a contract will be issued. The State anticipates the notice of intent to award will be issued on or before March 2, 2006.

Agreement, ¶ 4.

The Division followed that exact procedure. It scored Aetna's best and final offer

and Premera's revised cost proposal and arrived at final point totals. As explained by the State, Premera's technical proposal was already superior to that of Aetna, and therefore there was no perceived need to reevaluate that portion of Premera's proposal. Decision, p. 9.

Paragraph 4 of the Agreement does not contain the requirement asserted by Aetna that the Division would completely reevaluate Premera's proposal yet again with the same evaluation committee that evaluated Aetna's proposal. For the various Aetna witnesses to now say they assumed there would be an additional process not discussed by the parties or included in the Agreement is no more than an after the fact rationalization.

The focus of the parties' discussions on February 22 and 23, 2006, was clearly directed towards expediting the procurement process. Aetna knew that the preliminary evaluation of its proposal was taking place over more than two days. It agreed to a procedure by which best and final offers would be due by noon on Tuesday, February 28, 2006, with a final notice of intent scheduled to be issued on or before Thursday, March 2, 2006. Aetna could not plausibly have anticipated that both proposals would be evaluated from scratch by a newly-constituted evaluation team in less than two days. Aetna knew from the discussions about the scoring of its proposal that it took more than two days to evaluate one, let alone two, proposals.

Aetna's real dispute is with Mr. Shier's evaluation and scoring of its proposal, which was lower than that of either Ms. Miller or Ms. Porter. As such, Aetna really is taking issue with the outcome of its technical evaluation, not the process by which it was derived. In that vein, it is worth noting that Mr. Shier had originally scored a significant

portion of Premera's first proposal. If the Division had requested that Mr. Shier complete his evaluation and scoring of Premera's technical proposal and had his scores been substituted for one of the other two Premera evaluators, Premera's advantage over Aetna on the technical proposal scoring would likely have been even greater.

Mr. Shier evaluated Premera's original technical proposal and scored Sections 7.1 through 7.17, awarding a total of 1370 points. Aetna Attachment 5c. The average of the scores for the evaluators who fully evaluated Premera's proposal, Ms. Miller, Ms. Gray and Mr. Williams, through that section was 1167. Id. Mr. Shier awarded more than 200 points more than the average of the other evaluators for the portion of the proposal he scored. Aetna contends that Mr. Shier was unreasonably harsh in scoring its proposal. Aetna ignores that Mr. Shier's scoring of Premera's proposal would have increased Premera's scoring advantage relative to Aetna.

In the end, Aetna simply disagrees with Mr. Shier's subjective evaluation of its proposal. However, that is an insufficient basis on which to sustain a protest. Disparate scoring among evaluators does not, by itself, suffice to establish an improper evaluation. Unisys Corp., B-232634 (Comp. Gen. Jan. 25, 1989). The details of technical scoring decisions involve discretionary judgments which are committed to procuring agencies. Dismas Charities, Inc. v. United States, 61 Fed. Cl. 191, 198, 203 (2004). Aetna does not contend Mr. Shier considered factors other than the stated evaluation criteria. Nor has it argued, much less submitted any competent evidence, that Mr. Shier's evaluation of its proposal was the product of bad faith, favoritism, conflict of interest or any similar bias.

Under the difficult circumstances confronting the Division, it fairly balanced its need to proceed with the procurement, the availability of evaluation committee members and a reasonable remedial evaluation process.[6] It facilitated negotiation of an Agreement among the parties and implemented that Agreement evenhandedly.

3. There Is No Evidence that the Procedures Implemented by the Division Were the Product of Fraud, Bad Faith or Conflict of Interest.

It is within a procuring agency's discretion to decide how many and which members of an evaluation committee will review each proposal. T.V. Travel Time, Inc., B-218198 (Comp. Gen. Dec. 10, 1985); Data Res., Inc., B-203166 (Comp. Gen. Aug. 5, 1981) (evaluators applied the same criteria under the same instructions). A procuring agency may properly evaluate individual proposals with less than the entire evaluation panel and not all members of the panel need review each proposal. Data Res., Inc., B-203166; Design Concepts, Inc., B-186125 (Comp. Gen. Oct. 27, 1976). An agency's exercise of discretion as to those matters will not be set aside absent evidence of fraud, bad faith or conflict of interest. Drinkwater Eng'g, Inc., B-206368 (Comp. Gen. Nov. 2, 1982) (speculations and suspicions are not an adequate showing).

Aetna does not allege that the manner in which evaluations and scoring were conducted on this procurement were the product of fraud or conflict of interest. It does

[6] Aetna repeatedly offers the testimony of Commissioner Nordstrand in a legislative hearing as evidence that Aetna was treated unfairly. Aetna Appeal, pp. 19, 25, 31. Aetna's characterization of that testimony is misleading. In fact, in his testimony Commissioner Nordstrand acknowledged, as did the Division during the calls among the parties, that there was no way to remedy the harm to Premera resulting from the disclosure of its final cost proposal. His reference to lack of a "level playing field" refers to the competitive disadvantage to Premera. Aetna Attachment 12, p. 24. Aetna's attempt to mischaracterize Commissioner Nordstrand's testimony is yet another attempt to create a record that does not exist.

make generalized assertions of bad faith, but its allegations in that regard fall short of the proof necessary to sustain such charges.[7] "[A]gency personnel and procedure are presumed to be honest and impartial until a [claimant] makes a showing of actual bias or prejudgment." Bruner v. Petersen, 944 P.2d 43, 49 (Alaska 1997); Earth Resources Co. v. State, Department of Revenue, 665 P.2d 960, 962 n. 1 (Alaska 1983). "[T]he presumption can be overcome only with convincing evidence that 'a risk of actual bias or prejudgment is present.' In other words, any alleged prejudice on the part of the decisionmaker must be evident from the record and cannot be based on speculation or inference." Spectrum Printing, Inc., Dept. of Admin. No. 98-14 (April 28, 1999) (quoting Navistar Int'l Transp. Corp. v. United States Envtl. Prot. Agency, 941 F.2d 1339, 1360 (6th Cir. 1989)). Accord Sanders, OAH No. 05-240 PRO (Dec. 20, 2005).

B. Premera And Aetna Were Accorded Fair And Equitable Treatment In Their Respective Discussions With The Division.

Aetna contends it was treated inequitably because 1) the Division had a greater volume of discussions with Premera as measured by the number of pages of questions and answers, 2) Premera's evaluation scores rose by more than Aetna's as a consequence of those discussions, and 3) the Division improperly "coached" Premera during discussions. None of those arguments have merit.

Procuring agencies are authorized, where a request for proposals so provides, to engage in discussions with proposers which have been determined to be reasonably susceptible for award:

---

[7] Aetna alleges only one specific instance of bad faith. It contends that the State's characterization of the Agreement

> As provided in the request for proposals, and under regulations adopted by the commissioner, discussions may be conducted with responsible offerors who submit proposals determined to be reasonably susceptible of being selected for award for the purpose of clarification to assure full understanding of, and responsiveness to, the solicitation requirements. Offerors reasonably susceptible of being selected for award shall be accorded fair and equal treatment with respect to any opportunity for discussion and revision of proposals, and revisions may be permitted after submissions and before the award of the contract for the purpose of obtaining best and final offers. In conducting discussions, the procurement officer may not disclose information derived from proposals submitted by competing offerors.

Alaska Stat. § 36.30.240. See also 2 A.A.C. § 2.12.290.

In this case, the RFP expressly authorized such discussions. RFP § 2.07. As echoed in the RFP, the statute permits discussions not only to "to assure full understanding of . . . the solicitations requirements," but also to insure responsiveness to those requirements. Aetna itself acknowledges that under the RFP, the procurement code and implementing regulations, agencies are allowed to "flush out" (sic) proposal details and that process can lead to changes in a bidder's proposal. Aetna Appeal, p. 16-17. All of this is consistent with the obligation the State has to insure that it receives the best possible proposals. Kenai Lumber Co., Inc. v. LeResche, 646 P.2d 215, 220 (Alaska 1982) ("Competitive bidding itself is designed to ensure that government obtains the most favorable terms possible in its contracts.").

The context of the discussions the Division conducted with Premera is critical to understanding their propriety. The vast majority of those discussions took place in early February when Premera was presumed to be the only responsive bidder. At that point,

---

is an example of bad faith, but does not clarify why an interpretation that is reasonable on its face amounts to bad

the Division had a legitimate interest in obtaining the very best commitments it could from Premera to serve the interests of the State. In addition, because deadlines were not yet pressing, those discussions extended over a longer period of time and were in greater depth than what was feasible in the compressed schedule agreed upon in the Agreement. Finally, because Premera was not the incumbent, it was natural for discussions with it to be more involved to insure it understood the State's needs.

At the time of the telephone conferences between the Division, Premera and Aetna on February 22 and 23, 2006, Aetna knew or should have know that the Division had conducted discussions with Premera leading up to issuance of the original Notice of Intent. Aetna had ample time and opportunity during those conferences to inquire about that process and assert any objections it might have had to events which had already transpired. Instead, it agreed in writing to a process by which there would be further discussion with both parties, as necessary, following the evaluation of Aetna's original proposal. Following the determination that Aetna's proposal was responsive, the Division's discussions with Aetna were indisputably of greater depth than its discussions with Premera.

1. The Division Properly Tailored its Discussions with Premera and Aetna Based on the Nature of their Respective Proposals.

Aetna's protest evidences a fundamental misunderstanding of the law governing the permissible scope of an agency's discussions with offerors. The law does not require a precise equivalency in discussions between an agency and bidders or in resulting

---

faith.

changes in proposals and scoring. It requires only that all bidders are given the opportunity to clarify issues relating to their proposals. There is no abstract rule that discussions are improper if proposers are not asked a comparable number of questions or if reevaluations do not result in comparable changes in the scoring of competitors' proposals.

Instead, the scope of lawful discussions with proposers is driven by the quality of the proposer's individual initial and, as required, revised proposals. Agencies need not discuss every aspect of a proposal that receives less than the maximum score or identify relative weaknesses in a proposal that is technically acceptable but presents a less desirable approach than others. Biospherics, Inc. v. United States, 48 Fed. Cl. 1, 9 (2000); Northrop Grumman Info. Tech., Inc., B-290080 (Comp. Gen. June 10, 2002). Rather, an agency should tailor its discussions to each offeror, since the need for clarifications or revisions will vary with the proposals. Biospherics, Inc., 48 Fed. Cl. at 9. See also World Travel Service, B-284155.3 (Comp. Gen. March 26, 2001).

During discussions, an agency is not required to "spoon-feed" an offeror as to each and every item that could be revised to improve its proposal. ITT Fed. Svs. Int'l Corp., B-285176.4, B-285176.5 (Comp. Gen. Jan. 9, 2001). Nor are they required to discuss every element of a technically acceptable proposal that receives less than the maximum possible score. Labat-Anderson v. United States, 42 Fed. Cl. 806, 835 (1999) (agencies are not obligated to conduct all-encompassing discussions that address all inferior or inadequate aspects of a proposal); Cherokee Info. Svs., B-287270 (Comp. Gen. April 12, 2001) (no unequal discussions where agency held technical discussions with awardee,

whose technical proposal was initially evaluated as containing a number of weaknesses, while conducting no technical discussions with protester, whose initial proposal did not contain any weaknesses or deficiencies).

Scoring which leads to "a disparate *result*–does not mean that [the protestor] was *treated* unfairly or differently." Dismas Charities, Inc., 61 Fed. Cl. at 202 (emphasis in original). A protester must show that "the Government re-scored in order to alter the results." Id. Nor does disparate scoring among evaluators suffice, by itself, to establish an improper evaluation. Gen. Sec. Servs., Corp., B-280388, 280388.2 (Comp. Gen. Sept. 25, 1998).

The actual content and extent of discussions are matters of judgment primarily for determination by the agency and review of the agency's judgments is limited to a determination of whether they are reasonable. J.G. Van Dyke & Assocs., B-248981, B-248981.2 (Comp. Gen. Oct. 14, 1992).

In the absence of a showing of actual bias, state procurement officers are presumed to act in good faith and exercise honest and impartial judgment. Bruner v. Petersen, 944 P.2d 43, 49 (Alaska 1997); Earth Resources v. State, Dept. of Revenue, 665 P.2d 960, 962 n. 1 (Alaska 1983). See also Am-Pro Protective Agency, Inc. v. United States, 281 F.3d 1234, 1240 (Fed. Cir. 2002) (presumption can only be overcome by clear and convincing evidence of bad faith). To overcome that presumption, a protestor must provide direct evidence of actual bias or prejudgment, not just speculation. Sanders, OAH No. 05-240 PRO (Dec. 20, 2005).

The following hypothetical illustrates these principles. An initial proposal

submitted by Offeror A may contain few significant weaknesses and be viewed by an evaluation committee as technically acceptable in all other areas. In discussions, Offeror A's proposal might call for fewer clarifications and areas of evaluation adjustment. At the same time, an initial proposal submitted by Offeror B may be viewed as generally presenting a more desirable overall approach, but containing a greater number of areas where the proposal needs clarification. In discussions, Offeror B's proposal might trigger a greater number of questions and requests for modifications. If Offeror B makes the requested changes, there may be a greater resulting change in its evaluation scores. So long as the discussions with each proposer are tailored to the scope of deficiencies perceived in their initial proposals, the procuring agency will have acted within both the spirit and the letter of the law governing discussions in a negotiated procurement.

The facts of this procurement are consistent with the hypothetical discussed above. The scope of discussions conducted by the Division with Aetna, on the one hand, and Premera, on the other, were well within the broad scope of discretion granted to the contracting officer. See, e.g., Biospherics, 48 Fed. Cl. at 9 ("[B]oth the decision to conduct discussions with bidders and the scope of any discussions are left to the judgment of the contracting officer").

The record is clear that the evaluation committee did conduct discussions with Aetna in numerous areas where it perceived weaknesses in Aetna's initial proposal. Those areas included Section 7.06(d), Vision Services, where the evaluation committee was concerned that Aetna had only addressed VSP; Section 7.09(a)(v), Utilization Review, where there were noted concerns about the length of stay criteria used; Section

7.16(c), Information Technology, where the evaluation committee noted that Aetna stated it would not offer direct deposit; Section 7.16(f), Information Technology, where the evaluation committee noted that Aetna had simply not responded; Section 7.17(e), Client Service/Experience, where the evaluation committee noted that Aetna had failed to provide the required reference from a client which had terminated its relationship[8]; Section 7.19(j), Clinical Programs, where there were noted concerns that Aetna failed to provide necessary rebate information; and Section 7.21(t), Mail Order, where the evaluation committee found that Aetna had not identified a point of sale claims procedure. Aetna Attachment 3. Aetna fails to disclose in its briefing that it benefited from the very same type of input from the Division that it complains was unfair.

As discussed above, the test is not whether the Division asked Aetna and Premera an equal number of questions in an equal number of pages resulting in equal scoring changes. It is, instead, whether the Division asked Aetna appropriate questions in light of the deficiencies the evaluation committee perceived during its initial evaluation of Aetna's proposal. The record shows the Division fully discharged that responsibility to Aetna within the scope of its discretion.

The cases cited by Aetna do not help its position. Dynacs Eng'g Co., Inc. v. United States 48 Fed. Cl. 124 (2000), is inapposite as a basis to set aside the decision of the Division in this case. In Dynacs, the protestor argued and the court agreed that

[8] Aetna failed to include the required type of references in its proposal. Aetna Attachment 3. Even after this omission was pointed out to it by the Division, Aetna still failed to provide the requested information for one of the references. Aetna Best and Final Offer. Technically, Aetna's bid, even as modified following discussions with the Division, was non-responsive to the bid requirements. Rather than determining that Aetna was non-responsive, the Division accepted Aetna's response. This is further evidence that the Division was fair to Aetna.

NASA erred by conducting a second round of discussions in which it discussed continuing weaknesses in FDC's proposal but did not reopen discussions with Dynacs concerning similar continuing weaknesses in its proposal. The court found such disparate treatment was improper. Id. at 136. However, Aetna does not argue that it was denied an opportunity here to cure continuing weaknesses that was differentially provided to Premera in an exclusive final round of discussions. In fact, neither party was afforded an opportunity to further revise their substantive proposals after the submission of best and final offers.

As to the second issue decided in Dynacs, the court held there was no obligation on the part of NASA to discuss areas of Dynacs' proposal which were not viewed as significant weaknesses.

> There is, however, no requirement that all areas of a proposal which could have a competitive impact be addressed in discussions. Discussions must only address "areas of weakness." The procuring agency does not have to identify "each and every item that could be raised as to improve its proposal." [citation omitted] As this court observed in *Cube Corp. v. United States*, "[t]he government 'need not discuss every aspect of the proposal that receives less than the maximum score or identify relative weaknesses in a proposal that is technically acceptable but presents a less desirable approach than others.' " [citation omitted]

Id. at 131.

Here, Aetna has not protested on the ground that there were elements of its proposal which the evaluation committee identified as areas of significant weakness which the committee failed to discuss with it. As Dynacs holds, the evaluation committee had no obligation to conduct discussions with Aetna on every element which received less than the maximum score or which was viewed as technically acceptable but

presenting a less desirable approach than that of Premera.

Dubinsky v. United States, 43 Fed. Cl. 243 (1999), is of no more help to Aetna. In that case, the court held it was improper for the Air Force Academy to conduct discussions with only one of the six remaining proposers after the call for best and final offers. Id. at 263 (telephone call to one bidder to give it an opportunity unavailable to other offerors to make its proposal compliant was improper). No such disparate opportunity was provided to Premera to engage in additional discussions with the Division after the solicitation of Premera's best and final offer and prior to the Division's evaluation of that offer.

Paramax Systems Corp., 1993 WL 485205 (Comp. Gen. 1993), involved the same type of procedural impropriety as in Dubinsky. There the Department of the Navy provided Paramax with an opportunity, not afforded to any other proposers, of correcting a material nonconformance after the submission of best and final offers. Id., 1993 WL 485205, *5. As discussed above, no such disparate treatment was granted to Premera in this case.

2. The Division Did Not Improperly Coach Premera to Cure Responsiveness Defects or Reduce Premera's Cost Proposal.

Aetna's contentions of alleged improper "coaching" of Premera fall into two categories. First, it argues the Division improperly assisted Premera in curing responsiveness defects in its original proposal. Second, Aetna contends the Division suggested to Premera that it recharacterize network access fees so that its best and final

cost proposal could be decreased by $6,880,000. For the reasons discussed below, neither of those arguments have merit.

The examples which Aetna offers of alleged improper coaching of Premera by the Division to cure responsiveness defects include discussions relating to 1) RFP § 10.11(a)(i) which required that 85% of telephone calls be answered within 30 seconds, 2) RFP § 10.14(c) concerning direct deposit of benefit reimbursement, 3) RFP § 10.05(c) which asked if proposers agreed to allow fees within $10 or 10% of UCR without reduction, 4) RFP § 10.11(g)(i) which asks proposers if they agreed to reimburse the State for overpayment error in excess of $50 and 5) RFP § 10.02(A)(e) which inquired concerning compatible data processing. See Wiggins Aff., ¶¶ 20-24.

First, most of the sections of the RFP cited by Aetna do not involve responsiveness issues. Sections 7.13(a)(i) and (c)(iv) involve performance standards and they clearly state that "the State will consider alternative standards." Section 7.16(c) does not mandate direct deposit of participant benefit reimbursement, it simply inquires whether it is available. Section 7.07(c), states "If you have provider agreements in place allowing for waiver of charges in excess of UCR or other negotiated amounts, the forgiveness allowance may be eliminated. Please describe your reasons for not wanting the current forgiveness allowance." Section 7.04(A) expressly authorizes both "corrective action" in the course of proposal evaluation where a requirement is not met as well as the proposal of "alternative methods." The Division did not mandate a particular response in any of those sections.

Second, Aetna mischaracterizes several of the exchanges between the Division and Premera. For example, as to timeliness in responding to 85% of telephone calls within 30 seconds, the "disagreement" in fact involved Premera's willingness to commit to greater penalties than those stated in the RFP in the event it failed to perform as promised. Premera Proposal § 7.13(a)(i). Similarly, as to reimbursement for overpayments, Premera initially stated that it would reimburse the State for uncollected overpayment errors in excess of $50. Premera Proposal § 7.13(c)(iv). In response to the Division's question, Premera again offered more than what was requested. It stated it would reimburse the State for all collected overpayments over $25, regardless of cause, and all uncollected overpayments over $25 resulting from Premera's errors. Aetna Attachment 4b, p. 35. Likewise, Premera initially stated it would provide monthly reports with key statistics in accordance with RFP § 6.07 even though it did not provide a sample. Premera Proposal § 7.04(A)(e). Premera confirmed that commitment in response to the Division's question. Attachment 4b, p. 13.

Third, Aetna conveniently ignores the fact that the Division had the very same types of discussions with it relating to Section 7.13(c)(iv), Performance Standards (Claim Overpayment); Section 7.16(c), Information Technology (Direct Deposit); Section 7.16(f), Information Technology; Section 7.17(e), Client Service/Experience; Section 7.19(j), Clinical Programs and Section 7.21(t), Mail Order. Those were all issues where Aetna had either failed to include required information or disagreed with requirements of the RFP. Aetna Attachment 3.

Finally, and most importantly, Aetna ignores the fact that the statute expressly authorizes discussions to "assure full . . . responsiveness to, the solicitation requirements". Alaska Stat. § 36.30.240. Thus, the Division was in no manner violating the procurement code when it had discussions with both Aetna and Premera which were designed . . achieve full compliance with and responsiveness to the terms and conditions of the RFP.

Aetna's assertion that the elimination of Premera's network access fees allowed it to shift $6.88 million from its service fee proposal is simply false and misleading.[9] As Aetna acknowledges, carriers typically provide discounts through their networks, commonly known as Preferred Provider Organizations. McGuinness Aff., ¶ 13. Since there are administrative costs associated with maintaining such networks, carriers also typically recapture those costs by sharing in a portion of the discounts through various mechanisms. One approach is to charge a fixed fee for access to the network. Another, sometimes referred to as "shared savings" is to recover a percentage of savings generated by the network discounts on a contingency fee basis if savings exceed a certain benchmark. The common feature among the various recapture mechanisms is that they reduce the amount of the total discount to offset the cost of obtaining the discount.

The Division fully anticipated that proposers might include network access fees as part of their discount structures and requested information concerning such fees in RFP § 7.15(d), Provider Discounts: "Is there any additional fee for using any of the networks described above? Yes No If yes, please describe the fees." Any such fees, which reduce

the amount of the discounts, like a shared savings arrangement, were independent of and not considered by the Division as a component of the service fees that comprised elements of cost proposals under RFP § 7.23.

In its original best and final offer, Premera proposed a combination of a network access fee of $5.51 per employee per month and a shared savings plan. Premera Proposal § 7.15(d). In the shared savings component of its bid, Premera offered to guaranty the State that it would save at least $100 per member per month as a result of Premera's discounts. The State and Premera would share in any savings above $100 per member per month, with the State retaining 88% of those savings and Premera retaining the other 12%. Premera also committed to pay the State 24% of any amount by which the savings was less than the $100 guarantee. Aetna Attachment 4b, pp. 4, 33. Premera specifically explained that "the access fee works with the network savings guarantee." Id., p. 4.

In Premera's final best and final offer, it restructured the package by which it would recapture a portion of network discounts. It eliminated the fixed network access fee entirely and went exclusively with a plan in which it shared in a greater portion of the network discounts and was at risk for a greater amount if it did not deliver the guaranteed savings of $100 per member per month. In its final offer, Premera increased the percentage it stands to gain from 12% to 30%. Davis Aff., ¶ 18. This financial arrangement is virtually guaranteed to produce an additional benefit to the State, and puts Premera at risk for payment to the State should it not achieve the amount of the guaranteed savings.

---

[9] Among other things, Aetna never explains how it calculated the $6.88 million number.

Since by the terms of the RFP the network access fee was not included as part of the administrative cost proposal, the elimination of the network access fee by Premera in its best and final offer had no direct impact whatsoever on its cost proposal. All it did was restructure, in a manner favorable to the State, the mechanisms by which Premera would recover a portion of network savings.

Finally, Aetna is disingenuous in asserting that the treatment of the network access fee was inappropriate for two reasons: 1) Aetna restructured its cost proposal to reduce the administrative fee to the State while reducing the pharmacy rebate guarantees; and 2) Aetna's proposal includes a fee for its network discounts. First, as the Division notes, in Aetna's best and final offer it decreased the administrative costs by over $13 million, but at the same time reduced the benefit the State would receive from pharmacy discounts.[10] Second, under Aetna's proposal, the State would have been charged a "fee" for participation in its National Advantage Program of "30% of the actual savings attained", the same percentage as Premera. McGuinness Aff., ¶ 29. What is more, Aetna proposed charging the State an "additional fee" in the form of a "'bonus' of up to 5% of medical fees . . . for exceeding the Aetna network savings guarantee." Id.

Aetna simply cannot have it both ways, arguing on the one hand that Premera's shared savings fees should be recharacterized as network fees and imputed into Premera's cost proposal, while at the same time ignoring the fact that it structured its own proposal in a similar manner.

---

[10] Aetna reduced the net benefit to the State for pharmacy rebates from its original proposal by almost $5 million. For example, Aetna reduced its per claim rebate for mail order claims in year one of the contract from $15.05 to $2.34. In addition, Aetna decreased the amount of guaranteed pharmacy rebates from $3.5 million to $750,000 per

C. Aetna's Challenge To The Division's Cost Evaluation Is Untimely, Legally Unfounded And Factually Erroneous.

1. Aetna's Assertions Concerning the Comparative Costs to the State of Its and Premera's Proposals Is a Disguised and Untimely Protest of the Cost Evaluation Criteria Utilized by the Division.

Aetna complains that Premera's price was understated and materially higher than its own because items should have been included by the Division in the cost evaluation criteria which were not. Aetna Appeal, p. 10. In so doing, Aetna essentially takes issue with the procedure which the Division decided to use to analyze and compare proposal costs.

The criteria which the Division intended to utilize to conduct cost evaluations, monthly service fees per active employee and per retiree, were fully disclosed in the RFP when it was issued on November 30, 2005. RFP § 7.23. It was equally clear that certain other types of fees, charges and costs were not be included in the cost evaluation criteria. E.g., RFP § 7.15, Provider Discounts (including network fees). Because the Division's methodology was fully disclosed in the RFP, Aetna is *de facto* protesting an alleged impropriety in the terms of the RFP when it argues that certain elements, such as savings sharing formulae and pharmacy rebate structures, should have been included in the cost evaluation criteria.

Aetna's protest as to the structure of the evaluation criteria contained in the RFP should have been filed at least 10 days before the due date of the RFP, or December 27, 2005. Alaska Stat. § 36.30.565(a) ("A protest based on alleged improprieties or

---

year in its best and final offer. Decision, p. 14.

ambiguities in a solicitation must be filed at least 10 days before the due date of the bid or proposal, unless a later protest due date is specifically allowed in the solicitation."); RFP § 2.19 ("ten days prior to the deadline for receipt of proposals"). As such, Aetna's protest and discussion of this issue is untimely and should be summarily dismissed in its entirety.

2. The Cost Evaluation Criteria Utilized by the Division Were Clearly Within the Scope of Its Discretion.

Procuring agencies have broad discretion in selecting the methodology to be used for comparing proposal costs. Umpqua Research Co., B-199014 (Comp. Gen. Apr. 3, 1981); Francis & Jackson Assoc., B-190023 (Comp. Gen. Jan. 31, 1978).

Aetna has made no showing that the Division abused its discretion in its selection of the cost evaluation criteria utilized in the RFP. The mere fact that other alternative cost evaluation methods might have existed does not establish that the criteria selected by the Division were improper. In fact, because alternative cost evaluation methodologies, such as those which Aetna has used in the McGuinness Affidavit, rely largely on assumptions concerning future events, which are necessarily subjective, the strictly objective approach chosen by the Division was a sound choice.

3. A Fair Comparison of Aetna's and Premera's Proposals Reveals that Premera Offered the Lowest Cost Proposal to the State.

Premera's proposal to the State is more favorable than Aetna's proposal by $10,687,000. This comparative savings is based on a complete financial analysis of the two final proposals, rather than the selective and incomplete analysis offered by Aetna. Premera performed a thorough comparison of the costs of the proposals, using reasonable

ambiguities in a solicitation must be filed at least 10 days before the due date of the bid or proposal, unless a later protest due date is specifically allowed in the solicitation."); RFP § 2.19 ("ten days prior to the deadline for receipt of proposals"). As such, Aetna's protest and discussion of this issue is untimely and should be summarily dismissed in its entirety.

2 The Cost Evaluation Criteria Utilized by the Division Were Clearly Within the Scope of Its Discretion.

Procuring agencies have broad discretion in selecting the methodology to be used for comparing proposal costs. Umpqua Research Co., B-199014 (Comp. Gen. Apr. 3, 1981); Francis & Jackson Assoc., B-190023 (Comp. Gen. Jan. 31, 1978).

Aetna has made no showing that the Division abused its discretion in its selection of the cost evaluation criteria utilized in the RFP. The mere fact that other alternative cost evaluation methods might have existed does not establish that the criteria selected by the Division were improper. In fact, because alternative cost evaluation methodologies, such as those which Aetna has used in the McGuinness Affidavit, rely largely on assumptions concerning future events, which are necessarily subjective, the strictly objective approach chosen by the Division was a sound choice.

3. A Fair Comparison of Aetna's and Premera's Proposals Reveals that Premera Offered the Lowest Cost Proposal to the State.

Premera's proposal to the State is more favorable than Aetna's proposal by $10,687,000. This comparative savings is based on a complete financial analysis of the two final proposals, rather than the selective and incomplete analysis offered by Aetna. Premera performed a thorough comparison of the costs of the proposals, using reasonable

financial projections and substantiating his assumptions. Affidavit of David Braza ("Braza Aff."), Exhibits 1, 2. Milliman, one of the preeminent actuarial firms in the country, verifies Premera's analysis. Affidavit of Thomas E. Nightingale ("Nightingale Aff."), Exhibit 1.

As is discussed below, when one examines provider discounts and pharmacy costs in a comprehensive manner and applies realistic assumptions to trends in billed claims charges and discounts, it is evident Premera's proposal will produce significant net savings to the State on administrative costs, in addition to the savings in claims costs Premera has promised to the State. By awarding the Contract to Premera, the Division undeniably obtained the best value for the State and its employees and retirees.

a. The Methodology Utilized by Aetna to Compare Its and Premera's Cost Proposals Was Flawed.

The methodology relied upon by Aetna in the McGuinness Affidavit was flawed because it only examined selective features of the overall cost picture, those which advantaged Aetna, as opposed to attempting to compare the total costs to the State. First, Aetna ignored the full cost of pharmacy claims services by focusing solely on guaranteed rebates. In order to construct a comprehensive analysis, all costs associated with pharmacy claims should be considered. The calculation of those costs includes the following elements: the price for retail and mail purchases of both brand and generic drugs, provider discounts per category of purchase, and any additional administrative cost, such as for processing of written (as opposed to electronic) pharmacy claims. The analysis conducted by Premera took all of those various factors into account. Braza Aff.,

Exhibit 1.

Second, on the medical costs side, Aetna focused exclusively on shared savings fees. However, shared savings fees are meaningful only in the context of related overall medical charges and network discounts. Again, to construct a comprehensive analysis one needs to consider allowed, paid and billed claims data, as well as trends in those areas, trends in discounts and comparative discount structures. Aetna did none of those things other than to assume, as discussed below, an unrealistic growth in savings per employee per month. In contrast, the analysis conducted by Premera took all of thos various factors into account. Id.

b. Aetna Made Unreasonable Assumptions Concerning Future Trends as to Growth of Savings Per Employee Per Month.

Aetna's calculation of Premera's anticipated shared savings fees is the principle factor in McGuinness' analysis which erroneously suggests that Aetna's proposal is less expensive than Premera's. The single most critical component of Aetna's analysis is the trend numbers it uses for growth in per employee per month savings over the course of the contract. However, Aetna failed to candidly disclose that those trend numbers are dependant upon certain assumptions as to future events and further failed to offer documentation justifying those assumptions.

As discussed in Premera's analysis and confirmed by Milliman, a recognized independent actuarial expert, Aetna's assumption of 15.4% growth in network discounts is inconsistent with historical patterns. In contrast, Premera developed a 6.6% growth trend based upon the actual trend in billed claims charges supported by State data and the

2005 actual discount savings percentage of 13.6% supported by State and Aetna data. Milliman concludes that Premera's assumptions, rather than those of Aetna, are "reasonable assumptions" based on those data trends. It also notes that billed charge trends are not anywhere near as high as 15.4% using national data. In fact, they are only about half that amount:

> Our experience, nationally, indicates that billed charge trends have ranged over the past several years from the mid single digits to the high single digits (i.e., 5%-9%) for medical services (excluding Rx). Group by group variations in PEPM trend occur, however, such variations are generally driven by material changes in population risk, which we would not expect for the State of Alaska employee group, or other factors that cannot be foreseen at this time.
>
> We observe nothing on the horizon to indicate that, at least nationally, billed charge trends will be materially increasing over the next two to three years. Hence, use of a historical trend as an indicator of future trends is a reasonable assumption.

Nightingale Aff., Exhibit 1.

c. Premera Will Likely Save the State in Excess of $10,687,000 Over the Next Three Years as Compared to Aetna.

Mr. Braza concludes, and Milliman confirms, that Premera will likely save the State in excess of $10,687,000 over the next three years as compared to Aetna. This conclusion is based upon explicit and reasonable assumptions, as discussed above, concerning future trends as to growth in billed claims and network discounts. Using Premera's more realistic assumptions concerning those trends, Premera's projected fee for the network savings shared with the State is $3,132,143 over three years. Mr. McGuinness' estimate of $13,741,949 is unsupportable. It is also noteworthy that Premera, unlike Aetna, guarantees the State a base savings amount per employee per

month on its network discounts.

The Premera analysis conservatively assumes that Premera's and Aetna's network discounts are comparable. Premera believes that its network discounts are significantly better than those available through Aetna. As a result, Premera provides performance guarantees to certain groups based on savings from its network discounts. Davis Aff., ¶ 24.

Premera has proven it can deliver on those guarantees. For example, Premera won another major national account from Aetna as the third party administrator for its health benefits plan in 2003. For that customer, Premera guaranteed network savings of 36%, which were greater than Aetna's discounts, and has met that commitment. Id.

Similarly, Premera has promised the State that it will provide the State with at least $15 million in annual savings. Id., ¶ 18. However, for purposes of analyzing and responding to Aetna's assertions, Premera has conservatively assumed that the parties' discounts are and will remain equal over the course of the Contract.

The Premera analysis is also based on a more comprehensive evaluation of comparative pharmacy claims costs, which examines prescription claim counts, pricing and discounts, as opposed to just guaranteed rebate amounts. The total cost of pharmacy claims in Premera's proposal is $202,911,119 and in Aetna's proposal is $204,407,171. Braza Aff., Exhibit 1. Premera's proposal thus advantages the State by $1,496,053, a fact Aetna ignores in its financial analysis.

Aetna's assertion that the claims runout charges in its proposal are less than those in Premera's proposal is another example of how Aetna attempts to build a case on

erroneous financial analysis and unsupported assumptions. Aetna's assumption that the claims runout fees in the Premera proposal are $5 million is entirely unreasonable and completely unsupported. Id. Premera's true projected claims runout fees are less than $2 million, meaning they are over $600,000 less than Aetna's fees, not over $2 million more. Id.

## IV. FACTORS RELEVANT TO ANY REMEDY

Premera believes that the decision of the contracting officer denying Aetna's protest was correct and that Aetna's claims should be rejected in their entirety. Without knowing which of Aetna's points, if any, the Administrative Law Judge might find to have merit, Premera cannot take a position regarding what remedy might be appropriate. Should the Administrative Law Judge make any findings in support of any of Aetna's claims, Premera respectfully requests that a decision on an appropriate remedy not be made until the parties have had a chance to evaluate and respond to the Administrative Law Judge's findings.

In any event, any remedy should not alter the terms of the Contract. In the event of any relief to be awarded, the following factors are relevant under Alaska Stat. § 36.30.585(b) and support Premera's position that the Contract should not be set aside.

### A. Degree Of Prejudice To Premera.

Either rescoring or cancellation of this procurement would result in substantial prejudice to Premera in light of the expenditures it has made to date in preparation for

performance of the Contract. See Bachner Co., Inc., Dept. of Admin Case No. 03.10 (February 10, 2004) (irrevocable commitment of resources by innocent party).

B. Premera's Good Faith.

At no time during the course of this bid protest and appeal has there been any suggestion that Premera has acted in anything other than utmost good faith. Id. None of the issues raised by Aetna have implicated the conduct of Premera in any manner.

C. The Urgency Of This Procurement.

The State has a statutory obligation to issue a new contract for the administration of its health care plan. Since its contract with Aetna will expire on June 30, 2006, the State was required to enter into a new contract for these administrative services. The process for some members to make determinations about their benefit plan for the next contract year takes place in May and the Contract requires identification cards to be delivered by June 1. Realistically, there is no time for any work other than the work plan in place for Premera to assume administration of the State's plan.

D. The Extent To Which Premera Has Performed To Date.

Premera has been implementing the Contract diligently in accordance with its contractual obligations. It has spent over $1.2 million already and will have spent a total of over $2.3 million by the time of a decision in this case in implementing the Contract. Davis Aff., ¶ 21.

Working closely with the State, Premera has accomplished the following: 1) completed implementation project planning; 2) hired various personnel, including

operations manager, care facilitation specialists, customer service representatives; 3) designed the members' identification card; 4) developed membership and billing procedures; 5) purchased Ingenix HCS System for provider reimbursement; 6) established banking arrangements, including appropriate accounts; 7) worked on finalizing contracts with vendors; 8) established toll-free numbers for 24-hour per day healthline and EAP provider; 9) held frequent meetings with the State to reach agreement on implementation details; 10) initiated system changed necessary to support the State's program; 11) developed required reports; and 12) entered into a letter of intent for the lease of office space in Juneau and started to build out that space to ensure that it will comply with the Contract by July 1, 2006. Id., ¶¶ 21, 22. The interests of Alaska state employees and retirees are best served by affirming the Contract award to Premera and avoiding the costs and delays which would result from termination of the Contract.

## V. CONCLUSION

Aetna's arguments are without merit. Premera's proposal is superior on both administrative costs and technical aspects. The State fairly conducted a procurement process agreed to by all parties and there were no inappropriate discussions with Premera. Therefore, Premera submits that the decision of the contracting officer denying Aetna's protest should be affirmed.

Dated this 28th day of April, 2006.

Davis Wright Tremaine
Attorneys for Premera Blue Cross
Blue Shield of Alaska

By: _____
Robert K. Stewart, Jr.
Alaska Bar No. 8506082

Certificate of Service

The undersigned also certifies that on the 6th day of April, 2006, a copy of the foregoing was served via U.S. mail and e-mail on the following:

Jon Tillinghast
Simpson, Tillinghast & Sorensen
One Sealaska Plaza, Suite 300
Juneau, Alaska 99801

Marjorie Vandor
Assistant Attorney General
Attorney General's Office
123 4th Street, 6th Floor
P.O. Box 110300
Juneau, Alaska 99811-3600

Kris Hamann
Kris Hamann

Robert K. Stewart, Jr.
Davis Wright Tremaine LLP
701 W. Eighth Avenue, Suite 800
Anchorage, Alaska 99501
(907) 257-5300
(907) 257-5399 (Facsimile)

Attorneys for Premera Blue Cross Blue Shield of Alaska

BEFORE THE ALASKA DEPARTMENT OF ADMINISTRATION

| | |
|---|---|
| In the Matter of: | ) |
| | ) |
| Aetna Life Insurance Company and Aetna, Inc., | ) |
| | ) |
| Appellants. | ) DGS Solicitation No. 2007-0200-5946 |
| | ) OAH No. 06-0230-PRO |

AFFIDAVIT OF THOMAS E. NIGHTINGALE

STATE OF GEORGIA )
) ss.
COUNTY OF FULTON )

Thomas E. Nightingale, being first duly sworn on oath, deposes and says as follows:

1. I am a Consulting Actuary with Milliman Consultants and Actuaries ("Milliman"). Milliman is one of the largest actuarial and consulting firms in the United States. I am competent to make this affidavit, and do so on the basis of personal knowledge except as may be otherwise stated below.

2. I have 17 years of work experience in actuarial science, having spent 13 years with Milliman and 4 years with Excellus Health Plans and its divisions, where my last position being Vice President and Chief Actuary for all Excellus Health Plan divisions. I

have worked extensively in the area of government contracting. I have a Bachelor of Arts from the University of the State of New York. I am a Fellow of the Society of Actuaries and a Member of the American Academy of Actuaries.

3. At the request of Premera Blue Cross ("Premera") I performed a review of the information prepared by David Braza, Vice President of Actuarial Services for Premera, which analyzes the financial aspects of the bids submitted by Premera and Aetna for the administration of the state of Alaska's health benefit plan. My conclusions are included in my letter dated April 28, 2006, a copy of which is attached to this Affidavit as Exhibit 1.

Dated this 28th day of April, 2006.

Thomas E. Nightingale

SUBSCRIBED AND SWORN TO before me this 28th day of April, 2006.

Kathleen R Swanson
Notary Public in and for the State of Georgia
My commission expires: August 13, 2009
Printed Name: Kathleen R. Swanson

A MILLIMAN GLOBAL FIRM

Milliman
Consultants and Actuaries

945 E Paces Ferry Rd NE
Suite 2500
Atlanta, GA 30326-1362
Tel +1 404 237 7080
Fax +1 404 237 6984
www.milliman.com

April 28, 2006

*Via Email*

Mr. John Pierce
Special Counsel
Premera Blue Cross
7001 220th Street SW
Mountlake Terrace, WA 98043

**Re:St ate of Alaska Employee Benefit Administration Contract Award**

Dear John:

Per your request, we have reviewed the State of Alaska, Total Cost Comparison, Premera vs. Aetna ("Total Cost Comparison"), prepared by David Braza. As part of our review we have considered a similar cost comparison described in the March 28, 2006 Appeal of Denial of Protest of Intent to Award in RFP No. 2007-0200-5946 ("Aetna's Appeal document"), submitted to the Alaska Department of Administration on behalf of Aetna by their outside counsel.

Provided below is an overview of the Total Cost Comparison methodology used by Mr. Braza. We also provide below our comments regarding the reasonableness of the underlying premises and assumptions used in the methodology and contrast them to the premises and assumptions used in Aetna's Appeal document.

*This letter and any attached exhibits are intended for Premera Blue Cross. If this letter is released to third parties, it should be released in its entirety. Further, release of this letter is not intended to imply any commitment to such third parties.*

**Overview of the Total Cost Comparison**

As noted in David Braza's description of the Total Cost Comparison (Attachment 1), the purpose of his analysis was:

> "To compare the *total costs* of the Premera and Aetna 2/28/2006 BAFO ("Best and Final Offer") for the State of Alaska. Total costs include costs that are both fixed and variable. Administration Fees and Pharmacy (Rx) Rebate credits are examples of fixed costs. Medical Claim Costs, Medical Shared Savings Fees, and Rx Claim Costs are examples of variable costs."

The Total Cost Comparison has a narrative which describes the methodology, starting premises and underlying assumptions. The narrative also documents the information Mr. Braza had available to him for the cost comparison. In addition, there are four exhibits, as follows:

1. **Exhibit 1** – Summary of projected costs for both Premera and Aetna in each contract year and for all years combined, with the difference in cost between Aetna and Premera noted. Projected costs are split into the following categories for each company:

   - Administrative Fee – Development is documented on Exhibit 2;
   - Medical Claim Cost – Development is documented on Exhibit 3;
   - Medical Shared Savings Fee – Development is documented on Exhibit 3;
   - Rx (Prescription Drug) Claim Cost – Development is documented on Exhibit 4; and
   - Rx Rebates – Development is documented on Exhibit 4.

   The total net difference in projected cost as shown on Exhibit 1 for all cost categories and all years indicates Premera is less expensive than Aetna by $10.7 million ($3.02 million in year 1, $4.22 million in year 2, and $3.45 million in year 3). However, as noted above, the amounts shown on Exhibit 1 are developed in Exhibits 2, 3 and 4.

   > *The Aetna Appeal document also contains a cost comparison that projects Aetna to be $2.5 million less expensive than Premera over the three contract years. This is contained in the Affidavit of Matt McGuinness (Attachment 2). That cost comparison focuses only on administrative fees, the medical shared savings fee (termed Carrier Retained Discounts in the Aetna Appeal document) and Rx rebates. It does not address either projected medical or Rx claim cost.*

2. **Exhibit 2** – Overview of guaranteed administrative fees for both Premera and Aetna as stated in each company's Best and Final Offer (BAFO).

   *The Aetna Appeal document, and the Affidavit of Matt McGuinness, agree with Mr. Braza's summary of administrative fees. There appears to be no dispute that Premera is projected to be $1.1 million less expensive than Aetna over the three contract years in administrative fees.*

3. **Exhibit 3** – Development of projected medical claim cost, provider discounts and the medical shared savings fee for the three contract years. Critical assumptions in this exhibit include:

   - Mr. Braza assumes that medical claim costs for the State of Alaska employees and their dependents will not differ between Premera and Aetna. Without having actual knowledge of either Aetna's or Premera's provider discounts in Alaska and other member locations, this appears to be a reasonable assumption.
   - The most important difference between Exhibit 3 in the Total Cost Comparison and the Aetna Appeal document is the medical cost trend used to project the medical shared savings fee. Mr. Braza assumes that billed charges will trend at 6.6% per annum and that average discounts will remain constant at 13.6% of billed charges over the three contract years. As this is the key difference between the Total Cost Comparison and the Aetna Appeal Document, we discus this in greater detail below (see section heading Trend in Medical Shared Savings Fee).

   *The Aetna Appeal document does not appear to directly address medical claim costs. However, in the Affidavit of Matt McGuinness, where he develops the medical shared shavings fee (carrier retained discounts), he accords a starting value for discounts that is equal to Aetna's own experience (see page 3, part 17, second bullet). Aetna's implied assumption of equality of claim cost and discounts is, as noted above, in accordance with Mr. Braza's assumption in the Total Cost Comparison.*

   *As noted above, the key difference in assumptions between the Total Cost Comparison and the Aetna Appeal document is the trend used to project the medical shared savings fee. In the Affidavit of Matt McGuinness, Aetna uses a trend of 15.4% per annum. We address this in more detail below (section Trend in Medical Shared Savings Fee).*

4. **Exhibit 4** – Development of Rx claim costs and guaranteed rebates. Mr. Braza uses information about Aetna Rx discounts as provided in their BAFO along with his own knowledge of Premera Rx discounts to project Rx claims costs for each company. Rebate amounts for each company are based on the guarantees provided in the BAFOs. While there is a small projected difference in Rx claim expense due to discount differences, the primary difference in projected cost between Premera and Aetna results from the significantly higher rebate guarantee provided by Premera.

   *The Aetna Appeal document does not appear to directly address Rx claim costs. The Affidavit of Matt McGuinness, Exhibit 2, has rebates imbedded with the administrative fee costs; however, we were able to back them out of the total. While Aetna's estimate of rebates for each company differs from Premera's estimate, there does not appear to be disagreement that Premera's rebate guarantee is significantly better (i.e., less costly) to the State of Alaska*

**Summary of Difference in Projected Cost Between Premera and Aetna**

Table 1 below contrasts the results of the two projections: Premera's Total Cost Comparison (prepared by David Braza) and Aetna's Appeal Document as shown on Exhibit 2 of the Affidavit of Matt McGuinness. Positive values in Table 1 indicated that Aetna is projected to be more expensive and negative numbers indicate that Premera is projected to be more expensive.

It is significant to note that the only negative amount in Table 1 is the medical shared savings fee differential being projected by Aetna. While there are minor differences for the other categories of cost, there appears to be general agreement between the two projections that, for all other categories combined, Premera will be more cost effective (i.e., less expensive) than Aetna. Since the medical shared savings fee is the primary area of disagreement between the two projections, we have addressed this in detail in the next section.

## Table 1

**Three Year Difference in Cost [1]**
**As Projected by**

| Cost Component | Premera Projection of Difference | Aetna Projection of Difference |
|---|---|---|
| Administrative Fee | $1,103,617 | $1,103,617 |
| Medical Claim Cost | $0 | $0 [2] |
| Medical Shared Savings Fee [3] | $ 268,985 | **(10,340,821)** |
| Rx Claim Cost | $1,496,053 | $0 [2] |
| Rx Rebates | $7,818,673 | $6,750,000 |
| Total Projected Cost Difference | $10,687,328 | ($2,487,204) |

Notes:

1. A positive difference indicates Aetna is projected to be more expensive. A negative difference indicates Premera is projected to be more expensive.
2. Not specifically addressed by Aetna, hence we have assumed they project no difference.
3. This is termed Carrier Retained Discounts in the Aetna Appeal document, Affidavit of Matt McGuinness.

**Trend in Medical Shared Savings Fee**

As noted above, the primary difference between the Premera projection of cost and savings between the companies and Aetna's projection of cost and savings between the two companies is the value of the medical shared savings fee *for Premera*. Aetna states in their appeal (see Exhibit 2 of Affidavit of Matt McGuinness) that their medical shared savings fee (Carrier Retained Discounts) is $3.4 million dollars, which Mr. Braza has accepted and uses in his projection. Hence, there is no disagreement between the two projections on this point. However, there is considerable difference in the value of Premera's medical shared savings fee as projected by Mr. Braza and as projected in the Affidavit of Matt McGuinness. The key underlying assumption that develops the difference is the trend in per employee per month (PEPM) discount savings achieved. Both projections begin with an approximately equal discount savings of $92 PEPM, but they trend this base estimate at different rates to each contract period. Dave Braza's Total Cost Projection uses a trend of 6.6% per annum, while the Affidavit of Matt McGuinness uses a trend of 15.4% per annum.

The 6.6% trend in the medical shared savings fee used by Mr. Braza is the result of two assumptions: (1) that PEPM billed charges will increase at an annual rate of 6.6%; and (2) that the average discount savings of 13.6% be constant from the base period to all contract years. In our opinion these are reasonable assumptions for several reasons:

- Mr. Braza developed the 6.6% trend using the actual State of Alaska data available to him. He also developed the 2005 discount savings percentage of 13.6% using actual State of Alaska data and Aetna data available to him.
- Our experience, nationally, indicates that billed charge trends have ranged over the past several years from the mid single digits to the high single digits (i.e., 5%-9%) for medical services (excluding Rx). Group by group variations in PEPM trend occur; however, such variations are generally driven by material changes in population risk, which we would not expect for the State of Alaska employee and retiree group, or other factors that cannot be foreseen at this time.
- We observe nothing on the horizon to indicate that, at least nationally, billed charge trends will be materially increasing over the next two to three years. Hence, use of a historical trend as an indicator of future trends is a reasonable assumption.
- Use of a constant discount assumption is also in accordance with Milliman experience over the past several years. We have not observed Blue Cross Blue Shield discounts materially increasing or decreasing as a percentage of billed charges.

Unfortunately, the Affidavit of Matt McGuinness does not document the source of Aetna's assumed 15.4% annual trend. Without such documentation it is difficult to adequately evaluate this value; however, as we noted above, nationally, billed charge trends are not anywhere near this high (they are about half this amount). We therefore question the reasonableness of such a high trend, as it is outside of our expected range.

**Claims Runout**

Exhibit 5 of the Total Cost Comparison shows the expected cost of processing incurred but not reported (IBNR) claims upon termination of the contract. The estimated cost of approximately $2 million is based on average IBNR levels for Premera's Medicare Supplement business in Alaska (with a 4% processing fee), which is reasonable basis for estimating the claim lag given the high percentage of retirees in the population.

> *The Aetna Appeal document also comments on Premera's IBNR processing fee at termination of the contract. Aetna estimates the fee to be almost $5 million. This estimate appears high in light of Premera's claim lag for Medicare Supplement business.*

**Conclusion**

The Total Cost Comparison, prepared by David Braza, as well as the similar comparison contained in Aetna's Appeal document, is based on assumptions about the future that may vary from actual experience. We have noted, above, some of the key assumptions and commented on the likelihood that actual experience will vary from those assumptions. However, in our opinion, the assumptions used by Mr. Braza are reasonable and appropriate and are in accordance with our best estimate of future experience, given the information we have available to us.

In performing our review we have relied on information provided to us by Premera. If that information is inaccurate or incomplete, then the results of our review could likewise be inaccurate or incomplete.

Please let us know if you have any questions or need additional assistance.

Sincerely,

Thomas Nightingale, FSA, MAAA
Principal and Consulting Actuary

cc: John Bauerlein

# Attachment 1

## Total Cost Comparison

Prepared by David Braza of Premera Blue Cross

**EXHIBIT 1**

# State of Alaska
## Total Cost Comparison
## Premera vs. Aetna

### Purpose

To compare the *total costs* of the Premera and Aetna 2/28/2006 BAFO ("Best and Final Offer") for the State of Alaska. Total costs include costs that are both fixed and variable. Administration Fees and Pharmacy (Rx) Rebate credits are examples of fixed costs. Medical Claim Costs, Medical Shared Savings Fees, and Rx Claim Costs are examples of variable costs.

### Data Sources

In performing a *total cost* comparison, I projected both the fixed and variable costs that the State of Alaska will likely see over the course of the future contract period. To do so, I used information that was made available to Premera during the bidding process, supplemental information made public from Aetna, and internal information relating to Premera that was not included in the Rx portion of the bid. The information used in the *total cost* projection includes:

1) Medical Claim Dollars by year for 2003, 2004, and YTD2005 (data through September). The Medical Claim Dollars were split between the active and retiree populations.
2) Employee/Member counts for 2003, 2004, and YTD2005.
3) Estimated Future Employee/Member counts from Aetna's 12/28/2005 bid.
4) Aetna Medical Network Savings (History) – As reported in Aetna's 12/28/2005 bid, page 2 of 7. Aetna also included an estimated calendar year 2005 savings using actual savings data through September of 2005.
5) Retail and Mail Prescription Claims - From Mike Wiggins' March 10th Affidavit - Exhibit 1.
6) Rx Rebate Guarantees – These guarantees were included in both Premera and Aetna's 2/28/2006 BAFO.
7) Aetna Rx Retail/Mail Discounts and Dispensing Fees - From Aetna's 2/28/2006 BAFO.
8) Premera Rx Retail/Mail Discounts and Dispensing Fees – Premera offered a straight pass-through of discounts and dispensing fees from our Rx vendor (presently Medco).

*Note: The total cost comparison looks at all costs that the State of Alaska may incur – both fixed and variable (with the exception of dental claims). In contrast, the cost comparison produced by Matt McGuiness in his Affidavit, dated 3/28/2006, focused primarily on the fixed costs only with one variable cost component considered, namely, Medical Shared Savings Fees.*

## Total Cost Comparison – Explanation and Supporting Exhibits

**Total Cost Comparison (Exhibit 1)** – This exhibit summarizes the total expected dollar difference in costs for Administration Fees (fixed cost), Medical Claim Cost (variable), Medical Shared Savings Fee (variable), Rx Claim Cost (variable), and Rx Rebates (fixed). The total cost savings expected from the Premera bid is estimated to be **10.7** million dollars over the course of the three-year contract term. The savings are broken down as follows:

Administration Fee – 1.1M.
Medical Claim Costs – 0.0M.
Medical Shared Savings Fee – 0.3M.
Rx Claim Costs – 1.5M.
Rx Rebates – 7.8M.
Total – 10.7M.

**Administration Fee (Exhibit 2)** – The fees for both Aetna and Premera are as reported from Section 7.23 – Cost Proposal (All Services) – BAFO, dated 2/28/2006.

**Aetna Medical Claim Cost Projection (Exhibit 3, Page 1 of 2)**

Historical Periods – 2003, 2004, and YTD2005 (annualized)

The basis for the Aetna medical claim cost projection is the historical Aetna paid medical claim dollars and members over the period 2003, 2004, and YTD2005 (annualized). The medical claim dollars and members are used to derive Paid PMPM (Per Member Per Month) costs. The Paid PMPM costs were then converted to an Allowed PMPM costs. To do this, I assumed the member would be responsible for 10% of the provider allowed charges. Members are liable and pay providers for certain items, such as deductibles, coinsurance, and copays, if any.

*Note: The 10% member responsibility assumption is used throughout the historical and projection period and is also used in the Premera projection.*

Aetna Discounts and Savings PEPM – 2003, 2004, and YTD2005 (annualized)

The Allowed PMPM is converted to a Billed PMPM using the reported historical savings from Aetna's 12/28/2005 bid, page 2 of 7. Converting the Paid PMPM to Allowed PMPM and then to a Billed PMPM enabled me to impute an average historical discount and Savings PEPM (Per Employee Per Month) for Aetna. The average discounts using this imputation technique for 2003, 2004, and YTD2005 (annualized) are 11.9%, 12.4%, and 13.6%, respectively. The Saving's PEPM are 71.41, 78.90, and 91.91 for 2003, 2004, and YTD2005 (annualized), respectively.

Future Periods – 7/06 to 6/07, 7/07 to 6/08, and 7/08 to 6/09

The historical information is then used as the basis to project Aetna's medical claim costs into future periods. Using the historical data, I was able to derive a per annum claims trend of 6.6% as the difference in Billed PMPM figures from 2003 to 2004.

The 6.6% per annum trend is applied to the YTD2005 (annualized) Billed PMPM to project Billed PMPM figures into the future contract periods. Because the 2005 data (data available through September 2005) was annualized, the center of the YTD2005 claims is 7/1/2005. To project the Billed PMPM to the first contract period of 7/06 to 6/07, 18 months of trend was used. From there, only 12 months of trend was needed to move from the first to the second and from the second to the third contract periods.

Once the Billed PMPM figures for the future contract periods are established, I was able to derive an Allowed PMPM by assuming the provider discounts remain at 2005 levels - 13.6%. This produces PEPM Savings of 101.46, 108.07, and 115.17 for contract years 7/06 to 6/07, 7/07 to 6/08, and 7/08 to 6/09, respectively. The basis for this assumption is that as providers change their billing practices (pressure from self-pay lawsuits) discounts are anticipated to flatten in the future. Although, the discounts are anticipated to remain flat at 13.6%, the Savings PEPM will continue to grow as medical inflation continues to push costs higher.

Also, to test the sensitivity of the projection to higher than anticipated trends, I chose a 12.0% trend, which is nearly double the actual trend observed in the State's own experience from 2003 to 2004. The 12.0% per annum trend produces PEPM Savings of 109.26, 122.28, and 136.92 for contract years 7/06 to 6/07, 7/07 to 6/08, and 7/08 to 6/09, respectively. The total costs savings produced from the Premera offer (using the 12.0% trend) is still substantially more than Aetna, at 5.2M versus 10.7M over the course of the three-year contract period.

Finally, to calculate the projected Aetna Medical Claim Costs, the future Paid PMPM figures are multiplied by the anticipated members. As noted above, the member responsibility is assumed to remain at 10% of the provider allowed charges.

**Premera Medical Claim Cost Projection (Exhibit 3, Page 2 of 2)**

The starting point for the Premera Medical Claim Cost projection is the Billed PMPM figures from the Aetna Medical Claim Cost projection. The goal of the Premera Medical Claim Cost projection is to mirror the Aetna projection. Each projection uses the same assumptions. Although, we anticipate having significant claim savings versus the Aetna bid as referenced in Gubby Barlow's letter to the State of Alaska on 2/28/2006 (favorable provider discount differences that we have in the regions in which State employees live versus Aetna), the difference in claims over the course of the contact is reported to be the same as Aetna; meaning, network discounts achievable by Aetna and Premera are equal for purposes of this analysis.

**Aetna Medical Shared Savings Fee**

The Aetna Shared Savings Fee of 3.4M over the course of the contract term is obtained from the Matt McGuinness Affidavit, Page 7 of 8, dated 3/28/2006. It should be noted that Mr. McGuiness states that $2,423,506 of that fee is for Aetna's "National Advantage Program". That program is described as a program based on Aetna's "special negotiated discounts on certain PPO out of network and indemnity claims". This fee is similar to the network discount fee that Premera eliminated from its final BAFO. Lastly, due to Aetna confidentiality designations, I was not able to independently validate the accuracy of the McGuiness Shared Savings Fee calculation.

**Premera Medical Shared Savings Fee (Exhibit 3, Page 2 of 2)**

The Premera Medical Shared Savings Fee is calculated based on the guarantee reported in the Premera BAFO, dated 2/28/2006. The guarantee is that Premera would obtain at least 100.0 PEPM savings from the provider discount arrangements. To the extent that the PEPM savings are less than 100.0 PEPM, Premera will reimburse the State of Alaska 30% of the difference between the actual savings PEPM and 100.0 PEPM. In this projection, I anticipate that over the course of the contract the shared savings fee charges to the State of Alaska would be 3.1M dollars.

As stated above in the "Premera Medical Claim Cost Projection", we anticipate having significant claim savings versus the Aetna bid. Our estimate is based on favorable provider discount differences that we have in the regions in which State employees and retirees live versus Aetna.

**Base Rx Claim Cost Data (Exhibit 4, Page 1 of 3) – Both for Aetna and Premera**

To project future Rx Claim Costs for both Aetna and Premera, base data from Exhibit 4, Page 1 of 3 was used. The base Rx claim counts for Retail and Mail were obtained from Mike Wiggins' March 10th Affidavit – Exhibit 1. The base Rx claim counts were further split between brand and generic drugs, assuming that 52% are brand drugs and 48% are generic drugs (the 52%/48% split is based on averages obtained from Premera internal experience). This split was necessary to project future Rx claim costs. Rx provider discounts are separately reported and split between the retail/mail setting and within the retail/mail setting by brand/generic. Paper claims were taken from the Aetna 12/28/2005 bid and assumed to remain at the 8,000 per year level for future contract periods.

In addition to the Rx claim counts, the Average Wholesale Price (AWP) per claim is needed to project future Rx claim costs. The AWP prices for retail/mail are estimates based on Premera's block-of-business. Future AWP prices are assumed to increase at the rate of 8.0% per annum (the 8.0% is based on historical and future experience that is anticipated by Premera over the course of the contract period). The average discounts as shown in Exhibit 4, Page 2 and 3 of 3 are applied to the AWP per claim to derive the net

allowed per claim that the State of Alaska and their members will pay for prescription drugs in various settings (retail/mail, brand or generic).

**Aetna Rx Claim Cost (Exhibit 4, Page 2 of 3)**

Aetna Rx Claim Costs are derived from the base data from Exhibit 4, Page 1 of 3 and the reported discounts and dispensing fees in Aetna's BAFO, dated 2/28/2006. Although Aetna only reported discounts and dispensing fees for the first contract period (7/06 to 6/07), I assumed that those discounts and dispensing fees would hold for the two remaining contract periods – 7/07 to 6/08 and 7/08 to 6/09. The same assumption was also used in the Premera Rx Claim Cost projection.

Additionally, as with the medical claim cost projection, I assumed that the members would be responsible for 10% of the allowed amount (AWP amount less the discount). The 10% is an estimate of what members would be pay in copays, coinsurance, and deductibles, if any. The same 10% member responsibility assumption is also used in the Premera Rx Claim Cost projection.

**Premera Rx Claim Cost (Exhibit 4, Page 3 of 3)**

Premera Rx Claim Costs are derived from the base data from Exhibit 4, Page 1 of 3. The reported discounts and dispensing fees come from the Premera Medco (PBM vendor) contract. As with the Aetna Rx Claim Cost projection, I assumed that the Premera discounts would hold constant over the three-year contract period.

Additionally, as with the medical claim cost projection, I assumed that the members would be responsible for 10% of the allowed amount (AWP amount less the discount). The 10% is an estimate of what members would be pay in copays, coinsurance, and deductibles, if any. The same 10% member responsibility assumption is also used in the Aetna Rx Claim Cost projection.

The aggregate Rx claims impact comparing the Premera and Aetna discounts, dispensing fees, and charges for paper claim submissions (if any) is an estimated savings to the State of Alaska of 1.5M by choosing Premera. The direct Rx cost comparison is made possible by using the same Base Rx Claim Cost Data as described above.

**Aetna Rx Rebates (Exhibit 4, Page 2 of 3)**

Aetna Rx Rebates are guaranteed (as reported in Aetna's BAFO, dated 2/28/2006) at the greater of 13.3% of manufacturer rebates or 750,000 per year. Because the Rx claim count estimates in the 7/07 to 6/08 and 7/08 to 6/09 contract years produce rebate amounts of less than 750,000 per year, the rebate amount was set equal to 750,000.

*Note: Rx claim counts used to calculate rebate amounts are obtained from the Mike Wiggins's March 10th Affidavit – Exhibit 1.*

**Premera Rx Rebates (Exhibit 4, Page 2 of 3)**

Premera Rx Rebates are guaranteed (as reported in Premera's BAFO, dated 2/28/2006). The guarantee is a minimum of 3.0M dollars a year, contingent upon generating an average paid claims volume of at least 80,000 claims per month over any of the three contract years.

Based on Rx claim counts, the total Rx rebate credit is expected to be 10.1M versus the Aetna guarantee of 2.3M for a net savings to the State of Alaska of 7.8M over the course of the contract.

> *Note: Rx claim counts used to calculate rebate amounts are obtained from the Mike Wiggins's March 10th Affidavit – Exhibit 1.*

**Claims Runout Processing Fee (Exhibit 5, Page 1 of 1)**

Aetna contends that its proposed fee for administration of claims following termination of the contract ("Runout Fee") is more than 2.0M less than the comparable fee for Premera. In reality, Premera's Runout Fee is significantly less than that of Aetna.

Aetna estimates its Runout Fee to be 2.6M and states that "the Premera fee will be almost 5.0M". (McGuinness Affidavit, paragraph 26.). Matt McGuiness provides no explanation for how he arrived at the 5.0M calculation. In fact, it is likely that the Premera Runout Fee will be close to **2.05M**.

The State's contract with Premera provides that the State will pay Premera an administrative fee of 4.0% of eligible claims paid after the date of the contract termination. (Contract between the State and Premera, page 5.) Runout Claims are claims for medical and pharmacy services which were provided before a contract was terminated, but which were not received and/or processed by the administrator prior to the termination of the contract. To project the claims runout processing fee for the State of Alaska, I analyzed our claims payment history for Premera's group commercial business in the state of Alaska. For each of the last 33 months, I ran a computer-generated history that showed what volume of claims was paid following the end the month, thereby approximating a claims runout process. On average for those 33 months, Premera paid medical claims equivalent to 1.96 months worth of claims. For pharmacy claims, the claims equivalent is 0.58 months worth of claims.

Additionally, to better approximate the claims runout process for what the State of Alaska may experience (The State has a substantial number of retirees, which requires claims coordination with Medicare), I also analyzed Premera's claims processing for Medicare Supplement business. Coordination of benefits with Medicare adds additional time to the process, thus Medicare Supplement claims take longer to process. For the Medicare Supplement business, Premera pays claims runout over 2.05 months on average (slightly higher than the 1.96 months in the Premera group commercial Alaska business).

Finally, to estimate the 2.05M Premera claims runout processing fee shown on Exhibit 5, I used the longer (Medicare Supplement) period rather than the shorter Commercial period, recognizing that this produces a more conservative estimate for the fee. The projected runout processing fee was then calculated by multiplying the foregoing number of months for each of the medical and pharmacy claims by the average monthly claims volume for the third year of the contract (23.4M and 5.9M respectively), and totaling those. That number was then multiplied by the 4% Runout Fee to product the projected cost to the State of 2.05M, which is significantly less than Aetna's own projection of its termination fees – 2.6M.

# State of Alaska
## Total Cost Comparison
## Premera vs. Aetna

| | | 7/06 to 6/07 | 7/07 to 6/08 | 7/08 to 6/09 | Total | Difference |
|---|---|---|---|---|---|---|
| Employees | | | | | | |
| | Active | 5,464 | 5,519 | 5,574 | | |
| | Retiree | 28,128 | 29,394 | 29,982 | | |
| | Total | 33,592 | 34,913 | 35,556 | | |
| **Aetna** | | | | | | |
| | Administration Fee (1) | 7,203,823 | 12,011,706 | 12,839,123 | 32,054,652 | |
| | Medical Claim Cost (9), (10), (11), (12), (13), (14) | 233,599,109 | 258,604,608 | 280,686,001 | 772,889,718 | |
| | Medical Shared Savings Fee (2) | 1,133,709 | 1,133,709 | 1,133,709 | 3,401,128 | |
| | Rx Claim Cost (3), (12) | 66,832,747 | 66,199,894 | 71,374,530 | 204,407,171 | |
| | Rx Rebates (4) | (762,107) | (750,000) | (750,000) | (2,262,107) | |
| | Total | **308,007,281** | **337,199,917** | **365,283,364** | **1,010,490,562** | |
| **Premera** | | | | | | |
| | Administration Fee (5) | 8,190,903 | 10,990,649 | 11,769,483 | 30,951,035 | 1,103,617 |
| | Medical Claim Cost (9), (10), (11), (12), (13), (14) | 233,614,981 | 258,600,267 | 280,674,470 | 772,889,718 | 0 |
| | Medical Shared Savings Fee (6) | 170,799 | 1,015,328 | 1,946,015 | 3,132,143 | 268,985 |
| | Rx Claim Cost (7), (12) | 66,318,454 | 65,714,881 | 70,877,783 | 202,911,119 | 1,496,053 |
| | Rx Rebates (8) | (3,303,187) | (3,339,405) | (3,438,189) | (10,080,780) | 7,818,673 |
| | Total | **304,991,950** | **332,981,721** | **361,829,563** | **999,803,234** | **10,687,328** |
| | **Difference** | **3,015,330** | **4,218,196** | **3,453,801** | **10,687,328** | |

**Notes and Assumptions**

1) Aetna Administration Fee - From Section 7.23 - Cost Proposal (All Services) - BAFO, Dated 2/28/2006.

2) Aetna Shared Savings Fee - From Matt McGuinness Affidavit, Page 7 of 8, Dated 3/28/2006.

3) Aetna Rx Claim Cost - Estimated based on information from Aetna 12/28/2005 Bid and From Section 7.23 Cost Proposal (All Services) - BAFO, Dated 2/28/2006.

4) Aetna Rx Rebates - From Section 7.23 - Cost Proposal (All Services) - BAFO, Dated 2/28/2006. Rx script count estimates from Mike Wiggins' March 10th Affidavit - Exhibit 1.

5) Premera Administration Fee - From Section 7.23 - Cost Proposal (All Services) - BAFO, Dated 2/28/2006.

6) Premera Shared Savings Fee - Calculated from Premera BAFO, Dated 2/28/2006. To the extent that the PEPM Savings are less than 100.0 PEPM, Premera will reimburse the State of Alaska 30% of the difference between the actual savings and 100.0 PEPM.

7) Premera Rx Claim Cost - Estimated based on information from Premera's Medco (PBM vendor) contract.

8) Premera Rx Rebates - From Premera BAFO, Dated 2/28/2006. Rx script count estimates From Mike Wiggins' March 10th Affidavit - Exhibit 1.

# State of Alaska
## Total Cost Comparison
## Premera vs. Aetna

Medical Claim Cost - Notes

9) Medical claims are assumed to be the same between Aetna and Premera. Also, assumes that for Dental, LTC, and FSA costs beyond administration fees are the same between Aetna and Premera.

10) Medical Future Savings - Assumes that provider discounts will stay at the Aetna 2005 levels - 13.6%. The future PEPM savings are 101.46, 108.07, and 115.17 over the the future policy periods of 7/03 to 6/07, 7/07 to 6/08, and 7/08 to 7/09, respectively.

11) Medical Past Savings - The past savings are 71.41, 73.90, and 91.91 PEPM for calendar years 2003, 2004, and 2005 respectively. Savings are assumed to be as reported in Aetna's 12/28/2005 Bid, Page 2 of 7.

12) Assumes that for both Medical and Rx, the member will pay 10% of the provider allowed amount.

13) Claims Trend - Trend in billed claims assumed to be 6.6% per annum or the difference in billed amounts from 2003 to 2004.

14) Provider Discount - The network discount is assumed to grow 0.0% per annum. The discount is assumed to be the same as the 2005 discount of 13.6%.

# State of Alaska
## Administration Fee
## Section 7.23 - Cost Proposal
## All Services - BAFO, Dated 2/28/2006

| | | Aetna | | Premera | |
|---|---|---|---|---|---|
| | # of Lives | Year 1 | Annual Dollars | Year 1 | Annual Dollars |
| Per employee per month medical | 5,464 | 24.16 | 1,583,892 | 24.79 | 1,625,431 |
| Per retiree per month medical | 28,128 | 14.62 | 4,933,586 | 16.95 | 5,721,235 |
| Per retiree per month DVA | 20,725 | 2.21 | 549,627 | 2.78 | 691,386 |
| Per retiree per month LTC | 19,011 | 0.39 | 88,971 | 0.42 | 95,815 |
| Per participant per month Health FSA | 1,358 | 2.93 | 47,747 | 3.50 | 57,036 |
| | | | 7,203,823 | | 8,190,903 |

| | # of Lives | Year 2 | Annual Dollars | Year 2 | Annual Dollars |
|---|---|---|---|---|---|
| Per employee per month medical | 5,519 | 37.44 | 2,479,315 | 32.16 | 2,129,892 |
| Per retiree per month medical | 29,394 | 24.18 | 8,527,573 | 22.00 | 7,760,016 |
| Per retiree per month DVA | 21,658 | 3.09 | 803,079 | 3.61 | 938,225 |
| Per retiree per month LTC | 19,866 | 0.57 | 135,883 | 0.44 | 104,892 |
| Per participant per month Health FSA | 1,372 | 4.00 | 65,856 | 3.50 | 57,624 |
| | | | 12,011,706 | | 10,990,649 |

| | # of Lives | Year 3 | Annual Dollars | Year 3 | Annual Dollars |
|---|---|---|---|---|---|
| Per employee per month medical | 5,574 | 38.68 | 2,587,131 | 33.77 | 2,258,808 |
| Per retiree per month medical | 29,982 | 25.42 | 9,146,052 | 23.10 | 8,311,010 |
| Per retiree per month DVA | 22,633 | 3.24 | 879,971 | 3.79 | 1,029,349 |
| Per retiree per month LTC | 20,760 | 0.63 | 156,946 | 0.45 | 112,104 |
| Per participant per month Health FSA | 1,386 | 4.15 | 69,023 | 3.50 | 58,212 |
| | | | 12,839,123 | | 11,769,483 |

| | | |
|---|---|---|
| **Grand Total (Years 1-3)** | **32,054,652** | **30,951,035** |

# State of Alaska
## Aetna Medical Claim Costs and Savings

**Aetna Estimates**

### Active

| | 2003 | 2004 | YTD2005 (6) | 7/06 to 6/07 | 7/07 to 6/08 | 7/08 to 6/09 |
|---|---|---|---|---|---|---|
| Employees | 5,574 | 5,535 | 5,558 | 5,464 | 5,519 | 5,574 |
| Members | 14,884 | 14,811 | 14,049 | 14,097 | 14,239 | 14,381 |
| Medical Claim Dollars | 38,452,662 | 37,153,083 | 29,533,843 | 43,489,007 | 46,825,929 | 50,413,686 |
| PMPM | | | | | | |
| Paid | 204.09 | 211.90 | 233.58 | 257.08 | 274.05 | 292.13 |
| Allowed (1) (5) | 226.77 | 235.45 | 259.53 | 285.64 | 304.50 | 324.59 |
| Billed (2) (4) | 257.33 | 268.71 | 300.42 | 330.65 | 352.48 | 375.74 |
| Savings (3) | 30.56 | 33.27 | 40.89 | 45.01 | 47.98 | 51.15 |
| Savings Dollars | 5,458,978 | 5,832,526 | 6,894,184 | 7,613,838 | 8,198,050 | 8,826,212 |
| Discount (5) | 11.9% | 12.4% | 13.6% | 13.6% | 13.6% | 13.6% |

### Retiree

| | 2003 | 2004 | YTD2005 (6) | 7/06 to 6/07 | 7/07 to 6/08 | 7/08 to 6/09 |
|---|---|---|---|---|---|---|
| Employees | 25,350 | 26,680 | 27,804 | 28,128 | 29,394 | 29,982 |
| Members | 48,839 | 51,343 | 52,573 | 53,162 | 55,555 | 56,666 |
| Medical Claim Dollars | 140,502,716 | 157,131,257 | 128,112,868 | 190,110,102 | 211,778,679 | 230,272,115 |
| PMPM | | | | | | |
| Paid | 240.72 | 255.04 | 270.76 | 298.00 | 317.67 | 338.64 |
| Allowed (1) (5) | 267.47 | 283.37 | 300.85 | 331.12 | 352.97 | 376.27 |
| Billed (2) (4) | 303.52 | 323.41 | 348.25 | 383.29 | 408.59 | 435.55 |
| Savings (3) | 36.05 | 40.04 | 47.40 | 52.17 | 55.62 | 59.29 |
| Savings Dollars | 21,041,022 | 24,667,474 | 29,905,816 | 33,283,529 | 37,077,155 | 40,314,894 |
| Discount (5) | 11.9% | 12.4% | 13.6% | 13.6% | 13.6% | 13.6% |

### Total

| | | | | | | |
|---|---|---|---|---|---|---|
| Medical Claim Dollars | 176,955,378 | 194,284,320 | 157,646,711 | 233,599,109 | 258,604,608 | 280,686,001 |
| Savings Dollars | 26,500,000 | 30,500,000 | 36,800,000 | 40,897,367 | 45,275,205 | 49,141,105 |
| Savings PEPM | 71.41 | 78.90 | 91.91 | 101.46 | 108.07 | 115.17 |

**Notes**

**Shaded Numbers - Shaded areas represent numbers obtained during the bid process and Aetna's bid, dated 12/28/2005.**

1) Allowed PMPM - Assumed to be 10% higher than Paid PMPM. The member would be responsible for amounts between the Allowed and Paid PMPM.

2) Billed PMPM - Estimated based on reported savings from the Aetna 12/28/2005 Bid, Page 2 of 7.

3) Savings = Difference between the Billed and Allowed amounts.

4) Claims Trend - Trend in billed claims assumed to be 6.6% per annum or the difference in billed amounts from 2003 to 2004.

5) Discount - The network discount is assumed to grow 0.0% per annum. The discount is assumed to be the same as the 2005 discount of 13.6%.

6) YTD2005 - Information shown above has been extrapolated to produce estimated 2005 results.

# State of Alaska
## Premera Medical Claim Costs and Savings

**Premera Estimates**

### Active

| | 7/06 to 6/07 | 7/07 to 6/08 | 7/08 to 6/09 |
|---|---|---|---|
| Employees | 5,464 | 5,519 | 5,574 |
| Members | 14,097 | 14,239 | 14,381 |
| Medical Claim Dollars | 44,080,204 | 47,462,488 | 51,099,221 |
| **PMPM** | | | |
| Paid | 260.57 | 277.77 | 296.11 |
| Allowed (1) (4) | 289.53 | 308.64 | 329.01 |
| Billed (2) | 330.65 | 352.48 | 375.74 |
| Savings (3) | 41.13 | 43.84 | 46.73 |
| Savings Dollars | 6,956,953 | 7,490,762 | 8,064,728 |
| Discount (4) | 12.4% | 12.4% | 12.4% |

### Retiree

| | 7/06 to 6/07 | 7/07 to 6/08 | 7/08 to 6/09 |
|---|---|---|---|
| Employees | 28,128 | 29,394 | 29,982 |
| Members | 53,162 | 55,555 | 56,666 |
| Medical Claim Dollars | 189,534,777 | 211,137,779 | 229,575,249 |
| **PMPM** | | | |
| Paid | 297.10 | 316.71 | 337.61 |
| Allowed (1) (4) | 330.11 | 351.90 | 375.13 |
| Billed (2) | 383.29 | 408.59 | 435.55 |
| Savings (3) | 53.18 | 56.68 | 60.43 |
| Savings Dollars | 33,922,779 | 37,789,266 | 41,089,190 |
| Discount (4) | 13.9% | 13.9% | 13.9% |

### Total

| | | | |
|---|---|---|---|
| Medical Claim Dollars | 233,614,981 | 258,600,267 | 280,674,470 |
| Savings Dollars | 40,879,732 | 45,280,028 | 49,153,918 |
| Discount | 13.6% | 13.6% | 13.6% |

### Network Savings Split PEPM

| | | | |
|---|---|---|---|
| State of Alaska Share | 100.99 | 105.65 | 110.64 |
| Premera Share | 0.42 | 2.42 | 4.56 |
| Total | 101.41 | 108.08 | 115.20 |

### Network Savings Split Dollars

| | | | |
|---|---|---|---|
| State of Alaska Share | 40,708,932 | 44,264,700 | 47,207,903 |
| Premera Share | 170,799 | 1,015,328 | 1,946,015 |
| Total | 40,879,732 | 45,280,028 | 49,153,918 |

**Notes**

1) Allowed PMPM - Assumed to be 10% higher than Paid PMPM. The member would be responsible for amounts between the Allowed and Paid PMPM.

2) Billed PMPM - Assumed to be the same as Aetna billed amounts.

3) Savings = Difference between the Billed and Allowed amounts.

4) Discount - The network discount is assumed to grow 0.0% per annum. The discount is assumed to be the same as the Aetna 2005 discount of 13.6% in total. We anticipate having slightly different discounts between Active and Retiree populations as the two populations live in different regions of the country.

# State of Alaska
## Rx - Base Data

| | Script Distribution | Scripts 7/06 - 6/07 | Scripts 7/07 - 6/08 | Scripts 7/08 - 6/09 |
|---|---|---|---|---|
| Subscribers (Est.) | Active | 5,464 | 5,519 | 5,574 |
| | Retiree | 28,128 | 29,394 | 29,982 |
| | Total | 33,592 | 34,913 | 35,556 |
| Members (Est.) | Active | 14,097 | 14,239 | 14,381 |
| | Retiree | 53,162 | 55,555 | 56,666 |
| | Total | 67,259 | 69,794 | 71,047 |
| **Retail** | | | | |
| Brand (2) | 52.0% | 400,617 | 368,093 | 368,093 |
| Generic (2) | 48.0% | 369,801 | 339,778 | 339,778 |
| Total (1) | 100.0% | 770,418 | 707,871 | 707,871 |
| **Mail** | | | | |
| Brand (2) | 52.0% | 49,514 | 45,495 | 45,495 |
| Generic (2) | 48.0% | 45,706 | 41,995 | 41,995 |
| Total (1) | 100.0% | 95,220 | 87,490 | 87,490 |
| Paper Claims | | 8,000 | 8,000 | 8,000 |

| | Estimated 2006 AWP Per Script | AWP Cost Per Script 7/06 - 6/07 | AWP Cost Per Script 7/07 - 6/08 | AWP Cost Per Script 7/08 - 6/09 |
|---|---|---|---|---|
| **Retail** | | | | |
| Brand (3) | 135.98 | 141.42 | 152.73 | 164.95 |
| Generic (3) | 50.73 | 52.75 | 56.97 | 61.53 |
| **Mail** | | | | |
| Brand (3) | 336.68 | 350.15 | 378.16 | 408.41 |
| Generic (3) | 156.03 | 162.27 | 175.25 | 189.27 |

**Notes**

1) Retail and Mail Script Count - From Mike Wiggins' March 10th Affidavit - Exhibit 1.
2) Split between Brand and Generic - Based on Premera Experience. Experience in the bid was not available at this level of specificity.
3) AWP Per Script - Based on Premera Experience. Assumed an average trend of 8.0% per annum in AWP per script. As with the split between Brand and Gereric, experience in the bid was not available at this level of specificity.

# State of Alaska
## Aetna Rx - Integrated BAFO
**(unless noted, numbers are on an allowed basis, not paid basis)**

| | 7/06 - 6/07 | 7/07 - 6/08 | 7/08 - 6/09 | 7/06 - 6/07 | 7/07 - 6/08 | 7/08 - 6/09 | Total |
|---|---|---|---|---|---|---|---|
| **Retail - Discount** (2) | | | | | | | |
| Brand | 14.0% | 14.0% | 14.0% | 48,722,849 | 48,348,625 | 52,216,515 | 149,287,990 |
| Generic | 63.3% | 63.3% | 63.3% | 7,163,508 | 7,108,487 | 7,677,166 | 21,949,161 |
| **Mail - Discount** (2) | | | | | | | |
| Brand | 20.0% | 20.0% | 20.0% | 13,869,842 | 13,763,393 | 14,864,464 | 42,497,698 |
| Generic | 64.0% | 64.0% | 64.0% | 2,669,927 | 2,649,436 | 2,861,391 | 8,180,754 |
| **Dispensing Fee - Retail** (2) | | | | | | | |
| Brand | 2.35 | 2.35 | 2.35 | 941,451 | 865,018 | 865,018 | 2,671,488 |
| Generic | 2.35 | 2.35 | 2.35 | 869,032 | 798,478 | 798,478 | 2,465,988 |
| **Rebate** (1) | | | | | | | |
| Retail | 0.70 | 0.78 | 0.74 | 539,293 | 552,139 | 523,825 | 1,615,257 |
| Mail | 2.34 | 1.86 | 2.47 | 222,815 | 162,731 | 216,100 | 601,647 |
| | | | | 762,107 | 7[illegible]000 | 750,000 | 2,262,107 |
| **Administration Fee** | | | | | | | |
| PEPM | 0.00 | 0.00 | 0.00 | 0 | 0 | 0 | 0 |
| Paper Claims (Per Claim) | 2.75 | 2.75 | 2.75 | 22,000 | 22,000 | 22,000 | 66,000 |
| | | | Total Cost Excluding Rebates | 74,[illegible]58,608 | 73,555,438 | 79,305,033 | 227,119,079 |
| | | | Total Cost Excluding Rebates - Paid Basis (90% of Allowed) | 66,832,747 | 66,199,894 | 71,374,530 | 204,407,171 |
| | | | Rebates | 762,107 | 750,000 | 750,000 | 2,262,107 |

**Notes**

1) Rebates: Guarantee of 13.3% of manufacturer rebates. Minimum Guarantee of 750,000 per year. Rebates a[illegible]ubject to a minimum of 750,000. The per script rebates from Aetna 7.23 Cost Proposal - BAFO, Dated 2/28/2006.

2) Discounts/Dispensing Fee for the contract year 7/06 to 6/07 from Aetna 7.23 Cost Proposal - BAFO, Dated 2/28/2006. Contract year 7/07 to 6/08 and 7/08 to 6/09 assumed to be the same as contract year 7/06 to 6/07.

# State of Alaska
## Premera Rx - Integrated BAFO
**(unless noted, numbers are on an allowed basis, not paid basis)**

| | 7/06 - 6/07 | 7/07 - 6/08 | 7/08 - 6/09 | 7/06 - 6/07 | 7/07 - 6/08 | 7/08 - 6/09 | Total |
|---|---|---|---|---|---|---|---|
| **Retail - Discount** (2) | | | | | | | |
| Brand | 15.2% | 15.2% | 15.2% | 48,042,995 | 47,673,993 | 51,487,913 | 147,204,901 |
| Generic | 60.0% | 60.0% | 60.0% | 7,803,385 | 7,743,450 | 8,362,926 | 23,909,761 |
| **Mail - Discount** (2) | | | | | | | |
| Brand | 22.0% | 22.0% | 22.0% | 13,523,096 | 13,419,308 | 14,492,852 | 41,435,256 |
| Generic | 61.0% | 61.0% | 61.0% | 2,892,421 | 2,870,222 | 3,099,840 | 8,862,484 |
| **Dispensing Fee - Retail** (2) | | | | | | | |
| Brand | 1.85 | 1.85 | 1.85 | 741,142 | 680,972 | 680,972 | 2,103,086 |
| Generic | 1.85 | 1.85 | 1.85 | 684,131 | 628,589 | 628,589 | 1,941,310 |
| **Rebate** (1) | | | | | | | |
| Retail | 3.08 | 3.40 | 3.50 | 2,372,887 | 2,406,761 | 2,477,549 | 7,257,197 |
| Mail | 9.77 | 10.66 | 10.98 | 930,299 | 932,643 | 960,640 | 2,823,583 |
| | | | | 3,303,187 | 3,339,405 | 3,438,189 | 10,080,780 |
| **Administration Fee** | | | | | | | |
| PEPM | 0.00 | 0.00 | 0.00 | 0 | 0 | 0 | 0 |
| Paper Claims (Per Claim) | 0.00 | 0.00 | 0.00 | 0 | 0 | 0 | 0 |
| | | | Total Cost Excluding Rebates | 73,687,171 | 73,016,535 | 78,753,093 | 225,456,798 |
| | | | Total Cost Excluding Rebates - Paid Basis (90% of Allowed) | 66,318,454 | 65,714,881 | 70,877,783 | 202,911,119 |
| | | | Rebates | 3,303,187 | 3,339,405 | 3,438,189 | 10,080,780 |

**Notes**

1) Rebate - Guarantee of 3.0 million per year provided that the total number of scripts is at least 80,000 per month otherwise, the guarantee is prorated. Guarantee from Premera 2/28/2006 BAFO.

2) Discounts/Dispensing Fees are taken from Premera's Medco contract (PBM Vendor).

# State of Alaska
## Total Cost Comparison
### Premera - Claims Runout Processing Fee

| Range | Months (1) | Runout Claims (2) | Fee - 4% of Runout (3) |
|---|---|---|---|
| Medical Average | 2.05 | 47,948,555 | 1,917,942 |
| Rx Average | 0.58 | 3,425,760 | 137,030 |
| | | Total | 2,054,973 |

**Notes**

1) Months - Represents an average of the number of months of claims that are ultimately paid after contract termination. The average is derived from 33 months of historical Premera Medicare Supplement Business. We used the Medicare Supplement business as a benchmark because of the significant number of Retirees that the State of Alaska has. Premera's Commercial business averages 1.96 months of claims, slightly less than the Medicare Supplement business. The Rx Average is taken from our Commerical business and is expected to be a good approximation for the State of Alaska, regardless of the mix of indivduals (Active versus Retiree).
2) Runout Claims - Runout claims are based on the estimated claims in the 7/08 to 6/09 contract period. An average month of claims is expected to be 23.4M for medical and 5.9M for Rx.
3) Premera Claims Runout Processing Fee is 4% of runout claims.

# Attachment 2

## Affidavit of Matt McGuinness

# AFFIDAVIT OF MATT MCGUINNESS

STATE OF CALIFORNIA )
) ss:
COUNTY OF CONTRA COSTA )

I, Matt McGuinness, being first duly sworn, do depose and say that:

1. I am 40 years old. My home address is 114 Russell Drive, Walnut Creek, CA 94598.

2. My current position for Aetna is Underwriting Manager, National Accounts West. I have worked for Aetna for 14 years.

3. The RFP that is the subject of this protest is to provide medical and/or pharmacy benefit management claim services for the State of Alaska. Aetna and its affiliates have held this contract for these services for 24 years.

4. My own job experience in this field involves 10+ years directly related to the pricing of health insurance related matters.

5. In terms of my involvement with health management related RFPs, I have had, in addition to the current RFP in question, involvement in the (1) prior State of Alaska renewal, as well as numerous other RFPs and renewals for large self-insured customers.

6. My previous/past job titles have included Plan Coordination Consultant – Aetna, Underwriter – Aetna, Senior Underwriter– Aetna, Underwriting Manager – Aetna.

7. My current job function includes management of underwriting staff and pricing responsibility for governmental customers, including the State of Alaska, King County (WA) and County of San Mateo (CA) as well as corporate customers such as Costco, Alaska Airlines, Charles Schwab, Howlett Packard and REI.

8. Specifically for the State of Alaska proposal at issue in this protest, I oversaw the development of the various financial components, and have been

involved in the decision making process for all the major financial issues in the original proposal as well as the best and final offer.

9. By virtue of this experience, I have personal knowledge and am competent to testify regarding the subject matter of this affidavit.

**Attached Bar Chart**

10. The purpose of this affidavit is to clarify the numbers discussed in the attached bar chart (attached as Exhibit 2) submitted by Aetna.

11. The bar chart highlights three things:

- The relative amount of administrative fees paid toward the total cost of the plan over three years;
- To point out that when Premera stated that they "eliminated" the $6.88 million "Network Access Fee", they had actually just moved it to a less obvious place; and
- That when looking at total plan costs, the Aetna proposal actually saves the State of Alaska almost $2.5 million.

**A. Premera, 2/13/06**

12. In Premera's original bid on this project, it proposed to assess the State of Alaska a $5.51/per employee/per month "Network Access Fee." *Attachment 4b, pg 2 & 4.*

13. All medical claims service providers (both Aetna and Premera) enter into Preferred Provider Organization agreements. The agreements provide that health providers (doctors, etc.) will write off a portion of the charge for their service when the service is provided to a covered insured.

14. Aetna does business as one corporate entity throughout the country therefore Aetna's PPO agreements have nationwide coverage. Premera does business through many state and regional affiliates therefore Premera Alaska's PPO agreements have only state wide coverage. This difference in Premera's operations is the source of the "Network Access Fee."

15. If a Premera Alaska insured incurs a claim (for example) with an Arizona doctor, that Arizona doctor's PPO agreement will be with (again, just as an example) "Blue Cross of Arizona." Premera Alaska will ask "Blue Cross of Arizona" to make use of the latter's PPO agreement, and for that, in its original bid on this project, Premera proposed to assess the State a $5.51/per employee/per month charge. This so-called "Network Access Fee" increases Premera's Net Administrative Fees by $6.88 million over the course of the contract.

16. In the bar chart *Premera 2/13/06 Net Administrative Fees* of $31,957,787 has been calculated as follows: $34,077,274, as described in section 7.23 of Premera's Cost Proposal dated February 13, 2006, plus $6,880,513 in "Network Access Fees" minus $9.0 million in "guaranteed"[1] pharmacy rebates ($3.0 million per year) ($34,077,274 + $6,880,513 – $9.0 = $31,957,787).

17. In the bar chart *Premera 2/13/06 Carrier Retained Discounts* of $5,496,780 is calculated as follows:

- The $5,49 million consists of 12% of the projected Network Discount Savings over $100 per employee per month. The first year estimated network savings is $117.32 per employee per month. The amount over $100 would therefore be $17.32 and Premera would retain 12% of that number, which works out to $2.08 per employee per month. We calculated this $117.32 by following standard industry underwriting methodology.

- We took Aetna's actual Network Discount Savings from our standard "level A" reporting package for the period 10/1/04 – 10/1/05 of $92.42 and trended it forward to the 7/1/06 – 7/1/07 contract period at an annual rate of 15.4%, which works out to an adjusted rate of 27.0%. This adjusted rate is developed by measuring the number of months between the midpoint of the reporting period (4/1/05) and the midpoint of the upcoming contract period (1/1/07). There are 21 months between these two points in time. Therefore the annual trend rate of 15.4% is multiplied by 21/12, which gives the 27.0%. We

[1] Please note that this "guarantee" by Premera is contingent upon a minimum average volume of 80,000 "paid claims" per month. Premera's guarantee specifies that if the number of paid claims does not meet this threshold, the "guarantee" will be prorated accordingly, meaning it can be less than $3.0 million per year. Aetna's first year expectation of the number of paid claims (what Aetna calls "valid scripts") is 72,137 per month.

then increased $92.42 by 27.0% to arrive at the first year estimated network savings of $117.32 per employee (or retiree) per month.

- Premera stated, in its "Clarification Questions" dated February 14, 2006, that 12% of any savings over $100.00 per employee per month would be retained by Premera. *Attachment 4b, pg 4.* Therefore, 12% of $17.32 would be retained by Premera. This works out to $2.08 per employee per month x 33,592 employees (or retirees) x 12 months in the first contract period, for a total of $837,954 estimated to be retained by Premera.

- This same methodology was followed for the second and third contract years, trending each years estimated network discount savings forward at an annual rate of 15.4%, and assuming 12% of the amount over $100.00 per employee per month would be retained by Premera. Second year estimated retained discounts are $1,779,257. Third year estimated retained discounts are $2,879,568. The three year total is: $837,954 + $1,779,257 + $2,879,568 = $5,496,780.

**B. Premera, 2/28/06**

18. The State, asked Premera, in "Clarification Questions" dated February 24, 2006, if it could bill the "Network Access Fee" in a different manner. *Attachment 4b, pg 2.*

19. Premera advised the Procurement Officer, in its February 28, 2006 Best and Final Response, that the fee was "eliminated." *Id. at 57.* Premera did remove the fees it titled "Network Access Fees" however Premera correspondingly increased others fees to its bid particularly Carrier Retained Discounts that would be more than enough to recover the $6.88 million "Network Access Fee."

20. In the bar chart *Premera 2/28/06 Carrier Retained Discounts* of $13,741,949 was calculated the same way *Premera 2/13/06 Carrier Retained Discounts* were in paragraph 16 above, but Premera changed their retained amount of rebates from 12% of anything over $100.00 per employee per month to 30% of anything over $100.00 per employee per month in its Cost Proposal dated February 28, 2006. This change in percentage is very significant.

- The $13.74 million consists of 30% of the projected Network Discount Savings over $100 per employee per month. The first year estimated network savings is a $117.32 per employee per month. The amount over $100 would therefore be $17.32 and Premera would retain 30% of that number, which works out to $5.196 per employee per month. We calculated this $117.32 by following standard industry underwriting methodology.

- We took Aetna's actual Network Discount Savings from our standard "level A" reporting package for the period 10/1/04 – 10/1/05 of $92.42 and trended it forward to the 7/1/06 – 7/1/07 contract period at an annual rate of 15.4%, which works out to an adjusted rate of 27.0%. The adjusted rate is developed by measuring the number of months between the midpoint of the reporting period (4/1/05) and the midpoint of the upcoming contract period (1/1/07). There are 21 months between these two points in time. Therefore the annual trend rate of 15.4% is multiplied by 21/12, which gives the 27.0%. We then increased $92.42 by 27.0% to arrive at the first year estimated network savings of $117.32 per employee (or retiree) per month.

- Premera stated, in its "Performance Standards Summary" dated February 28, 2006, that 30% of any savings over $100.00 per employee per month would be retained by Premera. Therefore, 30% of $17.32 would be retained by Premera. This works out to $5.196 per employee per month x 33,592 employees (or retirees) x 12 months in the first contract period, for a total of $2,094,886 estimated to be retained by Premera.

- This same methodology was followed for the second and third contract years, trending each years estimated network discount savings forward at an annual rate of 15.4%, and assuming 30% of the amount over $100.00 per employee per month would be retained by Premera. Second year estimated retained discounts are $4,448,143. Third year estimated retained discounts are $7,198,920. The three year total is: $2,094,886 + $4,448,143 + $7,198,920 = $13,741,949.[2]

[2] It is important to note that the amounts retained go up dramatically each year because the per employee per month savings are compounded each year (working out to $117.32 in year 1, $135.59 in year 2 and $156.24 in year 3), but Premera retains 30% of all amounts over a fixed amount of $100.00 for the three year contract period.

21. In the bar chart *Premera 2/27/06 Net Administrative Fee* of $21,951,035 is the $30,951,035 described in section 7.23 of Premera's Cost Proposal dated February 28, 2006 less the $9.0 million in guaranteed pharmacy rebates ($3.0 million per year).

22. *Premera 2/27/06 Net Administrative Fee* reflects the "removal" of the $6.88 million "Network Access Fee." In conjunction with removing this $6.88 million "Network Access Fee", Premera's Cost Proposal dated February 28, 2006 increased the amount of Carrier Retained Discounts from 12% to 30%. As described in paragraph 20 above, 30% results in an estimated additional $9.2 million in discount savings to be retained by Premera.

23. The increase in Premera's Carrier Retained Discounts effectively shifts the $6.88 million from Net Administrative Fees to Carrier Retained Discounts. Therefore Premera did not in fact eliminate the $6.88 million "Network Access Fee." It hid the fee by increasing Carrier Retained Discounts.

### C. Aetna

24. It is common practice, and in fact, common sense, that when judging one proposal against another, one cannot focus on just one category of costs, while excluding another.

25. To determine the total cost to the State of Alaska, in addition to the administrative fees specified in the Cost Proposal, one must also include:

- The impact of pharmacy rebates (whether retained by the carrier or given to the State);
- Fees collected through another mechanism besides the monthly billing;
- Network discounts retained by the carrier in lieu of higher fees; and
- Runoff processing charges.

The State of Alaska should have taken these factors into consideration when judging the proposals. If the state did take these factors into consideration the

proposal submitted by Aetna on February 28, 2006 would have been judged to save the state approximately $2.5 million.

26. This $2.5 million does not include the impact of the cost of runoff claim processing. Premera charges 4% of claims processed after termination of the plan for this service. Aetna charges three months of service fees. Based on our projections, at the end of the 3 year contact period, the Aetna runoff processing fee would be $2.6 million, while the Premera fee will be almost $5 million. This alone would result in a savings to the State of $2.4 million at the time the plan terminates. Should the State of Alaska terminate the Aetna contract in 2006, the runoff processing fee payable at that time will be approximately $2.8 million.

27. Including the impact of runoff claim processing, we feel the Aetna proposal would save the State a total of $4.9 million.

28. The following describes in some detail, how Aetna came up with each of the numbers in the graph, and their significance to Aetna's assertions

29. Aetna Carrier Retained Discounts of $3,401,128 is made up of two components. The first is a potential "bonus" of up to 5% of medical fees that Aetna can earn for exceeding the Aetna network savings guarantee. For purposes of this comparison, we have assumed that Aetna will exceed that guaranteed network savings and thus earn the additional fee, and further that the "bonus" will be the same for each year of the three year contract period, totaling $977,622 over 3 years. Please note that the threshold set for this guarantee was only set for year 1 of the contract period, with the intent that it will be reviewed towards the end of each year, and set at a level agreeable to the State for the subsequent year, based on the latest claim information available. The second component is the fee for Aetna's "National Advantage Program" The NAP program gains the State of Alaska special negotiated discounts on certain PPO out of network and indemnity claims that would normally be paid at a non-discounted rate. The fee for the NAP program is 30% of the actual savings attained. We have estimated the total three year fee at $2,423,506 which is based off of actual 2005 NAP savings & fees.

30. Aetna Explicit Administrative Fee of $29,804,652 is comprised of $32,054,652, which is the total 3 year Aetna fee in section 7.23 of the Cost Proposal dated February 28, 2006, less the $2,250,000 guaranteed minimum pharmacy rebate to the State.

Further your affiant sayeth naught.

Dated this 24th day of March, 2006, at Walnut Creek, California.

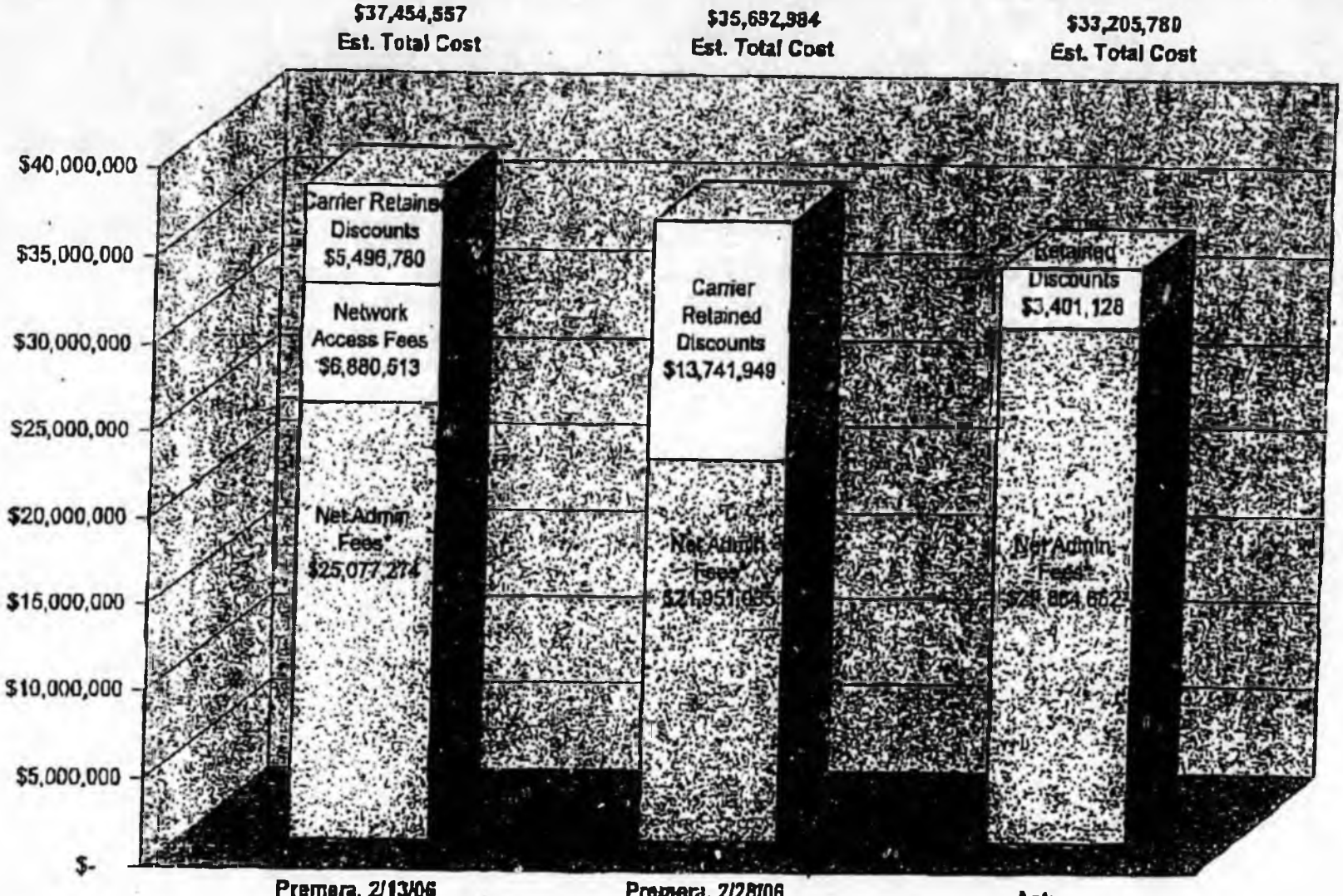
Matt McGuinness

SUBSCRIBED AND SWORN before me this 24th day of March, 2006, by Matt McGuinness who produced I.D.

Notary Public in and for California
My commission expires 1/13/09

03/29/08 04:10 FAX 425 918 5787 PBC LEGAL
MAR-29-2006 WED 11:13 AM DOA COMM OFC
FAX NO. 907 465 2135
P. 77
@076

## Exhibit 2: State of Alaska, Carrier Compensation Breakdown, 3 year view




*Net Administrative Fees is actual fees minus guaranteed pharmacy rebates

Robert K. Stewart, Jr.
Davis Wright Tremaine LLP
701 W. Eighth Avenue, Suite 800
Anchorage, Alaska 99501
(907) 257-5300
(907) 257-5399 (Facsimile)

Attorneys for Premera Blue Cross Blue Shield of Alaska

BEFORE THE ALASKA DEPARTMENT OF ADMINISTRATION

| | |
|---|---|
| In the Matter of: | ) |
| | ) |
| Aetna Life Insurance Company and Aetna, Inc., | ) |
| | ) |
| Appellants. | ) DGS Solicitation No. 2007-0200-5946 |
| | ) OAH No. 06-0230-PRO |

AFFIDAVIT OF DAVID BRAZA

STATE OF WASHINGTON )
) ss.
COUNTY OF SNOHOMISH )

David Braza, being first duly sworn on oath, deposes and says as follows:

1. I am Vice President of Actuarial Services for Premera Blue Cross ("Premera"). I am competent to make this affidavit, and do so on the basis of personal knowledge.

2. I have been Vice President of Actuarial Services with Premera since April, 2004. In total I have 14 years of work experience in actuarial science. I have a Bachelor of Science in Business Administration from Georgia State University, where I majored in Actuarial Science. I am a Fellow of the Society of Actuaries, an Associate of the Casualty Actuarial Society, and a Member of the American Academy of Actuaries.

3. I performed an analysis of the bids submitted by Premera and Aetna for the administration of the State of Alaska's health benefit plan. The conclusions of my analysis are included in my narrative description of my methodology, attached to this Affidavit as Exhibit 1, and my spreadsheet analysis, attached to this Affidavit as Exhibit 2.

Dated this 27th day of April, 2006.

D. Braza

David Braza

SUBSCRIBED AND SWORN TO before me this 27th day of April, 2006.

JOYCE A. EVERS NOTARY PUBLIC STATE OF WASHINGTON COMMISSION EXPIRES 04-09-09

Joyce A. Evers

Notary Public in and for the State of Washington
My commission expires: April 9, 2009
Printed Name: Joyce A. Evers

**EXHIBIT 1**

# State of Alaska
## Total Cost Comparison
## Premera vs. Aetna

**Purpose**

To compare the *total costs* of the Premera and Aetna 2/28/2006 BAFO ("Best and Final Offer") for the State of Alaska. Total costs include costs that are both fixed and variable. Administration Fees and Pharmacy (Rx) Rebate credits are examples of fixed costs. Medical Claim Costs, Medical Shared Savings Fees, and Rx Claim Costs are examples of variable costs.

**Data Sources**

In performing a *total cost* comparison, I projected both the fixed and variable costs that the State of Alaska will likely see over the course of the future contract period. To do so, I used information that was made available to Premera during the bidding process, supplemental information made public from Aetna, and internal information relating to Premera that was not included in the Rx portion of the bid. The information used in the *total cost* projection includes:

1) Medical Claim Dollars by year for 2003, 2004, and YTD2005 (data through September). The Medical Claim Dollars were split between the active and retiree populations.
2) Employee/Member counts for 2003, 2004, and YTD2005.
3) Estimated Future Employee/Member counts from Aetna's 12/28/2005 bid.
4) Aetna Medical Network Savings (History) – As reported in Aetna's 12/28/2005 bid, page 2 of 7. Aetna also included an estimated calendar year 2005 savings using actual savings data through September of 2005.
5) Retail and Mail Prescription Claims - From Mike Wiggins' March 10th Affidavit - Exhibit 1.
6) Rx Rebate Guarantees – These guarantees were included in both Premera and Aetna's 2/28/2006 BAFO.
7) Aetna Rx Retail/Mail Discounts and Dispensing Fees - From Aetna's 2/28/2006 BAFO.
8) Premera Rx Retail/Mail Discounts and Dispensing Fees – Premera offered a straight pass-through of discounts and dispensing fees from our Rx vendor (presently Medco).

*Note: The total cost comparison looks at all costs that the State of Alaska may incur – both fixed and variable (with the exception of dental claims). In contrast, the cost comparison produced by Matt McGuiness in his Affidavit, dated 3/28/2006, focused primarily on the fixed costs only with one variable cost component considered, namely, Medical Shared Savings Fees.*

## Total Cost Comparison – Explanation and Supporting Exhibits

**Total Cost Comparison (Exhibit 1)** – This exhibit summarizes the total expected dollar difference in costs for Administration Fees (fixed cost), Medical Claim Cost (variable), Medical Shared Savings Fee (variable), Rx Claim Cost (variable), and Rx Rebates (fixed). The total cost savings expected from the Premera bid is estimated to be **10.7** million dollars over the course of the three-year contract term. The savings are broken down as follows:

Administration Fee – 1.1M.
Medical Claim Costs – 0.0M.
Medical Shared Savings Fee – 0.3M.
Rx Claim Costs – 1.5M.
Rx Rebates – 7.8M.
Total – 10.7M.

**Administration Fee (Exhibit 2)** – The fees for both Aetna and Premera are as reported from Section 7.23 – Cost Proposal (All Services) – BAFO, dated 2/28/2006.

**Aetna Medical Claim Cost Projection (Exhibit 3, Page 1 of 2)**

Historical Periods – 2003, 2004, and YTD2005 (annualized)

The basis for the Aetna medical claim cost projection is the historical Aetna paid medical claim dollars and members over the period 2003, 2004, and YTD2005 (annualized). The medical claim dollars and members are used to derive Paid PMPM (Per Member Per Month) costs. The Paid PMPM costs were then converted to an Allowed PMPM costs. To do this, I assumed the member would be responsible for 10% of the provider allowed charges. Members are liable and pay providers for certain items, such as deductibles, coinsurance, and copays, if any.

*Note: The 10% member responsibility assumption is used throughout the historical and projection period and is also used in the Premera projection.*

Aetna Discounts and Savings PEPM – 2003, 2004, and YTD2005 (annualized)

The Allowed PMPM is converted to a Billed PMPM using the reported historical savings from Aetna's 12/28/2005 bid, page 2 of 7. Converting the Paid PMPM to Allowed PMPM and then to a Billed PMPM enabled me to impute an average historical discount and Savings PEPM (Per Employee Per Month) for Aetna. The average discounts using this imputation technique for 2003, 2004, and YTD2005 (annualized) are 11.9%, 12.4%, and 13.6%, respectively. The Saving's PEPM are 71.41, 78.90, and 91.91 for 2003, 2004, and YTD2005 (annualized), respectively.

Future Periods – 7/06 to 6/07, 7/07 to 6/08, and 7/08 to 6/09

The historical information is then used as the basis to project Aetna's medical claim costs into future periods. Using the historical data, I was able to derive a per annum claims trend of 6.6% as the difference in Billed PMPM figures from 2003 to 2004.

The 6.6% per annum trend is applied to the YTD2005 (annualized) Billed PMPM to project Billed PMPM figures into the future contract periods. Because the 2005 data (data available through September 2005) was annualized, the center of the YTD2005 claims is 7/1/2005. To project the Billed PMPM to the first contract period of 7/06 to 6/07, 18 months of trend was used. From there, only 12 months of trend was needed to move from the first to the second and from the second to the third contract periods.

Once the Billed PMPM figures for the future contract periods are established, I was able to derive an Allowed PMPM by assuming the provider discounts remain at 2005 levels - 13.6%. This produces PEPM Savings of 101.46, 108.07, and 115.17 for contract years 7/06 to 6/07, 7/07 to 6/08, and 7/08 to 6/09, respectively. The basis for this assumption is that as providers change their billing practices (pressure from self-pay lawsuits) discounts are anticipated to flatten in the future. Although, the discounts are anticipated to remain flat at 13.6%, the Savings PEPM will continue to grow as medical inflation continues to push costs higher.

Also, to test the sensitivity of the projection to higher than anticipated trends, I chose a 12.0% trend, which is nearly double the actual trend observed in the State's own experience from 2003 to 2004. The 12.0% per annum trend produces PEPM Savings of 109.26, 122.28, and 136.92 for contract years 7/06 to 6/07, 7/07 to 6/08, and 7/08 to 6/09, respectively. The total costs savings produced from the Premera offer (using the 12.0% trend) is still substantially more than Aetna, at 5.2M versus 10.7M over the course of the three-year contract period.

Finally, to calculate the projected Aetna Medical Claim Costs, the future Paid PMPM figures are multiplied by the anticipated members. As noted above, the member responsibility is assumed to remain at 10% of the provider allowed charges.

**Premera Medical Claim Cost Projection (Exhibit 3, Page 2 of 2)**

The starting point for the Premera Medical Claim Cost projection is the Billed PMPM figures from the Aetna Medical Claim Cost projection. The goal of the Premera Medical Claim Cost projection is to mirror the Aetna projection. Each projection uses the same assumptions. Although, we anticipate having significant claim savings versus the Aetna bid as referenced in Gubby Barlow's letter to the State of Alaska on 2/28/2006 (favorable provider discount differences that we have in the regions in which State employees live versus Aetna), the difference in claims over the course of the contact is reported to be the same as Aetna; meaning, network discounts achievable by Aetna and Premera are equal for purposes of this analysis.

**Aetna Medical Shared Savings Fee**

The Aetna Shared Savings Fee of 3.4M over the course of the contract term is obtained from the Matt McGuinness Affidavit, Page 7 of 8, dated 3/28/2006. It should be noted that Mr. McGuiness states that $2,423,506 of that fee is for Aetna's "National Advantage Program". That program is described as a program based on Aetna's "special negotiated discounts on certain PPO out of network and indemnity claims". This fee is similar to the network discount fee that Premera eliminated from its final BAFO. Lastly, due to Aetna confidentiality designations, I was not able to independently validate the accuracy of the McGuiness Shared Savings Fee calculation.

**Premera Medical Shared Savings Fee (Exhibit 3, Page 2 of 2)**

The Premera Medical Shared Savings Fee is calculated based on the guarantee reported in the Premera BAFO, dated 2/28/2006. The guarantee is that Premera would obtain at least 100.0 PEPM savings from the provider discount arrangements. To the extent that the PEPM savings are less than 100.0 PEPM, Premera will reimburse the State of Alaska 30% of the difference between the actual savings PEPM and 100.0 PEPM. In this projection, I anticipate that over the course of the contract the shared savings fee charges to the State of Alaska would be 3.1M dollars.

As stated above in the "Premera Medical Claim Cost Projection", we anticipate having significant claim savings versus the Aetna bid. Our estimate is based on favorable provider discount differences that we have in the regions in which State employees and retirees live versus Aetna.

**Base Rx Claim Cost Data (Exhibit 4, Page 1 of 3) – Both for Aetna and Premera**

To project future Rx Claim Costs for both Aetna and Premera, base data from Exhibit 4, Page 1 of 3 was used. The base Rx claim counts for Retail and Mail were obtained from Mike Wiggins' March 10th Affidavit – Exhibit 1. The base Rx claim counts were further split between brand and generic drugs, assuming that 52% are brand drugs and 48% are generic drugs (the 52%/48% split is based on averages obtained from Premera internal experience). This split was necessary to project future Rx claim costs. Rx provider discounts are separately reported and split between the retail/mail setting and within the retail/mail setting by brand/generic. Paper claims were taken from the Aetna 12/28/2005 bid and assumed to remain at the 8,000 per year level for future contract periods.

In addition to the Rx claim counts, the Average Wholesale Price (AWP) per claim is needed to project future Rx claim costs. The AWP prices for retail/mail are estimates based on Premera's block-of-business. Future AWP prices are assumed to increase at the rate of 8.0% per annum (the 8.0% is based on historical and future experience that is anticipated by Premera over the course of the contract period). The average discounts as shown in Exhibit 4, Page 2 and 3 of 3 are applied to the AWP per claim to derive the net

allowed per claim that the State of Alaska and their members will pay for prescription drugs in various settings (retail/mail, brand or generic).

**Aetna Rx Claim Cost (Exhibit 4, Page 2 of 3)**

Aetna Rx Claim Costs are derived from the base data from Exhibit 4, Page 1 of 3 and the reported discounts and dispensing fees in Aetna's BAFO, dated 2/28/2006. Although Aetna only reported discounts and dispensing fees for the first contract period (7/06 to 6/07), I assumed that those discounts and dispensing fees would hold for the two remaining contract periods – 7/07 to 6/08 and 7/08 to 6/09. The same assumption was also used in the Premera Rx Claim Cost projection.

Additionally, as with the medical claim cost projection, I assumed that the members would be responsible for 10% of the allowed amount (AWP amount less the discount). The 10% is an estimate of what members would be pay in copays, coinsurance, and deductibles, if any. The same 10% member responsibility assumption is also used in the Premera Rx Claim Cost projection.

**Premera Rx Claim Cost (Exhibit 4, Page 3 of 3)**

Premera Rx Claim Costs are derived from the base data from Exhibit 4, Page 1 of 3. The reported discounts and dispensing fees come from the Premera Medco (PBM vendor) contract. As with the Aetna Rx Claim Cost projection, I assumed that the Premera discounts would hold constant over the three-year contract period.

Additionally, as with the medical claim cost projection, I assumed that the members would be responsible for 10% of the allowed amount (AWP amount less the discount). The 10% is an estimate of what members would be pay in copays, coinsurance, and deductibles, if any. The same 10% member responsibility assumption is also used in the Aetna Rx Claim Cost projection.

The aggregate Rx claims impact comparing the Premera and Aetna discounts, dispensing fees, and charges for paper claim submissions (if any) is an estimated savings to the State of Alaska of 1.5M by choosing Premera. The direct Rx cost comparison is made possible by using the same Base Rx Claim Cost Data as described above.

**Aetna Rx Rebates (Exhibit 4, Page 2 of 3)**

Aetna Rx Rebates are guaranteed (as reported in Aetna's BAFO, dated 2/28/2006) at the greater of 13.3% of manufacturer rebates or 750,000 per year. Because the Rx claim count estimates in the 7/07 to 6/08 and 7/08 to 6/09 contract years produce rebate amounts of less than 750,000 per year, the rebate amount was set equal to 750,000.

> *Note: Rx claim counts used to calculate rebate amounts are obtained from the Mike Wiggins's March 10th Affidavit – Exhibit 1.*

**Premera Rx Rebates (Exhibit 4, Page 2 of 3)**

Premera Rx Rebates are guaranteed (as reported in Premera's BAFO, dated 2/28/2006). The guarantee is a minimum of 3.0M dollars a year, contingent upon generating an average paid claims volume of at least 80,000 claims per month over any of the three contract years.

Based on Rx claim counts, the total Rx rebate credit is expected to be 10.1M versus the Aetna guarantee of 2.3M for a net savings to the State of Alaska of 7.8M over the course of the contract.

> *Note: Rx claim counts used to calculate rebate amounts are obtained from the Mike Wiggins's March 10th Affidavit – Exhibit 1.*

**Claims Runout Processing Fee (Exhibit 5, Page 1 of 1)**

Aetna contends that its proposed fee for administration of claims following termination of the contract ("Runout Fee") is more than 2.0M less than the comparable fee for Premera. In reality, Premera's Runout Fee is significantly less than that of Aetna.

Aetna estimates its Runout Fee to be 2.6M and states that "the Premera fee will be almost 5.0M". (McGuinness Affidavit, paragraph 26.). Matt McGuiness provides no explanation for how he arrived at the 5.0M calculation. In fact, it is likely that the Premera Runout Fee will be close to **2.05M**.

The State's contract with Premera provides that the State will pay Premera an administrative fee of 4.0% of eligible claims paid after the date of the contract termination. (Contract between the State and Premera, page 5.) Runout Claims are claims for medical and pharmacy services which were provided before a contract was terminated, but which were not received and/or processed by the administrator prior to the termination of the contract. To project the claims runout processing fee for the State of Alaska, I analyzed our claims payment history for Premera's group commercial business in the state of Alaska. For each of the last 33 months. I ran a computer-generated history that showed what volume of claims was paid following the end the month, thereby approximating a claims runout process. On average for those 33 months, Premera paid medical claims equivalent to 1.96 months worth of claims. For pharmacy claims, the claims equivalent is 0.58 months worth of claims.

Additionally, to better approximate the claims runout process for what the State of Alaska may experience (The State has a substantial number of retirees, which requires claims coordination with Medicare), I also analyzed Premera's claims processing for Medicare Supplement business. Coordination of benefits with Medicare adds additional time to the process, thus Medicare Supplement claims take longer to process. For the Medicare Supplement business, Premera pays claims runout over 2.05 months on average (slightly higher than the 1.96 months in the Premera group commercial Alaska business).

Finally, to estimate the 2.05M Premera claims runout processing fee shown on Exhibit 5, I used the longer (Medicare Supplement) period rather than the shorter Commercial period, recognizing that this produces a more conservative estimate for the fee. The projected runout processing fee was then calculated by multiplying the foregoing number of months for each of the medical and pharmacy claims by the average monthly claims volume for the third year of the contract (23.4M and 5.9M respectively), and totaling those. That number was then multiplied by the 4% Runout Fee to product the projected cost to the State of 2.05M, which is significantly less than Aetna's own projection of its termination fees – 2.6M.

# EXHIBIT 2
## Total Cost Comparison
## Premera vs. Aetna

| | | 7/06 to 6/07 | 7/07 to 6/08 | 7/08 to 6/09 | Total | Difference |
|---|---|---|---|---|---|---|
| Employees | | | | | | |
| | Active | 5,464 | 5,519 | 5,574 | | |
| | Retiree | 28,128 | 29,394 | 29,982 | | |
| | Total | 33,592 | 34,913 | 35,556 | | |
| **Aetna** | | | | | | |
| | Administration Fee (1) | 7,203,823 | 12,011,706 | 12,839,123 | 32,054,652 | |
| | Medical Claim Cost (9), (10), (11), (12), (13), (14) | 233,599,109 | 258,604,608 | 280,686,001 | 772,889,718 | |
| | Medical Shared Savings Fee (2) | 1,133,709 | 1,133,709 | 1,133,709 | 3,401,128 | |
| | Rx Claim Cost (3), (12) | 66,832,747 | 66,199,894 | 71,374,530 | 204,407,171 | |
| | Rx Rebates (4) | (762,107) | (750,000) | (750,000) | (2,262,107) | |
| | Total | **308,007,281** | **337,199,917** | **365,283,364** | **1,010,490,562** | |
| **Premera** | | | | | | |
| | Administration Fee (5) | 8,190,903 | 10,990,649 | 11,769,483 | 30,951,035 | 1,103,617 |
| | Medical Claim Cost (9), (10), (11), (12), (13), (14) | 233,614,981 | 258,600,267 | 280,674,470 | 772,889,718 | 0 |
| | Medical Shared Savings Fee (6) | 170,799 | 1,015,328 | 1,946,015 | 3,132,143 | 268,985 |
| | Rx Claim Cost (7), (12) | 66,318,454 | 65,714,881 | 70,877,783 | 202,911,119 | 1,496,053 |
| | Rx Rebates (8) | (3,303,187) | (3,339,405) | (3,438,189) | (10,080,780) | 7,818,673 |
| | Total | **304,991,950** | **332,981,721** | **361,829,563** | **999,803,234** | **10,687,328** |
| | **Difference** | **3,015,330** | **4,218,196** | **3,453,801** | **10,687,328** | |

**Notes and Assumptions**

1) Aetna Administration Fee - From Section 7.23 - Cost Proposal (All Services) - BAFO, Dated 2/28/2006.

2) Aetna Shared Savings Fee - From Matt McGuinness Affidavit, Page 7 of 8, Dated 3/28/2006.

3) Aetna Rx Claim Cost - Estimated based on information from Aetna 12/28/2005 Bid and From Section 7.23 Cost Proposal (All Services) - BAFO, Dated 2/28/2006.

4) Aetna Rx Rebates - From Section 7.23 - Cost Proposal (All Services) - BAFO, Dated 2/28/2006. Rx script count estimates from Mike Wiggins' March 10th Affidavit - Exhibit 1.

5) Premera Administration Fee - From Section 7.23 - Cost Proposal (All Services) - BAFO, Dated 2/28/2006.

6) Premera Shared Savings Fee - Calculated from Premera BAFO, Dated 2/28/2006. To the extent that the PEPM Savings are less than 100.0 PEPM, Premera will reimburse the State of Alaska 30% of the difference between the actual savings and 100.0 PEPM.

7) Premera Rx Claim Cost - Estimated based on information from Premera's Medco (PBM vendor) contract.

8) Premera Rx Rebates - From Premera BAFO, Dated 2/28/2006. Rx script count estimates From Mike Wiggins' March 10th Affidavit - Exhibit 1.

**Medical Claim Cost - Notes**

# EXHIBIT 2
## Total Cost Comparison
## Premera vs. Aetna

9) Medical claims are assumed to be the same between Aetna and Premera. Also, assumes that for Dental, LTC, and FSA costs beyond administration fees are the same between Aetna and Premera.

10) Medical Future Savings - Assumes that provider discounts will stay at the Aetna 2005 levels - 13.6%. The future PEPM savings are 101.46, 108.07, and 115.17 over the the future policy periods of 7/06 to 6/07, 7/07 to 6/08, and 7/08 to 7/09, respectively.

11) Medical Past Savings - The past savings are 71.41, 78.90, and 91.91 PEPM for calendar years 2003, 2004, and 2005 respectively. Savings are assumed to be as reported in Aetna's 12/28/2005 Bid, Page 2 of 7.

12) Assumes that for both Medical and Rx, the member will pay 10% of the provider allowed amount.

13) Claims Trend - Trend in billed claims assumed to be 6.6% per annum or the difference in billed amounts from 2003 to 2004.

14) Provider Discount - The network discount is assumed to grow 0.0% per annum. The discount is assumed to be the same as the 2005 discount of 13.6%.

# State of Alaska
## Administration Fee
## Section 7.23 - Cost Proposal
## All Services - BAFO, Dated 2/28/2006

| | | Aetna | | Premera | |
|---|---|---|---|---|---|
| | # of Lives | Year 1 | Annual Dollars | Year 1 | Annual Dollars |
| Per employee per month medical | 5,464 | 24.16 | 1,583,892 | 24.79 | 1,625,431 |
| Per retiree per month medical | 28,128 | 14.62 | 4,933,586 | 16.95 | 5,721,235 |
| Per retiree per month DVA | 20,725 | 2.21 | 549,627 | 2.78 | 691,386 |
| Per retiree per month LTC | 19,011 | 0.39 | 88,971 | 0.42 | 95,815 |
| Per participant per month Health FSA | 1,358 | 2.93 | 47,747 | 3.50 | 57,036 |
| | | | 7,203,823 | | 8,190,903 |

| | # of Lives | Year 2 | Annual Dollars | Year 2 | Annual Dollars |
|---|---|---|---|---|---|
| Per employee per month medical | 5,519 | 37.44 | 2,479,315 | 32.16 | 2,129,892 |
| Per retiree per month medical | 29,394 | 24.18 | 8,527,573 | 22.00 | 7,760,016 |
| Per retiree per month DVA | 21,658 | 3.09 | 803,079 | 3.61 | 938,225 |
| Per retiree per month LTC | 19,866 | 0.57 | 135,883 | 0.44 | 104,892 |
| Per participant per month Health FSA | 1,372 | 4.00 | 65,856 | 3.50 | 57,624 |
| | | | 12,011,706 | | 10,990,649 |

| | # of Lives | Year 3 | Annual Dollars | Year 3 | Annual Dollars |
|---|---|---|---|---|---|
| Per employee per month medical | 5,574 | 38.68 | 2,587,131 | 33.77 | 2,258,808 |
| Per retiree per month medical | 29,982 | 25.42 | 9,146,052 | 23.10 | 8,311,010 |
| Per retiree per month DVA | 22,633 | 3.24 | 879,971 | 3.79 | 1,029,349 |
| Per retiree per month LTC | 20,760 | 0.63 | 156,946 | 0.45 | 112,104 |
| Per participant per month Health FSA | 1,386 | 4.15 | 69,023 | 3.50 | 58,212 |
| | | | 12,839,123 | | 11,769,483 |

**Grand Total (Years 1-3)** **32,054,652** **30,951,035**

# State of Alaska
## Aetna Medical Claim Costs and Savings

### Aetna Estimates

**Active**

| | 2003 | 2004 | YTD2005 (6) | 7/06 to 6/07 | 7/07 to 6/08 | 7/08 to 6/09 |
|---|---|---|---|---|---|---|
| Employees | 5,574 | 5,536 | 5,555 | 5,464 | 5,519 | 5,574 |
| Members | 14,384 | 14,411 | 14,049 | 14,097 | 14,239 | 14,381 |
| Medical Claim Dollars | 36,452,062 | 37,153,063 | 28,539,843 | 43,489,007 | 46,825,929 | 50,413,886 |
| PMPM | | | | | | |
| Paid | 204.09 | 211.90 | 233.58 | 257.08 | 274.05 | 292.13 |
| Allowed (1), (5) | 226.77 | 235.45 | 259.53 | 285.64 | 304.50 | 324.59 |
| Billed (2), (4) | 257.33 | 268.71 | 300.42 | 330.65 | 352.48 | 375.74 |
| Savings (3) | 30.56 | 33.27 | 40.89 | 45.01 | 47.98 | 51.15 |
| Savings Dollars | 5,458,978 | 5,832,526 | 6,894,184 | 7,613,838 | 8,198,050 | 8,826,212 |
| Discount (5) | 11.9% | 12.4% | 13.6% | 13.6% | 13.6% | 13.6% |

**Retiree**

| | 2003 | 2004 | YTD2005 (6) | 7/06 to 6/07 | 7/07 to 6/08 | 7/08 to 6/09 |
|---|---|---|---|---|---|---|
| Employees | 25,350 | 26,680 | 27,809 | 28,128 | 29,394 | 29,982 |
| Members | 48,839 | 51,443 | 52,673 | 53,162 | 55,555 | 56,666 |
| Medical Claim Dollars | 140,502,716 | 157,631,257 | 128,112,868 | 190,110,102 | 211,778,679 | 230,272,115 |
| PMPM | | | | | | |
| Paid | 240.72 | 255.04 | 270.76 | 298.00 | 317.67 | 338.64 |
| Allowed (1), (5) | 267.47 | 283.37 | 300.85 | 331.12 | 352.97 | 376.27 |
| Billed (2), (4) | 303.52 | 323.41 | 348.25 | 383.29 | 408.59 | 435.55 |
| Savings (3) | 36.05 | 40.04 | 47.40 | 52.17 | 55.62 | 59.29 |
| Savings Dollars | 21,041,022 | 24,667,474 | 29,905,816 | 33,283,529 | 37,077,155 | 40,314,894 |
| Discount (5) | 11.9% | 12.4% | 13.6% | 13.6% | 13.6% | 13.6% |

**Total**

| | | | | | | |
|---|---|---|---|---|---|---|
| Medical Claim Dollars | 176,955,378 | 194,284,320 | 157,646,711 | 233,599,109 | 258,604,608 | 280,686,001 |
| Savings Dollars | 26,500,000 | 30,500,000 | 136,800,000 | 40,897,367 | 45,275,205 | 49,141,105 |
| Savings PEPM | 71.41 | 78.90 | 91.91 | 101.46 | 108.07 | 115.17 |

**Notes**

Shaded Numbers - Shaded areas represent numbers obtained during the bid process and Aetna's bid, dated 12/28/2005.

1) Allowed PMPM - Assumed to be 10% higher than Paid PMPM. The member would be responsible for amounts between the Allowed and Paid PMPM

2) Billed PMPM - Estimated based on reported savings from the Aetna 12/28/2005 Bid, Page 2 of 7.

3) Savings = Difference between the Billed and Allowed amounts.

4) Claims Trend - Trend in billed claims assumed to be 6.6% per annum or the difference in billed amounts from 2003 to 2004.

5) Discount - The network discount is assumed to grow 0.0% per annum. The discount is assumed to be the same as the 2005 discount of 13.6%.

6) YTD2005 - Information shown above has been extrapolated to produce estimated 2005 results.

# State of Alaska
## Premera Medical Claim Costs and Savings

### Premera Estimates

**Active**

| | 7/06 to 6/07 | 7/07 to 6/08 | 7/08 to 6/09 |
|---|---|---|---|
| Employees | 5,464 | 5,519 | 5,574 |
| Members | 14,097 | 14,239 | 14,381 |
| Medical Claim Dollars | 44,0E 204 | 47,462,488 | 51,099,221 |
| **PMPM** | | | |
| Paid | 260.57 | 277.77 | 296.11 |
| Allowed (1), (4) | 289.53 | 308.64 | 329.01 |
| Billed (2) | 330.65 | 352.48 | 375.74 |
| Savings (3) | 41.13 | 43.84 | 46.73 |
| Savings Dollars | 6,956,953 | 7,490,762 | 8,064,728 |
| Discount (4) | 12.4% | 12.4% | 12.4% |

**Retiree**

| | 7/06 to 6/07 | 7/07 to 6/08 | 7/08 to 6/09 |
|---|---|---|---|
| Employees | 28,128 | 29,394 | 29,982 |
| Members | 53,162 | 55,555 | 56,666 |
| Medical Claim Dollars | 189,534,777 | 211,137,779 | 229,575,249 |
| **PMPM** | | | |
| Paid | 297.10 | 316.71 | 337.61 |
| Allowed (1), (4) | 330.11 | 351.90 | 375.13 |
| Billed (2) | 383.29 | 408.59 | 435.55 |
| Savings (3) | 53.18 | 56.68 | 60.43 |
| Savings Dollars | 33,922,779 | 37,789,266 | 41,089,190 |
| Discount (4) | 13.9% | 13.9% | 13.9% |

**Total**

| | | | |
|---|---|---|---|
| Medical Claim Dollars | 233,614,981 | 258,600,267 | 280,674,470 |
| Savings Dollars | 40,879,732 | 45,280,028 | 49,153,918 |
| Discount | 13.6% | 13.6% | 13.6% |
| **Network Savings Split PEPM** | | | |
| State of Alaska Share | 100.99 | 105.65 | 110.64 |
| Premera Share | 0.42 | 2.42 | 4.56 |
| Total | 101.41 | 108.08 | 115.20 |
| **Network Savings Split Dollars** | | | |
| State of Alaska Share | 40,708,932 | 44,264,700 | 47,207,903 |
| Premera Share | 170,799 | 1,015,328 | 1,946,015 |
| Total | 40,879,732 | 45,280,028 | 49,153,918 |

**Notes**

1) Allowed PMPM - Assumed to be 10% higher than Paid PMPM. The member would be responsible for amounts between the Allowed and Paid PMPM.

2) Billed PMPM - Assumed to be the same as Aetna billed amounts.

3) Savings = Difference between the Billed and Allowed amounts.

4) Discount - The network discount is assumed to grow 0.0% per annum. The discount is assumed to be the same as the Aetna 2005 discount of 13.6% in total. We anticipate having slightly different discounts between Active and Retiree populations as the two populations live in different regions of the country.

# State of Alaska
## Rx - Base Data

| | Script Distribution | Scripts 7/06 - 6/07 | Scripts 7/07 - 6/08 | Scripts 7/08 - 6/09 |
|---|---|---|---|---|
| Subscribers (Est.) | Active | 5,464 | 5,519 | 5,574 |
| | Retiree | 28,128 | 29,394 | 29,982 |
| | Total | 33,592 | 34,913 | 35,556 |
| Members (Est.) | Active | 14,097 | 14,239 | 14,381 |
| | Retiree | 53,162 | 55,555 | 56,666 |
| | Total | 67,259 | 69,794 | 71,047 |
| Retail | | | | |
| Brand (2) | 52.0% | 400,617 | 368,093 | 368,093 |
| Generic (2) | 48.0% | 369,801 | 339,778 | 339,778 |
| Total (1) | 100.0% | 770,418 | 707,871 | 707,871 |
| Mail | | | | |
| Brand (2) | 52.0% | 49,514 | 45,495 | 45,495 |
| Generic (2) | 48.0% | 45,706 | 41,995 | 41,995 |
| Total (1) | 100.0% | 95,220 | 87,490 | 87,490 |
| Paper Claims | | 8,000 | 8,000 | 8,000 |

| | Estimated 2006 AWP Per Script | AWP Cost Per Script 7/06 - 6/07 | AWP Cost Per Script 7/07 - 6/08 | AWP Cost Per Script 7/08 - 6/09 |
|---|---|---|---|---|
| Retail | | | | |
| Brand (3) | 135.98 | 141.42 | 152.73 | 164.95 |
| Generic (3) | 50.73 | 52.75 | 56.97 | 61.53 |
| Mail | | | | |
| Brand (3) | 336.68 | 350.15 | 378.16 | 408.41 |
| Generic (3) | 156.03 | 162.27 | 175.25 | 189.27 |

**Notes**

1) Retail and Mail Script Count - From Mike Wiggins' March 10th Affidavit - Exhibit 1.
2) Split between Brand and Generic - Based on Premera Experience. Experience in the bid was not available at this level of specificity.
3) AWP Per Script - Based on Premera Experience. Assumed an average trend of 8.0% per annum in AWP per script. As with the split between Brand and Gereric, experience in the bid was not available at this level of specificity.

# State of Alaska
## Aetna Rx - Integrated BAFO
**(unless noted, numbers are on an allowed basis, not paid basis)**

| | 7/06 - 6/07 | 7/07 - 6/08 | 7/08 - 6/09 | 7/06 - 6/07 | 7/07 - 6/08 | 7/08 - 6/09 | Total |
|---|---|---|---|---|---|---|---|
| **Retail - Discount** (2) | | | | | | | |
| Brand | 14.0% | 14.0% | 14.0% | 48,722,849 | 48,348,625 | 52,216,515 | 149,287,990 |
| Generic | 63.3% | 63.3% | 63.3% | 7,163,508 | 7,108,487 | 7,677,166 | 21,949,161 |
| **Mail - Discount** (2) | | | | | | | |
| Brand | 20.0% | 20.0% | 20.0% | 13,869,842 | 13,763,393 | 14,864,464 | 42,497,698 |
| Generic | 64.0% | 64.0% | 64.0% | 2,669,927 | 2,649,436 | 2,861,391 | 8,180,754 |
| **Dispensing Fee - Retail** (2) | | | | | | | |
| Brand | 2.35 | 2.35 | 2.35 | 941,451 | 865,018 | 865,018 | 2,671,488 |
| Generic | 2.35 | 2.35 | 2.35 | 869,032 | 798,478 | 798,478 | 2,465,988 |
| **Rebate** (1) | | | | | | | |
| Retail | 0.70 | 0.78 | 0.74 | 539,293 | 552,139 | 523,825 | 1,615,257 |
| Mail | 2.34 | 1.86 | 2.47 | 222,815 | 162,731 | 216,100 | 601,647 |
| | | | | 762,107 | 750,000 | 750,000 | 2,262,107 |
| **Administration Fee** | | | | | | | |
| PEPM | 0.00 | 0.00 | 0.00 | 0 | 0 | 0 | 0 |
| Paper Claims (Per Claim) | 2.75 | 2.75 | 2.75 | 22,000 | 22,000 | 22,000 | 66,000 |
| | | | Total Cost Excluding Rebates | 74,258,608 | 73,555,438 | 79,305,033 | 227,119,079 |
| | | | Total Cost Excluding Rebates - Paid Basis (90% of Allowed) | 66,832,747 | 66,199,894 | 71,374,530 | 204,407,171 |
| | | | Rebates | 762,107 | 750,000 | 750,000 | 2,262,107 |

**Notes**

1) Rebates: Guarantee of 13.3% of manufacturer rebates. Minimum Guarantee of 750,000 per year. Rebates are subject to a minimum of 750,000. The per script rebates from Aetna 7.23 Cost Proposal - BAFO, Dated 2/28/2006.

2) Discounts/Dispensing Fee for the contract year 7/06 to 6/07 from Aetna 7.23 Cost Proposal - BAFO, Dated 2/28/2006. Contract year 7/07 to 6/08 and 7/08 to 6/09 assumed to be the same as contract year 7/06 to 6/07.

# State of Alaska

## Premera Rx - Integrated BAFO

**(unless noted, numbers are on an allowed basis, not paid basis)**

| | 7/06 - 6/07 | 7/07 - 6/08 | 7/08 - 6/09 | 7/06 - 6/07 | 7/07 - 6/08 | 7/08 - 6/09 | Total |
|---|---|---|---|---|---|---|---|
| **Retail - Discount** (2) | | | | | | | |
| Brand | 15.2% | 15.2% | 15.2% | 48,042,995 | 47,673,993 | 51,487,913 | 147,204,901 |
| Generic | 60.0% | 60.0% | 60.0% | 7,803,385 | 7,743,450 | 8,362,926 | 23,909,761 |
| **Mail - Discount** (2) | | | | | | | |
| Brand | 22.0% | 22.0% | 22.0% | 13,523,096 | 13,419,308 | 14,492,852 | 41,435,256 |
| Generic | 61.0% | 61.0% | 61.0% | 2,892,421 | 2,870,222 | 3,099,840 | 8,862,484 |
| **Dispensing Fee - Retail** (2) | | | | | | | |
| Brand | 1.85 | 1.85 | 1.85 | 741,142 | 680,972 | 680,972 | 2,103,086 |
| Generic | 1.85 | 1.85 | 1.85 | 684,131 | 628,589 | 628,589 | 1,941,3 |
| **Rebate** (1) | | | | | | | |
| Retail | 3.08 | 3.40 | 3.50 | 2,372,887 | 2,406,761 | 2,477,549 | 7,257,197 |
| Mail | 9.77 | 10.66 | 10.98 | 930,299 | 932,643 | 960,640 | 2,823,583 |
| | | | | 3,303,187 | 3,339,405 | 3,438,189 | 10,080,780 |
| **Administration Fee** | | | | | | | |
| PEPM | 0.00 | 0.00 | 0.00 | 0 | 0 | 0 | 0 |
| Paper Claims (Per Claim) | 0.00 | 0.00 | 0.00 | 0 | 0 | 0 | 0 |
| | | | Total Cost Excluding Rebates | 73,687,171 | 73,016,535 | 78,753,093 | 225,456,798 |
| | | | Total Cost Excluding Rebates - Paid Basis (90% of Allowed) | 66,318,454 | 65,714,881 | 70,877,783 | 202,911,119 |
| | | | Rebates | 3,303,187 | 3,339,405 | 3,438,189 | 10,080,780 |

**Notes**

1) Rebate - Guarantee of 3.0 million per year provided that the total number of scripts is at least 80,000 per month, otherwise, the guarantee is prorated. Guarantee from Premera 2/28/2006 BAFO.

2) Discounts/Dispensing Fees are taken from Premera's Medco contract (PBM Vendor).

# State of Alaska
## Total Cost Comparison
### Premera - Claims Runout Processing Fee

| Range | Months (1) | Runout Claims (2) | Fee - 4% of Runout (3) |
|---|---|---|---|
| Medical Average | 2.05 | 47,948,555 | 1,917,942 |
| Rx Average | 0.58 | 3,425,760 | 137,030 |
| | | Total | 2,054,973 |

**Notes**

1) Months - Represents an average of the number of months of claims that are ultimately paid after contract termination. The average is derived from 33 months of historical Premera Medicare Supplement Business. We used the Medicare Supplement business as a benchmark because of the significant number of Retirees that the State of Alaska has. Premera's Commercial business averages 1.96 months of claims, slightly less than the Medicare Supplement Business. The Rx Average is taken from our Commerical business and is expected to be a good approximation for the State of Alaska, regardless of the mix of indivduals (Active versus Retiree).
2) Runout Claims - Runout claims are based on the estimated claims in the 7/08 to 6/09 contract period. An average month of claims is expected to be 23.4M for medical and 5.9M for Rx.
3) Premera Claims Runout Processing Fee is 4% of runout claims

Robert K. Stewart, Jr.
Davis Wright Tremaine LLP
701 W. Eighth Avenue, Suite 800
Anchorage, Alaska 99501
(907) 257-5300
(907) 257-5399 (Facsimile)

Attorneys for Premera Blue Cross Blue Shield of Alaska

BEFORE THE ALASKA DEPARTMENT OF ADMINISTRATION

| | |
|---|---|
| In the Matter of: | ) |
| | ) |
| Aetna Life Insurance Company and Aetna, Inc., | ) |
| | ) |
| Appellants. | ) DGS Solicitation No. 2007-0200-5946 |
| | ) OAH No. 06-0230-PRO |

AFFIDAVIT OF JEFF DAVIS

STATE OF WASHINGTON )
) ss.
COUNTY OF SNOHOMISH )

Jeff Davis, being first duly sworn on oath deposes and says as follows:

1. I am the General Manager and Vice President of Premera Blue Cross, doing business in the state of Alaska as Premera Blue Cross Blue Shield of Alaska ("Premera"). I reside in Anchorage, Alaska. I have the primary responsibility for Premera's contract with the State of Alaska ("State") for administration of its self-funded health plan. I was involved in the procurement process, including the discussions and agreement among Premera, the State, and Aetna. Prior to my current role I was Vice President of Health Care Delivery Systems for Premera for 2 years. I have a Masters in Health Services

Administration. I am competent to make this affidavit, and do so on the basis of personal knowledge except as may be otherwise stated below.

2. On December 28, 2005, Premera submitted a proposal in response to Request for Proposals No. 2007-0200-5946 ("RFP"), issued by the Department of Administration, Division of General Services ("Division") to solicit administrative services for the State's self-funded health care benefit program. Premera's cost proposal at that time was in the amount of $34,390,750.

3. On February 7, 2006, the Division sent Premera an e-mail with questions on twenty-one areas of Premera's technical proposal. Later the same day, the Division asked Premera a few additional questions and requested assurance that all components of its program would be administered for the stated fees.

4. On February 13, 2006, Premera responded in writing to Division's questions and submitted a best and final cost proposal of $34,077,274 over 3 years.

5. The Division e-mailed two pages of additional clarification requests to Premera on February 14, 2006. Premera responded to those requests the same day.

6. I participated in the series of telephone conversations among the Division, Premera and Aetna on February 22 and 23, 2006. During those calls we learned from the Division that after issuance of the Notice of Intent and during conversations between the Division and Aetna to which Premera was not a party, the Division discovered it had overlooked part of Aetna's proposal. The Division also stated that it had disclosed the total amount of Premera's best and final cost proposal to Aetna.

7. During the first telephone conference, the Division outlined what had happened

and how it planned to remedy the situation. It stated it intended to proceed with the procurement process in the following manner: 1) evaluate Aetna's proposal and, assuming the Aetna proposal was determined to be responsive and reasonably susceptible for award; 2) share Aetna's original cost proposal with Premera in an attempt to put the parties in as comparable a position as possible (given the Division's earlier disclosure of Premera's best and final cost proposal); 3) solicit new best and final offers from both Premera and Aetna; 4) conduct discussions with offerors; and 5) after reviewing the final offers, issue a new notice of intent to award a contract.

8. The parties recognized there was an inherent inequity created by the disclosure of Premera's best and final cost proposal. The Division explicitly recognized that it "could not level the playing field" to remove this competitive disadvantage to Premera.

9. The Division, Aetna and Premera discussed the nature of the disclosure that had been made of Premera's cost proposal and agreed to confirm what had been disclosed and provide for mutual disclosures of some type of Premera's and Aetna's cost proposals. In a discussion of options to the process outlined by the Division, Premera proposed a process whereby Aetna would submit a preliminary best and final offer, to be disclosed to Premera, followed by final best and final offers from both parties. That proposal was not accepted by the Division and Aetna.

10. The parties also discussed at length the makeup of the proposal evaluation committee that would evaluate Aetna's proposal. The Division shared the names of the individuals who would be responsible for the evaluation--Freda Miller, Pat Shier, and Judy Carter--and described their job titles and responsibilities.

11. Because no agreement was reached on February 22, 2006, the parties reconvened by conference call the next morning, February 23, 2006. Mike Robinson stated on behalf of Aetna that it recognized this was a challenging situation and that, while it did not view the proposed process as ideal, it was willing to agree to the Division's original proposal.

12. Premera suggested a modification to the Division's proposal similar to the alternative that it had proposed the previous day. It proposed that Aetna submit an initial best and final proposal, and only if that cost proposal was less than Premera's existing cost proposal, would the parties go to final best and final offers. Premera based this approach on a desire not to be required to bid against itself should Aetna not submit a superior cost proposal.

13. Following a caucus, the Division declined Premera's proposal. After additional discussions, the parties reached an agreement which was memorialized in a document drafted by the Division and signed by the parties ("Agreement").

14. At several points during the calls on February 22 and 23, the Division solicited questions from Premera and Aetna and provided responses. In my opinion, there was more than ample time and opportunity for the parties to raise questions, offer suggestions, discuss issues, and explore alternate solutions.

15. During those calls, Aetna did not raise any questions as to the areas where they now challenge the Division's actions. For example, at no time during the several conference calls and extensive questioning and discussions which took place on February 22 and 23, 2006, was there any proposal by Aetna for discussion, much less agreement,

that the Division would start all over with a new technical evaluation of both proposals after the submission of the final best and final offers. Nor was there any statement by the Division that the technical evaluation of Aetna's proposal would be conducted by an evaluation team constituted exactly the same as that which had evaluated Premera's technical proposal.

16. Premera was informed on February 24, 2006, that the Division had completed its initial evaluation of Aetna's proposal as provided for in Paragraph 1 of the Agreement, and found the proposal to be responsive and reasonably susceptible for award. The Division then confirmed the cost proposal contained in Premera's initial best and final offer, $34,077,274, and informed Premera of those contained in Aetna's proposal, $49,163,735/$45,237,171.

17. On February 24, 2006, the Division sent 3 new questions to Premera and conducted a telephone conference to allow us to provide clarification in response to the questions.

18. On February 28, 2006, Premera submitted a new best and final offer to the State. Premera reduced its administrative cost proposal to $30,951,035. It also provided a guaranteed pharmacy rebate of $3 million per year, based on a minimum number of pharmacy claims; doubled the amount of dollars Premera put at risk on the performance guarantees; and eliminated the network access fee. The revised financial proposal increased from 12% to 30% the percentage Premera would pay to the State in case it did not meet the guaranteed network savings amount of $100 per member per month and similarly increased from 12% to 30% the amount Premera would be paid by the State for

amounts saved above the guaranteed savings. Premera reaffirmed its promise to save the State $15 million per year compared to its current claims costs. (See letter from Gubby Barlow to Walt Harvey dated February 27, 2006, attached hereto as Exhibit 1.)

19. Based on Premera's superior proposal, the Division issued a new Notice of Intent to Award to Premera on February 28, 2006. The Notice of Intent specified that the Division determined that Premera's proposal was superior to Aetna's on both the cost and technical components. Premera scored 4,618.5 points to Aetna's 4,482.5. On March 13, 2006, the Division and Premera entered into a contract (the "Contract") for performance of this work.

20. Premera has been working diligently to implement the Contract, so as to ensure a smooth transition of the administrative responsibilities from Aetna to Premera. In particular, Premera wants to make certain that the State's employees and retirees do not have a disruption in service and that Premera meets its contractual commitments. Due to the short time between contract award and the date services begin, Premera has mobilized a dedicated team including representatives from all areas of its business to meet the implementation timeline.

21. As of April 28, 2006, the date of filing of this statement of position, Premera will have spent or irrevocably committed to the expenditure of over $1.2 million for implementation of the State's business. By May 15th, the date by which a final decision in this case is expected, the amount incurred by Premera will be approximately $2.3 million. Examples of Premera's implementation work as of April 28 includes: 1) completed implementation project planning; 2) various personnel hired, including

operations manager, care facilitation specialists, customer service representatives; 3) identification card designed; 4) membership and billing procedures developed; 5) purchased Ingenix PHCS System for provider reimbursement; 6) established banking arrangements, including appropriate accounts; 7) worked on finalizing contracts with vendors; 8) established toll-free numbers for 24-hour per day healthline and employee assistance program (EAP) provider; 9) held frequent meetings with the State to reach agreement on implementation details; 10) initiated system changes necessary to support the State's program; 11) developed required reports; and 12) entered into a letter of intent to lease office space in Juneau and started to build out that space.

22. Premera will be prepared to administer the contract by the July 1 date for the commencement of services because it has diligently executed its duties under the contract with the State.

23. In my opinion, Premera's nationwide network discounts are significantly better than those available through Aetna. As a result, Premera provides performance guarantees to certain groups based on savings from its network discounts. Premera has proven that it is able to deliver on those guarantees. For example, Premera won another major national account from Aetna as the third party administrator for its health benefits plan in 2003. For that customer, Premera guaranteed network savings of 36%, which were greater than the prior carrier's discounts, and has met that commitment.

Dated this 28 day of April, 2006.

Jeff Davis

SUBSCRIBED AND SWORN TO before me this 28th day of April, 2006.

Heather Ellen Marshall aka Scott
Notary Public in and for the State of WA
My commission expires: 10-8-06
Printed Name: Heather Ellen Marshall aka Scott

PREMERA | BLUE CROSS BLUE SHIELD OF ALASKA

February 27, 2006

Mr. Walt Harvey
Contracting Manager
Department of Administration
Division of General Services
333 Willoughby Avenue, 7th Floor State Office Building
Juneau, AK 99811-0203

Dear Mr. Harvey:

Thank you again for the opportunity to provide additional clarification and our "Best and Final" offer. I am personally pleased to reaffirm our commitment to the State of Alaska. I believe Premera Blue Cross Blue Shield of Alaska is uniquely qualified to deliver the lowest net cost while providing outstanding service to the State of Alaska and its members.

The highlights of Premera Blue Cross Blue Shield of Alaska's proposal to the State include:

- **Significant Claims Savings:**
  The State of Alaska will achieve at least **$45 million in net additional claims savings in the next three years** (before health cost inflation) through the use of the Blue Cross Blue Shield networks. These savings are over and above the savings now achieved using your current administrator's network, and after sharing any upside performance with Premera. To support this claim, we have reduced our administrative fees by 10%, eliminated our pharmacy fees and network access fees, plus placed additional amounts at risk for claims discount performance. In other words, the State will not pay unless Premera Blue Cross Blue Shield of Alaska delivers the network claims savings. Meeting our savings commitments was a big element to our success with Microsoft and Weyerhaeuser; both clients will be happy to validate this achievement.

- **No Surprises:**
  The State of Alaska will have the security of an all-inclusive fee arrangement, other than for clearly identified optional services. This includes removal of the pharmacy administration fee proposed when the State requested receipt of full pharmacy rebates, as well as removal of the separately billed charge for use of the national BlueCard network. Additionally, we have now included 65 hours of training provided by Compsych, the EAP vendor partner.

- **Guaranteed Results:**
  In addition to waiving our pharmacy administration fee, we are now guaranteeing a minimum of **$3 million in annual pharmacy rebates**. Moreover, the State can also share our confidence in our ability to meet our commitments as we are **doubling** the dollars at risk in our other Performance Guarantees in each category.

- **Superior Service:**
  The State will experience **Premera's outstanding service to members**. Both Microsoft and Weyerhaeuser named Premera their Benefits **"Vendor of the Year."** Extensive planning **is already well underway** on the implementation of this account –and you have my personal commitment that the State of Alaska can expect a similar experience.

- **Local Presence:**
  The State will collaborate with Premera's **Alaska-based leaders** who understand the unique challenges of the Alaska health-care environment and will partner with an organization which has been providing service to Alaskans for the last 50 years.

Again, thank you for the opportunity to reaffirm the unique advantages of Premera Blue Cross Blue Shield of Alaska. You have my assurance that we will provide health benefits, service and savings with the highest level of integrity and quality. We are ready to be your partner.

Sincerely,

H. R. Brereton (Gubby) Barlow
President and CEO

Copy:
Heyward Donigan, EVP and Chief Marketing Executive
Jeffrey Davis, VP and General Manager, Alaska Market
Barbara Russell, Director of Sales, Alaska Market

Enclosure

Appeal

LAW OFFICES OF
SIMPSON, TILLINGHAST & SORENSEN, P.C.

ONE SEALASKA PLAZA, SUITE 300 JUNEAU, ALASKA 99801
TELEPHONE 907-586-1400 FAX 907-586-3065

**HAND DELIVERED**

March 28, 2006

The Honorable Scott Norstrand
Commissioner of Administration
Alaska Department of Administration
10th Floor, State Office Building
Juneau, Alaska 99811-0200

Re: Appeal of Denial of Protest of Intent to Award in
RFP No. 2007-0200-5946
OUR FILE NO.: 14671

Dear Commissioner Nordstrand:

Enclosed, pursuant to AS 36.30.590, is the Appeal of Aetna Life Insurance Company and Aetna ("Aetna") of the procurement officer's denial of Aetna's protest in the above-captioned matter. The appeal and supporting documentation include all of the material required by that statute.

Aetna would respectfully request that your office immediately transfer this appeal to the Office of Administrative Hearings under AS 44.64.060. Given that you have already announced your recusal from this matter, Aetna does not believe there is any purpose served by retaining the file at the Department of Administration, and the parties to this proceeding will have need of current access to a hearing officer to establish procedures for resolution of the merits of this case.

The purpose of this letter is also to advise you that, pursuant to my telephone conversation with Asst. Attorney General Margie Vandor, the procurement office is being simultaneously served with this appeal by service on Ms. Vandor.

Sincerely,

SIMPSON, TILLINGHAST, SORENSEN
& LONGENBAUGH

Jon K. Tillinghast

**BEFORE THE ALASKA DEPARTMENT OF ADMINISTRATION**

| | |
|---|---|
| *In the Matter of*<br>AETNA LIFE INSURANCE<br>and AETNA | **APPEAL OF DENIAL OF CONTRACT PROTEST (AS 36.30.590)** |
| | DGC RFP No. 2007-0200-5946<br>Dept. of Administration Case No. 07-____ |

## I. Introduction

Pursuant to AS 36.30.590, Aetna and Aetna Life Insurance Company ("Aetna") respectfully appeal the Department of Administration, Division of General Service's (the "Division's") March 21, 2006 denial of Aetna's March 10, 2006 Protest of a February 28, 2006 Final Notice of Intent to Award a Contract pursuant to the above-referenced Request for Proposal ("RFP") to Premera Blue Cross (the "*Protest Decision*"). A copy of the Protest Decision is appended to this memorandum as *Attachment 10*.

## II. Background

On December 22, 2005, Aetna submitted a complete, responsive and responsible proposal to provide medical and pharmaceutical claim management services to the State of Alaska pursuant to the above-referenced RFP. *Wiggins Aff.*, ¶11. After shipping the complete bid, Mr. Wiggins telephoned then-procurement officer Victor Leamer, and Mr. Leamer confirmed to Mr. Wiggins that Aetna's application had been timely received. *Fourth Wiggins Aff.*, ¶4.

Having heard nothing in response for nearly two months, Aetna finally received a form Notice of Intent to Award the contract to Premera on February 18, 2006. *Id.* at

Simpson, Tillinghast & Sorensen
One Sealaska Plaza, Suite 300
Juneau, Alaska 99801
(907) 586-1400 Fax (907) 586-3065

¶13. A subsequent phone call to Mr. Walt Harvey, the employee who had replaced Mr. Leamer as procurement officer, disclosed that the Division had lost the meat of Aetna's proposal, consisting of some four boxes of binders in which were contained a critical portion of Aetna's overall proposal. *Id.* Over those two intervening months, the Division had never simply contacted Aetna (who, through itself and its affiliates, had been providing these services to the State for the past 24 years), and asked why there was such a gaping omission in its bid. Rather, the Division simply declared Aetna "nonresponsive" for failure to submit a complete bid. *Id.* [1]

The initial award to Premera was therefore, and in essence, predicated on the erroneous conclusion that Premera was the sole responsive bidder.

The Division initially scored Premera's proposal under the RFP's point system around January 20, awarding it 1489.5 points for the more subjective, technical elements of the RFP (called here the "Non-Cost Factors"), which counted the most (50%) in proposal evaluation. *See Section VI post. See also Chart 1 (attached directly to this memorandum). See Attachment 5(c).*

Shortly thereafter, the Division began extensive private communications with Premera aimed at improving its offer. These included 21 pages of questions on Premera's proposals for various Non-Cost Factors in the RFP, each question being designed to solicit a more beneficial answer. *Attachment 4(a).* Premera answered those questions in a 49-page reply on February 13, 2006. *Attachment 4(b) at 7-56. See, generally, Section VIII, post.*

---

[1] In rejecting Aetna's protest, the procurement officer claimed that it would have been improper to contact Aetna, as the receipt of late bids is prohibited. *Attachment 10* at 3. The purpose of such a query, however, would not have been to solicit a late bid. Rather, it would have been to enquire

SIMPSON, TILLINGHAST & SORENSEN
One Sealaska Plaza, Suite 300
Juneau, Alaska 99801
(907) 586-1400 Fax (907) 586-3065

Aetna, of course, knew nothing of any of this.

As a result of Premera's answers (and even though Premera ostensibly had no competition at this point, Aetna's proposal still being lost), the Division rescored Premera's proposal on February 16-17, 2006; *Attachment 5(d), Attachment 11 (email response from Walt Harvey)*. The Division's extensive work with Premera had succeeded in increasing Premera's point total for the Non-Cost factors by 629 points—to 2119 points. *Attachment 5(d) at 1-2, Chart 1*.

One day after this re-scoring, the Division issued its initial Notice of Intent to Award, and Aetna placed its phone call to the Division. After considerable pleading by Aetna that it had timely delivered a comprehensive and complete proposal, the Division looked again, and found all of the missing boxes in a store room after a mere hour's search. *Id* at ¶14.

The State promptly rescinded the Notice of Intent, and commenced another evaluation process that is the subject of this protest. *Id at ¶17*. This process is explained in (i) ¶17 of the *Mike Wiggins Affidavit*, (ii) a confirming memorandum found at *Attachment* 2, (iii) the *Fifth Affidavit of Mike Wiggins*, and (iv) the *Affidavits of Mike Robinson and Reed Stoops*, all of whom were participants in a phone conference that resulted in the agreement contained at *Attachment 2*. The essence of that agreement is as follows:

Because of vacation plans, the same full evaluation team that had scored Premera could not be reformed to evaluate Aetna's newly-found bid. To accommodate a quick resolution of the matter, Aetna agreed that the Division could "reconstitute" the original

---

into the inarguably odd fact that the huge middle of the incumbent contractor's bid was nowhere to be found.

SIMPSON, TILLINGHAST & SORENSEN
One Sealaska Plaza, Suite 300
Juneau, Alaska 99801
(907) 586-1400 FAX (907) 586-3065

evaluation team so that it "consist[ed] of three members, two of whom were on the original [evaluation committee] that scored Premera's proposal." *Attachment 2* at ¶1 This "reconstituted" team would first perform a threshold evaluation of Aetna's newly-discovered bid to determine whether that bid was "reasonably susceptible for award." *Id* [2] By "reconstituting" the team in this manner, Aetna was assured that the scores of the "reconstituted" committee would be as comparable as possible to the scores of the original committee, since 2/3 of the scores of the "reconstituted" committee would come from individuals who had actually also scored Premera *Robinson Aff.* ¶7; *Stoops Aff.* ¶6; *Fifth Wiggins Aff.*, ¶7 [3]

Unfortunately, the Division breached the agreement, and appointed only <u>one</u> person who had actually scored Premera to the "reconstituted" committee Neither of the other two members of the "reconstituted" committee had scored Premera on either of the two Premera scorings *Section VII, post; see also Chart I and pp 1-2 of Attachments 5(a)-(d)* [4]

There was then a second undisclosed breach of the agreement After the "reconstituted" committee completed its initial scoring of Aetna, and if Aetna's proposal passed its threshold evaluation (which it did [*Wiggins Aff.*, ¶18]), the agreement

---

[2] / Under Alaska's procurement code, the Procurement Officer is allowed to discuss first proposals, on an even-handed basis, with all bidders who are "reasonably susceptible of being selected for award," and this for the purpose of ultimately soliciting a "best and final offer" from this final pool of bidders AS 36 30 240 This initial process does not constitute a scoring of one proposor against another, but rather a look at the intrinsic strengths and weaknesses of a proposal, so as to see whether, if improved, it might plausibly become the "best and final offer "

[3] / It is worth noting that Aetna would have been well within its rights to demand that the Division comply with 2 AAC 12 260(a), and have its "found" proposal evaluated by <u>exactly</u> the same "committee" that had evaluated Premera's bid Aetna was being collegial here But as we shall shortly see, no good deed goes unpunished

[4] / Aetna had no knowledge of the Division's breach at the time, and thus no opportunity to correct it

SIMPSON, TILLINGHAST & SORENSEN
One Sealaska Plaza, Suite 300
Juneau, Alaska 99801
(907) 586-1400 Fax (907) 586-1065

provided that each party would have the opportunity to submit a best and final offer. In conjunction with that best and final offer, the Division would contact both parties to obtain new responses on Non-Cost Factor issues that were of concern to the Division. *Attachment 2*, ¶3. Once those offers, and the parties answers' to the Division's questions, were submitted, the agreement provided that "both proposals will be scored," and a winner would be selected. *Id.* at ¶4.

It was Aetna's understanding that this paragraph meant that the entire "proposal" (both cost and Non-Cost Factor components) would be evaluated. *Robinson Aff.* ¶10. This was very important to Aetna, since this last scoring would be the only opportunity when both proposals would be re-scored by single, identical review committee--the so-called "reconstituted" committee. *Id.*

Indeed, until the Division responded to Aetna's protest on March 21, 2006 (*see Section V, post*), Aetna had assumed that a Premera scoring tally entitled "*2nd Score After Best and Final, Premera*" and found at *Attachment 5(d)* was the promised scoring of Premera's last proposal by the "reconstituted" committee. It was not until service of the Division's response to Aetna's protest that Aetna learned that, contrary to ¶4 of the agreement, there had been no rescoring of Premera's Non-Cost Factors by the "reconstituted" committee. Rather, the rescoring found at *Attachment 5(d)* was actually the rescoring of Premera's proposal that had been done on February 17—before Aetna's "lost" proposal had been found. *Attachment 10 at 8-10, Attachment 11.*

Apparently, the only things done with the parties' final proposals under the agreement were a comparison of the new cost bids, and a brief revisiting of three Non-Cost topics in Aetna's final proposal. *Attachment 10* at 9. It was on that basis that the

SIMPSON, TILLINGHAST & SORENSEN
One Sealaska Plaza, Suite 300
Juneau, Alaska 99801
(907) 586-1400 FAX (907) 586-3065

Procurement Officer issued his February 28 Notice of Intent to award the contract to Premera.

And so, at the time the final Notice of Intent Award had been issued, Aetna's and Premera's final proposals have never been scored by either an identical review committee, nor even by separate committees that had more than one common member between them.

And yet despite all the disadvantages thrown Aetna's way in this unfortunate process, when all was said and done, out of a 5000-point evaluation process, Premera was able to top Aetna by only 141 points.

### III. Aetna's Protest

Aetna's protest is appended as *Attachment 9* to this Appeal. In a nutshell, Aetna claimed that the procurement

- violated state statute (AS 36.30.240) and regulation (2 AAC 12.290(a)), and created an appearance of impropriety that undermined the integrity of the competitive bidding process, because, while the Department held prolonged and extensive discussions with Premera to produce its "best and final offer," the counterpart discussions with Aetna were only perfunctory. Because state law requires that all proposors be accorded fair and equal treatment with respect to any opportunity for discussion and revision of proposals" (AS 36.30.240(a)), and "[t]he opportunity for confidential discussions, if held, must be extended to all offerors submitting proposals deemed reasonably susceptible for award" (2 AAC 12.290(a)), Aetna contended that the procurement was illegal and subverted the

SIMPSON, TILLINGHAST & SORENSEN
One Sealaska Plaza, Suite 300
Juneau, Alaska 99801
(907) 586-1400 FAX (907) 586-3065

competitive process It also contended that this process actually affected the outcome of the evaluation, and

› For the "best and final offer" evaluation, the Division used separate evaluation teams to evaluate the two bidders, with only one member of these three-member teams being in common Because many of the factors on which the evaluation was based were subjective, and hinged on personal idiosyncrasy, the absence of common evaluators rendered the evaluation useless for determining which proposal was "most advantageous to the state" as required by AS 36 30.250(a), and impaired, if not destroyed altogether, the integrity of the competitive bidding process [5] Aetna also asserted that this procedure clearly affected outcome of the procurement Nor did the process comply with 2 AAC 12 260(a), which only authorizes the Division to score RFP's through a single "evaluation committee"

## IV. Aetna's Request for a Stay of Award

Contemporaneous with its protest, Aetna filed a request with the Procurement Officer, pursuant to AS 36 30 575, to stay award of the contract pending disposition of Aetna's protest and any subsequent administrative appeal *Attachment 9 at Cover Letter* The Department never ruled on that request before simply going ahead, and signing the contract Without notice of any kind to Aetna, the Department executed the contract on March 13, 2006

[5] A third issue raised in the protest--*i e* , that the Division failed to separately score an Aetna proposal to provide pharmaceutical claim services only (an alternative specifically called for the RFP), is not being appealed, and does not receive further discussion in this Appeal

SIMPSON, TILLINGHAST & SORENSEN
One Sealaska Plaza, Suite 300
Juneau, Alaska 99801
(907) 586 1400 Fax (907) 586 3065

## V. The Procurement Officer's Response to Aetna's Protest; Identification of Erroneous Factual Findings and Resultantly Erroneous Legal Conclusions

On March 21, 2006, the procurement officer rejected Aetna's protest. *Attachment 10* The procurement officer's principal findings and conclusions were as follows:

- The Division had complied with the parties' agreement, and had evaluated Aetna's proposal using a three-person review team comprised of two persons who had actually scored Premera's first proposal,
- The communications between the Division and Aetna, on the one hand, and Premera, on the other, were essentially equal,
- Any difference in communications between the Division and Aetna, on the one hand, and Premera, on the other hand, did not create an appearance of impropriety, [6]
- Neither the use of different evaluation teams nor the disparity in treatment between proposors affected the outcome of the procurement; and
- The Division acted in good faith.

From these factual findings, the procurement officer drew the ultimate legal conclusion that Aetna's protest was without merit. As required by AS 36.30.590(b)(2), Aetna respectfully submits that each of the above-described factual findings was erroneous, and that if any of those findings is reversed, Aetna will be entitled to appropriate relief as a matter of law.

---

[6] "Whether an appearance of impropriety exists is a factual question . . ." *In the Matter of J&S Services, Inc*., Alaska Dept. of Administration Case No. 02-01 (Sept. 16, 2002) ("*J&S Services*") at 5.

SIMPSON, TILLINGHAST & SORENSEN
One Sealaska Plaza, Suite 300
Juneau, Alaska 99801
(907) 586-1400 FAX (907) 586-3065

## VI. The Nature of the Contract Being Awarded

To evaluate Aetna's claims, a brief background on the contract at issue here is warranted

The services for which the RFP solicited proposals were to provide a wide range of medical and pharmacy insurance claim management services to the State. *Request for Proposals*, §1.03. [7] Those services have been provided economically and efficiently by Aetna itself, or through its affiliates, for some 24 years *Wiggins Aff.* ¶4 The State of Alaska self-insures both its medical and pharmaceutical claims; however, it still needs an agent to evaluate and process those claims *Third Wiggins Aff.*, ¶5; *RFP*, §6.06 The agent charges a per-employee and per-retiree fee for providing those administrative services, and its proposal consists, in part, on the proposed amount of those fees. *Id.*, *RFP at Section 7.23*

However, because many factors other than cost bore on the State's choice of suppliers (factors such as expertise, system compatibility, ability to serve clientele, and the like), a "Request for Proposal" format was utilized, rather than a Request for Sealed Bids Under the RFP, cost accounted for only 40% of the total bid evaluation, all the other relevant factors (loosely called "Non-Cost Factors") were in the technical portion of the RFP, and were collectively allocated 50% of the total scoring *RFP*, §10. [8] As to those Non-Cost Factors, each individual evaluator awarded points based upon that evaluator's personal judgment as to how the proposor dealt with each Non-Cost Factor.

---

[7] / The lengthy RFP for this contract has not been appended as an exhibit to this Appeal because of its bulk It is on file with the Procurement Officer, and Aetna would respectfully request that it be made part of this Appeal record by reference

[8] / The remaining 10% was allocated for preference points

SIMPSON, TILLINGHAST & SORENSEN
One Sealaska Plaza, Suite 300
Juneau, Alaska 99801
(907) 586-1400 FAX (907) 586-3065

When the so-called "best and final" proposals were opened, the *cost* of the two responsive proposals appeared virtually identical. On the cost side, Premera was awarded 2000 points for having the lowest cost bid, while Aetna was awarded 1930 points for having a cost bid that was only marginally higher than Premera's. *Attachment 10* at 7. However, Premera's cost bid was understated (and in fact materially higher than Aetna's) because some large costs that should have been included as part of Premera's administrative fees were in fact disclosed only in other, more subjective portions of Premera's proposal that are not added into the cost component of the proposal. *See, generally, Affidavit of Matt McGuinness*

**VII. The Department Violated AS 36.30.250(a) and 2 AAC 12.260(a) by Using Different Evaluation Teams to Score the Two Applicants, Making it Impossible to Determine Which Proposal was "Most Advantageous to the State." The Division Erred in Finding that: (a); Aetna Had Agreed to this Process; and (b) any Error did not Affect the Outcome of the Procurement.**

A *In the absence of any agreement, the use of different evaluation teams to score different proposals is unlawful, and in this case affected the outcome of the procurement.* In its decision on Aetna's protest (*Attachment* 10), the Division does not contend that, absent some special agreement, it is permissible to use two different evaluation committees to score two different proposals under an RFP. After all, 2 AAC 12.260(a) only authorizes the Division to review RFPs through an "evaluation committee," *singular*, and for good reason.

SIMPSON, TILLINGHAST & SORENSEN
One Sealaska Plaza, Suite 300
Juneau, Alaska 99801
(907) 586-1400 FAX (907) 586-3065

The ultimate goal of the competitive bidding process—the one on which its "integrity" turns—is to provide "the opportunity to *compare* multiple responsible bids." *Laidlaw Transit Inc v Anchorage School District*, 118 P 3rd 1018, 1033 (Alaska 2005), *emphasis added*. Any error that undermines the State's ability to meaningfully compare competing proposals deprives the public and the courts of any basis to assess the legality of the agency's choice.

In this case, the points for Non-Cost Factors were awarded based on an evaluation of largely qualitative (as opposed to quantitative) factors, ranging from the suitability of appeals procedures to transition and training concerns. *Wiggins Aff.*, ¶3. Points were awarded based on how individual evaluators reacted to the proposor's approach to a long list of subjective issues—responses that would translate into very different point totals among different evaluators, depending on each evaluator's individual background, grading policies and priorities.

The evaluators' separate final scores for the subjective, 50% Non-Cost Evaluation illustrate how idiosyncratic this scoring process really was:

| Evaluator | Evaluated | Score |
|---|---|---|
| Miller | Aetna | 2440 |
| | Premera | 2160 |
| Gray | Premera Only | 2207 |
| Porter | Aetna Only | 2120 |
| Williams | Premera Only | 1990 |
| Shier | Aetna Only | 1585 |

SIMPSON, TILLINGHAST & SORENSEN
One Sealaska Plaza, Suite 300
Juneau, Alaska 99801
(907) 586-1400 FAX (907) 586-1065

*Attachment 5(b) and (d) at 1-2* The Division then took the average of each evaluator's scores (*i.e.*, Aetna's score was based on the average of Miller's, Porter's and Shier's evaluation, while, Premera's was based on the average of Miller's, Gray's and Williams' evaluation), and (because of the near-identity of the cost score), the proposor with the highest average evaluation won.[9]

It is also apparent that compromising the rating process by using non-comparable, idiosyncratic scoring affected the outcome. For example: (i) the only evaluator who evaluated both applications, Ms. Miller, rated Aetna significantly higher than Premera, while (ii) one of the evaluators who scored only Aetna (Shier) gave Aetna aberrationally low scores (535 points lower than Porter), and 855 points lower than Miller. Given that Premera ultimately received only 141 more points than Aetna, it is apparent that point swings of up to 855 points that were due entirely to the use of different evaluators plainly affected the procurement's outcome.

B. *Aetna did not agree to this procedure.* The Division's only defense to its unusual procedure here is that Aetna agreed to it. *Attachment 10* at 5-9. Aetna agreed to a process, but it did not agree to this process.

As discussed in *Section II, ante*, the parties' February 24, 2006 agreement provided that both Aetna's and Premera's final proposals would be reviewed by a so-called "reconstituted" Procurement Evaluation Committee (or "PEC") that would:

> *consist[] of three members, two of whom were on the original PEC that scored Premera's proposal in the initial evaluation process*

[9] / *Attachment 5(b) at 2 (Aetna "best and final" summary sheet), Attachment 5(d) at 2 (Premera "best and final" summary sheet).*



SIMPSON, TILLINGHAST & SORENSEN
One Sealaska Plaza, Suite 300
Juneau, Alaska 99801
(907) 586-1400 FAX (907) 586-3065

*Attachment 2*, ¶1, *emphasis added* The members "who scored Premera's" proposal," on the one hand, and the members of the "reconstituted" committee who scored Aetna's proposal, can be found in summary fashion on *Chart 1* to this memorandum, and more directly on the scoring tally sheets for both Aetna and Premera at pp. 1-2 of *Attachments 5(a)-5(d)*

From those documents, one can see that there was, in fact, only <u>one</u> member of the "reconstituted" team, and not two as the agreement requires, who had also "scored Premera's proposal." That lone individual was Freda Miller.

The Division's answer is that Mr. Pat Shier was also a member of the evaluation team that "scored Premera's proposal." *Attachment 10* at 5-6. That is not true. The evaluation team score sheets for Premeras' first and second proposals are found, respectively, at pages 1-2 of *Attachments 5(c) and 5(d)*. The reader will see that Mr. Shier's name has been <u>*crossed off*</u> the list of evaluators on both score sheets, and not a single Premera scoring sheet contains any score from Mr. Shier.

The Division's explanation is that Mr. Shier did begin to score Premera's first proposal. But Shier abruptly ceased his partial scoring just over half-way through the scoring factors, left his half-done worksheet incomplete, was resultantly <u>*scratched off*</u> the Premera evaluation team; and was never heard from again on any Premera proposal, first or second. [10/]

The reason that Aetna insisted that a majority of the reconstituted team be comprised of employees who had "scored Premera's proposal" was to ensure

---

[10/] Shier's partial scoring of Premera's first proposal is found at *Attachment 5(c), pp. 114-136*. The remaining items that Shier did not score can be found (in the evaluation sheets of a different reviewer) at *Attachment 5(c), pp. 159-170*.

SIMPSON, TILLINGHAST & SORENSEN
One Sealaska Plaza, Suite 300
Juneau, Alaska 99801
(907) 586-1400 Fax (907) 586-3065

comparability of Aetna's and Premera's scores *Robinson Aff.* ¶7, *Fifth Wiggins Aff.* ¶ 7, *Stoops Aff.* ¶6 Premera's first and second scores were not affected in the slightest by Shier, and so an Aetna score that include scoring by Shier would be less comparable, not more As Mr Robinson, who attended the negotiations and signed the agreement for Aetna, explains:

> *It never occurred to us, and it was never mentioned, that one of the two "original" PEC members would be a member that did not score Premera Such an individual would have been of no value in reconstituting a comparable-as-possible review team, and we would never have accepted such a major change in the agreement*

*Robinson Aff.* ¶7.

It is frivolous for the Division to maintain that Mr Shier was a member of the evaluation committee "that scored Premera's proposal" The allegation, in fact, is the best illustration of the Division's bad faith in this entire procurement process.

Finally, the Division breached its promise that "both [final] proposals will be scored" by the "reconstituted evaluation committee" *Attachment 2*, ¶4 Instead, the Division simply looked at the new cost component of the proposals and three minor items in Aetna's new proposal *Attachment 10* at 8-9.

Mr Harvey explained that it is a "longstanding practice" to review only the cost component of final proposals, unless changes to other components of the proposal had been made But the parties' agreement here had little to do with "longstanding practice"—it was, in many respects, a very unique arrangement The obvious rationale for not rescoring unchanged portions of a final proposal is that the <u>*same evaluation committee*</u> had already scored the unchanged portions But here, there was a new, "reconstituted" evaluation committee, and a comprehensive review of both parties' final

SIMPSON, TILLINGHAST & SORENSEN
One Sealaska Plaza, Suite 300
Juneau, Alaska 99801
(907) 586-1400 Fax (907) 586-1065

proposals gave the Division its only chance to have both parties' proposals scored, from top to bottom, by the same people

The importance of this level playing field was why Aetna took the agreement at its word, and properly assumed that "proposal" meant the entire proposal, and not just a portion of the "proposal" that represented only 40% of the scoring weight (*i.e.* the cost component). *Robinson Aff.* ¶10.[11/] The Division's failure to follow the plain wording of the agreement here makes it doubly difficult for the Division to justify its conduct on the basis of that agreement

**VIII. The Division Violated AS 36.30.240 and 2 AAC 12.290, and Created an Appearance of Impropriety that Actually Affected the Outcome of the Procurement. By Engaging in Prolonged and Complex Negotiations With Premera, But Only Perfunctory Correspondence With Aetna, Before Soliciting "Best and Final Offers." The Division Erred in Finding that: (a) the Communications with Aetna and Premera Were Equivalent; (b) any Difference did not Raise an Appearance of Impropriety or Influence the Outcome of the Procurement**

"The appearance of impropriety and impropriety in fact are sufficient to void procurement contracts." *Paul Wholesale v. State*, 908 P.2nd 994, 1000 (Alaska 1995). *Dick Fisher Development No. 2 v. Department of Administration*, 838 P.2nd 263, 269

[11/] Aetna's interpretation of ¶4 of the agreement is consistent with Section 7.26 of the Agreement, which makes it clear the the "proposal" includes the offeror's responses to all of the sections of the RFP, including, but not limited to, the cost section.

SIMPSON, TILLINGHAST & SORENSEN
One Sealaska Plaza Suite 300
Juneau, Alaska 99801
(907) 586-1809 FAX (907) 586-3065

(Alaska 1992); *In the Matter of J&S Services, Inc.*, Alaska Dept. of Administration Case No. 02.01 (Sept. 16, 2002) ("*J&S Services*") at 5.

The appearance-of-impropriety rule was applied in *Paul Wholesale*, 753 P.2nd 1132. In that case, DOT&PF cancelled all parties' rights in a procurement that had already resulted in a contract award to two different bidders because of certain alleged *ex parte* communications between one party and DOT&PF. In upholding DOT&PF's cancellation, the Supreme Court reaffirmed its holding in *Dick Fisher* that the appearance of impropriety was enough to void a procurement. Further, it held that "subjective bad faith," or actual "bias" on the part of the agency, is not required. Bad faith was only one relevant factor; equally important was "the amount of agency discretion and whether the agency violated the relevant law." *Id.* at 1002.

Similarly, in *J&S Services*, the hearing officer ruled that extensive *ex parte* communications between a member of the evaluation committee and one proposer created a "substantial and material appearance of impropriety." *Id.* at 7.

In assessing whether apparent impropriety warrants relief, one relevant consideration is whether the impropriety violated specific statutes and regulations written to avoid that impropriety. *Paul Wholesale*, 908 P.2nd at 1002; *J.S. Services*, *ante* at 7; *Keco Industries v. United States*, 492 F.2nd 1200, 1203 (Ct. Cl. 566 (1974). Here, there exist specific statutory and regulatory prohibitions on precisely the kind of one-sided, *ex parte* communications in which Premera and the Division engaged.

Under AS 36.30.240 and 2 AAC 12.290, the Division may discuss proposals with proposers who are "reasonably susceptible of being selected for award" in order to flush

SIMPSON, TILLINGHAST & SORENSEN
One Sealaska Plaza, Suite 300
Juneau, Alaska 99801
(907) 586-1400 FAX (907) 586-3065

out proposal details, and, those discussions can lead to changes in the proposer's so-called "best and final offer." [12]/

This authority, however, is subject to a caveat—that all such proposers "shall be accorded fair and equal treatment with respect to any opportunity for discussion and revision of proposals" (AS 36.30.240(a)), and that "[t]he opportunity for confidential discussions, if held, must be extended to all offerors submitting proposals deemed reasonably susceptible for award." 2 AAC 12.290(a).

Ostensibly under these laws, the Division held extensive discussions with Premera which had the effect of giving Premera detailed advice on how to:

- retract portions of their proposal which, absent a retraction, would leave Premera's proposal unresponsive to the RFP.

---

[12]/ In addition, 2 AAC 12.285 permits the Division to communicate with an offeror and ask clarifying questions to eliminate confusion concerning the contents of a proposal, but the questions may not result in a substantive change in the proposal. 2 AAC 12.285 does not avail the Division here. Section 12.285 says:

> In order to determine if a proposal is reasonably susceptible for award, communications by the procurement officer or the procurement evaluation committee are permitted with an offeror to clarify uncertainties or eliminate confusion concerning the contents of a proposal which does not result in a material or substantive change to the proposal.

*Emphasis added.* The extensive discussions between the Division and Premera from 2/12/06 to 2/14/06, concerning Non-Cost Factors, resulted in a near 50% increase in Premera's point total from 1489.5 to 2119. *Chart 1, Attachment 5(c) at 1-2, Attachment 5(d) at 1-2.* The additional points were the product of Premera's significantly changing its answers to many RFP questions. *See Attachment 4(b) at 7 et seq.* And, further discussions between the Division and Premera, on 2/24/06, enabled Premera to lower its Best and Final proposal by more than $6.88 million in costs. *Wiggins Aff. ¶¶ 2-11, McGuinness Aff. ¶¶ 10-23.* All of these changes to Premera's proposal were obviously material and substantive, and therefore beyond the scope of 2 AAC 12.285. Moreover, that regulation authorizes only "clarifying" questions. The questions asked by the Division here were not "clarifications," but rather suggestions by the Division to Premera to change its proposal. *See text, post.*

SIMPSON, TILLINGHAST & SORENSEN
One Sealaska Plaza, Suite 300
Juneau, Alaska 99801
(907) 586-1400 FAX (907) 586-3065

- insert items required to be included in the RFP, but originally omitted by Premera, and
- suggest available contract administration measures that could result in lower cost, or increased evaluator attractiveness, and hence higher point scores.

*Wiggins Aff. ¶¶ 21-29, Attachments 4(a) and 4(b).* Premera accepted virtually every suggestion given by the Division, and as a direct result: (1) Premera's gross point total from its Non-Cost factor evaluation rose by 629 points from its original proposal, and (2) Premera was able to move $6.88 million in real, direct costs to the State into a category that was not counted as a proposed "cost," resulting, in turn, in a $6.88 million understatement of its Best and Final cost bid. *Compare Attachments 5(c) and 5(d). Wiggins 3rd Aff. ¶¶ 2-11, McGuinness Aff. ¶¶ 10-23, Attachment 4(b) at 58, Attachment 4(c) at 1.*

On February 7, 2006, the Division began extensive private communications with Premera aimed at improving its offer.[13] On February 12-14, the Division and Premera exchanged 62 pages of "clarification" questions and answers on Premera's proposals for various Non-Cost Factors in the RFP, each question being aimed at soliciting a more beneficial answer. *Attachment 4(a) at 2-19, 4(b) at 7-56.* At the conclusion of these communications, the Division rescored Premera's heavily-revised proposal and, as a direct result of the Division's efforts to make Premera's proposal more attractive, Premera's proposal gained 629 points in the Non Cost Factor category—a near 50%

[13] / Email messages document at least three private conversations between the procurement officer and Premera officials (on February 7, 9 and 15). *See Attachments 4(a) at 1 & 20-21 and 4(b) at 6.*

SIMPSON, TILLINGHAST & SORENSEN
One Sealaska Plaza, Suite 300
Juneau, Alaska 99801
(907) 586-1400 FAX (907) 586-3065

increase in Premera's point total *See Chart 1. Compare Attachments 5(c) and 5(d), pp 1-2*

Aetna was never offered any similar opportunity, leaving Aetna so far behind the competitive curve that even Department of Administration Commissioner Nordstrand was forced to admit to the Alaska Legislature that the playing field was "[n]ot entirely level" because the answers Premera resubmitted to the Division on February 14, 2006 were the equivalent of a "second offer." *Attachment 12 at 24*

The second round of questions occurred on February 24, 2006, during the evaluation process called for by the parties' agreement, when the Division asked questions of both Aetna and Premera pursuant to paragraph 3 of that agreement *Attachment 2*. Here, the different treatment that the Division gave Aetna and Premera was substantive. Aetna, on the one hand, was given only three pages of minor, technical suggestions that ultimately resulted in awarding a mere 21 extra points to Aetna (*Wiggins Aff., ¶ 19, Attachment 3)*. Conversely, the Division's communications to Premera gave Premera a clear road map as to how to reclassify $6.88 million of its proposed costs to a category that would not appear in the "cost" section of the bid, and thereby artificially lower Premera's cost bid by that same $6.88 million. *Third Wiggins Aff., ¶¶ 2-11, see also McGuinness Aff. ¶¶ 10-23, see also text, post*

And so, while Premera benefited from the Division's extensive communications by an 629 additional points and was also able to decrease its cost proposal by more than $6.88 million in its final bid, Aetna's perfunctory dialogue with the Division yielded it only 21 additional points. *Compare Attachments 5(a) and 5(b) with Attachment 5(c) and 5(d)*

SIMPSON, TILLINGHAST & SORENSEN
One Sealaska Plaza, Suite 300
Juneau, Alaska 99801
(907) 586-1400 Fax (907) 586-3065

The relative impact of those questions on the scoring process was as follows:

| COMPANY | EXTENT OF BIDDER QUESTIONING | ADDITIONAL POINTS FROM ANSWERS COST BID IMPACT |
|---|---|---|
| Premera | 62 pages of questions and answers, several private conversations | 629 points<br>$6.88 million cost bid reduction |
| Aetna | 3 pages of questions | 21 points<br>No cost bid impact |

The extra points granted to Premera were doubly significant:

- *First*, in the initial grading of the two proposers (the grading of the initial proposals, before the Division's extensive assistance to Premera), Aetna won the Non-Cost Scoring portion (*i.e.* the 50% of the bid that reflects proposal quality) by 541 points. *Compare Attachments 5(a) and 5(c)*, while
- *Second*, even after its extensive assistance from the Division, Premera was able to beat Aetna's Non-Cost score by only 71 points. *Compare Attachments 5(b) and 5(d)*. It is apparent, then, that without these extensive suggestions from the Division, Premera would not have won the Non-Cost Scoring on the final "best and final" round. The summary of all of these scores is contained in *Chart 1*, which is appended to this appeal.

As a result, the impropriety plainly affected the outcome of the solicitation — another factor counseling for relief. *Keko*, 492 P.2nd at 1203; *J&S Services*, *ante* at 6.

Because of the potential for abuse in private bidder/agency conversations, courts are insistent on all qualified proposers in an RFP being given the "same opportunity" in curing proposal shortcomings. *Gunderson v. University of Alaska, Fairbanks*, 922 P.2nd

SIMPSON, TILLINGHAST & SORENSEN
One Sealaska Plaza, Suite 300
Juneau, Alaska 99801
(907) 586-1400 FAX (907) 586-3065

229, 235 (Alaska 1996) "Fair" contract solicitation, and demanding that no proposer "receive[] an unfair competitive advantage," are critical to ensuring that the best possible offer emerges from the bidding process *McBirney & Associates v State*, 753 P 2nd 1132, 1135 (Alaska 1988)

Hence, Aetna was entitled to equal treatment in post-opening discussions with the Division Indeed, because of the obvious potential for abuse in statutes giving bidding agencies the authority to engage in private conversations with qualified RFP proposers, courts have been especially alert in demanding equality in the substance of those communications, and not just in form

Here, the danger of apparent inequality emerges from the Division's own wording in its questions to Premera Time-and-time again, the Division asks Premera to "clarify" a point that needed no clarification. In one class of cases, for example, Premera's original offer unequivocally rejected a condition of the RFP The Division, instead of simply asking Premera to reverse its position, asked it to "clarify" that it would accept the condition, despite the fact that its original proposal made it clear that it would not capable of taking a hint, Premera routinely agreed to "clarify" that it would, after all, abide by the RFP, which resulted in material and substantive changes to Premera's proposal

Mr Mike Wiggins offers several examples of this in his affidavit (*id* at ¶¶21-29, *Wiggins 3rd Aff ¶¶ 2-11*), including the following

> *The RFP asks the offeror to agree that it will answer 85% of all telephone calls within 30 seconds in any given month, or face penalties RFP, §10 11(a)(1) In its original proposal, Premera "disagreed" with this element of the RFP This caused Premera to lose points on this issue in its first proposal, receiving only 2 points from one evaluator (Gray) and 0 from another (Williams) out of a possible 5 points ... To raise Premera's*

SIMPSON, TILLINGHAST & SORENSEN
One Sealaska Plaza, Suite 300
Juneau, Alaska 99801
(907) 586-1400 FAX (907) 586-3065

> *point total, the Department asked Premera to "clarify" that it would answer 85% of all calls on a monthly basis, despite what it said in its proposal ... In response to the State's suggestion that Premera change its position, Premera agreed to the State's demand ... As a result, Premera received 3.5 added points from one evaluator (Gray) and additional points from another (Miller) in its "best and final" proposal.*

*Id.* at ¶21. In a similar vein: (1) Premera clearly declined to offer direct deposit in its original offer, but was convinced by the Division to change its mind (*id.* at ¶22); and (2) the Division asked Premera to "agree" to a service that it had unequivocally not agreed to provide in it proposal. *Id.* at ¶23. Additional "clarifications" that in fact resulted in significant point increases and cost decreases are given as examples at ¶¶23-29 of Mr. Wiggins' affidavit, and *Attachments 4(a) and 4(b)* are rife with them.

Wiggins and Mr. Matt McGuinness also discuss in their affidavits how the Division suggested the re-packaging of nearly $6.88 million of "Network Access Fees," which effectively helped lower Premera's Best and Final cost proposal by at least that amount. *Third Wiggins Aff., ¶¶ 2-11, see also McGuinness Aff. ¶¶ 10-23.* Premera's initial bid was understated by a significant amount, since its $34 million bid did not include $6.88 million in "Network Access Fees." *Wiggins Aff., ¶ 10.* Premera accomplished this by calling these fees "claim charges," which are not included in the cost portion of the bid. *Id.*[14] The Division advised Premera, in "clarification" questions dated February 24, 2006, that these "Network Access Fees" were not "claim charges" and needed to be billed in a different manner. *Attachment 4(b) at 2 & 57.* Premera informed the procurement officer, in its February 28, 2006 Best and Final

[14] / The "cost" of the proposal to the State (which, again, is worth 40% of the total proposal) is supposed to be disclosed in response to Section 7.23 of the RFP. In all fairness, all costs being charged to the State as a result of the proposal should be included in the response to Section 7.23. The point of this narrative is that, in Premera's case, they were not.

SIMPSON, TILLINGHAST & SORENSEN
One Sealaska Plaza, Suite 300
Juneau, Alaska 99801
(907) 586-1400 FAX (907) 586-3065

Response, that these fees were "eliminated." *Attachment 4(b) at 57*. Those fees, however, were not "eliminated." Rather, Premera merely removed "Network Access Fees" from the category of claim charges, but recouped the amount of those formerly-called "Network Access Fees" ($6.88 million) by increasing the cost associated with a Non-Cost Factor. *McGuinness Aff. ¶ 19*. The net result was to bury $6.88 million in real, direct costs to the state in a Non-Cost Factor portion of the proposal, artificially reducing the cost proposal itself by that same amount. *Id.* And, none of this would have been possible without the guidance that had been supplied by the Division over the month of February.

In *Dynacs Engineering Company v. United States*, 48 Fed.Cl. 124 (2000), the government made a disproportionate effort to enhance one RFP proposer's bid, offering it multiple opportunities to cure deficiencies and working with the favored bidder to cure nine shortcomings while pointing out only two deficiencies in the other bidder's proposal. The government tried to justify this substantive inequality by claiming that it had made some effort to work with both bidders. The court disagreed, holding that, in RFP discussions, the equality of treatment among proposers must be "meaningful," and both sides must be given the "same opportunity" to address weaknesses. A bidding agency cannot get by with "not telling [one bidder] about its continuing weaknesses, [while continuing to inform the other bidder] about each of [its] weaknesses until [that other bidder] got it right." 48 Fed.Cl. at 130. The disparity in both the frequency and substance of the communications among the two bidders in our case, and the vastly different results that the two sets of "discussions" achieved, proved that precisely the same inequity occurred here.

SIMPSON, TILLINGHAST & SORENSEN
One Sealaska Plaza, Suite 300
Juneau, Alaska 99801
(907) 586-1400 FAX (907) 586-9065

To the same effect is *Dubinsky v United States*, 43 Fed Cl 243 (1999), *appeal dismissed* 215 F.3rd 1350 (Fed Cir 1999), where the government also used the device of common discussions with potentially successful proposers to improve one bidder's proposal, while giving *pro forma* attention to the other Without substantive equality in the discussions between proposers, the court held, "discussions with offerors readily would be subject to abuse, merely becoming a cover for an agency's discussions with the offeror it has selected to receive the contract prior to the formal selection decision." *Id* at 263-4, *see also Paramax Systems Corp v CAE-Link Corp*, *1993 WL 485205 (Com Gen ) (October 27, 1993)*, (where bidders "were not treated equally since they were not given the same opportunity to participate in discussions and to amend their cost price proposals after BAFO [Best and Final Offer]," Comptroller General recommended a new round of BAFO's and, if necessary, cancellation of the originally-successful contract)

By selling Aetna short in the negotiation process, the big loser could well have been the Alaska public Could the Division have gotten the best deal for Alaskans by engaging in the same discussions with Aetna that it had undertaken with Premera? As the court in *McBirney* stressed, we've no idea, because equality of treatment never occurred, and we thus do not know what kind of alternative proposal might have emerged from a similarly intensive effort with Aetna. 753 P 2nd at 1138

Arguably, the genesis of the unequal treatment may have arisen from the Division's misplacement of Aetna's bid From that point, and until the mistake was discovered, the Division considered Premera the only qualified bidder, and one might expect a government agency to communicate exclusively with the only bidder who (as the Division thought at the time) was qualified for the contract That spin gives the

SIMPSON, TILLINGHAST & SORENSEN
One Sealaska Plaza, Suite 300
Juneau, Alaska 99801
(907) 586-1400 Fax (907) 586-1065

Division every benefit of the doubt. But even if that were the case, the Division's ultimate failure came in its refusal to give Aetna's proposal the same individual assistance once the Division learned that Aetna was a qualified bidder whose bid was "susceptible for award." As Commissioner Norstrand acknowledged, by that time the playing field was "not entirely level," but the Division did nothing to level it. *Attachment 12 at 24*. It was incumbent on the Division to level that playing field, by helping Aetna improve its proposal to the same extent as it already had with Premera. The Division, in a word, cannot excuse such clear inequality of treatment by its own mistake, particularly when the Division later had every opportunity to rectify that mistake. The plain fact remains that the contract was awarded based on a process that treated the two proposers with patent inequality – a fact that proves not only a material statutory and regulatory violation, but as well a "serious[] impair[ment] of the purpose of the competitive bidding statutes" that warrants voiding the contract. *Earthmovers of Fairbanks, Inc. v. State*, 765 P.2nd 1360, 1369 (Alaska 1989).

**IX. The Appropriate Remedy Here is to: (a) Re-Score the Parties' Previously-Submitted Final Proposals in their Entirety, Using a Three-Person Team Comprised of Uninvolved, Qualified and Unbiased Personnel Assisted by a Mutually-Agreeable Consultant With Expertise in Evaluating Health Claim Management Service Proposals; (b) Have the Evaluation Team Include Total Costs (as Defined in this Section) in the Cost Proposal Required by Section 7.23 of the RFP; and (c) Cancel Premera's Existing Contract, and Award**

SIMPSON, TILLINGHAST & SORENSEN
One Sealaska Plaza, Suite 300
Juneau, Alaska 99801
(907) 586-1400 FAX (907) 586-3065

**the Contract to Aetna, if the new Evaluation Committee Finds Aetna's Final Proposal to be Most Advantageous to the State**

The deciding officer's discretion to grant relief in this case is defined by AS 36.30.585, which broadly authorizes the grant of "an appropriate remedy." §585(a). Subsection (b) of that section guides the deciding officer in determining what remedy is appropriate.

> *In determining an appropriate remedy, the procurement officer shall consider the circumstances surrounding the solicitation or procurement including the seriousness of the procurement deficiencies, the degree of prejudice to other interested parties or to the integrity of the procurement system, the good faith of the parties, the extent to which the procurement has been accomplished, costs to the agency and other impacts on the agency of a proposed remedy, and the urgency of the procurement to the welfare of the state.*

These remedies can include "award of bid or proposal preparation cos's, termination of an existing contract, re-evaluation [and other appropriate relief]." *In the Matter of Bachner Company Inc. and Bowers Investment Company*, Ak. Dept. of Administration Case No. 03-10 (Feb. 10, 2004) at 7 ("*Bachner*"), *J&S Services, ante* at 5. To the extent that the basis for the remedy is impropriety in the procurement, the deciding officer should also consider the factors set out in *Keko*, 492 F.2nd at 1203. *J&S Services, ante* at 6.

Aetna's proposed remedy requests the deciding officer to direct the Division to appoint a three-person uninterested,[15] qualified and unbiased review team that includes a mutually-agreeable consultant (as the State has used in the past) to re-score the parties'

[15] / As used in these Sections IX and X, "uninterested" means team members who have had no involvement in any evaluation process related to this procurement, nor any other substantive involvement in the procurement. None of the new team members should be made aware of any prior evaluation scores.



SIMPSON, TILLINGHAST & SORENSEN
One Sealaska Plaza, Suite 300
Juneau, Alaska 99801
(907) 586-1400 Fax (907) 586-3065

last proposals [16] in their entirety, and, if the evaluation team determines that Aetna's proposal is the most advantageous to the state (using the RFP's point system), (i) cancel the contract awarded March 13, 2006 to Premera, and (ii) award the contract to Aetna. [17]

Before re-evaluation, the evaluation team should modify the parties' proposals in one respect only: the price offer made under Section 7.23 of the RFP should include *total costs* to the state. [18] As explained in *Section VIII, ante*, and in the *Third Affidavit of Mike Wiggins* and the *Affidavit of Matt McGuinness*, by including "total costs," the cost portion of the bid would capture (among other cost items) network savings sharing arrangements. These sharing arrangements represent a true, direct cost to the state, because they deny the State a portion of these otherwise important savings (in a nutshell, putting money in the contractor's pocket that would otherwise go into the state's pocket—here to the tune of $6.88 million). *Id.* [19] By not including those savings sharing arrangements as a

---

[16] The parties' last proposals are comprised of their RFP responses, all of their answers to the various questions propounded by the Division that have heretofore been disclosed to the parties and included in the *Attachments* to this Appeal, and the so-called Best and Final Offer submitted on February 28, 2006.

[17] This proposed remedy is premised on the assumption that this Appeal can be resolved on an expedited basis. If the appeal is not expedited, or it is not expedited sufficiently, then Aetna reserves the right to request alternative relief, and to seek such stays and interim relief as circumstances may warrant.

[18] As used in these Sections IX and X, "total costs" include program administration fees, pharmacy rebate sharing arrangements, network savings sharing arrangements, run out fees in the event of termination, banking arrangements, and other terms that affect cost. Pharmacy rebates are being included because it is common practice to offset administration fees with rebate sharing guarantees. This approach is referenced as a preferred approach in the RFP under 3.08 "Proposed Payment Arrangements".

[19] In fact, Premera was able not only to effectively obscure the $6.88 million in "Network Access Fees" discussed throughout this memorandum, but also to add additional costs to the State that were not disclosed in the cost section of Premera's proposal, such that the total amount of undisclosed costs ultimately totaled $13.74 million (using reasonable underwriting assumptions). *Id.*

STOPSON, TILLINGHAST & SORENSEN
One Sealaska Plaza, Suite 300
Juneau, Alaska 99801
(907) 586-1400 FAX (907) 586-3065

"cost," the proposor's bid understates the cost to the state of the proposal by the corresponding amount.[20]/

Aetna submits that, taken as a whole and fairly balanced, the factors set out in §585 support such a remedy. For example:

- The initial factor listed in §585—the "seriousness of the procurement deficiencies," and the "degree of prejudice to ... the integrity of the procurement system" plainly argue for re-evaluation and (if necessary) cancellation of the existing contract.

The extent to which the Division's statutory and regulatory violations have undermined the purpose of Alaska's competitive bidding laws has been extensively discussed *ante*. The extensive, one-sided contacts held with one bidder have undermined the purpose of AS 36.30.240 and 2 AAC 12.290, which is to guard against the potential for abuse inherent in pre-award conversations with proposors by placing strict limits of equality in dealings with all qualified proposors. And, as the court stressed in *McBirney v. State*, 753 P.2nd 1132, the failure of the Division to work just as intensely with Aetna as it did with Premera to improve its proposal frustrated the central purpose of our competitive bidding system—to obtain the deal "most advantageous to the state" (AS 36.30.250(a))—

[20]/ It should be noted that the relief requested here is considerably less favorable to Aetna than the relief originally requested in the Protest. *Attachment 9* at 16-17. That is because one of the material factors for shaping relief under AS 36.30.585 has changed since the protest was submitted—*i.e.*, the status of the procurement. The ultimate standard for relief under §585 is "appropriateness," which is plainly a function of current realities. But if the Division can erect some arbitrary barrier to this Appeal's request, then the relief sought in the Protest is incorporated herein by reference. Of course, the deciding officer is not limited, in fashioning relief, to that set out in the parties' papers.

SIMPSON, TILLINGHAST & SORENSEN
One Sealaska Plaza, Suite 300
Juneau, Alaska 99801
(907) 586-1400 FAX (907) 586-3065

by focusing on just one proposor, while short-shrifting a competitor who might, in fact, have been able to offer a superior alternative.

Additionally, it is self-evident that the use of different evaluation teams for the two different proposors horribly undermines the competitive system. Such a system is not, in fact, "competitive" at all, but a whimsical game of chance.

Finally, and as this memorandum has shown, both irregularities affected the outcome of the procurement.

- With respect to "the extent to which the procurement has been accomplished," and the "degree of prejudice to other interested parties," the contract has been signed, but only on March 13, 2006. The contract performance period does not begin until July 1, 2006. *RFP, Section 1.02*. In the interim, Premera will be expending funds in preparation for assuming the state's program in July. As of some point *after* July 1, 2006, these start-up funds will eventually approximate $614,000. *See Affidavit of Robert Moore* ¶5. However

  - A portion of these expenditures will be incurred after contract commencement on July 1, 2006. *Id.* at ¶7.
  - The funds will be incurred only incrementally over the next three months (that is, the number today does not approach $614,000). The earlier the merits of this appeal can be resolved, the fewer start-up funds at stake. *Id.* at ¶5, and

Stoel Rives LLP
One Sealaska Plaza, Suite 230
Juneau, Alaska 99801
(907) 586-1400 Fax (907) 586-3065

- Even the entire $614,000 is considerably less than the $2.48 million that the state would save by accepting Aetna's proposal,[21] and a fraction of the $30 million-plus contract price.

Thus, this is not a case where a building has already been constructed (*Bachner*) or a jet completely retrofitted to meet unique state specifications (*J&S Services*). It is, rather, a case where contract performance has not even commenced, and mobilization costs are, to this point, a small fraction of ultimate contract cost.[22]

- The Division did not, in Aetna's judgment, proceed "in good faith" here — another factor relevant under both §585(b) and *Keko*. To the extent that the Division's extensive *ex parte* contacts arose from the Division's original loss of Aetna's bid documents, there is no good faith that emerges from that ostensible "mistake." Four entire boxes were "lost." And they were not lost very well, since the Division was able to find them within an hour of Aetna's notification that the materials had, in fact, been timely filed. An agency acting in good faith would have surely questioned why the State's long-time existing contractor had "omitted" the bulk of its bid, and either spent the requisite hour to find the documents much earlier, or simply contacted Aetna. Further, once the materials

---

[21] *McGuinness Aff.*

[22] If the contract is ultimately awarded to Aetna, Premera's damages, if any, would be governed by *Earthmovers of Fairbanks, Inc. v. State*, 765 P.2d 1360 (Alaska 1988). Under *Earthmovers*, (i) if Premera's original contract is void because "the defect in the award seriously impair[ed] the purpose of the competitive bidding statutes" (*id.* at 1369), then Premera would be due no damages under the contract, but could receive reimbursement of those out-of-pocket expenses that the factfinder determined fair, and (ii) if the contract is not void, it would be cancelable under Appendix A, Article 5 of the contract (*Attachment 13*), which provides for termination for the Division's convenience, and allows Premera to recover only "for services rendered before the effective date of termination." While this is not the appropriate forum to resolve Premera's damages (and in fact the issue is not yet even ripe, since Premera's contract has not yet been canceled), the extent of those conceivably-available damages does warrant note.

SIMPSON, TILLINGHAST & SORENSEN
One Sealaska Plaza, Suite 300
Juneau, Alaska 99801
(907) 586-1400 Fax (907) 586-1065

were found, the Division undertook no effort to level the now-stilted playing field before finally awarding the contract – a playing field even the agency's commissioner admits was "not entirely level." *Attachment 12* at 24.

With respect to the different evaluation teams, the Division's unilateral and undisclosed conversion of an agreement to use *one* different evaluator for an initial threshold review of Aetna's original bid into a process that used a *majority* of different evaluators for the two companies' final proposals does not reflect good faith.

And finally, the Division's contention now that Patrick Shier was a member of the evaluation team that "scored Premera's proposal" is a naked manifestation of bad faith.

- The "costs to the agency and other impacts on the agency of [Aetna's] proposed remedy, and the urgency of the procurement to the welfare of the state" weigh in Aetna's favor. As just discussed *ante*, those costs, if any, are at this juncture relatively minor, since the contract has just been awarded, performance does not commence until July 1, 2006, and currently-ongoing mobilization costs are an order of magnitude less than the longer-term sums at stake here.
- Nor is the procurement urgent. The services solicited under the procurement have been satisfactorily provided by Aetna and its affiliates for 24 years, and, even if it became necessary to extend the start-up date under the new contract past July 1, 2006, Aetna stands ready to continue to provide those services at the

SIMPSON, THACHER & BARTLETT
One Sealaska Plaza, Suite 300
Juneau, Alaska 99801
(907) 586-1400 Fax (907) 586-1065

existing contract price until a fair procurement process can be completed *Attachment 9 at Cover Letter, p. 2, Wiggins Aff.*, ¶¶ *30-31* [23].

- Finally, and with respect to the remaining *Keko* factors (1) Premera's offer was not "clearly superior" (*cf. J&S Services, ante* at 7), but in fact likely inferior in cost and quality than Aetna's [24], and (2) as we have seen in Section VIII, *ante*, the Division's impropriety in its grossly disproportionate communications with Premera violated specific statutory and regulatory prohibitions designed to avoid the precise misconduct that occurred here, and in a way that affected the outcome of the solicitation.
- Finally, failure to grant Aetna's remedy would cause extraordinary disruption to the State's provision of health care coverage to its employees and retirees. The switching of health care claim management inevitably leads to confusion and delays in obtaining payment for or reimbursement of health care expenses, and invariably causes extreme hardship on the insured—and in particular, retirees, who are dependent on prescription drug coverage. *See Wiggins Aff.*, ¶¶31-41.

---

[23] In any event, an extension beyond July 1 is probably not necessary. Because there is currently no stay in effect, Premera is beginning the mobilization process to assume control of the programs at issue—a process described in the *Affidavit of Robert Moore*. That process will continue, unless and until an expedited evaluation of new final proposals from Aetna and Premera concludes that Aetna's proposal is the one most advantageous to the state. Should Aetna prevail, its current infrastructure to continue providing these same services would have remained intact. *Wiggins Aff.* ¶¶ *30-31*. And, the re-evaluation process requested in this Appeal should not be time-consuming. Bear in mind, in this regard, that it took the Division only *four days* from its February 24 "agreement" to reconstitute the evaluation committee, solicit and review new best and final offers and responses to the Division's substantive questions, and issue a new Notice of Intent.

[24] *See McGuinness Aff.*

On balance, then, Aetna's proposed remedy best serves the public interest, is clearly the remedy that best protects the purposes of Alaska's competitive bidding laws, and at this point will pose no great hardship on other parties.

**X. Conclusion and Request for Relief**

For the foregoing reasons, Aetna respectfully requests that the deciding officer

(1) direct the Division that the previously-submitted proposals be scored on an expedited basis by an uninterested, qualified and unbiased three-person evaluation team that includes one consultant with demonstrated expertise in medical claim benefit management and acceptable to the Division, Premera and Aetna. If the parties cannot agree on a consultant, the deciding officer should choose the consultant from among the parties' nominees. The evaluation committee shall amend the submitted proposals to include total costs (as defined in this memorandum) in the parties' response to RFP Section 7.23. The process required by this subsection should be completed in no more than seven days;

(2) direct the Division that, if Aetna's proposal is found to be most advantageous to the state (on the basis of the point system set out in the RFP), award the contract to Aetna and cancel the contract awarded to Premera on March 13, 2006. The award and, if necessary, the contract cancellation, should be issued in final form, without any further Notice of Intent to Award, within one week of entry of the final decision in this appeal; and

SIMPSON, TILLINGHAST & SORENSEN
One Sealaska Plaza, Suite 701
Juneau, Alaska 99801
(907) 586-1500 FAX (907) 586-1666

(3) award Aetna such other relief as the deciding officer finds warranted under AS 36 30 585

DATED May 28, 2008

SIMPSON, TILLINGHAST & SORENSEN
Attorneys for Aetna

By Jon K Tillinghast
Alaska Bar Assn No 7410109

By James Sheehan
Alaska Bar Assn No 0506026

SIMPSON, TILLINGHAST & SORENSEN
One Sealaska Plaza, Suite 300
Juneau, Alaska 99801
(907) 586-1400 FAX (907) 586-8010

## AETNA'S FIRST EVALUATION SCORES

| Evaluators: | Miller | Shier | Porter | Average |
|---|---|---|---|---|
| Total Evaluator Scores From Aetna's First Evaluation | 2415 | 1570 | 2105 | 2030.0 |

## PREMERA'S FIRST EVALUATION SCORES

| Evaluators: | Gray | Jarrell | Miller | Williams | Average |
|---|---|---|---|---|---|
| Total Evaluator Scores From Premera's First Evaluation | 1692 | 1290.5 | 1156 | 1810 | 1489.5 |

## AETNA'S SECOND EVALUATION SCORES

| Evaluators: | Miller | Shier | Porter | Average |
|---|---|---|---|---|
| Total Evaluator Scores From Aetna's Second Evaluation | 2440 | 1585 | 2120 | 2048.3 |

## PREMERA'S SECOND EVALUATION SCORES

| Evaluators: | Gray | Miller | Williams | Average |
|---|---|---|---|---|
| Total Evaluator Scores From Premera's Second Evaluation | 2207 | 2160 | 1990 | 2119.0 |

## CHART 1

# PREMERA'S FIRST EVALUATION SCORES

| Technical Proposal | Gray | Jarrell | Miller | Williams | Average |
|---|---|---|---|---|---|
| 10.01 | 40 | 55 | 25 | 75 | 40.0 |
| 10.02 | 81 | 67.5 | 83.5 | 80 | 77.3 |
| 10.03 | 50 | 25 | 25 | 45 | 33.3 |
| 10.04 | 26.5 | 14 | 4 | 20 | 14.8 |
| 10.05 | 40 | 55 | 40 | 60 | 45.0 |
| 10.06 | 62 | 85 | 51 | 125 | 66.0 |
| 10.07 | 166.5 | 91 | 127 | 190 | 128.2 |
| 10.08 | 127.5 | 85 | 87 | 120 | 99.8 |
| 10.09 | 80 | 32.5 | 11 | 90 | 41.2 |
| 10.10 | 67 | 60 | 50 | 100 | 59.0 |
| 10.11 | 75 | 42.5 | 63.5 | 75 | 60.3 |
| 10.12 | 84 | 45 | 54 | 85 | 61.0 |
| 10.13 | 191 | 155 | 171 | 200 | 172.3 |
| 10.14 | 135 | 90 | 72 | 125 | 99.0 |
| 10.15 | 104 | 50 | 62.5 | 65 | 72.2 |
| 10.16 | 79 | 90 | 40 | 100 | 69.7 |
| 10.17 | 91 | 85 | 51 | 70 | 75.7 |
| 10.18 | 69 | 70 | 46.5 | 90 | 61.8 |
| 10.19 | 80.5 | 65 | 67 | 70 | 70.8 |
| 10.20 | 43 | 28 | 25 | 25 | 32.0 |
| Total | 1692 | 1290.5 | 1156 | 1810 | 1379.5 |

# PREMERA'S SECOND EVALUATION SCORES

| Technical Proposal | Gray | Miller | Williams | Average |
|---|---|---|---|---|
| 10.01 | 80 | 75 | 75 | 76 7 |
| 10.02 | 128 | 125 | 100 | 117 7 |
| 10.03 | 50 | 45 | 45 | 46.7 |
| 10.04 | 50 | 45 | 35 | 43 3 |
| 10.05 | 90 | 100 | 70 | 86 7 |
| 10.06 | 122 | 125 | 125 | 124 0 |
| 10.07 | 176 5 | 200 | 190 | 188 8 |
| 10.08 | 142 5 | 125 | 120 | 129.2 |
| 10.09 | 92 | 100 | 90 | 94 0 |
| 10.10 | 150 | 100 | 100 | 116 7 |
| 10.11 | 88 5 | 80 | 80 | 82 8 |
| 10.12 | 86 | 100 | 90 | 92 0 |
| 10.13 | 207 | 225 | 200 | 210 7 |
| 10.14 | 145 | 100 | 130 | 125 0 |
| 10.15 | 133 5 | 100 | 130 | 121 2 |
| 10.16 | 150 | 125 | 100 | 125 0 |
| 10.17 | 115 | 140 | 90 | 115 0 |
| 10.18 | 75 | 100 | 90 | 88 3 |
| 10.19 | 83 | 100 | 90 | 91 0 |
| 10.20 | 43 | 50 | 40 | 44 3 |
| Total | 2207 | 2160 | 1990 | 2119 0 |

# AETNA'S FIRST EVALUATION SCORES

| Technical Proposal | Miller | Shier | Porter | Average |
|---|---|---|---|---|
| 10.01 | 100 | 55 | 100 | 85.0 |
| 10.02 | 125 | 80 | 75 | 93.3 |
| 10.03 | 50 | 30 | 50 | 43.3 |
| 10.04 | 35 | 25 | 40 | 33.3 |
| 10.05 | 100 | 70 | 75 | 81.7 |
| 10.06 | 150 | 85 | 150 | 128.3 |
| 10.07 | 200 | 120 | 165 | 161.7 |
| 10.08 | 150 | 85 | 140 | 125.0 |
| 10.09 | 100 | 70 | 100 | 90.0 |
| 10.10 | 150 | 75 | 120 | 115.0 |
| 10.11 | 90 | 50 | 95 | 78.3 |
| 10.12 | 100 | 70 | 90 | 86.7 |
| 10.13 | 225 | 200 | 225 | 216.7 |
| 10.14 | 140 | 85 | 120 | 115.0 |
| 10.15 | 150 | 90 | 90 | 110.0 |
| 10.16 | 150 | 95 | 135 | 126.7 |
| 10.17 | 150 | 120 | 135 | 135.0 |
| 10.18 | 100 | 60 | 60 | 73.3 |
| 10.19 | 100 | 80 | 90 | 90.0 |
| 10.20 | 50 | 25 | 50 | 41.7 |
| Total | 2415 | 1570 | 2105 | 2030.0 |

# AETNA'S SECOND EVALUATION SCORES

| Technical Proposal | Miller | Shier | Porter | Average |
|---|---|---|---|---|
| 10.01 | 100 | 55 | 100 | 85.0 |
| 10.02 | 125 | 80 | 75 | 93 3 |
| 10.03 | 50 | 30 | 50 | 43 3 |
| 10.04 | 50 | 35 | 40 | 41 7 |
| 10.05 | 100 | 70 | 75 | 81 7 |
| 10.06 | 150 | 85 | 150 | 128 3 |
| 10.07 | 200 | 120 | 165 | 161 7 |
| 10.08 | 150 | 85 | 140 | 125 0 |
| 10.09 | 100 | 70 | 100 | 90 0 |
| 10.10 | 150 | 75 | 120 | 115 0 |
| 10.11 | 90 | 50 | 100 | 80 0 |
| 10.12 | 100 | 70 | 90 | 86 7 |
| 10.13 | 225 | 200 | 225 | 216 7 |
| 10.14 | 150 | 95 | 130 | 125 0 |
| 10.15 | 150 | 90 | 90 | 110 0 |
| 10.16 | 150 | 95 | 135 | 126 7 |
| 10.17 | 150 | 120 | 135 | 135 0 |
| 10.18 | 100 | 60 | 60 | 73 3 |
| 10.19 | 100 | 75 | 90 | 88 3 |
| 10.20 | 50 | 25 | 50 | 41 7 |
| Total | 2440 | 1585 | 2120 | 2048 3 |

# AFFIDAVIT OF MIKE WIGGINS

STATE OF WASHINGTON )
) ss
KING COUNTY )

I, MIKE WIGGINS, being first duly sworn, to depose and say that:

1. I am 51 years old. My home address is 6628 138th Pl. SW, Edmonds, WA 98026.

2. My current position for Aetna is Vice President National Account, Seattle, Washington. I have worked for Aetna for 8 years.

3. The RFP that is the subject of this protest is to provide medical and or pharmacy benefit management claim services for the State of Alaska. Aetna and its affiliates have held this contract for these services for 24 years.

4. My own job experience in this field involves 25 years directly related to the pricing, operational monitoring, and consulting on health insurance related matters.

5. In terms of involvement with health management related RFPs, I have had, in addition to the current RFP in question, involvement with the prior (2) five year bids, one with NYLCare, another with Aetna, and (1) prior State of Alaska RFP with Blue Cross of Washington and Alaska.

6. My previous past job titles have included: Manager of Actuarial and Underwriting – Medical Service Corporation of Eastern Washington, now a subsidiary of Blue Cross of Washington and Alaska, Manager of Experience Underwriting, Vice President of Underwriting, Vice President Large Group Consulting and Product Development. (All positions with Blue Cross of Washington and Alaska), Senior Benefit Consultant, William M. Mercer, Solo Consulting Practice - Health Care Tactical Partners, Director of Public Programs – NYLCare, a subsidiary of New York Life.

7. My current job function includes overall account management responsibility for government entities with more than 3,000 employees in part of

Aetna's West region. This includes such entities as the State of Utah, State of Idaho, State of Nevada, King County, and the City of Seattle. Job functions include working with entities such as the State of Alaska in a consultative capacity to help them design health care programs to meet the financial challenges they face in delivering benefits to their active and retired employees. In my current role, I also act as the point person in negotiating future administrative fees, responding to Requests for Proposals, and service related issues.

8. Specifically for the State of Alaska proposal at issue in this protest, I coordinated the responses to the bid questions and the responses that crossed many different disciplines within Aetna. At least 10 Aetna staff members were committed to insuring Aetna's bid response was complete and reflected answers to the questions raised by the State.

9. By virtue of this experience, I have personal knowledge and am competent to testify regarding the subject matter of this affidavit.

**Aetna's bid response to RFP 2007-200-5946 – Issued November 30th 2005**

10. On December 22, 2005, AETNA submitted a timely, complete, responsive and responsible proposal on the above referenced RFP. The cover page of Aetna's submission is attached as *Attachment 1*. Aetna's bid response contained separate responses to Section 7 (Medical, Dental, LTC and Pharmacy Services), Section 8 (Mental, Dental and LTC Services) and Section 9 (Pharmacy Benefit Management Services). The separate requested responses to the RFP were submitted because one of the stated purposes of the RFP was to allow the State to determine whether it was more economical to award all services on one contractor, or award a stand-alone Pharmacy Benefit Management Services contract to a second contractor.

11. Prior to Jan. 20, 2006, the first scheduled award date of any parts of the RFP in question; I contacted Victor Leamer, who was then the initial procurement officer, asking if there were any problems with the Aetna RFP response. This was due to the fact that Aetna had heard nothing to date about our response to the RFP. His response was no comment and that the bid evaluation would take longer than the original stated date of Jan 20th.

12. On Saturday, February 18th, 2006, AETNA was notified that its proposal to RFP 2007-0200-5946 was being rejected as being non-responsive. This came in the form of a faxed Notice of Intent to Award the contract to Premera which Aetna received on that Saturday. Subsequently, I was informed via a telephone call with Mr. Walt Harvey, who was now the procurement officer, that Aetna's bid response was being rejected as non-responsive because it was missing key requested information that was part of the RFP. In the course of this conversation I informed Mr. Harvey that he was mistaken. Together, we confirmed what Aetna material he had in his hands and what materials he should have had. Based upon this conversation, it became obvious that Mr. Harvey was missing a 6 inch binder which contained the meat of Aetna's responses to which Aetna sent multiple copies to the State. Again I stated I had confirmation that the State received our RFP bid materials. At this point Walt said he would get back to me within an hour.

13. One hour later, Aetna's multi copied bid responses were found in their boxes in a storeroom. No explanation was given as to how or why the boxes were lost, just an apology. Also, no explanation was given as to why they didn't call Aetna sooner.

14. Upon discovering the State's mistake, Mr. Harvey immediately withdrew the State's Notice of Intent previously given to Premera.

15. Mr. Harvey also stated that he needed to speak with the Attorney General to determine what steps needed to be taken.

16. Following internal dialog, a scheduled meeting was held. The meeting included Aetna, Premera and State Representatives at which time the State laid out its next steps in the procurement process which included: (1) Aetna's newly discovered RFP response would receive a threshold evaluation to see if it was "reasonably susceptible to award"; (2) since one of the evaluators who had evaluated Premera's first offer was absent, we agreed that the State could substitute one reviewer on our reviewer panel for the purpose of determining whether we met the threshold of "reasonably susceptible to award"; (3) if we met that threshold, the State would share with Premera, Aetna's original offer because the State had shared with Aetna, Premera's unsolicited original "best final and final offer"; and (4) Aetna and Premera would then be allowed submit another "best and final offer" that would be subject to comparative evaluation and the best offer would receive the contract. It was always our understanding that this second evaluation, in which

Aetna and Premera would be directly compared, would be evaluated by the same individuals. That agreement is reflected in the letter appended as *Attachment 2*. Note that this agreement only permits one different reviewer to review the threshold question of whether Aetna's proposal was "reasonably susceptible to award" (Aetna was not told, and was not made aware at the time, that the Division substituted two evaluators for even the first "reasonably susceptible to award" evaluation). Nowhere in that agreement did Aetna agree to multiple different reviews in comparing the final "best and final offers" that would be submitted by both sides, and under no circumstances would Aetna have agreed to such an arrangement.

17. Aetna's initial responses were deemed "reasonably susceptible of award," and therefore, thereafter, both Aetna and Premera submitted best and final offers.

18. The Division advised both proposers that they would submit certain questions to both proposers to clarify or improve both parties' proposals. However, the letter to Aetna only posed three pages of very limited clarifications. These clarifications questions appended as *Attachment 3*.

19. On the other hand, the Division served 62 pages of detailed questions on Premera over the course of apparently several weeks. The questions submitted to Premera are appended as *Attachment 4a & b*.

20. The RFP asks the offeror to agree that it will answer 85% of all telephone calls within 30 seconds in any given month, or face penalties. RFP § 10.11(a)(i). In its original proposal, Premera "disagreed" with this element of the RFP. *Attachment 5c at 19 & 93*. This caused Premera to lose point on this issue in its first proposal, receiving only 2 points from one evaluator (Gray) and 0 from another (Miller) out of a possible 5.5 points. *Id.* To raise Premera's point total, the Department asked Premera to "clarify" that it would answer 85% of all calls on a monthly basis, despite what it said in its proposal. *Attachment 4b at 33*. In response to the State's suggestion that Premera change its position, Premera agreed to the State's demand. *Id.* As a result, Premera received 3.5 added points from one evaluator (Gray) on this particular Performance Standard issue and additional points from another (Miller) on this particular Performance Standard section in its "best and final" proposal. *Attachment 5d at 47 & 112*.

21. The RFP asked whether the offeror is prepared to offer direct deposit of participant benefit reimbursement. RFP § 10.14(c). In its original proposal, Premera answered "no" to this question in the RFP. *Attachment 5c at 55 & 98.* This caused Premera to lose points on this issue in its first proposal, receiving only 16 points from one evaluator (Gray) and 0 points from another (Miller) out of a possible 25 points. *Id.* To raise Premera's point total, the Department asked Premera, when it had already clearly answered "no" in its original proposal, to describe how Premera would meet the need for direct deposit. *Attachment 4b at 41.* In response to the State's suggestion that Premera change its position, Premera agreed that it would offer this service. *Id.* As a result, Premera received 9 added points from one evaluator (Gray) on this particular Performance Standard issue and additional points from another (Miller) on this particular Performance Standard section in its "best and final" proposal. *Attachment 5d at 53 & 111.*

22. The RFP asks the "offeror whether it agrees to allow fees within the greater of 10% or $10 of UCR without reduction?" RFP § 10.05(e). In its original proposal, Premera answered "no" to this section of the RFP. *Attachment 5c at 41 & 84.* This caused Premera to lose points on this issue in its first proposal, receiving 0 points from two of the evaluators (Gray and Miller) out of a possible 20 points. *Id.* To raise Premera's point total, the Department explained to Premera that "the RFP required offerors' to agree to the UCR procedures" and asked Premera whether it could agree to this procedure although it originally answered that it could not. *Attachment 4b at 29.* In response to the State's explanation and question Premera changed its position, Premera agreed to the State's demand. *Id.* As a result, Premera received 20 added points from evaluators (Gray and Miller) on this particular Performance Standard issue in its "best and final" proposal. *Attachment 5d at 40 & 103.*

23. The RFP asks to the offeror "[t]o what degree does the offeror agree that they shall reimburse the State for any overpayment error in excess of $50?" RFP § 10.11(g)(i). In its original proposal, Premera "disagreed" with this element of the RFP. *Attachment 5c at 51 & 95.* This caused Premera to lose points on this issue in its first proposal, receiving only 3 points from one evaluator (Gray) and 0 from another (Miller) out of a possible 5.5 points. *Id.* To raise Premera's point total, the Department asked the question a second time when Premera clearly "disagreed" with this element of the RFP. *Attachment 4b at 27.* In response to the State's suggestion that Premera change its position, Premera agreed to the State's demand. *Id.* As a result, Premera received 2.5 added points from one evaluator

(Gray) on this particular Performance Standard issue and additional points from another (Miller) on this particular Performance Standard section in its "best and final" proposal. *Attachment 5d at 49-50 & 112.*

24. The RFP asks whether "the offeror agrees to use a data processing system that is compatible with the State's system and that can produce ... reports [containing key statistics] ... in a timely fashion?" RFP § 10.02(A)(e). In its original proposal, Premera could only produce annual reports containing key statistics. *Attachment 5c at 38.* This caused Premera to lose points on this issue in its first proposal, receiving only 6 points from one evaluator (Gray) and 0 points from another (Miller) out of a possible 12 points. *Id. at 38 & 51.* To raise Premera's point total, the Department asked Premera to "clarify" that it could produce monthly reports that included key statistics. *Attachment 4b at 13.* In response to the State's suggestion that Premera change its position, Premera agreed to the State's demand. *Id.* As a result, Premera received 6 added points from one evaluator (Gray) on this particular Performance Standard issue and additional points from another (Miller) on this particular Performance Standard section in its "best and final" proposal. *Attachment 5d at 37-38 & 110.*

25. The RFP asks:

> To what extent did the offeror agree that some or all of the work associated with this RFP would be performed in Alaska within six months of contract implementation?
>
> How well did the offeror adequately describe which functions Alaskans will perform and list the approximate number of positions? Did they also note where these positions would be located?

RFP § 10.10(a) & (b). In its original proposal, Premera answered "Yes" without an explanation to the first question and gave an inadequate answer to the second question. *Attachment 5c at 49 & 92.* This caused Premera to lose points on this issue in its original proposal, receiving only 67 points from one evaluator (Gray) and 50 from another (Miller) out of a possible 150 points. *Id.* One evaluator (Miller) noted that Premera's answer was inadequate. *Id. at 49.* To raise Premera's point total, the Department told Premera to "define the number of dedicated full time employees that will compose the team, defined by function and listed by location." *Attachment 4b at 32.* In response to the State's suggestion

Premera added a chart describing: (1) the functions Alaskans will perform, (2) the number of positions; and (3) where positions would be located. *Id.* As a result, Premera received 50 additional points from one evaluator (Miller) and 83 from another (Gray) on this particular Performance Standard section in its "best and final" proposal. *Attachment 5d at 47 & 111.*

26. The RFP asks "[t]o what extent are third party subcontractors being used to satisfy parts of this RFP?" RFP § 10.01(a). In its original proposal, Premera did not include in its answer discussions regarding subcontractors PointShare, Subimo and CareMark. *Attachment 4b at 9-10.* This caused Premera to lose points on this issue in its original proposal, receiving 5 points from one evaluator (Gray) and 0 points from another (Miller) out of a possible 20 points. *Attachment 5c at 57 & 80.* To raise Premera's point total, the Department told Premera to discuss its relationship with subcontractors: PointShare, Subimo and CareMark. *Attachment 4b at 9-10.* In response to the State's suggestion, Premera filled in the issue. *Id.* As a result, Premera received 15 added points from one evaluater (Gray) on this particular Performance Standard issue and additional points from another (Miller) on this particular Performance Standard section in its "best and final" proposal. *Attachment 5d at 36-37 & 99.*

27. The RFP asks "[t]o what extent did the offeror offer other dedicated or customized services to the State?" RFP § 10.15(a)(ii). In its original proposal, Premera did not offer any other services. *Attachment 5c at 55.* One evaluator noted that "customization not addressed" and "no other services offered." *Id.* This caused Premera to lose points on this issue in its first proposal, receiving 0 points from one evaluator (Miller) and 6 from another (Gray) out of a possible 12.5 points. *Attachment 5c at 55 & 99.* To raise Premera's point total, the Department asked Premera, when it clearly did not offer any other services, to re-answer this question. *Attachment 4b at 43-44.* In response to the State's suggestion, Premera filled in the issue. *Id.* As a result, Premera received 6.5 added points from one evaluator (Gray) on this particular Performance Standard issue and additional points from another (Miller) on this particular Performance Standard section in its "best and final" proposal. *Attachment 5d at 53-55 & 118.*

28. In their original response, Premera indicated that they would be charging a $5. /person network access fee—a fee that would total about $6 million over the three-year contract period. On February 24, just four days before Premera was due to file its "best and final offer," the Division suggested to

Premera that they find some way to categorize this cost other than as a "fee." Per-person charges tend to be very visible in cost calculations. Premera took the Division's cosmetic suggestion, eliminating all network access fees. As a result, Premera received 16 additional points from one evaluator (Gray) and 54 from another (Miller) on this particular Performance Standard section in its "best and final" proposal. *Attachment 5d at 51-52 & 115-16.*

29. We also repeatedly requested that the State provide us with the evaluation notes of all evaluations. However, the State has only provided us with evaluation notes that appear incomplete and confusing. The evaluator notes that the State did provide us are appended as *Attachment 5a-d*

30. These are the services that Aetna is currently providing to the State under the existing medical claims administrative contract:

* Medical
* Dental
* Vision – Managed and Indemnity
* Pharmacy – Retail Card, Mail Order, Specialty, Paper Transactions
* Cobra Administration
* Individual Billing Administration
* Employee Assistance Programs (EAP)
* Flexible Spending Account Administration
* Managed Behavioral Health
* Long Term Care
* Preferred Provider Arrangements
* Centers of Excellence
* Medicare D Administration

31. Aetna is the nation's third largest medical carrier with 14.8 million medical lives, 13.1 million dental lives and has a significant presence in the nation's top 500 largest companies. Aetna is ready, willing and able to perform all current services without interruption if it is allowed to continue to perform under its existing contract pending the outcome of this protest and appeal

32. As a company, Aetna is committed to insuring that the State's employees have uninterrupted services during the protest and appeal period. Should the ultimate outcome of the protest process be a re-bid or an extension of

the existing Aetna contract, we will work with the State to develop a process to continue our existing fees and administration until the protest and appeal is resolved. Although the State by statute is required to re-bid some services every (5) years there is precedence to extend a contract for a period of time beyond (5) years if it is in the best interest of the State and its employees. For example, the current extension of the State's Life/Disability contract with Unum went beyond the statutorily (5) years and the present (1) year extension of its current contract with its benefit consultants beyond (5) years

33. On the other hand, if Aetna is not allowed to continue to perform under its existing contract pending the outcome of this appeal and protest, a significant amount of short-term harm will occur. The following is based upon an intimate knowledge of the State of Alaska's employee population and observations of 2 transitions by this population to new carrier platforms in the last 10 years - (Aetna to NYLCARE and NYLCARE to Aetna). In addition, it is also based upon recent discussions with Municipal clients and potential new clients who were determining lead times of when to go to bid and the appropriate transition period. Lead times averaged 10 to 12 months.

34. The State of Alaska has a total membership of approximately 68,500; of this number 14,500 are active members and 54,000 are retired members residing in all 50 states and several foreign countries. Due to the high number of retirees many State members are undergoing care for chronic diseases which involves constant interaction with the medical community and any change of benefit administrators must include intensive communication with the effected parties to insure that disruption of service to these ill State of Alaska members who are in course of treatment does not occur.

35. Additionally, because of the high retiree population, the State has almost 1,000,000 prescriptions filled annually. This significant utilization of prescription drugs requires by law some interaction with medical providers to obtain a prescription. The State must acknowledge that in many cases a new prescription and a subsequent office call and in some cases multiple office calls will be required to obtain a new prescription to be submitted to the new Administrator

36. Presently, the State is undertaking a positive open enrollment process for its retiree population to insure that only eligible dependents are covered by the

State's benefit plans. At present this is an un-completed task that will require huge man power commitment to complete. This process must be completed so that only truly eligible retiree members receive Identification Cards from a new Administrator.

37. The State has only limited ability to communicate to its retiree populations on the complexity of any transition to a new administrator. In a short period of time the State will be challenged to communicate significant number of changes and by the sheer volume of information it will appear confusing to this population.

38. Presently, it is also on State's docket to draft new benefit booklets for its retiree population. Again this will be significant manpower commitment by the State as it is planning a transition to a new Administrator. Significant questions will be asked of the State of Alaska by retirees who are mailed these booklets

39. Lastly, the State's Retirement and Benefits is also scheduled to bring a new retirement system online this summer. Even without a transition to a new carrier the division's resources have been stretched to the maximum.

40. There will also be hardship caused to Aetna from immediate closure. including the following:

Closure of the Aetna Juneau Office
Closure of the Aetna Anchorage Office
Loss of Alaska jobs by both Aetna and Magellan
Overall potential loss of 40 jobs in just Aetna – some of these staff have 20 tenures in servicing the State of Alaska employees, many have at least 10 year tenures.

41. It has been difficult to get qualified individuals to reside in Alaska and we don't want to lose the one's we have. Today there is also significant walk in traffic to both Aetna Alaska offices by retirees by virtue of the complexity of their bills and by legislative staff during session. Over time many deep personal relationships have been established between Aetna staff and the members who they have served diligently. This transition will be very difficult for all because of the close personal ties to Alaska Care staff both in Juneau, Anchorage, and Seattle.

42. Aetna submitted a separate proposal for providing only pharmaceutical benefit management services. This type of stand-alone proposal was specifically requested in the RFP and was therefore responsive to the RFP. Although the RFP promised that these stand-alone proposals would be evaluated in the overall cost evaluation of providing the services covered by the RFP. The State never conducted such an overall evaluation, and therefore had no basis for determining whether it would have been more economical to split the contract between one contractor for medical and other non-pharmaceutical services, and another contractor for pharmaceutical services. Based on public information now available to us, and set out in Exhibit 1 to this Affidavit, it is apparent that the State would have saved approximately $3 million over the course of the contract by selecting Aetna's stand alone pharmacy offer (the numbers in Exhibit 1 show higher pharmacy numbers for Aetna than for Premera). However, it is important to note that pharmacy numbers are reported as rebate numbers refundable to the state, so that the higher the rebate number, the lower the cost to the State.

43. It must be noted that a significant part of the RFP in question can have a great deal of variability in scoring by individual scorers for the non - cost 60% portion they reviewed. This variability or statistical bias can be observed by the different scorers' totals. For this reason the need to have the same reviewers is statistically important so that all scores reflect the same bias in their totals. It is also important that all bids have the same number of reviewers, if not, the weighting of a different number of scores will distort the outcome of the scoring process.

Further your affiant sayeth naught.

Dated this 7 day of March, 2006, at SEATTLE WA.

Mike Wiggins

SUBSCRIBED AND SWORN before me this 7 day of March, 2006

ALICE L. TRAN NOTARY PUBLIC STATE OF WASHINGTON COMM EXP MAY 5, 2008

Notary Public in and for WA

My commission expires 05-05-08

# SUPPLEMENTAL AFFIDAVIT OF MIKE WIGGINS

STATE OF Washington

COUNTY OF King

I, MIKE WIGGINS, being first duly sworn, do depose and say that:

1. This affidavit supplements the information contained in paragraph 28 of my March 8, 2006 affidavit;

2. The network access fees discussed in that paragraph totaled approximately $6 million over the course of the contract,

3. At the Division's request, Premera stopped referring to these charges as "network access fees," and labeled them instead as claim charges. Because network access fees are included in the reported "cost" of the project, while client charges are not, this had the effect of appearing to reduce Premera's bid by $6 million, when, in reality, that $6 million had actually just been moved to another category where it would not show up as a project cost;

4. The methodology and information I used to reach this conclusion is appended to this Supplemental Affidavit as Attachment 1.

Further your affiant sayeth not.

DATED this 10th day of March 2006 at 10:57 AM, Seattle WA

Mike Wiggins

Mike Wiggins

SUBSCRIBED AND SWORN to before me this 10th day of March, 2006.

Notary Public in and for Washington
My commission expires January 21, 2007

Attachment 1

Progression of Premera offer to the State of Alaska

| As of February 14, 2006 | | |
|---|---|---|
| 3 year Fees | $ | 30,951,035 |
| 3 year Network access fee | $ | 6,680,513 |
| 3 year Rx Rebate guarantee | $ | (9,000,000) |
| 3 year network savings retained by Premera @ 12% | $ | 4,779,925 |
| Total cost to State of Alaska | $ | 33,611,473 |

| As of February 28, 2006 | | |
|---|---|---|
| 3 year Fees | $ | 30,951,035 |
| 3 year Network access fee | $ | - |
| 3 year Rx Rebate guarantee | $ | (9,000,000) |
| 3 year network savings retained by Premera @ 30% | $ | 11,949,813 |
| Total cost to State of Alaska | $ | 33,900,848 |

PREMERA | Blue Cross Blue Shield of Alaska

*The following network savings guarantee replaces the answer provided for Section 10.11, page 25 in the Best and Final Offer Clarification Questions – State of Alaska submitted on February 13, 2006.*

**Please explain the network discount guarantee arrangement as mentioned on page 37 of Premera's proposal**

Premera Blue Cross Blue Shield of Alaska will guarantee network savings of $100.00 per employee per month resulting from the use of Premera's Alaska and Washington networks and the national Blue Cross Blue Shield BlueCard network program. The following table represents aggregate network savings outside of the state of Alaska.

**Aggregate Network Discounts (outside of Alaska)**

| Arizona | California | Oregon | Washington |
|---|---|---|---|
| 57% | 52% | 39% | 39% |

Network savings in excess of $100.00 per employee per month will be shared between the State of Alaska and Premera Blue Cross Blue Shield of Alaska. The State of Alaska will retain 70% of the amounts over $100.00 per employee per month. Premera Blue Cross Blue Shield of Alaska will retain 30%. In the event that the savings are less than $100.00 per employee per month, Premera Blue Cross Blue Shield of Alaska will reimburse the State of Alaska 30% of the difference between the savings amount per employee per month and $100.00 per employee per month.

Approach

Premera Blue Cross Blue Shield of Alaska will produce a quarterly report identifying billed charges for in-network medical claims compared to the in-network provider allowable charges. The difference between these two charges is savings. The savings are turned into per employee per month savings over the quarter by dividing by the number of employees covered over the three-month period. The report will be produced 30 days after the end of each quarter and the quarterly results will be settled 45 days after the quarter ends. The final amounts due, if any, will be reconciled and due 90 days after the close of the policy year.

PREMERA BLUE CROSS BLUE SHIELD OF ALASKA

Please itemize the following components of your service fee for year 1
(This is for informational purposes only)

| | [illegible] | [illegible] |
|---|---|---|
| Precertification and Utilization Review | $5.16 | $3.78 |
| Large Case Management | Included in Precertification | Included in Precertification |
| COBRA Continuation Administration | $0.39 | $0.28 |
| High Risk Maternity | Included in Precertification | Included in Precertification |
| Wellness/Patient Education | Included in Precertification | Included in Precertification |
| EAP/Managed Mental Health | $3.29 | $2.69 |
| Pharmacy Network/Administration | No charge | No charge |
| Vision Network/Administration | No charge | Not applicable |

Note (1): In the event of termination of administration services, an administration fee of 4% of claims paid after the date of termination will be made

Note (2): A $12 per month billing fee will be applied to bill any self-paying retirees

included in fee?

THE
FOLLOWING
DOCUMENT(S)
ARE
POOR
ORIGINAL
COPIES

PREMERA | BLUE CROSS BLUE SHIELD OF ALASKA

February 27, 2006

Mr. Walt Harvey
Contracting Manager
Department of Administration
Division of General Services
333 Willoughby Avenue, 7th Floor State Office Building
Juneau, AK 99811-0203

Dear Mr. Harvey,

Thank you again for the opportunity to provide additional clarification and our "Best and Final" offer. I am personally pleased to reaffirm our commitment to the State of Alaska. I believe Premera Blue Cross Blue Shield of Alaska is uniquely qualified to deliver the lowest net cost while providing outstanding service to the State of Alaska and its members.

The highlights of Premera Blue Cross Blue Shield of Alaska's proposal to the State include:

- **Significant Claims Savings:**
  The State of Alaska will achieve at least **$45 million in net additional claims savings in the next three years** (before health cost inflation) through the use of the Blue Cross Blue Shield networks. These savings are over and above the savings now achieved using your current administrator's network, and after sharing any upside performance with Premera. To support this claim, we have reduced our administrative fees by 10%, eliminated our pharmacy fees and network access fees, plus placed additional amounts at risk for claims discount performance. In other words, the State will not pay unless Premera Blue Cross Blue Shield of Alaska delivers the network claims savings. Meeting our savings commitments was a big element to our success with Microsoft and Weyerhaeuser; both clients will be happy to validate this achievement.

- **No Surprises:**
  The State of Alaska will have the security of an all-inclusive fee arrangement, other than for clearly identified optional services. This includes removal of the pharmacy administration fee proposed when the State requested receipt of full pharmacy rebates, as well as removal of the separately billed charge for use of the national BlueCard network. Additionally, we have now included 65 hours of training provided by Compsych, the EAP vendor partner.

- **Guaranteed Results:**
  In addition to waiving our pharmacy administration fee, we are now guaranteeing a minimum of **$3 million in annual pharmacy rebates**. Moreover, the State can also share our confidence in our ability to meet our commitments as we are doubling the dollars at risk in our other Performance Guarantees in each category.

dedicated customer service representatives, these representatives serve current Premera Blue Cross Blue Shield of Alaska members.

The original bid noted a customer service staff of five located in Alaska. The five included the two marketing liaisons and one customer service representative noted above, in addition to the two new Marketing Liaisons dedicated to the State of Alaska. These three staff were noted because they can provide back-up to the dedicated State of Alaska staff.

All other State of Alaska customer service and claims staff will be located in Mountlake Terrace, WA. However if customer service volumes in Anchorage or Juneau indicate a need for additional staff, Premera Blue Cross Blue Shield of Alaska will add appropriate staff to the meet the volume.

3) Pages 30 and 31 of 47; answer to 10.13 d);

**Provide in dollars the BlueCard access fees and administration fees expected to be charged annually by the State of Alaska for use of the Blues network for our population? Is there a cap on these fees?**

As outlined in the Performance Guarantee section of the RFP, there is an access fee charge for the use of the BlueCard network. The access fee is charged as a claim charge. The guaranteed access fee is $5.51 per employee per month. As the fee is guaranteed as a per employee per month charge the cap is $5.51 times the number of employees per month times 12 months.

The access fee works with the network savings guarantee as follows:

Premera Blue Cross Blue Shield of Alaska will guarantee network savings of $100.00 per employee per month resulting from the use of Premera's Alaska and Washington networks and the national Blue Cross Blue Shield BlueCard network program. The following table represents aggregate network savings outside of the state of Alaska.

Network savings in excess of $100.00 per employee per month will be shared between the State of Alaska and Premera Blue Cross Blue Shield of Alaska. The State of Alaska will retain 88% of the amounts over $100.00 per employee per month; Premera Blue Cross Blue Shield of Alaska will retain 12%. In the event that the savings are less than $100.00 per employee per month, Premera Blue Cross Blue Shield of Alaska will reimburse the State of Alaska 24% of the difference between the savings amount per employee per month and 100.00 per employee per month.

Approach

Premera Blue Cross Blue Shield of Alaska will produce a quarterly report identifying billed charges for in-network medical claims compared to the in-network provider allowable charges. The difference between these two charges, **minus the BlueCard access fees**, is savings. The savings are turned into per employee per month savings over the quarter by dividing by the number of employees covered over the 3 month period. The report will be produced 30 days after the end of each quarter and the quarterly results will be settled 45 days after the quarter ends. The final amounts due, if any, will be reconciled and due 90 days after the close of the policy year.

4) Page 33 of 47; answer to 10.14 a);

**The State of Alaska plans produce over 100,000 claims per month, not including pharmacy. PBC reflects that 90% of claims from our population will be auto adjudicated. Currently, based on December 2005 volume: 116,119 claims; the actual auto adjudication rate experienced was 40%, with 60% of claims manually processed, which is the typical percentage experienced over time. Please describe the rationale that PBC used to conclude that 90% of all State of Alaska claims per month will be auto adjudicated. PBC must confirm that it can process in excess of 100,000 claims per month regardless of the adjudication ratio.**

Premera Blue Cross Blue Shield of Alaska is very confident that it can process in excess of 100,000 claims per month regardless of the adjudication rate.

The following definitions and calculations provide further clarification as to the process for determining the appropriate number of claims processors for the State of Alaska.

Assume 100,000 claims per month received for processing

- 10,000 claims will require manual entry and adjudication
- 90,000 claims will be electronically entered into the system – either through EDI or Optical Character Recognition (OCR)
  - 45,000 of those claims will be paired for manual review and adjudication
  - 45,000 of those claims will be paid through the system with no manual intervention

# THIRD AFFIDAVIT OF MIKE WIGGINS

STATE OF WASHINGTON )
) ss:
KING COUNTY )

I, MIKE WIGGINS, being first duly sworn, do depose and say that:

1. On March 8, 2006, I provided an affidavit in the Blue Cross Premera bid protest matter, and on March 10, 2006, I provided a supplemental affidavit in that matter. The purpose of this affidavit is to clarify two matters raised in those affidavits, and this is in response to the Procurement Officer's rejection of that protest.

## A. THE SUPPLEMENTAL AFFIDAVIT: THE MOVING OF THE $6 MILLION NETWORK ACCESS FEE

2. The supplemental affidavit concerns billings for "Network Access Fees" that Premera proposed to charge the State of Alaska for dealings that Premera would have with other affiliated Blue Cross Blue Shield Plans throughout the United States. Unlike Aetna, which does business as one corporate entity throughout the country, Premera does business through many unrelated corporate state or regional affiliates. This difference in Premera's national operation is the source of the extra charge that Premera sought to add to its bid.

3. Many health care providers utilized by State members (both Aetna and Premera) enter into Preferred Provider Organization agreements. These agreements provide that health providers (doctors, etc.) will write off a portion of the charge for their service when the service is provided to a covered insured.

4. Aetna's PPO agreements have nationwide coverage. "Premera Blue Cross Blue Shield of Alaska" does not. If a Premera Alaska insured incurs a claim (for example) with a California doctor, that California doctor's PPO agreement will be with (again, just as an example) "Blue Cross of California." Premera Alaska will ask Blue Cross of California to make use of the latter's PPO agreement, and for that, in its original bid on this project, Premera proposed to assess the State of Alaska a $5.51 per employee/per month charge. This so-called "Network Access Fee" would increase Premera's administrative fees by $6,880,513 over the course of the contract.

5. The contract that is the subject of this appeal was for the provision of administrative services to the State, which self-insures its health coverage. The contracted administrator will administer claims—dealing with things such as eligibility, coverage, deductibles and the like. Its bid amount, which is set out in Section 7.23 of the RFP on a per employee and per retiree basis, and it is supposed to include all of the administrative services being provided by the bidder. Additionally, the contracted administrator will pass on to the State—the eligible claims that health providers have submitted for payment. The amount of these claim charges is not included in the bid, because it is not an administrative cost incurred by the contractor, but rather a health care cost incurred by the doctor or other provider, who seek payment for services rendered. This $5.51/employee/month "Network Access Fee" is clearly a fee for a service provided by Premera, and not for a health claim charge for services provided by a doctor. So it is obviously not a "claim charge." Even so, in its original bid, Premera Alaska proposed to add this charge as a "claim charge," rather than as part of the administrative fees included in the bid cost. *Attachment 4b at 2 & 4.* Since the network access fee is really an administrative fee, and not a claim charge, this tended to artificially lower the actual bid being made by Premera for the administrative services it would provide under the contract. Premera's original bid was approximately $34 million (*Attachment 4c at 1*)—a sum that did not include the $6.88 million in network access fees that I have been discussing. In truth, and counting these $6.88 million in fees as the administrative cost of the contractor services, Premera's initial cost bid was closer to $40 million.

6. The State apparently understood that much, because, on February 24, 2006, the Procurement Officer requested that Premera place this "Network Access Fee" somewhere else, rather than as a claim charge, in its final bid. *Id. at 2.* The State failed, however, to tell Premera where to put these charges (i.e. in its cost bid), which left it open for Premera to merely obscure those charges somewhere else.

7. In a February 27 letter, Premera advised the Procurement Officer that it has "eliminated our... network access fees." *Id. at 57.* But Premera did not simply eliminate the $6.88 million in fees. Rather, the fees were moved in a way which made them even harder to detect.

8. Here is how the costs were moved: PPO agreements save the State money. Usually, a bidder will guarantee a certain level of savings from these PPO Agreements. Earlier, Premera had proposed to guarantee the state a certain amount

of savings, but, above that guaranteed amount, Premera would keep 12% of those savings. *Id. at 2.*

9. However, on February 28, 2006, in its final bid, Premera increased the amount of these savings that it would retain to 30% over the guaranteed amount *Id. at 63-64.* Based on the number of plan participants, the difference in value between 12% and 30% (in excess of the guaranteed amount) is roughly $8.2 million.

10. So, in summary: Premera's initial bid was understated by a significant amount, since its $34 million bid did not include $6.88 million in "Network Access Fees." Premera accomplished this by calling these fees "claim charges," which are not included in the bid. The State advised Premera that these access fees were not "claim charges." Premera responded not by adding them to their bid, as it should have, but by obscuring them even further by hiking the amount of PPO savings that Premera would retain by $8.2 million.

11. In my, March 10, Supplemental Affidavit I stated that Premera labeled its "Network Access Fee" as a "claim charge" and that this appeared to reduce Premera's bid. After further review of Premera's bid proposal I now realize in its final proposal that Premera did not label the $6.88 million fee as a "claim charge," rather Premera increased its proposed guaranteed savings amount that it would retain from 12% to 30%. This increase is where Premera recovered its $6.88 million "Network Access Fee."

## B. 1ST AFFIDAVIT, ¶42: THE SAVINGS FROM AETNA'S PHARMACY PLAN

12. In assessing whose bid for providing pharmacy services was "lower," the uniqueness of the pharmacy market needs to be explained. As discussed above, for medical claim services, the bidder will bid an amount that covers all services being provided.

13. For pharmacy claim services, however, there is another large source of revenue that drives the bid for these services. Each year, drug manufactures give pharmacy claim services rebates based on volumes of certain drugs sold. To win a contract for providing pharmacy claim management services, bidders will often promise to guarantee that a minimum amount of rebates will be passed along to the plan sponsor (i.e. the State). The more financially attractive arrangement for the State of any pharmacy claim management services plan would, therefore, be a

guaranteed rebate pass-through amount, net of any administrative charge that bidder might assess. The higher the guaranteed rebate amount the better the bid for the State.

14. Aetna's proposed rebates are set out in *Exhibit 1* to my March 8 affidavit. I derived these rebates from section 9.09 of Aetna's Cost Proposal *Attachment 4d at 1-5*. These numbers are net of any administrative charge for providing pharmacy claim management services.

15. Premera's proposed rebates are also set out in *Exhibit 1*. I derived theses rebates from Premera's "Pharmacy Rebate Guarantees" *Attachment 4b at 75*. These numbers are also net of any administrative charge for providing pharmacy claim management services, so they are comparable to Aetna's.

Further your affiant sayeth naught.

Dated this 27 day of March, 2006, at Seattle WA

Mike Wiggins

SUBSCRIBED AND SWORN before me this 27 day of March, 2006.

ALICE L. TRAN NOTARY PUBLIC STATE OF WASHINGTON COMM. EXP. MAY 5, 2008

Notary Public in and for WA

My commission expires May 05 2008

# FOURTH AFFIDAVIT OF MIKE WIGGINS

STATE OF WASHINGTON

COUNTY OF KING

I, MIKE WIGGINS, being first duly sworn, do depose and say that:

1. My background, employment and relationship to the current procurement dispute involving the State of Alaska, Premera and Aetna is set out in my March 8, 2006 affidavit;

2. Aetna timely submitted 10 copies of our entire proposal as specified in 1.01 of the Introduction and Instructions section for the State's RFP No. 2006-0200-5946 to the correct address at the Department of Administration as provided in the RFP. Aetna bid responses were broken out in the appropriate sections and labeled as specified in the RFP.

3. Several conversations prior to Aetna's mailing of our bid responses took place with the State's procurement office to insure the necessary mail lead times were met to insure our bid responses timely reached Alaska over the Christmas holidays.

4. Prior to the opening date of December 28th as specified in the State's RFP, I called Victor Leamer, the designated procurement officer noted in the RFP, to confirm the mailing date of Aetna's proposal. Subsequently, on or about December 27 (and, in any event, before the bid opening date of December 28th) I called to confirm the State's timely receipt of our RFP responses prior to the Opening Date and the number boxes the State should have received. Mr. Leamer's response affirmed that he had received Aetna's boxes.

5. Additionally, there was another call to Mr. Leamer when he extended the opening date past Dec. 28th. On this call, I voiced Aetna's concerns that we could not realistically retrieve our bid reponses that had already been sent and we would have to live with the previously sent bid responses.

6. Mr. Learner was very much aware prior to the RFP Opening Date that Aetna intended to respond to the State's RFP for Administrative Services. I affirmed this as part a number of conversations with him during discussions on aspects of the bid and our submission. It is also evidenced by Aetna's attendance at the State's pre-proposal conference and Aetna's written submission of the majority of bidder's questions seeking clarifications prior to the original Opening Date of Dec 28, 2005

FURTHER YOUR AFFIANT SAYETH NOT

DATED at Seattle, Washington this 28th day of March, 2006.

Mike Wiggins

SUBSCRIBED AND SWORN to before me this 28th day of March 2006

Notary Public
State of Washington
KRISTEN E PERRYMAN
My Appointment Expires Oct 13, 2008

Notary Public in and for Washington
My Commission Expires 10/13/2008

# FIFTH AFFIDAVIT OF MIKE WIGGINS

STATE OF WASHINGTON )
) ss.
KING COUNTY )

I, MIKE WIGGINS, being first duly sworn, to depose and say that:

1. I am 51 years old. My home address is 6628 138th PL SW, Edmonds, Washington.

2. In my current position at Aetna and Affiliate Companies I have had the overall account management responsibilities for the State of Alaska account since 1997.

3. My current job function includes working with other governmental entities throughout Aetna's West region.

4. Specifically for the State of Alaska proposal at issue in this protest, I participated in the development of our proposal strategy, review of specific sections of the proposal and oversight of the final price for our proposal and BAFO. Additionally, I was part of an Aetna team that participated in calls with the Department of Administration, the State's procurement office and the State of Alaska AG about potential actions being taken to remedy the loss of Aetna's proposal. Aetna participants in this call were Mike Robinson, Steve Fisher, Reed Stoops and myself.

5. On Wednesday, February 21, 2006 I participated as part of the Aetna team along with representatives from Premera in a call and the Department of Administration, State procurement, and the State of Alaska AG. The call was convened to discuss the outstanding issue of Aetna's lost proposal and further discussions on specifically what Premera information the Division had disclosed to Aetna and when and where it fit into the context of and intent to award to Premera that was issued on February 18, 2006.

6. During this call a State identified a problem with the original review team. They indicated that one of the original review team was no longer available to continue the process because that individual was currently out of State, and that the State's intent was to replace that one

individual with another reviewer for both proposals and the best and final offers.

7. There was no discussion during this call about different reviewers being involved in the review for Premera or Aetna or that more than one reviewer would be new to the process. The discussions centered on the one individual original reviewers being currently of out of State and that only one reviewer was going to be new to the process. All of us participating in the call were very concerned that the review team be as close as possible to the old team, so that the team's scores were as comparable as possible, to those of the original review team. Based up the State representative's comments during the call we had assurance that the remaining two members of the team would be "two (who) were on the original and PEC that scored Premera's proposal

8. During the call it was never mentioned, that one of the two "original" PEC members would be a member that did not score Premera. Had we been given notice of such a material change in the team's composition we would never have agreed to the process proposed by the State.

9. During the course of the telephone call discussing the State's proposed agreement a Premera representative stated that his company would not accept the agreement if it prevented his company from its rights to pursue future challenges and remedies. At the point in the conversation, Margie Van Dorn confirmed that accepting the State's proposed agreement in know caused Premera or Aetna to forfeit their right to pursue future appeals and protests.

10 Based the AG's comments we understood that at no point was Aetna waiving any of our rights to protest irregularities in the procurement process that had occurred

FURTHER YOUR AFFIANT SAYETH NAUGHT.

DATED this 28th day of March, 2006, at Seattle, Washington

Mike Wiggins

SUBSCRIBED AND SWORN before me this 30th day of March, 2006.

Notary Public
State of Washington
KRISTEN E PERRYMAN
My Appointment Expires Oct 13, 2008

Notary Public in and for Seattle
My commission expires 10/13/08

# AFFIDAVIT OF MATT MCGUINNESS

STATE OF CALIFORNIA )
) ss
COUNTY OF CONTRA COSTA )

I, Matt McGuinness, being first duly sworn, do depose and say that:

1. I am 40 years old. My home address is 114 Russell Drive, Walnut Creek, CA 94598.

2. My current position for Aetna is Underwriting Manager, National Accounts West. I have worked for Aetna for 14 years.

3. The RFP that is the subject of this protest is to provide medical and/or pharmacy benefit management claim services for the State of Alaska. Aetna and its affiliates have held this contract for these services for 24 years.

4. My own job experience in this field involves 10+ years directly related to the pricing of health insurance related matters.

5. In terms of my involvement with health management related RFPs, I have had, in addition to the current RFP in question, involvement in the (1) prior State of Alaska renewal, as well as numerous other RFPs and renewals for large self-insured customers.

6. My previous/past job titles have included Plan Coordination Consultant – Aetna, Underwriter – Aetna, Senior Underwriter– Aetna Underwriting Manager – Aetna.

7. My current job function includes management of underwriting staff and pricing responsibility for governmental customers, including the State of Alaska, King County (WA) and County of San Mateo (CA) as well as corporate customers such as Costco, Alaska Airlines, Charles Schwab, Hewlett Packard and REI.

8. Specifically for the State of Alaska proposal at issue in this protest, I oversaw the development of the various financial components, and have been

involved in the decision making process for all the major financial issues in the original proposal as well as the best and final offer.

9. By virtue of this experience, I have personal knowledge and am competent to testify regarding the subject matter of this affidavit.

## Attached Bar Chart

10. The purpose of this affidavit is to clarify the numbers discussed in the attached bar chart (attached as Exhibit 2) submitted by Aetna.

11. The bar chart highlights three things:

- The relative amount of administrative fees paid toward the total cost of the plan over three years;
- To point out that when Premera stated that they "eliminated" the $6.88 million "Network Access Fee", they had actually just moved it to a less obvious place; and
- That when looking at total plan costs, the Aetna proposal actually saves the State of Alaska almost $2.5 million.

### A. Premera, 2/13/06

12. In Premera's original bid on this project, it proposed to assess the State of Alaska a $5.51 per employee per month "Network Access Fee." *Attachment 4b, pg 2 & 4*

13. All medical claims service providers (both Aetna and Premera) enter into Preferred Provider Organization agreements. The agreements provide that health providers (doctors, etc.) will write off a portion of the charge for their service when the service is provided to a covered insured.

14. Aetna does business as one corporate entity throughout the country therefore Aetna's PPO agreements have nationwide coverage. Premera does business through many state and regional affiliates therefore Premera Alaska's PPO agreements have only state wide coverage. This difference in Premera's operations is the source of the "Network Access Fee."

15. If a Premera Alaska insured incurs a claim (for example) with an Arizona doctor, that Arizona doctor's PPO agreement will be with (again, just as an example) "Blue Cross of Arizona." Premera Alaska will ask "Blue Cross of Arizona" to make use of the latter's PPO agreement, and for that it, in its original bid on this project, Premera proposed to assess the State a $5.51 per employee/per month charge. This so-called "Network Access Fee" increases Premera's Net Administrative Fees by $6.88 million over the course of the contract.

16. In the bar chart *Premera 2/13/06 Net Administrative Fees* of $31,957,787 has been calculated as follows: $34,077,274, as described in section 7.23 of Premera's Cost Proposal dated February 13, 2006, plus $6,880,513 in "Network Access Fees" minus $9.0 million in "guaranteed"[1] pharmacy rebates ($3.0 million per year) ($34,077,274 + $6,880,513 - $9.0 = $31,957,787).

17. In the bar chart *Premera 2/13/06 Carrier Retained Discounts* of $5,496,780 is calculated as follows:

- The $5.49 million consists of 12% of the projected Network Discount Savings over $100 per employee per month. The first year estimated network savings is $117.32 per employee per month. The amount over $100 would therefore be $17.32 and Premera would retain 12% of that number, which works out to $2.08 per employee per month. We calculated this $117.32 by following standard industry underwriting methodology.

- We took Aetna's actual Network Discount Savings from our standard "level A" reporting package for the period 10/1/04 – 10/1/05 of $92.42 and trended it forward to the 7/1/06 – 7/1/07 contract period at an annual rate of 15.4%, which works out to an adjusted rate of 27.0%. This adjusted rate is developed by measuring the number of months between the midpoint of the reporting period (4/1/05) and the midpoint of the upcoming contract period (1/1/07). There are 21 months between these two points in time. Therefore the annual trend rate of 15.4% is multiplied by 21/12, which gives the 27.0%. We

[1] Please note that this "guarantee" by Premera is contingent upon a minimum average volume of 80,000 "paid claims" per month. Premera's guarantee specifies that if the number of paid claims does not meet this threshold, the "guarantee" will be prorated accordingly, meaning it can be less than $3.0 million per year. Aetna's first year expectation of the number of paid claims (what Aetna calls "valid scripts") is 72,137 per month.

then increased $92.42 by 27.0% to arrive at the first year estimated network savings of $117.32 per employee (or retiree) per month.

- Premera stated in its "Clarification Questions" dated February 1st, 2006, that 12% of any savings over $100.00 per employee per month would be retained by Premera. *Attachment 4b, pg 4.* Therefore, 12% of $17.32 would be retained by Premera. This works out to $2.08 per employee per month x 33,592 employees (or retirees) x 12 months in the first contract period, for a total of $837,954 estimated to be retained by Premera.

- This same methodology was followed for the second and third contract years, trending each years estimated network discount savings forward at an annual rate of 15.4%, and assuming 12% of the amount over $100.00 per employee per month would be retained by Premera. Second year estimated retained discounts are $1,779,257. Third year estimated retained discounts are $2,879,568. The three year total is: $837,954 + $1,779,257 + $2,879,568 = $5,496,780.

**B. Premera, 2/28/06**

18. The State, asked Premera, in "Clarification Questions" dated February 24, 2006, if it could bill the "Network Access Fee" in a different manner. *Attachment 4b, pg 2*

19. Premera advised the Procurement Officer, in its February 28, 2006 Best and Final Response, that the fee was "eliminated." *Id. at 57.* Premera did remove the fees it titled "Network Access Fees" however Premera correspondingly increased others fees to its bid particularly Carrier Retained Discounts that would be more than enough to recover the $6.88 million "Network Access Fee."

20. In the bar chart *Premera 2/28/06 Carrier Retained Discounts* of $13,741,949 was calculated the same way *Premera 2/13/06 Carrier Retained Discounts* were in paragraph 16 above, but Premera changed their retained amount of rebates from 12% of anything over $100.00 per employee per month to 30% of anything over $100.00 per employee per month in its Cost Proposal dated February 28, 2006. This change in percentage is very significant.

- The $13.7 million consists of 30% of the projected Network Discount Savings over $100 per employee per month. The first year estimated network savings is a $117.32 per employee per month. The amount over $100 would therefore be $17.32 and Premera would retain 30% of that number, which works out to $5.196 per employee per month. We calculated this $117.32 by following standard industry underwriting methodology.

- We took Aetna's actual Network Discount Savings from our standard "level A" reporting package for the period 10/1/04 – 10/1/05 of $92.42 and trended it forward to the 7/1/06 – 7/1/07 contract period at an annual rate of 15.4%, which works out to an adjusted rate of 27.0%. The adjusted rate is developed by measuring the number of months between the midpoint of the reporting period (4/1/05) and the midpoint of the upcoming contract period (1/1/07). There are 21 months between these two points in time. Therefore the annual trend rate of 15.4% is multiplied by 21/12, which gives the 27.0%. We then increased $92.42 by 27.0% to arrive at the first year estimated network savings of $117.32 per employee (or retiree) per month.

- Premera stated, in its "Performance Standards Summary" dated February 28, 2006, that 30% of any savings over $100.00 per employee per month would be retained by Premera. Therefore, 30% of $17.32 would be retained by Premera. This works out to $5.196 per employee per month x 33,592 employees (or retirees) x 12 months in the first contract period, for a total of $2,094,886 estimated to be retained by Premera.

- This same methodology was followed for the second and third contract years, trending each years estimated network discount savings forward at an annual rate of 15.4%, and assuming 30% of the amount over $100.00 per employee per month would be retained by Premera. Second year estimated retained discounts are $4,448,143. Third year estimated retained discounts are $7,198,920. The three year total is: $2,094,886 + $4,448,143 + $7,198,920 = $13,741,949.[2]

[2] It is important to note that the amounts retained go up dramatically each year because the per employee per month savings are compounded each year (working out to $117.32 in year 1, $135.39 in year 2 and $156.24 in year 3), but Premera retains 30% of all amounts over a fixed amount of $100.00 for the three year contract period.

21. In the bar chart *Premera 2/27/06 Net Administrative Fee* of $21,951,035 is the $30,951,059 described in section 4.23 of Premera's Cost Proposal dated February 28, 2006 less the $9.0 million in guaranteed pharmacy rebates ($3.0 million per year).

22. *Premera 2/27/06 Net Administrative Fee* reflects the "removal" of the $6.88 million "Network Access Fee." In conjunction with removing the $6.88 million "Network Access Fee", Premera's Cost Proposal dated February 28, 2006 increased the amount of Carrier Retained Discounts from 12% to 30%. As described in paragraph 20 above, 30% results in an estimated additional $8.2 million in discount savings to be retained by Premera.

23. The increase in Premera's Carrier Retained Discounts effectively shifts the $6.88 million from Net Administrative Fees to Carrier Retained Discounts. Therefore Premera did not in fact eliminate the $6.88 million "Network Access Fee." It hid the fee by increasing Carrier Retained Discounts.

## C. Aetna

24. It is common practice, and in fact, common sense, that when judging one proposal against another, one cannot focus on just one category of costs, while excluding another.

25. To determine the total cost to the State of Alaska, in addition to the administrative fees specified in the Cost Proposal, one must also include:

- The impact of pharmacy rebates (whether retained by the carrier or given to the State);
- Fees collected through another mechanism besides the monthly billing;
- Network discounts retained by the carrier in lieu of higher fees, and
- Runoff processing charges.

The State of Alaska should have taken these factors into consideration when judging the proposals. If the state did take these factors into consideration the

proposal submitted by Aetna on February 28, 2006 would have been judged to save the state approximately $2.5 million.

26. This $2.5 million does not include the impact of the cost of runoff claim processing. Premera charges 4% of claims processed after termination of the plan for this service. Aetna charges three months of service fees. Based on our projections, at the end of the 3 year contact period, the Aetna runoff processing fee would be $2.6 million, while the Premera fee will be almost $5 million. This alone would result in a savings to the State of $2.4 million at the time the plan terminates. Should the State of Alaska terminate the Aetna contract in 2006, the runoff processing fee payable at that time will be approximately $2.8 million.

27. Including the impact of runoff claim processing, we feel the Aetna proposal would save the State a total of $4.9 million.

28. The following describes in some detail, how Aetna came up with each of the numbers in the graph, and their significance to Aetna's assertions.

29. Aetna Carve Retained Discounts of $3,401,128 is made up of two components. The first is a potential "bonus" of up to 5% of medical fees that Aetna can earn for exceeding the Aetna network savings guarantee. For purposes of this comparison, we have assumed that Aetna will exceed that guaranteed network savings and thus earn the additional fee, and further that the "bonus" will be the same for each year of the three year contract period, totaling $977,622 over 3 years. Please note that the threshold set for this guarantee was only set for year 1 of the contract period, with the intent that it will be reviewed towards the end of each year, and set at a level agreeable to the State for the subsequent year, based on the latest claim information available. The second component is the fee for Aetna's "National Advantage Program." The NAP program gains the State of Alaska special negotiated discounts on certain PPO out of network and indemnity claims that would normally be paid at a non-discounted rate. The fee for the NAP program is 30% of the actual savings attained. We have estimated the total three year fee at $2,423,506 which is based off of actual 2005 NAP savings & fees.

30 Aetna Explicit Administrative Fee of $29,804,652 is comprised of $32,054,652, which is the total 3 year Aetna fee in section 7.23 of the Cost Proposal dated February 28, 2006, less the $2,250,000 guaranteed minimum pharmacy rebate to the State.

Further y affiant sayeth naught

Dated this 24th day of March, 2006, at Walnut Creek, California.

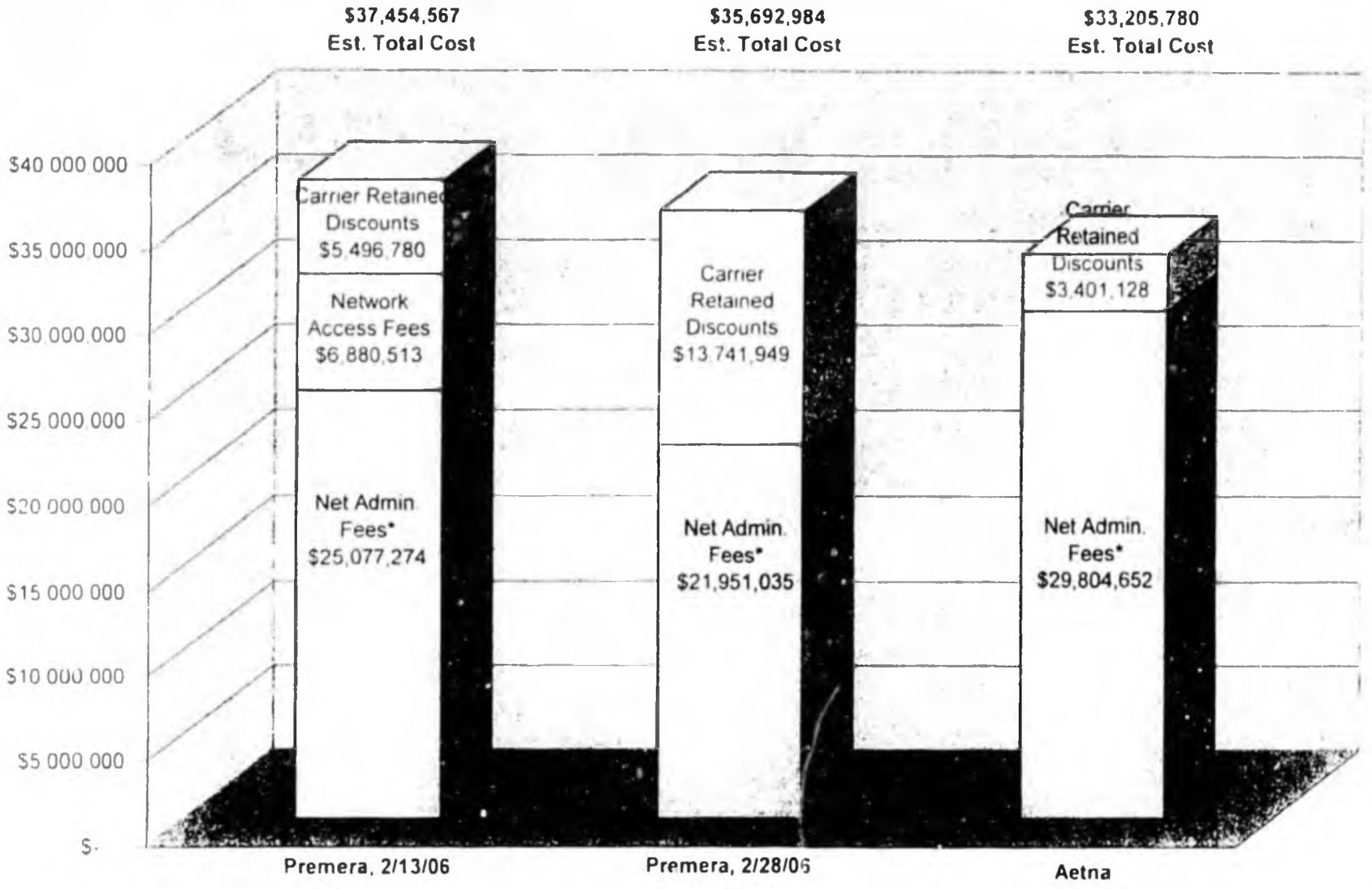
Matt McGuinness

SUBSCRIBED AND SWORN before me this 24th day of March, 2006, by Matt McGuinness who produced I.D.

KEKE KASTL
Commission # 1843906
Notary Public - California
Contra Costa County
My Comm. Expires Jan 13, 2009

Notary Public in and for California
My commission expires 1/13/09

## Exhibit 2: State of Alaska, Carrier Compensation Breakdown, 3 year view




*Net Administrative Fees is actual fees minus guaranteed pharmacy rebates

# AFFIDAVIT OF ROBERT C. MOORE

STATE OF CONNECTICUT

COUNTY OF HARTFORD

I, ROBERT C. MOORE, after being first duly sworn, do depose and say that:

1. I am 56 years old. My home address is 11 Stegos Drive Wallingford CT 06492.

2. My current position for Aetna is Actuarial Team Leader, Hartford, Connecticut. I have worked for Aetna for 36 years.

3. My current job function includes responsibility for pricing health benefit plan administrative services provided to plan sponsors by Aetna, including the cost of new customer implementation management services.

4. Based on my experience in pricing administrative services to plans sponsors, I have projected the costs to an insurer, such as Premera, in setting up new benefit plans for the State of Alaska active employees and retirees. In making these cost projections, I considered that the contract was awarded to Premera on March 13, 2006, with an contract effective date to be July 1, 2006, for health and pharmacy services to be provided to approximately 35,000 enrollees and their dependants.

5. Listed below are the projected new customer set up costs for the State of Alaska plans. The costs include hiring or re-deploying necessary staff to work on all aspects of account set up prior to the effective date, including customer-specific training. To reflect employee benefits, taxes, rent, telephone, computer services and other overhead items, I added a 50% overhead factor to pre-contract date salary costs. Based on this review, I calculated the costs to implement the State of Alaska plans to be $614,293. The cost components are as follows:

| | |
|---|---|
| Claims Processing Requirements | $126,575 |
| Member Services | $144,831 |
| Provider Services | $144,831 |
| Eligibility | $ 9,975 |
| Plan Coordination Consult | $ 5,400 |

| | |
|---|---|
| Billing | $ 2,734 |
| Drafting | $ 7,313 |
| SIMS Coordination | $ 16,875 |
| Patient Management | $ 82,500 |
| Account Executive | $ 73,260 |
| TOTAL START UP COSTS | $614,293 |

6. While my calculations are based on Aetna's experiences with setting up large national account costumers, I believe that these costs are representative of the health insurance industry as a whole and that Premera's set up costs for the State of Alaska active employees and retirees would be similar.

7. With a July 1, 2006 effective date, implementation expenses would be incurred primarily in the three months preceding the effective date

FURTHER AFFIANT SAYETH NOT.

DATED at Hartford, Connecticut this 27th day of March, 2006

Robert C. Moore

SUBSCRIBED AND SWORN to before me this 27 day of March, 2006

Notary Public in and for
My Commission Expires

JANET S. FOX
NOTARY PUBLIC
My Commission Exp. June 30, 2009

# AFFIDAVIT OF REED R. STOOPS

STATE OF ALASKA )
) ss
FIRST JUDICIAL DISTRICT )

I, Reed R. Stoops, being first duly sworn, do depose and say that:

1. I am 57 years old. My home address is 1703 Willow Drive, Juneau, Alaska 99801.

2. I am a lobbyist for business clients, including Aetna. I have represented Aetna in Juneau for approximately 20 years.

3. My current job function includes representing Aetna with the Legislature and Administration.

4. Specifically for the State of Alaska proposal at issue in this protest, I consulted with Aetna on occasion during its development and participated in calls with the Department of Administration after it was determined that a portion of Aetna's bid had been lost by the Department.

5. On Wednesday, February 22, 2006, I participated in a call with representatives from Aetna, Premera, the Department of Administration and the Department of Law. The call was convened to discuss proposed actions by the Department in the aftermath of the discovery of a portion of Aetna's RFP that was not provided to evaluators.

SIMPSON, TILLINGHAST & SORENSEN
One Sealaska Plaza Suite 300
Juneau, Alaska 99801
(907) 586-1400 FAX (907) 586-3065

6 In that call, the Department indicated that it was going to "reconstitute the evaluation team" to determine whether Aetna's bid was susceptible to award. The Department further indicated that they were going to substitute a member of the "evaluation team" that reviewed and scored Premera's proposal because Sheri Gray had left for vacation out of state. My recollection is that the new member was going to be Judy Porter. There was no discussion that indicated another member of the "evaluation team" which was going to score Aetna's proposal was someone who did not complete the evaluation of Premera's initial proposal and whose score was not used in the evaluation.

Further your affiant sayeth naught.

Dated this 27 day of March, 2006, at Juneau, Alaska.

Reed R. Stoops

SUBSCRIBED AND SWORN before me this 27th day of March, 2006.

STATE OF ALASKA
OFFICIAL SEAL
Beverly K. Wilson
NOTARY PUBLIC
My Commission Expires 9-21-2009

Beverly K. Wilson
Notary Public in and for Alaska
My commission expires 9-21-2009

SIMPSON, TILLINGHAST & SORENSEN
One Sealaska Plaza, Suite 300
Juneau, Alaska 99801
(907) 586-1400 FAX (907) 586-3065

# AFFIDAVIT OF MIKE ROBINSON

STATE OF CALIFORNIA

COUNTY OF CONTRA COSTA

I, MIKE ROBINSON, being first duly sworn, do depose and say that

1. I, Michael T. Robinson, being first duly sworn, to depose and say that

2. I am 44 years old. My home address is 27 Sheridan Road, Oakland, CA 94618.

3. My current position for Aetna is Regional Vice President, National Accounts. I have worked for Aetna for 20 years.

4. My current job function includes overall responsibility for Aetna's national accounts business in the west region. In this role I have oversight for all administration work in support of the State of Alaska plan.

5. Specifically for the State of Alaska proposal at issue in this protest, I participated in the development of our proposal strategy, review of specific sections of the proposal and oversight of the final price for our proposal and BAFO. I also participated in calls with the Department of Administration about actions being taken to remedy the loss of our proposal.

6. On Wednesday, February 21, 2006 I participated in a call with representatives from Premera and the Department of Administration. Aetna participants in this call were Mike Wiggins, Steve Fisher, Reed Stoops and myself. The call was convened to discuss the issue of Aetna's lost proposal and Premera information that was disclosed to Aetna at the point where a notice of intent to award was issued on February 18, 2006.

7. In the call a state representative (I believe to be Vern Jones) identified a problem with the review team. He indicated that one of the original review team was no longer available to continue the process because that one individual was on vacation, and the state would be replacing that one individual with another reviewer for both proposals and the best and final offers (assuming Aetna's proposal was deemed "reasonably susceptible to award"). There was no discussion whatsoever about different reviewers being involved in the review for each competitor or that more than one reviewer was new to the process. Indeed, the reference to one individual being on vacation very clearly reinforced to us the fact that only one reviewer was going to be new to the process. As all of us were very concerned that the "reconstituted" review team be as close as possible to the old team, so that the team's scores were as comparable as possible, we relied on the fact that the remaining two members of the team would be "two (who) were on the original and PEC that scored Premera's proposal," as paragraph 1 of the agreement provided. It never occurred to us, and it was never mentioned, that one of the two "original" PEC members would be a member that did not score Premera. Such an individual would have been of no value in reconstituting a comparable-as possible review team, and we would never have accepted such a major change in the agreement.

8. It is also important to note comments made about the agreement not preventing future remedies for either competitor. As the agreement was being discussed Yori Mito, Chief Legal Officer for Premera, stated that he did not accept this agreement as preventing his organization from pursuing future challenges or remedies. Margie Vandor, a representative of the Department of Law, confirmed this agreement did not cause either party to forfeit their future opportunity to pursue a future protest or appeal. This is confirmed by item #5 in the agreement.

9. Consistent with the preservation of all remedies in paragraph 5 of the agreement, it was never our understanding that we were waiving any right to protest irregularities in the process that had occurred by that point (i.e. February 24). We would not and could not have made such a waiver, as we had no knowledge of what irregularities may have occurred by that point. Specifically, we had no knowledge at that time of the extent to which the State had coached Premera in improving its proposal through many pages of specific suggestions. We also did not know that one of the proposed reviewers, Pat Shier, never completed his scoring for the Premera proposal.

10. Finally, paragraph 4 of the agreement provided that, as a final step, after receipt of best and final offers from Aetna and Premera, both proposals will be scored." I understood the word "proposal" to mean the entire proposal, and not just the cost score, and my understanding of this sentence was that the entirety of both parties' final proposals would be scored by a common review team—the review team reconstituted under paragraph 1 of the agreement.

FURTHER YOUR AFFIANT SAYETH NOT

DATED at Walnut Creek this 27th day of March, 2006.

Mike Robinson

SUBSCRIBED AND SWORN to before me this ___ day of _____, 2006.

Subscribed and sworn to before me Sandra S. Belk, Notary Public on this 27th day of March 2006, by Michael Robinson who proved to me on the basis of satisfactory evidence to be the person(s) who appeared before me.

Sandra S Belk

Notary Public in and for _____
My Commission Expires _____

SANDRA S. BELK
Commission # 1567841
Notary Public - California
Contra Costa County
My Comm. Expires May 7, 2009

Aetna

**Michael T. Robinson**
National Accounts Region Head - West

RobinsonMT@aetna.com
**Tel:** 925-948-4205
**Fax:** 925-948-4902
2625 Shadelands Drive
Walnut Creek, CA 94598

April 28, 2006

The Honorable Bruce Weyhrauch
Chair, Special Committee on Ways and Means
House of Representatives
Alaska State Capitol, Room 421
Juneau, AK 99801

Re: State of Alaska Third Party Administrator proposals for health claims processing

Dear Representative Weyhrauch:

On April 7, 2006, you received a letter from the Department of Administration accompanied by a chart which purports to show Premera's proposal to the State of Alaska as less expensive than Aetna's proposal. Aetna maintains the Department's analysis contained in this letter is not accurate and fails to recognize Premera's proposal to the State would result in a significantly greater cost to the State over the next three year contract period.

This letter is written to help clarify and quantify some of the differences in cost between the Aetna and Premera proposals. In evaluating health care administration proposals, it is common practice in our industry to ask for all cost components to be clearly disclosed to ensure a full evaluation all of cost factors. We feel confident that had this procurement followed the established State procurement practice of utilizing a Benefit Consultant, they would have established benchmarks and completed a thorough financial analysis to ensure this occurred. We are concerned you and other members of your committee may not be aware of several key cost components of the current Premera proposal which are significant enough to warrant your attention.

The summary analysis provided to your committee by the Division of Administration (attached) fails to quantify the full cost of the Premera contract. To help you better understand the full financial picture, we have outlined the details of two significant, but material, omissions about Premera's most recent proposal to the State below:

- Network savings retained by Premera in lieu of higher fees
- Post termination claim processing costs

As noted previously, it has been the State's practice to retain and involve expert benefits consultants in evaluating medical claims administration proposals. We believe a benefits consultant would include these additional cost components in the normal course of the proposal analysis and evaluation. This would ensure a comparable or "apples to apples" evaluation with full disclosure of all cost elements. This analysis would also lead to the conclusion that the "best and final offer" submitted by Aetna on February 28, 2006 was the most cost effective proposal for the State of Alaska saving approximately $4.9 million when compared to the Premera proposal.

Outlined below, you will find a financial analysis that we believe to be an accurate and supportable approach in comparing the Aetna and Premera proposals submitted to the State. We also believe an expert benefits consultant would find our assumptions and conclusions to be very reasonable. Aetna has submitted detailed affidavits of these calculations with our pending appeal to the assigned Administrative Law Judge.

**Network discounts retained by Premera (30%) as compared to Aetna's (5%) retention: ($2.5 million savings to the State had they selected Aetna)**

**Premera**
$30,951,035 (3 years of fees)
- $9,000,000 (3 years of guaranteed pharmacy rebates)
= $21,951,035 (gross cost)

$21,951,035
+ $13,741,949 (Network savings that Premera keeps and does not pass on to the State)
= **$35,692,984 (Net cost to State of Alaska)**

**Aetna**
$32,054,652 (3 years of fees)
- $2,250,000 (3 years of guaranteed pharmacy rebates)
= $29,804,652 (gross cost)

$29,804,652
+ $3,401,128 (Network savings that Aetna keeps and does not pass on to the State)
= **$33,205,780 (Net cost to State of Alaska)**

Aetna and Premera both offer national preferred provider networks in which negotiated discounts benefit both the plan participants and the plan sponsor (State of Alaska). In some cases, a portion of the negotiated discount is retained by the plan administrator as an offset to administration fees. In reviewing publicly available information, we found a significant change in Premera's "best and final offer." While the explicit administration fees were reduced, the network savings share increased significantly from 12 % to 30%. This means Premera will retain 30% of the negotiated savings realized through this PPO network arrangement. By comparison, Aetna is retaining 5% of the network savings. The estimated impact of this

arrangement allows Premera to retain $13.7 million of the savings over the first three years of the contract while Aetna would only retain $3.4 million. In other words, Premera's bid cost the State $10.3 million more than Aetna's bid in network savings with a net effect of making their proposal $2.5 million more expensive than Aetna's proposal.

**Post termination claim processing costs: (Savings to State for selecting Aetna $2.44 million)**

As required in the RFP, both proposals included administrative fees to be paid at the end of the contract for the handling of claims incurred prior to, but paid after that termination date. This is a fairly common approach, and a benefits consultant would typically include this termination cost in developing the total cost projection. The Premera proposal states their charges for this service will equal 4% of claim dollars processed after termination of the plan. Aetna's quoted cost for this administration is three months of service fees. Using very conservative projections, the Aetna runoff processing fee would be $2.6 million and Premera's fee would be approximately $5 million. This will result in an additional cost to the State of $2.4 million at the time the plan terminates. We do not believe this additional cost has been included in the State's analysis.

**Premera**

$30,951,035 (3 years of fees)
- $9,000,000 (3 years of guaranteed pharmacy rebates)
= $21,951,035 (gross cost)

$21,951,035
+ $13,741,949 (Network savings that Premera keeps and does not pass on to the State)
= **$35,692,984 (Net cost to State of Alaska)**

$35,692,984
+ $ 5,000,000 (Post Termination Costs)
= **$40,692,984 Final Premera Cost to State of Alaska**

**Aetna**

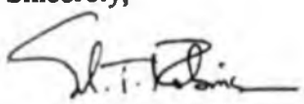
$32,054,652 (3 years of fees)
- $2,250,000 (3 years of guaranteed pharmacy rebates)
= $29,804,652 (gross cost)

$29,804,652
+ $3,401,128 (Network savings that Aetna keeps and does not pass on to the State)
= **$33,205,780 (Net cost to State of Alaska)**

$33,205,780
+ $2,600, 000 (Post Termination Costs)
= **$35,805, 780 Final Aetna Cost to State of Alaska**

Beyond the numerous bid irregularities, Aetna contends its bid was and is still financially superior to the Premera bid that has been accepted by the Department of Administration when all cost elements are evaluated. We will continue to pursue an appeal of the award because we believe our cost proposal is the most advantageous, and it involves none of the turmoil associated with changing administrators. Aetna values the State's business, and we hope to continue supporting State benefit plans. We appreciate the time you have taken to understand our concerns, and we are happy to discuss any of the details provided in this letter or our appeal if you would like more information.

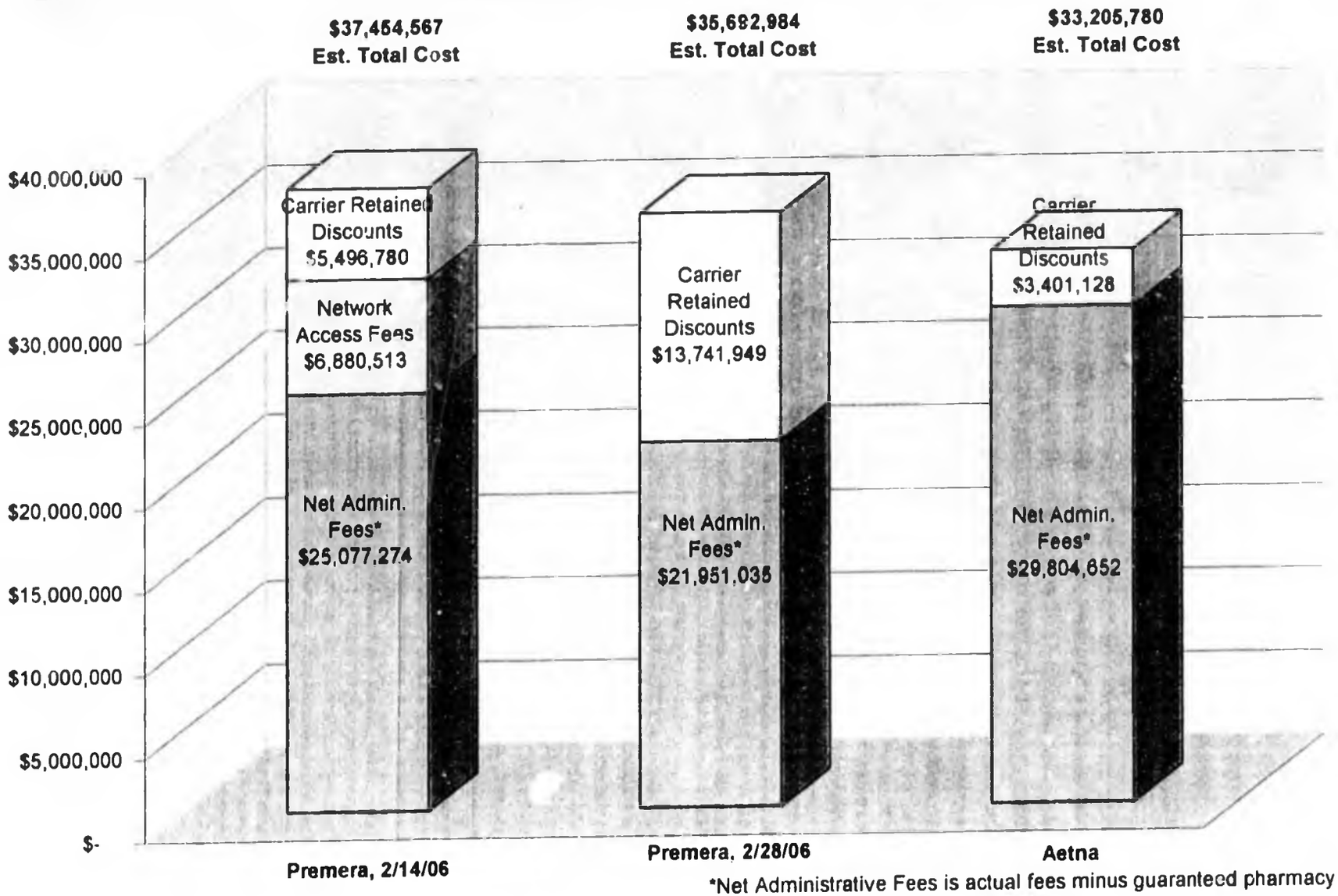
Sincerely,



Michael T. Robinson
National Accounts Region Head

Exhibit 2

## State of Alaska, Carrier Compensation Breakdown, 3 year view




*Net Administrative Fees is actual fees minus guaranteed pharmacy

STATE OF ALASKA

FRANK H. MURKOWSKI, GOVERNOR

DEPARTMENT OF ADMINISTRATION

OFFICE OF THE COMMISSIONER

PO BOX 110200
JUNEAU, ALASKA 99811-0200
PHONE (907) 465-2200
FAX (907) 465-2135

April 7, 2006

The Honorable Bruce Weyhrauch
Chair, Special Committee on Ways and Means
House of Representatives
State Capitol, Room 421
Juneau, Alaska 99801

Re: Response to Questions from Meeting on March 17, 2006

Dear Representative Weyhrauch:

This letter is written in response to questions received from members of the Special Committee on Ways and Means on March 17, 2006. I have re-stated the questions, below in italics, with responses immediately following.

1. *What were the cost proposals received by the Division of General Services for the RFP Third Party Administrator (TPA) for active and retiree health claims processing?*

Attached is a summary sheet that outlines the cost proposals received from Aetna and Premera Blue Cross for Third Party Administrative services.

2. *What percentage of the 3.0 % premium increase for the retiree plan and 1.8% for the active plan premium increase can be attributed to the Third Party Administrator?*

The specific categories of cost containment as provided to the Special Committee on Ways and Means are noted below for both the AlaskaCare active and retiree health plans (see attached sheet).

**Utilize Network Savings TPA (FY05)*.....$35.2 M**
The Network Savings amount originates from the TPA, who negotiates rates with various medical facilities and providers. In FY2005 the State negotiated with the TPA a performance guarantee associated with the network savings amount in an effort to increase the network savings amount. The State expects Premera Blue Cross, as the new TPA, to meet or exceed the network savings amount previously generated from Aetna.

**Verify Dependent Eligibility Active and Retiree Health Plans .....$14 M**
This first time cost containment measure was brought forward by the Division with strong support from the Commissioner's Office, the Health Benefits Evaluation Committee and Retirement Health Subcommittee.

**Qualified for Medicare Part D Subsidy.....$7 M**
The Division pursued application with the Federal Government to qualify for this subsidy.

Printed on recycled paper by Alaska Litho, Inc

**Negotiated Pharmacy Rebates*.....$4 M**
The Third Party Administrator negotiates to obtain pharmacy rebates. In the last three years the pharmacy rebate amount has been approximately $4 million annually. The recent proposal from Aetna provided for a pharmacy rebate of $750,000 whereas Premera Blue Cross will guarantee $3.5 million annually under the terms of the contract.

**Utilize Generic Drugs*.....$4 M**
This was an educational effort that included combined efforts from the TPA, Health Subcommittees (active and retiree), Division Staff and Deloitte Consulting.

**Verified Eligibility for Full-time Students.....$3 M**
The Division initiated this measure in order to remove dependents that were not eligible in accordance with AS 39.35.680 (12) and as a cost containment measure.

**Awarded New TPA Contract To Premera Blue Cross (3 Yr Ave).....$3.6 M**
The Division initiated the TPA RFP in accordance with AS 36.30. Division of General Services has oversight for RFPs and the contract negotiation process.

**Note: * identifies the Third Party Administrator's role in cost containment initiatives.**

3. *What were Aetna's last final bid proposal costs for FY2007, FY2008 and FY2009 compared to the last final proposal costs for Premera Blue Cross?*

See attached sheet.

In closing, I appreciate the opportunity to provide the members with this information. Please let me know if you have any questions about this correspondence.

Sincerely,

Scott J. Nordstrand
Commissioner

Enclosure(s)
cc: Members of Special Committee on Ways and Means

Kevin Brooks, Deputy Commissioner
Department of Administration

Michael Tibbles, Deputy Commissioner
Department of Administration

Melanie Millhorn, Director, Division of Retirement and Benefits
Department of Administration

**StarTribune.com** | MINNEAPOLIS - ST. PAUL, MINNESOTA
Last update: April 27, 2006 – 8:56 AM

# Blue Cross reserves: $1 billion

He says premiums continue to rise while reserves total more than $1 billion.

**Glenn Howatt,** Star Tribune

Blue Cross and Blue Shield of Minnesota has amassed more than $1 billion in financial reserves but continues to raise health care premiums and shift costs to consumers, according to an investigation by Minnesota Attorney General Mike Hatch.

In a seven-volume report to be released today, the attorney general's office credited Blue Cross for trimming travel and entertainment expenses, but faulted the Eagan company for generous executive pay packages, high spending on consultants and accumulating $1.1 billion in reserves, an amount 12 times greater than state law requires.

"The obligation of Blue Cross is to provide affordable health care," Hatch said. "Their statutory purpose is not to become the wealthiest nonprofit."

Officials in at least 12 other states have raised concerns about growing surpluses at local Blue Cross plans. Some have called for customer rebates or funding health care for the uninsured.

A Minnesota Blue Cross official defended the reserves Wednesday, saying Hatch's office had overstated the company's financial position.

"We actually don't agree with the calculations that the attorney general has in his report," said President Colleen Reitan. "Our reserve levels are absolutely in keeping with both regulatory and auditing requirements."

Blue Cross acknowledged that it has $693 million in surplus funds, which is about three to four times above state-required minimums. Reitan said it would be too risky to reduce the company's surplus to the mandatory minimum.

She added that its financial strength gives the company the ability to serve state residents with a variety of health plans.

Reitan said Blue Cross, which received a copy of the report Wednesday, will review Hatch's recommendations on consulting, compensation and expenses. But she said the company stands behind several health improvement initiatives criticized by Hatch, including its $9 million "do" advertising campaign, which promotes physical fitness.

"[Hatch] really views health plans as playing a very narrow role," Reitan said. "We have an eye towards the long-term determinants of health care costs. We think it is central to the mission of the organization."

**Series of criticisms made**

With 2.7 million members, Blue Cross is also a much more complex organization than when it became Minnesota's first health plan in 1933 and offered hospital insurance for a dime.

The Minnesota Blues have become a national player, selling health insurance to national companies through an agreement with the Blue Cross and Blue Shield Association, which coordinates with other Blues organizations. About one-third of its members don't live in the state.

They are also involved in multicompany partnerships that control prescription drug costs and market Medicare drug plans.

Hatch's Blue Cross review, which began 15 months ago, is the fourth his office has conducted of a nonprofit health care company. The first review, of Allina Health System, which at that time included Medica health plans, uncovered lavish spending on travel, executive perks, entertainment, gifts and consultants.

That review, released in 2001, triggered management and board changes at Allina and Medica. The health plan remained under Hatch's purview until Medica won its independence last year after a long court battle.

He called on Blue Cross, which had already made changes in response to the audits of Medica and HealthPartners, to tighten its spending policies on compensation, travel and consultants.

But his primary criticism was the size of the Blue Cross reserves.

"They ought to refund this money back to policyholders," Hatch said. He also criticized the Minnesota Commerce Department, which regulates insurers, for letting the Blues set aside the money, which appears on company financial statements but is not counted as part of its surplus.

"We have as many complaints about the regulator here as we do about the company," he said.

**Concerns raised elsewhere**

The report said Blue Cross has used accounting gimmicks to inappropriately set aside $174 million. Another $50 million was moved to the Blue Cross Foundation, which has been giving away an average of $1.7 million a year and "stockpiling" the rest, according to the report.

And $190 million that Blue Cross has in three HMO subsidiaries aren't included in the surplus, contrary to national insurance standards.

"We have a very complacent regulator," said Hatch, who was commerce commissioner under Gov. Rudy Perpich. Commerce Department spokesman Pet Sexton said agency officials had not seen Hatch's report. But Assistant

Commissioner Jackie Gardner said the national standard doesn't apply to Minnesota in this case because HMOs here are nonprofit, meaning that they have no corporate owners and that Blue Cross can't claim the assets.

The issue of Blue Cross subsidiaries has been raised in other states, said Laurie Sobel, senior staff attorney at Consumers Union, which is monitoring developments across the country.

"A lot of this is just a hide-the-money game," Sobel said. "We feel like there should be more transparency, and the surpluses don't need to so high."

Under a deal reached with Pennsylvania's governor, the Blue Cross plans serving that state agreed to spend $1 billion of surplus funds over six years for community health activities, including basic health coverage for the uninsured.

Consumers Union found that the 38 nonprofit Blue Cross plans had a combined surplus of $20 billion at the end of 2003, an increase of 30 percent from the previous year. Health care researchers are now analyzing 2005 financial statements, which were filed in most states a month ago, to see if competition has forced those surpluses to shrink.

Large reserves are of concern to health-care policy officials because they indicate that premiums could be too high. They also give an insurer the financial cushion to underbid competitors.

**School plans were questioned**

Concerns about Blue Cross' market powers were raised last year in Minnesota after State Auditor Pat Anderson released a report criticizing the relationship between Blue Cross and several regional state cooperatives that buy health insurance for school districts and local governments.

The audit discovered that Blue Cross had employed a consultant who was also working for the cooperatives. It also said Blue Cross was not providing enough information to school districts, and questioned payments that Blue Cross was making to the cooperatives.

The Commerce Department said it would investigate Anderson's findings. Blue Cross said its arrangements with the cooperatives were appropriate and beneficial to schools and local governments.

Reitan said Hatch's misstatement of its reserves was one of the factual errors in the report. But she said the company will work with his office to make required changes.

Glenn Howatt • 612-673-7192

©2006 Star Tribune. All rights reserved.

ALASKACARE

# Third Party Administrator
# Cost Proposals (3 year total)

## Original Cost Proposal (January 6, 2006)

**Aetna -----** $49,163,734 / $45,387,171*
$3.5 million annual guarantee for pharmacy rebates

**Premera -** $34,390,750
No minimum guarantee for pharmacy rebates

* The state was unable to discern the difference between the two total prices offered by Aetna. Aetna was required to submit a single cost proposal in its best and final offer.

## Best and Final Cost Proposal (February 13, 2006)

**Premera -** $34,077,274
No minimum guarantee for pharmacy rebates

## Best and Final Cost Proposal (February 28, 2006)

**Aetna -----** $32,054,652
$750,000 annual guarantee for pharmacy rebates

**Premera -** $30,951,035
$3.0 million annual guarantee for pharmacy rebates

ALASKACARE

## Retiree and Active Health Plans
## Cost Containment Measures

- Utilize Network Savings TPA (FY05) .....$35.2 M
- Verify Dependent Eligibility (Est) ..... $14 M
- Qualified for Medicare Part D Subsidy .....$7 M
- Negotiated Pharmacy Rebate.....$4 M
- Utilize Generic Drugs.....$4 M
- Verified Eligibility for Full-time Students.....$3 M
- Awarded New TPA Contract to Premera Blue Cross (3 Yr Ave)...$3.6 M

Total Annual Savings = $70.8 M

ALASKACARE

## Third Party Administrator
## Contract Fee Schedule
## Last Final Best Offer Figures

| Annual Contract Fees | Premera Proposal | Aetna Proposal | Difference |
|---|---|---|---|
| FY07 | $8.1 M | $7.2 M | $.9 M |
| FY08 | $10.9 M | $12.0 M | ($1.1 M) |
| FY09 | $11.6 M | $12.8 M* | ($1.2 M) |
| | | Savings | $1.4 M * |

Note: The RFP process reduced the overall costs for Third Party Administration by $10.9 million when compared with existing contract fees.

*Third year costs for FY09 with Premera Blue Cross would also apply to contract renewal periods. For example, 4 one-year renewals at $1.2 M would result in Additional savings of $4.8 M in the out years of the contract compare to the Aetna proposal. In other words, the baseline contract cost ending in FY09 would allow additional accrual of savings for each one-year renewal.

Premera offered an annual $3.0 M Pharmacy Rebate Guarantee
Aetna offered an annual $750,000 Pharmacy Rebate Guarantee

ALASKACARE

## Third Party Administrator
## Contract Fee Schedule

| Annual Contract Fees | Premera Proposal | Aetna * Existing Contract | Difference |
|---|---|---|---|
| FY07 | $8.1 M | $13.9 M | $5.8 M |
| FY08 | $10.9 M | $13.9 M | $3.0 M |
| FY09 | $11.6 M | $13.9 M | $2.1 M |
| | | Savings | $10.9 M |

* Current contractor figures are based on FY06 amount, which are held constant for FY07, FY08 and FY09 for comparison purposes.

In the Press Conference held on March 7th, the Commissioner stated the Department of Administration would save almost $11 million dollars in future health care costs by comparing the 2005/2006 administrative fees charged by Aetna to the 2006/2007 bid price by Premera.

First, the comparison is not valid as the administrative costs currently charged by Aetna are not equivalent to those requested in the RFP bids due in part to the issue of payment for "claim runoffs" which is not included in the RFP bid for administrative costs.

Second, the comparison, at a minimum should have compared the bid numbers between the two companies, which would drastically reduce the difference as portrayed by the Department.

But the most important comparison should be the full cost that will be charged to the State under each bid.

There are three major "costs" to the State in this contract: administrative fees for processing claims, retention of pharmacy rebates, and retention of network savings.

The three are closely interrelated because costs may be easily shifted from one to the other. In fact, the change in Premera's bid from 2/14/2006 to 2/28/2006 shows just that sort of re-arranging. For that reason, the State has normally used its consultant to compare all cost variables so that the State can more accurately determine the best overall bid price.

Based upon documents that are now publicly available, Aetna estimates that Premera's bid price for administrative services was **$35,692,984**. Aetna's bid price was **$33,205,780** for a three year period. These costs consider all three of the important elements required to complete an effective cost analysis.

If the State chooses to go to a plan design with more financial incentives to utilize network providers, Premera's retention will increase significantly, raising their cost further.

Without a competent analysis by a qualified consultant, the State cannot reasonably demonstrate any savings in Premera contract. In fact, it may cost the State more

* Handout provided by Aetna

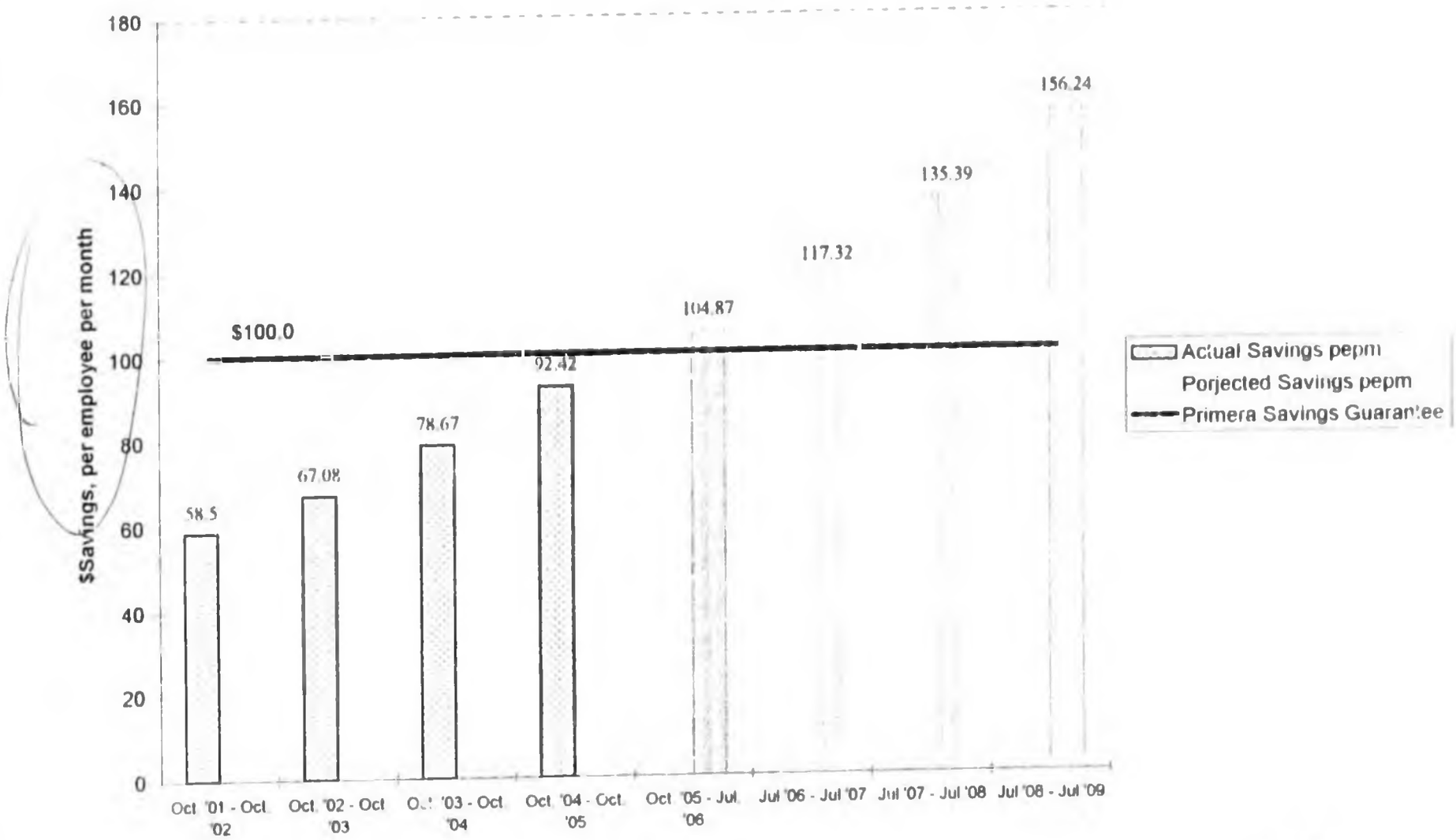
**Progression of Premera offer to the State of Alaska**

| As of February 14, 2006 | | |
|---|---|---|
| 3 year Fees: | $ | 30,951,035 |
| 3 year Network access fee: | $ | 6,880,513 |
| 3 year Rx Rebate guarantee | $ | (9,000,000) |
| 3 year network savings retained by Premera @ 12% | $ | 5,496,780 |
| Total cost to State of Alaska | $ | 34,328,328 |

| As of February 28, 2006 | | |
|---|---|---|
| 3 year Fees: | $ | 30,951,035 |
| 3 year Network access fee: | $ | - |
| 3 year Rx Rebate guarantee | $ | (9,000,000) |
| 3 year network savings retained by Premera @ 30% | $ | 13,741,949 |
| Total cost to State of Alaska | $ | 35,692,984 |

| Aetna Best and Final Offer to the State of Alaska | | |
|---|---|---|
| 3 year Fees: | $ | 32,054,652 |
| 3 year Network access fee: | $ | - |
| 3 year Rx Rebate guarantee | $ | (2,250,000) |
| 3 year network savings retained by Aetna* | $ | 3,401,127 |
| Total cost to State of Alaska | $ | 33,205,780 |

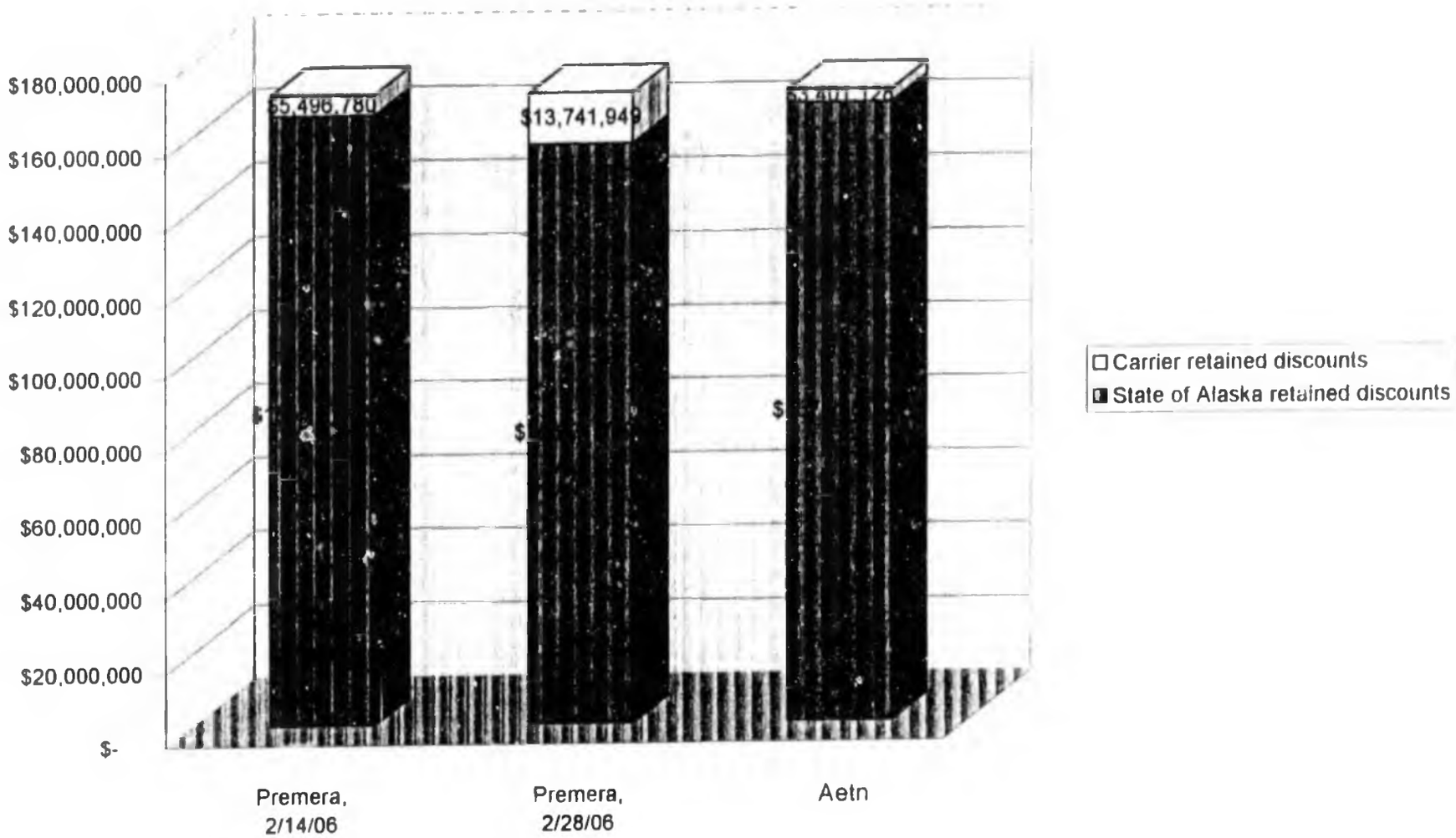
# State Of Alaska



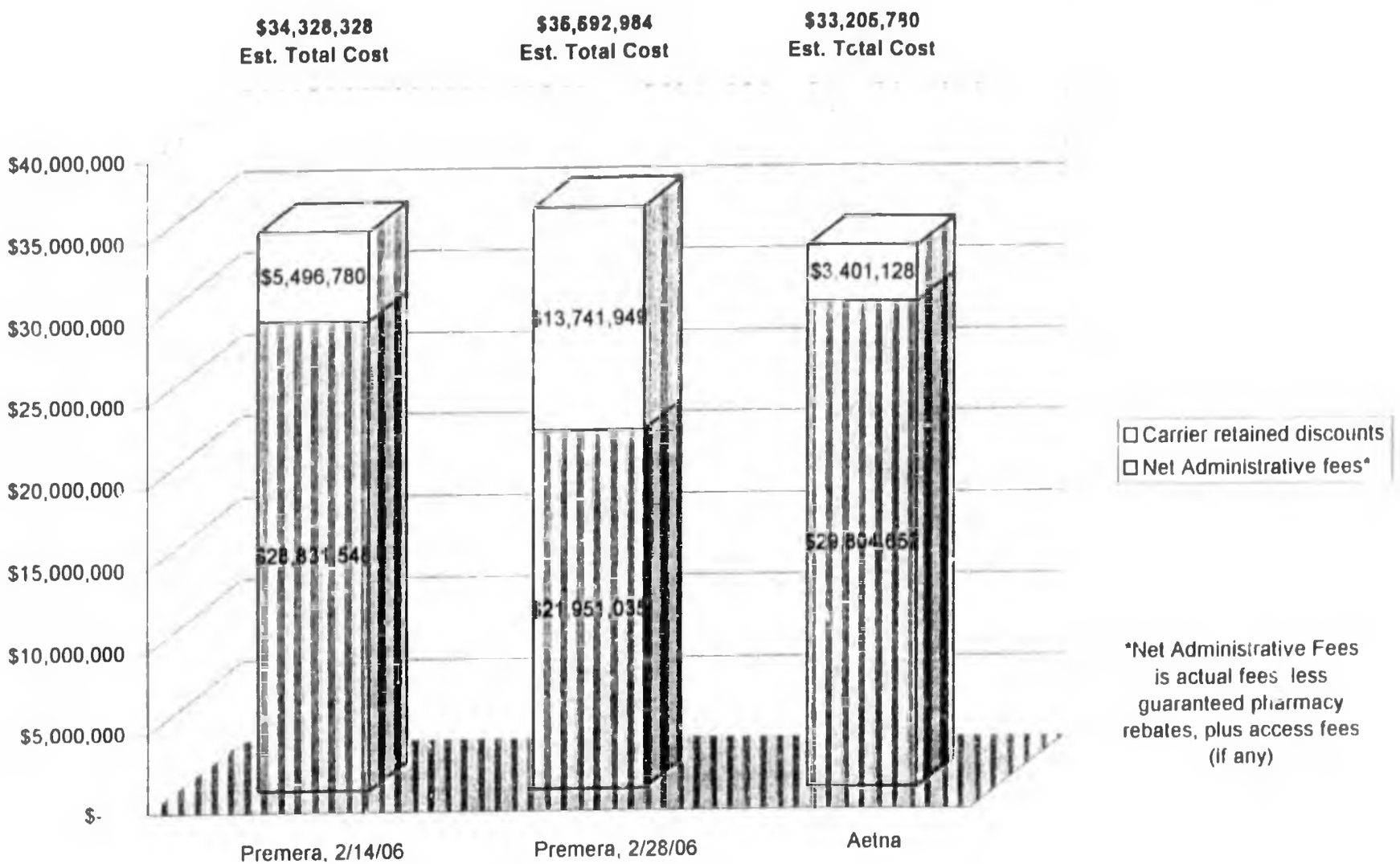



From Reed

## State of Alaska, Network Discount Savings Comparison, 3 year view



## State of Alaska, Carrier Compensation Breakdown, 3 year view



| Savings to the State, Aetna deal | Amount retained by Aetna |
|---|---|
| $ 114.79 | $ 2.53 |
| $ 132.09 | $ 3.30 |
| $ 152.57 | $ 3.67 |

| | % increase in savings over prior period |
|---|---|
| 10/1/01-10/1/02 | N/A |
| 10/1/02-10/1/03 | 14.7% |
| 10/1/03-10/1/04 | 17.3% |
| 10/1/04-10/1/05 | 17.5% |
| 10/1/05-7/1/06 | 13.5% |
| 7/1/06-7/1/07 | 11.9% |
| 7/1/07-7/1/08 | 15.4% |
| 7/1/08-7/1/09 | 15.4% |

*Includes upside to fee g'tee plus NAP savings estimate

NAP:

| | |
|---|---|
| *Current* | $ *602,485* |
| Year 1 | $ 695,268 |
| Year 2 | $ 802,339 |
| Year 3 | $ 925,899 |
| 3 year total: | $ 2,423,506 |

or meeting network savings g'tee

| | | |
|---|---|---|
| Year 1 | $ 325,874 | >> based on immature fees |
| Year 2 | $ 325,874 | >> assumed @ year 1 level, as no acutal g'tee was offered |
| Year 3 | $ 325,874 | >> assumed @ year 1 level, as no acutal g'tee was offered |
| 3 year total: | $ 977,622 | |

bined 3 year total: $ 3,401,128

| Network Savings Retained by Carrier |
|---|
| $ 5,496,780 |
| $ 13,741,949 |
| $ 3,401,128 |

Projected SOA discount savings PEPM

| Experience Period | Total $ Savings PEPM | Savings to the State, Premera deal | Amount retained by Premera |
|---|---|---|---|
| 10/1/01-10/1/02 | $ 58.50 | $ - | |
| 10/1/02-10/1/03 | $ 67.08 | $ - | |
| 10/1/03-10/1/04 | $ 78.67 | $ - | |
| 10/1/04-10/1/05 | $ 92.42 | $ - | |
| 10/1/05-7/1/06 | $ 104.87 | $ - | |
| 7/1/06-7/1/07 | $ 117.32 | $ 100.00 | $ 5.20 |
| 7/1/07-7/1/08 | $ 135.39 | $ 100.00 | $ 10.62 |
| 7/1/08-7/1/09 | $ 156.24 | $ 100.00 | $ 16.87 |

| | Network savings totals | Retained by Premera | Retained by Aetna |
|---|---|---|---|
| Year 1 | $ 47,292,161 | $ 2,094,886 | $ 1,021,142 |
| Year 2 | $ 56,722,453 | $ 4,448,143 | $ 1,128,213 |
| Year 3 | $ 66,663,233 | $ 7,198,920 | $ 1,251,773 |
| | $ 170,677,847 | $ 13,741,949 | $ 3,401,128 |
| Total Savings | $ 170,677,847 | $ 170,677,847 | |
| Carrier retained Savings | $ 13,741,949 | $ 3,401,128 | |
| State of Alaska Retained S | $ 156,935,898 | $ 167,276,720 | |

| | Premera Lives | Aetna |
|---|---|---|
| Year 1 | 33,592 | |
| Year 2 | 34,913 | |
| Year 3 | 35,556 | |

Upside to fee f

Comb

| | Network savings totals | Retained by Carrier | Retained by SOA |
|---|---|---|---|
| Premera - Feb 14 | $ 170,677,847 | $ 5,496,780 | $ 165,181,067 |
| Premera - Feb 28 | $ 170,677,847 | $ 13,741,949 | $ 156,935,898 |
| Aetna | $ 170,677,847 | $ 3,401,128 | $ 167,276,720 |

| | Gross Fees | Rx Rebates | Access fee | Net fees |
|---|---|---|---|---|
| Premera - Feb 14 | $ 30,951,035 | $ (9,000,000) | $ 6,880,513 | $ 28,831,548 |
| Premera - Feb 28 | $ 30,951,035 | $ (9,000,000) | $ - | $ 21,951,035 |
| Aetna | $ 32,054,652 | $ (2,250,000) | $ - | $ 29,804,652 |

| | | | |
|---|---|---|---|
| 10/1/01 - 10/1/02 | | | |
| 10/1/02 - 10/1/03 | | | |
| 10/1/03 - 10/1/04 | | | |
| 10/1/04 - 10/1/05 | | | |
| 10/1/05 - 7/1/06 | | | |
| 7/1/06 - 7/1/07 | | | |
| 7/1/07 - 7/1/08 | | | |
| 7/1/08 - 7/1/09 | | | |
| | Actual Savi | Projected S. | Primera Savings Guarantee |
| Oct. '01 - Oct. '02 | $58.50 | | $100.00 |
| Oct. '02 - Oct. '03 | $67.08 | | $100.00 |
| Oct. '03 - Oct. '04 | $78.67 | | $100.00 |
| Oct. '04 - Oct. '05 | $92.42 | | $100.00 |
| Oct. '05 - Jul. '06 | | $ 104.87 | $100.00 |
| Jul '06 - Jul '07 | | $117.32 | $100.00 |
| Jul '07 - Jul '08 | | $135.39 | $100.00 |
| Jul '08 - Jul '09 | | $156.24 | $100.00 |

**Legislative Briefing on Health Care Cost Proposals**

During the hearing a series of questions were asked about certain cost elements of the evaluation, namely pharmacy rebates and network savings sharing. In response to the questions, Vern Jones indicated that rebates and network savings share were evaluated in the qualitative segment of the review process. On page 4 of his response to Aetna's appeal it appears that those items would be scored under items 7.15(Provider Discounts) and 7.18(Pharmacy Benefit Management Services). The combined weight of these two categories is 8%.

The Premera proposal involves significant dollars in pharmacy rebates and network savings share. It also appears that they may have intentionally moved money among categories in an effort to improve their scoring in the financial section while the overall cost to the State does not improve. This would allow Premera to score better in the financial evaluation, where 40% of the overall weight is placed.

If you refer to the attached exhibit, you will see an estimate of the two Premera offers compared to Aetna's. This view includes administrative fees, pharmacy rebates and network savings share. A comprehensive evaluation must include all three of these categories to gain a full view of the cost picture. Failure to include all of these elements may allow a bidder to move money between the categories and improve their bid without actually improving the cost structure paid for by the State plans.

It appears Premera's initial bid (2/14/2006) involved administration fees and network access fees totaling $40,957,787. This was revised for their best and final offer (2/28/2006) to $30,951,035. Upon initial review this appears to be a significant reduction that would benefit the State. However, the initial proposal and subsequent contract include a network savings share arrangement that would allow Premera to recapture money if savings exceed a threshold. It appears that the savings share increased from 12% to 30% in conjunction with the revised administration fee. This allows Premera to recapture cost through a different mechanism. Aetna developed an estimate of what would likely be recaptured through this arrangement in both scenarios. While certain assumptions were made in developing this network share estimate, the assumptions are based upon Aetna's experience as the plan's long time administrator and established underwriting methods.

Using Aetna's estimate of network savings share it appears Premera would expect to recapture $5,496,780 with the initial offer. This increases to $13,741,949 with their best and final offer. It seems convenient that this arrangement allows them to recapture an additional $8,245,169 at a point where they claim to have reduced their fees by $10,006,752. While there was some overall improvement in the offer when all of the

necessary cost categories are considered, this combined view shows Aetna as having a superior overall offer.

By moving money between categories, it appears Premera benefited from having lower administration fees. This would allow them to score better in the cost category where 40% of the weight is placed. While they may have lost some points in the other categories, this approach certainly appears advantageous from a scoring standpoint. Unfortunately, the revised approach and improved score do not really lead to an improved cost structure for the state relative to the incumbent's (Aetna) offer.

The original basis for awarding the bid to Premera was significant cost savings. Certainly the significant disruption and turmoil caused by a short transition timeline might be justified for substantial savings. Unfortunately, the evaluation does not appear to have considered all of the relevant cost categories and a full cost comparison suggests Aetna's offer is superior.

Retired Public Employees of Alaska, APEA/AFT
Anchorage Office
3310 Arctic Blvd., Suite 200, Anchorage, Alaska 99503
Phone (907) 274-1703, (800) 478-9992, Fax 907-277-4588

March 24, 2006

The Honorable Frank Murkowski
Governor of the State of Alaska
PO Box 110001
Juneau, AK 99811-0001

Dear Governor Murkowski,

The Executive Board of the Retired Public Employees of Alaska respectfully request that the transfer of the Third Party Administrator (TPA) for AlaskaCare from Aetna to Premera Blue Cross be delayed pending the outcome of the challenge by Aetna to the State's decision to award to Premera Blue Cross. Our request is based on the belief that the bid and selection process was significantly flawed. Here listed are some of our concerns.

1. The selection process may have been violated by assigning different evaluators to the two bidders with only one out of seven persons having evaluated both bids.

2. Members of the retiree peer groups were not included on the evaluation teams nor were they consulted during the entire process. Nor was the usual expert health care consultant hired to advise the State, as had been done during previous contract awards.

3. There seems to be evidence of substantial inequality in soliciting clarifications and improvements to the two bidders.

4. There appears to have been summary rejection of a stand-alone pharmaceutical claim management contract.

5. There was loss by the State of bid documents necessary for the TPA bid from Aetna to be considered in concert with the regular review process.

6. And, there were other numerous inconsistencies, which appear to flaw the bid and selection process.

From past experience (ex: 1999 NylCare to Aetna) any transition from one TPA to another will involve extensive process problems resulting in poor service for over 45,000 AlaskaCare members for a significant period of time. For example: delays in payment of medical insurance claims; denial of legitimate medical insurance claims due to paperwork problems arising from the transfer process; communication problems with and between/among health care providers, recipients, and TPA; problems with coordination of benefits.

We believe the whole bid process should be revisited utilizing correct, objective and legal procedures. As things stand now there are numerous appearances of impropriety, which can and will taint the entire selection process and cause immense distrust among AlaskaCare beneficiaries.

For the Retired Public Employees of Alaska

Jay N. Dulany

Jay N. Dulany
Executive Vice-President

cc: Alaska Legislators

Protecting & Enriching
Your Retirement Years

Progression of Premera offer to the State of Alaska

| As of February 14, 2006 | | |
|---|---|---|
| 3 year Fees: | $ | 34,077,274 |
| 3 year Network access fee: | $ | 8,880,513 |
| 3 year Rx Rebate guarantee | $ | (9,000,000) |
| 3 year network savings retained by Premera @ 12% | $ | 5,496,780 |
| Total cost to State of Alaska | $ | 37,454,567 |

| As of February 28, 2006 | | |
|---|---|---|
| 3 year Fees: | $ | 30,951,035 |
| 3 year Network access fee: | $ | - |
| 3 year Rx Rebate guarantee | $ | (9,000,000) |
| 3 year network savings retained by Premera @ 30% | $ | 13,741,949 |
| Total cost to State of Alaska | $ | 35,692,984 |

| Aetna Best and Final Offer to the State of Alaska | | |
|---|---|---|
| 3 year Fees: | $ | 32,054,652 |
| 3 year Network access fee: | $ | - |
| 3 year Rx Rebate guarantee | $ | (2,250,000) |
| 3 year network savings retained by Aetna* | $ | 3,401,127 |
| Total cost to State of Alaska | $ | 33,205,780 |

# Alaska State Legislature


*DURING SESSION*
STATE CAPITOL
JUNEAU, AK 99801-1182
(907) 465-4843 (800) 892-4843
FAX: (907) 465-3871

*WEB SITE*
www.akrepublicans.org/Bunde

**SENATOR CON BUNDE**
District P

VICE-CHAIR: SENATE FINANCE COMMITTEE
CHAIR: SENATE LABOR & COMMERCE COMMITTEE

*DURING INTERIM*
716 W. FOURTH AVE.
ANCHORAGE, AK 99501-2133
(907) 269-0181
FAX: (907)269-0184

*E-MAIL*
Senator.Con.Bunde@legis.state.ak.us


March 29, 2006

Commissioner Scott Nordstrand
Department of Administration
PO Box 110200
10th Floor, State Office Building
Juneau, Alaska 99811-0200

Dear Commissioner:

Thank you for coming before the Senate Labor and Commerce Committee on March 24, 2006 to discuss concerns with the members regarding the 3rd party administrator contract award to Premera Blue Cross.

After hearing your testimony regarding the state's response to Aetna's protest, it appears that you believe the Department of Administration carefully evaluated all aspects of the two competing bids to ensure that you received the best overall bid/cost to the State.

Information provided by Aetna after review of the bid documents indicates that when you take into account the administrative fees, network access fees, network savings and pharmacy rebates, the proposal from Premera could likely cost the state $2 million more over the course of the 3 -year contract.

This contrasting information leaves unanswered questions in my mind. Since you did not hire a consultant to advise the Department on analysis of these two bids, I am requesting from you a comparison and analysis of the two bids in each of the four areas mentioned above. Additionally, I would like to know how these costs were taken into account in each proposal's scoring so I may better understand the projected costs to our state's health care system.

Sincerely,

Senator Con Bunde, District P
Chair, Senate Labor and
Commerce Committee

cc: Governor Frank Murkowski

# ALASKA BUDGET REPORT™

April 13, 2006 © ABR Company Volume 16, No. 15

## CONTENTS

**OVERVIEW**

Special session speculation, Senate spending ..... 1

**OIL AND GAS**

ANALYSIS: Time running out on Murkowski gas line ..... 3

Rokeberg oil tax break bill to cost state $157 million ..... 4

**EDUCATION**

H. Finance weighs K-12 aid; Chenault pushes reallocation ..... 7

**CONTRACTS**

DOA botches benefits bidding, denies Aetna allegations ..... 10

**REVENUE**

DOR cuts production outlook, assumes big budget cut in FY 08 ..... 15

**TRANSITIONS**

Bartholomew leaves permanent fund to build, climb, sail ..... 17

* Article reprinted by permission of the publisher.

Rebecca Braun, publisher and editor
Gregg Erickson, editor-at-large
Katie Bausler, reporter

ABR Company, 319 Seward St. Suite 7, Juneau, AK 99801
Phone: 907.523.2122 Fax: 907.586.1987
E-mail: rbraun@alaska.com Website: www.akbudgetreport.com

The *ALASKA BUDGET REPORT* is a copyrighted publication of ABR COMPANY, published weekly when the Alaska Legislature is in session and irregularly during the interim. Copying and electronic reproduction strictly prohibited except by written license.

# *ALASKA BUDGET REPORT*

**April 13, 2006**

**NO ISSUE NEXT THURSDAY**

The Legislature will take its traditional Easter-Passover recess from Friday, April 14 until Tuesday, April 17. As is our custom, we do not publish the *ALASKA BUDGET REPORT* during the week following the recess. We will resume regular weekly publication on April 20.

## OVERVIEW

### Special session speculation, Senate spending

Lots of talk focused this week on the possibility of one or more special sessions. When, what and how long are subject of speculation, and one's guesses tend to reflect one's political, practical or ideological inclinations. Those who don't want to see the governor's gas pipeline deal go through—and those who don't believe he really has a deal—tend to think a special session either won't happen or will be a relatively brief affair.

Stalwarts like the governor's chief gas line negotiator Jim Clark say there will be a special session immediately after the May 9 adjournment, and legislators should prepare for a long siege: first they'll need to take up some 10 to 20 amendments to the Stranded Gas Development Act and other statutes; then they'll need to approve the 300-page contract Clark says the administration will produce as soon as lawmakers approve an acceptable petroleum production tax. Somehow the public will need to be afforded a minimum of 30 days to review and comment on the behemoth contract, and at some point lawmakers will presumably campaign in advance of the August 22 primary election.

Pessimists see the possibility of a broader special session. "If we don't get the budget done and we don't get the PPT done, those'll be part of the call," House Speaker John Harris told reporters Monday. But House Majority Leader John Coghill said, "I don't know that the budget's going to be that tough—those issues seem small compared to the oil and gas issues."

Still, some speculate that if Senate Finance Co-chair Gary Wilken doesn't get his priority legislation through the House, he could hold up the capital budget, a strategy that proved effective for Senate Republicans last year. Wilken's SB 171, which would reallocate National Petroleum Reserve-Alaska revenue, is currently lodged in House Community and Regional Affairs, where co-chairs Kurt Olson and Bill Thomas have suggested it will stay. But Wilken is nothing if not tenacious.

Harris expressed his hope that the oil and gas tax legislation will be completed independent of the budget to avoid vote-buying. "I don't want the PPT tied around the capital budget."

Asked if that would argue for delaying the PPT bill to a special session, Harris said that sort of horse-trading could take place anyway, "quietly, behind the scenes."

The respective PPT bills are being considered in the finance committees. At a Senate Finance work session yesterday members reached consensus on several provisions to be included in the committee's draft substitute bill, including a tentative decision to adopt a modified version of the Senate Resources credit of 5000 tax-free barrels to help small producers. The committee is scheduled to continue that work today at 8:00 a.m. Co-chair Lyda Green said she expects to have a draft substitute available for discussion when members return from their long weekend Tuesday.

Down the hall in House Finance, Co-chair Mike Chenault reportedly told colleagues he will have a draft bill to circulate after the break, but in a conversation with a reporter last week, Chenault said he intends to take whatever time is necessary to craft a bill the House can pass by a healthy margin.

Meantime, the Senate Finance Committee moved its operating budget to Rules, and the budget is expected to be on the Senate floor next week. It appeared Democrats, at least the two on Finance, had struck an agreement with the co-chairs. Committee Republicans—primarily the co-chairs—offered far more amendments than minority Democrats, who had an unusually high success rate: seven of ten minority amendments passed, several with Republican co-sponsorship.

Although the committee increased spending through the amendment process, the final committee bill appears to appropriate less money than the committee substitute introduced last week. That's because the final bill shifts $20 million in debt service payments from the FY 07 column to the FY 06 column. That maneuver helped put the Senate bill $50 million, or 2.1 percent, under the House bill in general fund spending.

The Senate Finance Committee also got a boost from $8.5 million in unanticipated revenues from a semi-dormant account called the investment lost trust fund [see **SBS loss trust fund suggested for use in budget**, *ALASKA BUDGET REPORT*, March 3, 1992]. The committee used that money to supplant almost $3 million in the Division of Elections. The mini-windfall also went to support increases to the Department of Education and Early Development's teacher mentor program, predator-control data collection, the Council on Domestic Violence and Sexual Assault, and other health and social programs.

The Democrats' failing amendments would have appropriated:

- $350,000 for the Kotzebue domestic violence shelter;
- $156,700 for public television to reverse a 25 percent reduction from the governor's request; and
- $763,400 for the Village Public Safety Officer program.

Unlike the House, the Senate bill appropriates the governor's full $25 million request for power cost equalization (PCE), a program to offset the high cost of energy in rural Alaska.

A conference committee on the not-so-fast-track supplemental spending bill resolved the impasse over rural energy assistance, voting yesterday to approve the House's $3.3 million for PCE and splitting the difference between the House and Senate positions on the other two open items: the

 © ABR COMPANY 2006 / Copying and electronic reproduction strictly prohibited except by written license.

conference committee approved $250,000 for the bulk fuel revolving loan fund and $430,000 for the Arctic Winter Games Host Committee.

The supplemental bill, SB 232, appropriates a whopping $765 million in additional FY 06 spending, including $712 million in general funds. Legislative leaders will be quick to note that the general fund tally includes $600 million "saved" via appropriation to the Alaska Housing Finance Corporation and the public education fund.

The House approved the conference committee report the same day. Minority Leader Ethan Berkowitz said the Democrats agreed to waive the normal 24-hour waiting period to expedite delivery of energy assistance. If the bill had sat, it would not have been taken up until next week. But the Senate has not yet approved the report, and with the governor in the Netherlands, it's unclear when he'll be available to sign the measure.

## OIL AND GAS

### ANALYSIS: Time running out on Murkowski gas line

Has time run out on Frank Murkowski's gas pipeline dream? The prevailing—though not unanimous—view among legislators, lobbyists and Capitol reporters is that it has, and no Stranded Gas Act contract is likely to be approved by this Legislature. The contract is the key inducement in the Murkowski plan to entice the three oil companies that own the North Slope's huge reserves of "stranded" natural gas to build an Alaska gas pipeline.

Before such a contract can be ratified, an increasingly improbable series of events must unfold, in sequence. The most immediate of these events is the passage of petroleum production tax (PPT) legislation in a form acceptable to BP, ConocoPhillips and ExxonMobil, the firms controlling the bulk of the North Slope's gas reserves.

The Stranded Gas Act contract on which the governor and the producers claim to have reached tentative agreement is designed to incorporate and make permanent for the next 30 years (45 years as it relates to gas) the PPT tax scheme. Every indication is that the legislation will pass—with terms that the three producers have intimated would be unacceptable, including a provision that makes the tax progressive at high oil prices, and possibly a base tax rate above 20 percent. If the companies' protests about these provisions are sincere, the firms would presumably reject any stranded gas contract locking them into such terms. In that case, there would be no contract to send to the Legislature.

Assuming, however, that the governor and the producers do come to agreement on a contract, the next step is to ask the Legislature to change various laws so the state can legally sign such a contract. For example, the Stranded Gas Act doesn't permit the governor to put oil tax terms in the contract. Yet two of the producers insist that they need fiscal certainty on oil as well as gas, and in the tentative contract, Murkowski gave them what they wanted.

To make this, and at least a dozen other deviations from current law legal, Murkowski needs a pile of new legislation, most elements of which are likely to be highly controversial. For example, one element will allow the contract to promise producers that the state will "indemnify" them for any extra taxes levied as a result of legislation passed by initiative.

"That's a poison pill for me, and I think that's the view in the building, not just among Democrats," commented Sen. Kim Elton earlier this week at a Senate Minority press availability.

"I think that would be a hard sell in the Legislature, to say that if the people of Alaska spoke on

an issu that we are going to ignore them," said House Majority Leader John Coghill, commenting on the initiative indemnification provision [see **Secret provision said to neutralize gas reserves tax initiative**, *ALASKA BUDGET REPORT*, March 16, 2006].

"If he calls a special session with that [indemnification amendment] on the agenda, it will be in the wastebasket in three days, and legislators will be on their way home, which is where they will want to be anyway," commented a longtime lobbyist not involved with the issue.

At a meeting last week with reporters, Murkowski chief of staff Jim Clark, confronted by profoundly skeptical reporters, put on a brave face. "We have no plan B," he claimed. The administration fully intends to push forward with the contract, and see it ratified by this Legislature. Peppered with questions about the effect of the impending election campaign season on the administration's plan, Murkowski's own ambivalent status as a potential candidate, and other factors suggesting time has already run out, Clark refused to identify a date after which it would be time to step aside and let the next governor and legislature try again.

"Believe it and it will happen," commented an administration official, explaining the dream-like atmosphere that pervades the narrow circle of advisors Clark has assembled to push the deal.

Rarely, but sometimes, belief alone makes remarkable things happen. The 1990 election of perennial losing candidate Walter Hickel is an example. There is at least one theory as to how the gas line contract could all come together. At the heart of this theory is the notion that the producers are now so afraid—that they will get a PPT tax with higher rates than they bargained for and without fiscal certainty, and that a frustrated public will pass the initiative taxing gas reserves—that they will agree to anything in an effort to forestall passage of the initiative. The producers will therefore give up on their demands for certainty on oil, abandon their desire for indemnification from taxation by initiative, and accept contract terms lasting a mere 20 years. Thus Murkowski will obtain a Stranded Gas Act contract that legislators will be willing to accept.

"That's a nice fantasy," commented a long-time oil industry lobbyist.

## Rokeberg oil tax break bill to cost state $157 million

A development incentive bill proposed by Rep. Norman Rokeberg is so broad oil companies could be eligible for more than 100 percent credit on their tax liability, said administration officials testifying on the measure. The House Oil and Gas Committee moved the measure nonetheless, after Chair Vic Kohring suggested the details could be addressed in the House Resources Committee.

HB 498, introduced April 3 by Rokeberg's House Rules Committee, is meant to mesh with the petroleum production tax (PPT) under consideration, Rokeberg said, and is primarily an effort to spur development of less-economic "heavy" oil on Alaska's North Slope. "It is a unique way to help finance that investment," Rokeberg told Oil and Gas members at an April 11 hearing.

The bill authorizes tax credits of 15 percent against the PPT for qualified expenditures on challenged or non-conventional oil or gas, and tax credits of 25 percent on expenditures for alternative energy resources such as wind and solar power. The bill is contingent on passage of a PPT bill. Rokeberg said the bill could move as standalone legislation, or could be added to the PPT bill as an amendment.

"Alaska depends on the oil industry and its development of new tools to sustain production," writes Rokeberg in his sponsor statement. He notes that production is declining and the 17 billion barrels of recoverable oil on the North Slope are increasingly expensive to produce. "Alaska needs to look at ways to encourage development that will provide easier access to these reserves. ... HB

© ABR COMPANY 2006 / Copying and electronic reproduction strictly prohibited except by written license.

498 is intended to encourage use of new technologies and methods of operation that are experimental and cutting edge."

Kohring, a self-styled oil and gas industry champion, lauded the proposal. "My only regret is I didn't think of the idea. ... This is a very good approach in light of the fact that we're likely to see higher taxes on the industry; this is another way to help offset that."

Industry representatives voiced strong support for the bill. Brian Wenzel, vice president of finance and administration for ConocoPhillips Alaska, used the opportunity to put in a plug for the governor's version of the PPT bill, warning that the incentive bill under consideration won't do much good unless lawmakers "find the right balance" in the PPT.

Officials from BP and Arctic Slope Regional Corporation also testified in favor of the bill, and Chevron U.S.A. Inc. submitted a letter of support.

But administration officials warned that the bill as drafted is overly broad and may result in unintended consequences. Robynn Wilson, director of the Department of Revenue's Tax Division, expressed concern about administering the bill. "It doesn't define 'qualified expenditure.'" She noted that the bill needs clarification regarding time, place and allowable costs of qualified spending.

Regarding time, she said it's unclear whether credits can be generated on past investment. "In terms of place, research and development are eligible activities even if they're in Venezuela. It doesn't say it has to be in Alaska." The scope and type of allowable costs are likewise unclear.

For renewable energy, she pointed out that the bill provides a credit for both "development and use," and encouraged lawmakers to consider and clarify their intentions.

Wilson also noted that the bill does not say how costs will be allocated. For example, oil from a given well contains a mix of grades, some of which may qualify for the incentive and some of which may not. Costs will also need to be allocated among owners of jointly owned or operated facilities.

Further, Wilson suggested the bill extends credits to technologies that do not need it. "New technology and more cost-efficient technology makes what was once considered difficult or unconventional now possible."

As a parting shot, Wilson said many of the projects targeted in the bill qualify for federal credits, credits in pending PPT legislation and the proposed credit in HB 498. She listed the credits, noting, "That does add up to potentially more than 100 percent." The credits Wilson enumerated sum to 105 percent.

"You'll be refunding the industry—paying them to go out there and drill?" asked Kohring, who laughed and immediately added, "You don't have to answer that."

Wilson, who was not laughing, said, "And that does not include the state income tax deduction." She said she'd be happy to work with the committee to clarify that the tax credits should not exceed 100 percent.

"I would like to think that's not the case and I don't expect it to be the case," Kohring said. He said he wanted to get the bill out of committee and asked Wilson to work with Rokeberg and Resources Co-chair Ralph Samuels to address the issues she raised.

Bill Van Dyke, who directs the Department of Natural Resources' Oil and Gas Division, added his concerns. He acknowledged that viscous and heavy oil on the North Slope are economically challenged. "But that being said, I would urge a little bit of restraint when considering incentives. ... The bill as drafted probably contains some unintended consequences."

Van Dyke cited definitions and terms that "leave you wide open," and reiterated that the bill creates "a pretty challenging cost allocation down the road." He suggested, for example, that Rokeberg's definition of "heavy oil" needs to be tightened and linked to different measures, and that "fields" need to be narrowed to more specific locations.

Samuels, who also serves on the Oil and Gas Committee, noted the bill's inclusion of incentives for natural gas development. "If the gas line moves forward, that changes the economics of everything."

"I'd agree," said Van Dyke.

"Does that translate to, we don't need gas incentives?" asked Rokeberg.

Van Dyke replied, "What I struggle with today is I just don't know." He said in a year it will be clear.

Samuels said the Resources Committee had the same "chicken-and egg" debate during PPT hearings regarding incentives for Point Thomson: if there's a gas pipeline, the incentives aren't needed; if there's no gas line, the incentives aren't enough to make development economic.

Rep. Lesil McGuire suggested legislators could pass a bill with incentives for heavy oil only, and add provisions for gas once the outcome of gas line negotiations are clear.

Samuels flagged other issues, such as deductibility of seemingly unlimited research and development costs, even if the research and development takes place outside Alaska for projects outside Alaska. He also pointed out that the pending PPT legislation will provide a method of cost recovery because it taxes net profits. "If all your costs are [pre-tax], it shouldn't make as big a difference as under the current system."

During Wilson's testimony, Samuels asked, "How would you stop overhead from getting counted?"

"I'm not sure what the intention is in terms of overhead," Wilson said.

ConocoPhillips' Wenzel suggested even out-of-state research and development can benefit Alaska. "It's a question of whether Alaska wants to wait and let someone else do it, or accelerate development of this resource."

Rokeberg said he'd work with the department to narrow the scope of the bill and clarify terms. Kohring made it clear he wanted to move the bill on to better its chances of passage this year, and said he would draft a letter of intent for the Resources Committee.

The bill moved from committee without objection. Kohring and Rokeberg signed "do pass" on the committee report; Reps. David Guttenberg, Nancy Dahlstrom and McGuire signed "amend," and Samuels signed "no recommendation."

At press time Kohring had not released his letter of intent. His staff said the letter would likely ask the Resources Committee to address some or all of the following issues:

- whether or not to include incentives for natural gas development; or limit incentives to heavy oil;
- whether or not to include out-of-state research and development for out-of-state projects, and narrow the scope of qualified research and development;
- whether or not to limit the incentive to development of new fields;

 © ABR COMPANY 2006 / Copying and electronic reproduction strictly prohibited except by written license.

- add sideboards to the definition of heavy oil;
- define qualified expenditures; and
- address the concern about credits exceeding 100 percent of a taxpayer's liability.

A fiscal note from Revenue projects the bill will cost $138 million in FY 07 at Revenue's official oil price forecast, or $157 million at $60 per barrel. Costs include foregone revenue as well as costs of administering the tax break, which include three new auditor positions and one engineering geologist. The fiscal note was not discussed during the hearing.

## EDUCATION

### H. Finance weighs K-12 aid; Chenault pushes reallocation

Although the House disposed of its operating budget plan in March, the House Finance Committee just last week began serious consideration of how much money to spend on K-12 education.

"Even with the proposed $90 million [increase] to the base student allocation, districts are experiencing large deficits up to 6 percent," Wrangell Superintendent Susan Sciabbarrasi told House Finance Committee members at an April 7 hearing on HB 362, the governor's proposal to increase state aid to districts. HB 362 and companion SB 238, which has not yet had a hearing, would raise the base student allocation by 8.8 percent, from $4919 to $5352 per pupil. Because the per-pupil allotment is adjusted as it goes through the foundation formula, the increase would boost the amount districts receive by 11 percent, a projected $90 million over FY 06.

Those testifying expressed appreciation for the governor's proposal, but of the 15 people who spoke, only John Ringstad, representing the Fairbanks North Star Borough School District, indicated the governor's proposal would be adequate to forestall budget cuts in the coming year. School districts around the state told the committee that even with an additional $90 million, retirement and health cost increases and other unavoidable costs would mean burgeoning class sizes and cuts to staff and programs.

"The PERS and TRS [retirement system contribution] impact is staggering," said Sarah Welton of the Matanuska-Susitna school board. The largest and fastest-growing district in the state, Mat-Su expects 580 new students next year and is facing health insurance cost increases of 27 percent next year, Welton said.

Stephanie Allison, a Juneau school board member, said the delay in the House Finance meeting (which was postponed from 9 a.m. to 1:30 p.m.) allowed her to bake several dozen brownies for her son's elementary school bake sale. The proceeds, she said, would be used to support a 100-percent-fundraised weekly art program at the school.

Few were surprised when Finance Co-chair Mike Chenault circulated an amendment to partially implement new district cost factors, district-specific differentials meant to offset the cost of providing education in different areas of the state. Chenault's amendment would implement 25 percent of the new cost factors recommended in a 2005 study by the University of Alaska's Institute for Social and Economic Research (ISER) [see **New school cost study would boost aid to rural districts**, *ALASKA BUDGET REPORT*, March 3, 2005].

Chenault, who represents the financially strapped Kenai Peninsula School District, has been trying to win approval of the new cost factors, and he said his proposal to phase in just one-fourth of the new cost factors is a compromise: "I'll probably have half the people in my district screaming at

me that it's not enough. But we've got to make forward motion, we can't continue to tell kids and parents and teachers in districts around the state that we don't care."

Chenault got sympathy from National Education Association-Alaska President Bill Bjork, who during public testimony called the Kenai district a "poster child" for struggling schools. "That school district has cut everything, and now they're cutting 70 more teachers," Bjork said.

ISER found school costs nearly 20 percent higher on the Kenai Peninsula than in Anchorage, the benchmark district. Kenai's current cost factor is 0.4, which suggests Kenai education costs are less than one-half percent higher than in Anchorage.

But inherent in any redistribution are winners and losers. The districts that gain little or nothing under the ISER study happen to include the populous and politically powerful Anchorage, Fairbanks and the Matanuska-Susitna Borough districts. The table on page 9 shows the distribution of the governor's proposed $90 million increase and the $24 million required to implement Chenault's proposal.

Chenault's co-chair, Anchorage Rep. Kevin Meyer, was forthright about his ambivalence: "I don't think there is anyone here who doesn't agree that there should be some sort of cost differential addition to this amount. But the way that it's set up is that the largest school district, the one I represent, gets nothing."

Meyer suggested simply distributing more money through the existing formula by adding to the base student allocation "so the larger school districts would also benefit."

Chenault contended that adding to the base student allocation simply exacerbates the existing inequities. "Every dollar that we add to the base widens the gap between districts that are short in the cost factor and those that are not."

Rep. Mike Hawker, also an Anchorage Republican, agrees that inequity exists; he said ISER's conclusions aren't perfect, but he's willing to support Chenault's amendment: "The answer before us is no more correct than the problem it's trying to solve. But it's a move in the right direction."

While House leaders other than Chenault may be reluctant to embrace ISER's recommendations, some Senate leaders are outright hostile toward the study.

"I have too much respect for the foundation formula to bastardize it with a study that is not valid or reliable," Fairbanks Republican and Senate Finance Co-chair Gary Wilken told a reporter last week. When ISER's Bradford Tuck presented his findings last year, Wilken issued a sharp critique, concluding, "With all due respect, Mr. Tuck, I'm not sure your study isn't a conclusion waiting for a study."

The existing cost factors were written into a 1998 rewrite of K-12 education funding statutes engineered largely by Wilken. The 1998 legislation required the Department of Education and Early Development to update the cost factors periodically, but department staff said the 1998 methodology was flawed, primarily because it had been based on historic spending patterns; they said the study ratified and institutionalized inequities in past appropriations [see **DOE criticizes McDowell cost study**, *ALASKA BUDGET REPORT*, February 25, 1998].

 © ABR COMPANY 2006 / Copying and electronic reproduction strictly prohibited except by written license.

# Proposed increased state aid to districts

**Gov's increase plus district cost factors as proposed by Chenault**

(thousands)

| District | BSA increase to $5,352 | cost factor (1/4 ISER) | Inc. due to cost factor |
|---|---|---|---|
| Aleutians East | $352 | $435 | 124% |
| Kake | $102 | $126 | 123% |
| Chatham | $215 | $264 | 123% |
| Hydaburg | $42 | $49 | 116% |
| Klawock | $73 | $74 | 101% |
| Bering Strait | $2,216 | $2,097 | 95% |
| Annette Island | $251 | $237 | 94% |
| Hoonah | $169 | $156 | 92% |
| Lower Yukon | $2,319 | $2,088 | 90% |
| Lake & Peninsula | $609 | $525 | 86% |
| Yakutat | $107 | $92 | 86% |
| Southeast Island | $151 | $116 | 76% |
| Petersburg | $432 | $309 | 71% |
| Alaska Gateway | $436 | $308 | 71% |
| Yukon Flats | $329 | $231 | 70% |
| Kuspuk | $571 | $366 | 64% |
| Saint Mary's | $178 | $110 | 62% |
| Mt. Edgecumbe | $248 | $150 | 60% |
| Tanana | $65 | $39 | 60% |
| Pribilof | $144 | $85 | 59% |
| North Slope | $1,942 | $1,135 | 58% |
| Southwest Region | $825 | $467 | 57% |
| Haines | $227 | $126 | 55% |
| Sitka | $993 | $543 | 55% |
| Northwest Arctic | $2,427 | $1,306 | 54% |
| Kodiak Island | $1,934 | $1,022 | 53% |
| Iditarod Area | $313 | $165 | 53% |
| Yupiit | $570 | $301 | 53% |
| Bristol Bay | $183 | $94 | 51% |
| Ketchikan Gateway | $1,507 | $758 | 50% |
| Kashunamiut | $347 | $174 | 50% |
| Unalaska | $368 | $179 | 49% |
| Wrangell | $267 | $130 | 48% |
| Kenai Peninsula | $6,030 | $2,900 | 48% |
| Pelican | $16 | $7 | 45% |
| Juneau | $3,341 | $1,280 | 38% |
| Cordova | $350 | $132 | 38% |
| Yukon/Koyukuk | $973 | $366 | 38% |
| Craig | $431 | $161 | 37% |
| Lower Kuskokwim | $4,699 | $1,632 | 35% |
| Copper River | $571 | $194 | 34% |
| Chugach | $104 | $35 | 34% |
| Aleutian Region | $69 | $23 | 34% |
| Nome | $669 | $203 | 30% |
| Delta/Greely | $823 | $244 | 30% |
| Valdez | $504 | $119 | 24% |
| Dillingham | $477 | $104 | 22% |
| Mat-Su | $9,843 | $1,614 | 16% |
| Nenana | $378 | $34 | 9% |
| Fairbanks | $9,419 | $809 | 9% |
| Skagway | $97 | $5 | 5% |
| Denali | $451 | $14 | 3% |
| Galena | $925 | $13 | 1% |
| Anchorage | $29,110 | $0 | 0% |
| **TOTAL** | **$90,198** | **$24,146** | **27%** |

In 2001 lawmakers appropriated money for a new study meant to focus on actual costs of delivering education across the state. That study, done by a California-based team at the American Institutes for Research, actually *reduced* most rural districts' cost factors, but those recommendations languished after lawmakers and experts questioned key assumptions and data used [see **Lawmakers question new school cost study,** *ALASKA BUDGET REPORT*, January 29, 2003 and **ISER says 2002 school cost study flawed**, February 11, 2004]. ISER was hired in 2004 to revise AIR's study, and came to vastly different conclusions, with cost factors increasing by an average of 24 percent.

Alaska Kids Count, a statewide parent network lobbying for increased education funding, is recommending an increase of $150 million in state aid, either through an additional $60 million over the governor's increase to the base student allocation, or 50 percent implementation of ISER's district cost factors, a move that would also add roughly $60 million, albeit distributed differently.

Mary Hakala, a Juneau parent who coordinates the volunteer network, said 25-percent implementation would boost Juneau's state aid by $1.3 million but would still leave the district with a $700,000 deficit: "Part of that deficit can be made up by increased local contribution. But how long can a community keep going to the cap? ... There are very few communities in this state that can meet that property tax burden any longer."

Wrangell is among several southeast communities that have a cost factor of 1.000, meaning its costs are presumed to be no higher than costs in Anchorage. Sciabbarrasi, the Wrangell school superintendent, testified in support of the new cost study, reminding legislators that they've been ignoring their own 1998 mandate to update the cost factors.

Last year Chenault attempted to push through the new cost factors by appending them to a high-priority school debt reimbursement bill, but burdened with that controversial freight, the bill, HB 13, stalled in House Rules. Legislators attached the school debt reimbursement extension to another bill during a special session [see **School aid change loaded on debt reimbursement bill,** *ALASKA BUDGET REPORT*, April 28, 2005, and **Special session final status**, May 31, 2005]. HB 13, having lain dormant since last May, is scheduled for a hearing in House Rules on April 20.

On the final day of last year's regular session, a frustrated Chenault created a legislative task force to address school cost factors, but that effort led to little more than an emotional outcry and political stalemate [see **Denied district cost factor fix, Chenault opts for task force,** *ALASKA BUDGET REPORT*, May 11, 2005 and **School cost study task force ends in limbo**, January 19, 2006].

The committee did not take action on Chenault's amendment or on the bill, which Meyer held in committee. Meyer said he'd like to add $6 million more to the foundation formula by raising the base student allocation to $5380, and adopt Chenault's amendment. The total foundation formula increase under that scenario would be $120 million, according to DEED projections; Anchorage would see an additional $2 million.

## CONTRACTS

### DOA botches benefits bidding, denies Aetna allegations

Department of Administration bungling has plunged the state into a dispute over who will be awarded a contract to administer more than $300 million in annual health benefit payments to 68,000 state employees, retirees, and their dependents.

 © ABR COMPANY 2006 / Copying and electronic reproduction strictly prohibited except by written license.

Murkowski administration officials admit key portions of the bid from Aetna and Aetna Life Insurance Company were misplaced in a locked, sixth-floor storeroom in Juneau's State Office Building, resulting in Aetna's disqualification. DOA initially awarded the contract to the only other bidder, Premera Blue Cross Blue Shield of Alaska, and later reaffirmed the award, saying Premera's proposal will save the state $10.9 million over the three-year course of the contract.

"The basic procedure seems really screwed up," said Anchorage Sen. Con Bunde, one of several lawmakers who have expressed concern over the botched bidding. The Legislative Budget and Audit Committee on April 4 approved Bunde's request for an audit of the department's professional services procurement process over the last two years.

At a House State Affairs Committee hearing last month Rep. Norman Rokeberg said that if it gets the state contract, Premera's share of the state's health insurance market could rise to 80 percent. He suggested DOA should have considered the effect the increased concentration might have on Alaskans' access to affordable health care.

At least once every five years the state is required to issue a competitive request for proposals seeking a contractor to administer its health benefit plans. Aetna, which has held the contract for the past 24 years, is scheduled to transfer benefits administration to Premera on July 1, notwithstanding a pending appeal.

### *Missing binders*

Aetna says it received notice February 18 that the state had issued a statement of its intent to award the contract to Premera. According to Aetna's March 10 protest and request for stay of the award: "A subsequent phone call to Mr. Walt Harvey, the ... procurement officer, disclosed that the Division [of General Services] had lost the meat of Aetna's proposal, consisting of some four boxes of binders in which were contained a critical portion of Aetna's overall proposal."

Aetna says it submitted its bid in December, and didn't know until the February notification that its bid had been deemed unresponsive: "Over those two intervening months, the Division had never simply contacted Aetna ... and asked why there was such a gaping omission in its bid."

"The initial award to Premera was therefore, and in essence, predicated on the erroneous conclusion that Premera was the sole responsive bidder," Aetna concludes.

In the division's March 21 denial of Aetna's protest, Harvey, the procurement officer, admitted that the errant binders later turned up in the sixth-floor storeroom.

"There was a mistake, and we recognized it ... but we all took the responsible steps moving forward," said Vern Jones, the state's chief procurement officer. Jones says the state remedied the situation by rescinding the notice of intent to award the contract and asking Aetna and Premera to submit new best and final offers under a modified process agreed to by both parties.

Aetna, which had by then seen Premera's initial $34-million-per-year bid, submitted a best and final offer of $32 million per year. But Premera's new offer was $31 million. On February 28 the state issued a new notice of intent to award a contract to Premera.

### *Allegations of unfair bid practices*

At the heart of Aetna's complaint is the allegation that state officials broke state procurement laws by "coaching" Premera to improve its bid score and assigning different evaluators to review the two competing bids.

For example, Aetna alleges, Premera re-categorized "network access fees" following advice from the state, resulting in an apparent reduction of nearly $7 million in its bid—a reduction Aetna considers deceptive.

Harvey, the procurement officer, doesn't deny that he worked with Premera on network access fees, explaining in his denial of Aetna's protest: "The state's benefits manager was concerned that the fee would artificially inflate the actual cost of claims and cause reporting issues. As such, the state asked Premera whether it was possible to bill this as a fee or cost in a different manner, rather than adding to the amount as a claim. Premera made adjustments in its best and final offer."

But Harvey contends similar discussions with Aetna resulted in a reduction of nearly $3 million in Aetna's pharmacy rebate guarantee, which enabled Aetna to reduce its cost proposal accordingly.

State law allows such consultation under certain circumstances (AS 36.30.240):

> [D]iscussions may be conducted with responsible offerors who submit proposals determined to be reasonably susceptible of being selected for award for the purpose of clarification to assure full understanding of, and responsiveness to, the solicitation requirements. Offerors reasonably susceptible of being selected for award shall be accorded fair and equal treatment with respect to any opportunity for discussion and revision of proposals.

Aetna says the state's communications were heavily weighted toward Premera: according to Aetna's protest, the state submitted 62 pages of questions and answers and had several private conversations with Premera, but had only had 3 pages of questions for Aetna. As a result, Aetna claims, Premera gained 629 points over its initial score, while Aetna gained just 21 points.

Harvey responds that because Aetna had the contract for so long, there was less to clarify, and that the state discussed different matters with Aetna. "Once again, the incorrect notion is advanced that the state must clarify and discuss the exact same items, or the same number of items with each offeror."

Premera spokesperson Scott Forslund said Aetna's allegation looks only at the "ear of the elephant." The bottom line, he says, is Premera will save the state money: "The [Premera] system is able to deliver much better network discounts than Aetna can deliver. Over the three-year contract we expect [the state's] overall claims cost savings to be somewhere in the range of $45 million."

In a recent interview, Jones offered a similar argument: "Had we not lost their binder and disclosed Premera's price of $34 million, do you think Aetna's proposal would have gone down by $12 million? It defies logic."

Aetna's original bid was for $45.4 million, compared to Premera's $34.4 million. Aetna claims it's an apples-to-oranges comparison because various costs in the complex multi-part contract had been categorized differently.

Aetna's other main point of contention is that different evaluators scored the two competing proposals. "It is a rule of the most obvious and fundamental nature that an RFP cannot succeed unless the grades being compared come from the same judge," wrote Jon Tillinghast, a Juneau attorney representing Aetna.

"It is not disputed that the situation is not ideal," agrees Harvey, "however, the state proposed to reconstitute a Proposal Evaluation Committee to the best of its ability. The paramount issue here is that Aetna signed an agreement that allowed different evaluation teams to evaluate proposals submitted by Aetna and Premera."

That agreement, signed February 23 by Aetna, states that the new committee will consist of two of the three original committee members. But Aetna says the state used *two* new committee members.

"We would never have accepted such a major change in the agreement," said Aetna's west coast vice president Mike Robinson in a sworn affidavit.

In an interview, Robinson noted that the sole evaluator who judged both proposals gave Aetna a higher score. The final tally—the sum of the three evaluators' scores—was 4618.5 for Premera and 4482.5 points for Aetna, a difference of about 3 percent.

Aetna says the state should have retained a qualified outside consultant to ensure there was a level playing field after the missing binders were discovered. Jones dismissed that argument, saying, "We did exactly what the law dictates and we did what we said we would do."

### *Aetna seeks new scoring process*

Aetna's appeal requests the state: re-score the parties' final proposals using a three-person team of qualified personnel assisted by a mutually agreeable expert consultant; consider total costs to the state; and cancel the contract with Premera and award a contract to Aetna if the new evaluation committee finds Aetna's proposal to be most advantageous to the state.

The department's response to Aetna's protest is due April 28.

Officials seemed uncertain about the scope of the administrative law judge's options for resolving the appeal. "That's been a question for some time," said Jones, the chief procurement officer. "I've been told that damages are limited to bid preparation costs, and yet there is some precedent for judges saying to re-bid a contract."

Administration Commissioner Scott Nordstrand, in testimony to the House State Affairs Committee on March 17, claimed re-bidding isn't an option. But Jim Duncan, a former commissioner of administration now with the Alaska State Employees Association said a hearing officer in a procurement dispute can reject the protest, find the protest has merit but not enough to throw out the contract, or require the state to re-bid the contract.

Assistant attorney general Marjorie Vandor, representing DOA in the appeal, declined to discuss the scope of permissible rulings.

Aetna argues that there is precedent for canceling a contract on the basis of procurement violations. Its appeal cites the 1995 *Paul Wholesale v. State* case. "In that case, the Department of Transportation and Public Facilities cancelled all parties' rights in a procurement that had already resulted in a contract award to two different bidders because of certain alleged *ex parte* communications between one party and DOT&PF. ... Here, there exist specific statutory and regulatory prohibitions on precisely the kind of one-sided *ex parte* communications in which Premera and the Division engaged."

### *Legislators dismayed*

At a March 17 Ways and Means Committee hearing, lawmakers questioned Nordstrand about the contract award. Nordstrand had come to share the good news that excess reserves had accrued in the state's retiree health trust fund, and $50 million had been transferred to the state's retirement funds to help offset the retirement systems' multi-billion-dollar unfunded liability.

As the committee probed how the excess money had accrued, Chair Bruce Weyhrauch asked whether any of the state's savings was attributable to cost-saving measures by Aetna, the state's third-party health benefits administrator.

Aetna was responsible for implementing many of the cost-saving measures, Nordstrand said, but the policy decisions were the state's and would be carried out by any third-party administrator.

Nordstrand deflected questions on the contract controversy: "This will undoubtedly be the subject of litigation. It would be inappropriate for me to comment on the specifics."

Rep. Peggy Wilson expressed concern about changing administrators before the dispute is resolved. She asked, and Nordstrand confirmed, that effective July 1 every beneficiary would receive new health insurance cards with new phone numbers and contacts. "I'm not sure it's wise for us to proceed until this is settled," Wilson said.

Nordstrand said the procurement process requires a contract to go forward unless there are extraordinary circumstances. AS 36.30.585, concerning protest remedies, states that if a protest is sustained, "the protestor's damages are limited to reasonable bid or proposal preparation costs."

"You don't undo contracts, you don't un-lease buildings," Nordstrand said. "The state has an interest in having things go forward in an orderly process."

Rokeberg, who for years chaired the House Labor and Commerce Committee, said one of his primary goals as a legislator has been removing barriers to new entrants into Alaska's insurance market. Premera is already Alaska's biggest insurer, he said, and its share of Alaska's market may go from 60 percent to 80 percent with the state's contract award. "Did you consider in any way when you awarded the contract [to Premera] the impact on health care availability in the state?"

Nordstrand said he guessed that factor was not considered. Jones, in a later interview, confirmed that a bidder's market share was not considered. Jones said he didn't know how that could be factored in under state procurement laws.

Rep. Ralph Samuels noted that he'd heard from Aetna representatives, and the evaluation process they described "sure sounded odd to me."

Wilson again asked if it's possible to get out of the contract if Aetna's protest is found to be merited.

Nordstrand reiterated his claim that it doesn't work that way. He said the superior court process can take a year, and a Supreme Court appeal can take another two years: "The system is not set up to stop and wait. If you were to simply stop the award of state contract [or] you were three years later to undo contracts that had been performed by innocent bidders, that would grind the procurement system to a halt."

Nordstrand reminded the committee that the two companies drove down each other's initial bids, and noted that the department expects Premera to save the state an average of $3.3 million per year for three years. "In this case, competition worked rather well."

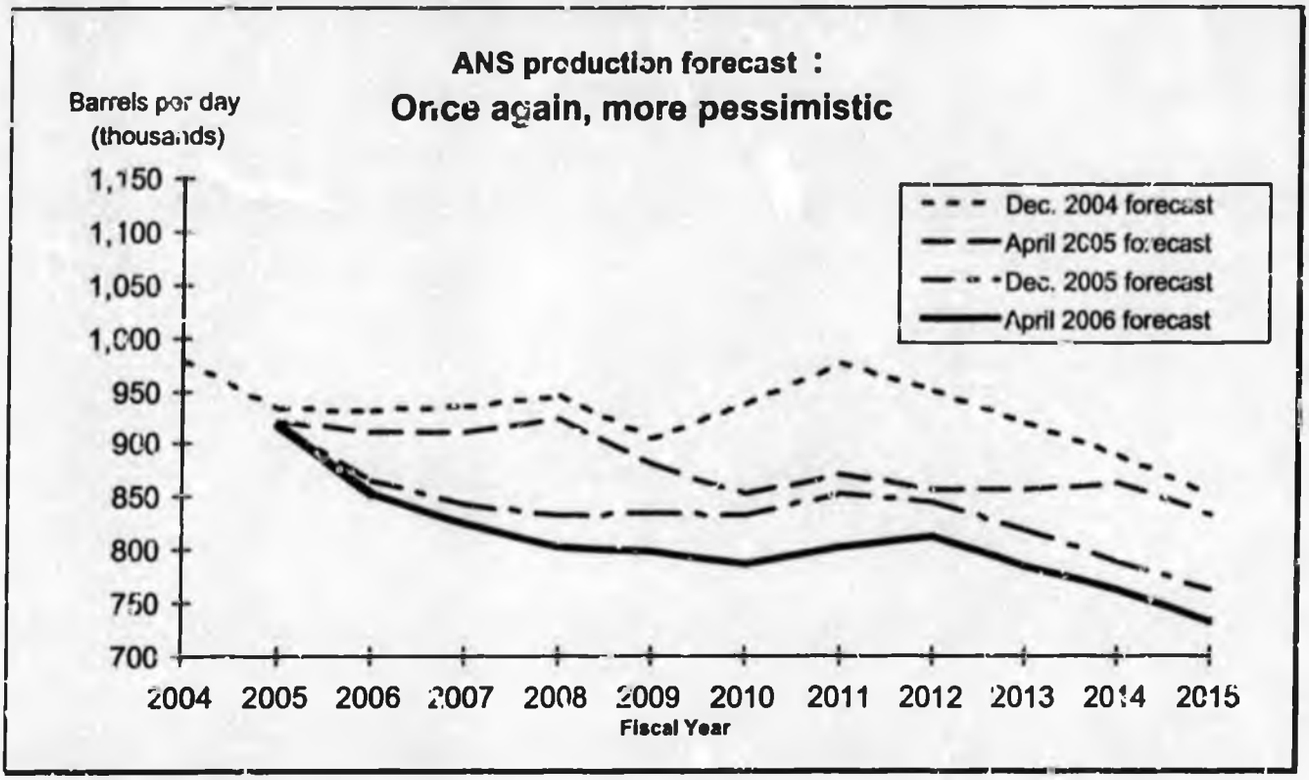
**© ABR COMPANY 2006 / Copying and electronic reproduction strictly prohibited except by written license.**

## REVENUE

### DOR cuts production outlook, assumes big budget cut in FY 08

Early last month the Department of Revenue gave legislators and the public an advance peek at the key numbers in the state's official spring forecast, revealing a $160 million boost in unrestricted general fund revenue in the current fiscal year, $297 million more in FY 07, and $391 million more in FY 08 [see **DOR bumps up revenue forecast; Gov. says "save" it**, *ALASKA BUDGET REPORT*, March 9, 2006].

Last Friday the department followed up with the full official forecast. As Revenue's contract petroleum engineer Dudley Platt warned in March, the department substantially scaled back its long-run forecast for Alaska North Slope production. Total production over the nine fiscal years from FY 07 to FY 15 is down by 4 percent from the amounts predicted five months ago in December 2005, and down 14 percent from the December 2004 forecast. The chart below shows the progression of forecasters' increasingly gloomy production outlook.



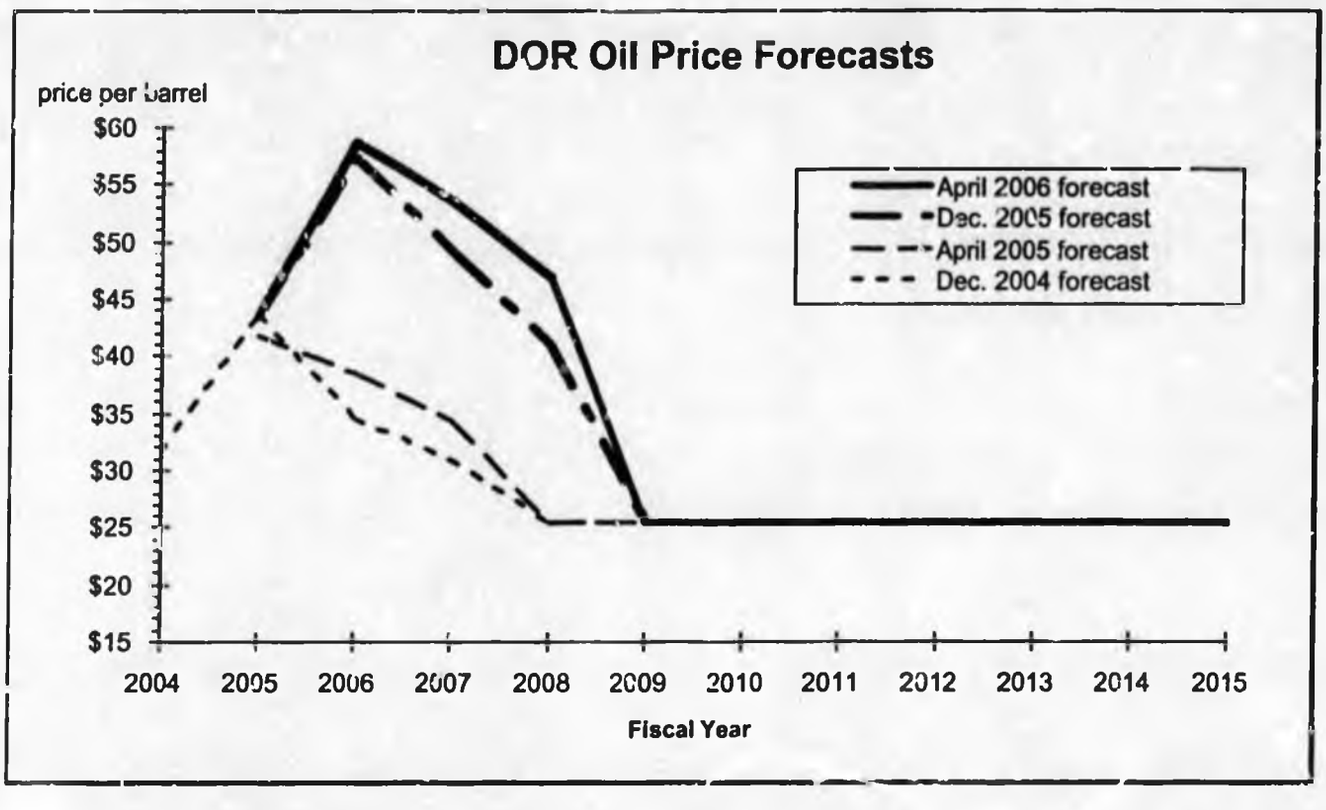

During March 15 hearings on Governor Frank Murkowski's proposed petroleum profits tax legislation, North Slope producers noted the reductions in successive state production forecasts. "We see the precipitous decline in those forecasts," said BP's Angus Walker. Walker suggested the current level of North Slope oil investment—$1 to $1.5 billion per year—translates to future production declines of 6 percent per year.

In his April 6 letter transmitting the forecast, Revenue Commissioner Bill Corbus predicted a much lower rate of decline: "After FY 2007 the decline of ANS production will slow to a ten-year average of 0.8 percent per year, due to smaller fields under development coming on line and the start-up of production from NPR-A in fiscal 2011."

Corbus acknowledged, however, the effects of unpredictable events, noting that a recent event has disrupted short-run production: "Since our production forecast was created there has been an oil spill from a feeder line at Prudhoe Bay, ... and about 10 percent of Prudhoe Bay's output was 'shut in.' ... Should production return by April 15, 2006 to pre-event levels, our fiscal 2006 production volume forecast could be revised downward by ... 1.3 percent, from 853,000 barrels per day to 842,000 barrels per day."

As of last week production remained at about 760,000 barrels per day, well below its pre-accident levels.

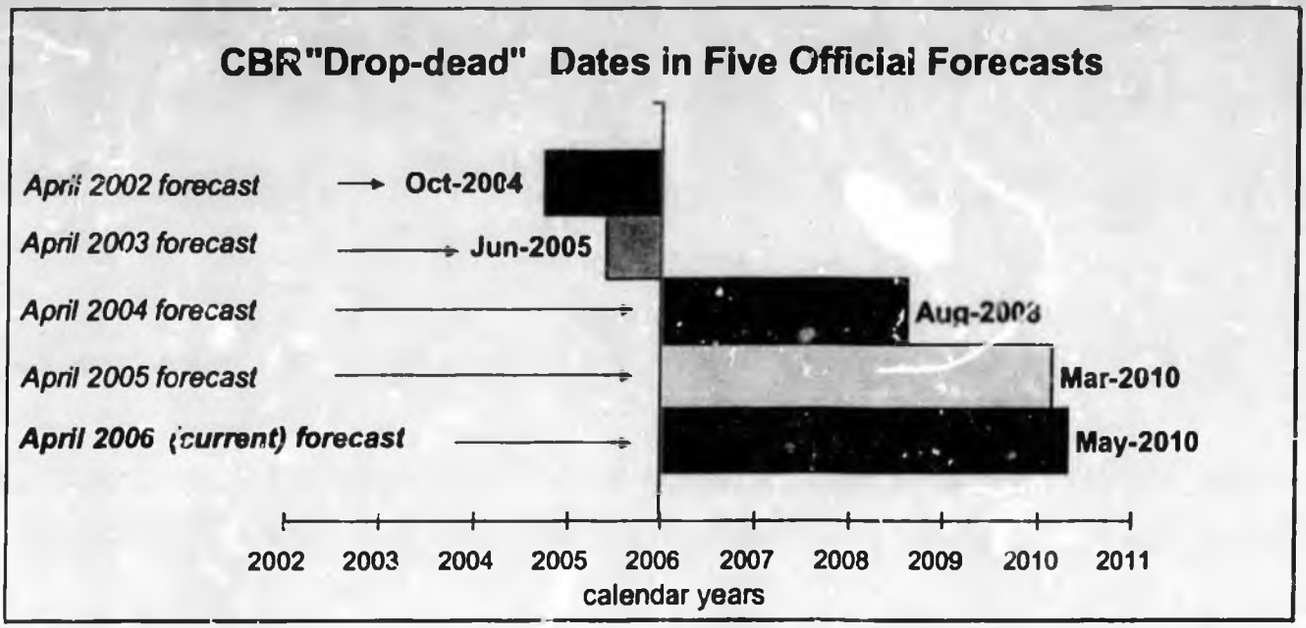
Oil prices, on the other hand, remain higher than predicted. But over the longer term Revenue sees a return to much lower prices. The chart below shows the official price outlook in the current and prior four forecasts.




"Our forecast for fiscal 2009 and beyond is $25.50—a price level set in the spring of 2004," wrote Corbus. "Yes, this is lower than today's markets, and certainly lower than many pundits predict. We are cautious in our approach, and do not frequently change our long-term price forecast."

Every official forecast reveals a new date at which the constitutional budget reserve is expected to run dry. The CBR drop-dead date in the new forecast is May 2010, three months later than the date in the December 2005, and two months later than the estimate a year ago. The chart on page 17 shows the progression of drop-dead dates in the current and previous four forecasts.

 © ABR COMPANY 2006 / Copying and electronic reproduction strictly prohibited except by written license.




In addition to oil production rates and oil prices, the key assumption in predicting the drop-dead date is the size of the state budget. DOR now assumes a general fund budget of $3.7 billion in FY 07, and $3.2 billion thereafter. Should spending not shrink by that improbable $500 million, the CBR will run dry much sooner.

## TRANSITIONS

### Bartholomew leaves permanent fund to build, climb, sail

Bob Bartholomew is resigning his job as chief operating officer of the Alaska Permanent Fund Corporation. He joined state government in 1987 as a project accountant at the Department of Transportation and Public Facilities, moving to Department of Revenue's tax division before joining the APFC as administrative officer in 2000. In 2005 he earned $127,197.

"You never really hire Bob, you just rent him for a while," said former boss and fan Bob Storer, a retired APFC executive director. Storer noted that this isn't the first time Bartholomew has interrupted the standard career progression. During the 1990s he took more than a year off to serve as a professional Juneau firefighter and paramedic.

"I think it's important to have balance in your life," said Bartholomew, in explaining his current decision to leave state service for a while. The main item on his agenda is helping develop the Juneau Family Birth Center, a non-profit corporation formed by his spouse, Kaye Kanne, and others in 1998. Kanne is a direct-entry midwife. "They are in leased quarters now, but are planning a $3 million construction project for their own space near the hospital," said Bartholomew in an interview yesterday. In addition to helping with that project, Bartholomew serves on the Birth Center's finance committee.

An experienced mountaineer with two ascents of 20,322-foot Mt. McKinley to his credit, Bartholomew is planning an expedition next December and January to scale Argentina's Mt. Aconcagua. At 22,833 feet, it's the highest point in South America. "In mountaineering terms, it's the next level up."

Also on the agenda is sailing his recently purchased 30-foot Rawson pilothouse sloop around Southeast Alaska, with a possible view toward voyages to more exotic destinations—"if Kaye and I get comfortable that we know what we are doing."

Bartholomew worked tirelessly to convince legislators to support the percent-of-market-value (POMV) constitutional amendment advocated by the permanent fund board, in which distributions from the fund would be based on the fund's total worth, not its investment income [see **Permanent fund trustees finalize POMV proposal,** *ALASKA BUDGET REPORT*, April 16, 2003].

The legislature's failure in 2003 to put that amendment to voters was a major disappointment. "The current formula is archaic. It's only a matter of time [until it's replaced], but it may not happen until something breaks." [See **Fund recovers after market slide eats $400 million hole in principal,** *ALASKA BUDGET REPORT*, September 17, 2002.]

One such "break" could occur if permanent fund dividend (PFD) payments reach one of their cyclic highs during a period when poor earnings and high inflation-proofing requirements are eroding the fund's reserves. The dividend cycle is now on the upswing, with PFD outlays over the next four to five years expected to rise much faster than fund income. Projections show the PFD will reach $2013 per person in 2009 [see **New projections show soaring PFD,** *ALASKA BUDGET REPORT*, March 2, 2006].

Bartholomew, 42, says he will likely return to state service sometime in the future: "I missed being tier 1 by some nine months. I've got a ways to go to real retirement." His last day at APFC will be June 2.

**Quotable**

"If we had another Prudhoe Bay we'd be tripping over ourselves to get there. We'd be digging a well with shovels if we had to."

—Pat Foley, Pioneer Natural Resources' Alaska manager, suggesting the National Petroleum Reserve-Alaska is unlikely to yield another giant oil field, Senate Finance, April 7

**Corrections and clarifications**

Legislative Finance Division figures indicate the Senate Finance Committee's proposed FY 07 operating budget reduces Medicaid general fund appropriations by 2.5 percent, not 10 percent as reported in the April 6 issue. That issue also misstated Rep. Mike Kelly's first name.

A clarification to last week's table comparing alternative petroleum production tax proposals' treatment of the 470 fund: The House Resources bill redistributes the current five-cent-per-barrel response and prevention surcharge, reducing the response charge to 1¢ and increasing the prevention charge to 4¢. The Senate Resources bill *increases* the surcharge to 6¢, reducing the response portion to 1¢ and increasing the prevention surcharge to 5¢.

 © ABR COMPANY 2006 / Copying and electronic reproduction strictly prohibited except by written license.

**BEFORE THE STATE OF ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL BY THE COMMISSIONER OF THE DEPARTMENT OF ADMINISTRATION**

| | | |
|---|---|---|
| AETNA LIFE INSURANCE and AETNA, | ) | |
| v. | ) | |
| DIVISION OF GENERAL SERVICES. | ) | OAH No. 06-0230-PRO<br>RFP No. 2007-0200-5946 |

## SCHEDULING ORDER

On April 3, 2006, the administrative law judge convened a telephonic prehearing conference. The participants were Jon Tillinghast, counsel for Aetna, and Marjorie Vandor, Assistant Attorney General, counsel for the Division of General Services. James Sheehan, co-counsel for Aetna, listened to the call.

### I. General Considerations

Ms. Vandor confirmed that Primera has been notified of the protest as required by AS 36.30.570.

The parties agree that this matter can be resolved on written briefing, affidavits, and documentary evidence. Aetna stated that its case in chief is fully presented in its March 28 appeal document and exhibits.

Although the administrative law judge's schedule would permit him to take up and decide this matter in the third week of April, Ms. Vandor must prepare for and conduct a major trial that will occupy her until April 21. To accommodate this commitment without requiring the Attorney General's Office to allocate an additional attorney to this appeal, the briefing schedule was pushed back by about two weeks from what might otherwise have been set. Ms. Vandor did not indicate that the additional delay of about two weeks in reaching a decision will alter appreciably the calculus for determining a remedy under AS 36.30.585(b), should the protest be upheld in whole or in part.

### II. Schedule

The parties agreed to the following schedule:

a. No discovery is required.

b. By close of business on April 28, 2006, the division will file and will deliver to counsel for Aetna its responsive brief and exhibits. The protest report under AS 36.30.605(a) may be combined with the responsive brief and exhibits, but shall in no event be filed later than April 28, 2006.

c. Aetna will have until midnight on May 3, 2006 to file and serve a reply. Filing should be accomplished by hand delivery or pdf transmission to OAH in Anchorage. The reply will subsume any comments on the protest report under AS 36.30.605(c).

d. If the administrative law judge desires oral argument, he will schedule it at his discretion.

DATED this 4th day of April, 2006.

By: _____
Christopher Kennedy
Administrative Law Judge

The undersigned certifies that on April 4, 2006, this Prehearing Conference Order was distributed by fax to the following: Jon Tillinghust and James Sheehan, counsel for Aetna; Marjorie Vandor, Assistant Attorney General, counsel for the Division of General Services.

_____
Linda Schwass

# MEMORANDUM

*Department of Administration*
*Division of General Services*
*vern_jones@admin.state.ak.us*

## STATE OF ALASKA

**Phone Number:** 465-2250
**FAX Number:** 465-2189
**TDD Number:** 465-2205

**TO:** Members of
the House Ways & Means and
the Senate Labor & Commerce
Committees

**DATE:** March 22, 2006

**FROM:** Vern Jones
Chief Procurement Officer

**SUBJECT:** Aetna TPA Protest and
Response

Attached, for your information is a copy of Aetna's protest to the State's award of the Third Party Administrator RFP (#2007-0200-5946) and the State's response.

FRANK H. MURKOWSKI, GOVERNOR

**DEPARTMENT OF ADMINISTRATION**

*DIVISION OF GENERAL SERVICES*

PO BOX 110210
JUNEAU, ALASKA 99811-0210
PHONE (907) 465-2250
FAX (907) 465-2189

March 21, 2006

Jon K. Tillinghast
Simpson, Tillinghast & Sorensen, P.C.
One Sealaska Plaza, Suite 300
Juneau AK 99801

Re: Protest and Request for Stay of Award
RFP 2007-0200-5946

Dear Mr. Tillinghast.

This is in response to the protest filed under AS 36.30.565, regarding Request for Proposals (RFP) 2007-0200-5946, filed by Simpson, Tillinghast & Sorensen on behalf of its client, Aetna. The protest was received by the state on March 10, 2006.

After careful review of the protest and examination of the RFP file, it is my decision to deny Aetna's protest and its request for a stay of award based on the following reasons.

Stay Request.

Respecting the request for stay of the award, it is denied. AS 36.30.575 allows the procurement officer to stay an award if one of two conditions exist: 1) there is a reasonable probability that the protest will be sustained, or 2) stay of the award is not contrary to the best interests of the state. As discussed below, I do not believe Aetna's protest has merit and do not find there to be reasonable probability that the protest will be sustained. Further, the award of this contract is necessary, without delay, due to the immediacy of the need for Premera to implement the contract and because the current contract with Aetna has no authorized extensions. Thus, it is my decision that a stay of the award would be contrary to the best interests of the state.

printed on recycled paper

Additionally, the contracting agency, Division of Retirement and Benefits, originally anticipated award of a contract resulting from the RFP would be made by February 1, 2006 (see RFP Amendment #6). It is my understanding from the contracting agency that an award needed to be made without delay in order for the winning contractor to meet the July 1, 2006 implementation date specified in the RFP. As such, the final contract award was made to Premera on March 13, 2006.

On a related point, Aetna implies that the state satisfied the requirement under AS 39.30.090(a)(5) by simply issuing the RFP and there is no deadline on completion of the RFP process. Aetna's Protest at 2. Aetna asserts that the state is thus free to extend its contract with Aetna. Aetna's citation to AS 39.30.090(a)(5) as authority to allow an extension with Aetna is off point. The issuance, evaluation and award of this RFP is required by the State Procurement Code (AS 36.30), procurement regulations (2 AAC 12), state policies and procedures, the RFP itself and the written agreement signed by Aetna (Exhibit A). Therefore, I disagree with Aetna's claim there is no deadline associated with the completion of this RFP; the state is not free to simply extend its contract with Aetna.

Protest Issues

The basis of Aetna's protest is that the state (1) violated basic principles of competitive bidding by assigning different evaluators to evaluate proposals submitted by Aetna and Premera, (2) treated the two offerors with substantial inequality in soliciting clarifications and improvements to the proposals, and (3) summarily rejected the option of awarding a stand-alone pharmaceutical claim management contract. I have responded to each section of the protest in the order presented:

**I. Introduction**

Response: On page one, in footnote 1 of Aetna's protest, Aetna asserts that the "economic impact on Aetna of the loss of this long-standing business will be severe." However, Aetna fails to note that the state was required to solicit proposals for a replacement contract in accordance with the State Procurement Code (AS 36.30) because the current contract will expire on June 30, 2006, and there are no remaining renewal options. The potential for economic impact to Aetna was not caused by actions of the state, but rather by contract terms and statutory requirements to solicit competing offers and award a new contract pursuant to the procurement code.

## II. Overview

Response: The RFP was issued November 30, 2005. It was amended six times. January 6, 2006, was set for deadline of receipt of proposals. Four proposals were received in response to the RFP. Sometime shortly after the RFP deadline, the state's original procurement officer determined that two of the proposals received were nonresponsive (Coresource and Walgreens). He also determined that critical sections were missing from Aetna's proposal and it was declared nonresponsive.

I became the procurement officer of record, on or about January 31, 2006. I reviewed the three binders (Financials, Exhibits and Samples and Brochures) known to me at that time as Aetna's proposal. I asked the previous procurement officer to ensure that the sections apparently missing from Aetna's proposal had not been overlooked or misplaced. After performing a search he assured me there were no other sections of Aetna's proposal in the state's possession. I then concurred with the prior decision that Aetna's proposal was nonresponsive as it failed to address all material items in the RFP.

On pages two and three of the Aetna's protest, Aetna implies the state should have simply called and asked "why there was such a gaping omission in its bid." Since 2 AAC 12.250 precludes the submittal of late proposals, and considering I had re-confirmed that Aetna's proposal was missing critical sections, the state did not contact Aetna because submission of missing sections after the deadline would have been contrary to regulation. As Aetna is aware, the missing sections of its proposal were contained in a separate binder and labeled "Questionnaire." This was subsequently located in a locked, sixth floor storeroom in the State Office Building where all the offers submitted in response to the RFP had been held prior to evaluation.[1] However, the separate matter of Aetna's missing binder is not a point included in the protest.

Also on page two, and throughout its protest, Aetna incorrectly refers to 60% as being the percentage that could be awarded at the discretion of the proposal evaluation committee (PEC) for non-cost factors. Per RFP Section 7.02, and RFP Attachment 1, the PEC could only subjectively evaluate 50% of the total available criteria in response to the technical sections of the proposals. The maximum percentage for cost was 40% and Alaskan Offerors received a 10% preference, both of which were calculated by the procurement officer.

[1] It was unfortunate that Aetna's binders were not labeled in a manner that would have informed the state as to the total number of binders constituting Aetna's offer (i.e., Aetna Proposal Binder 1 of 4, etc.).

The list of evaluation factors and corresponding maximum point percentages are provided below:

| | | |
|---|---|---|
| 1. Technical Proposal | | 50 percent |
| 7.03 Management Plan for the Project | 2% | |
| 7.04 Essential Administrative Services | 3% | |
| 7.05 Appeals Procedure | 1% | |
| 7.06 Vision Services | 1% | |
| 7.07 Usual, Customary and Reasonable (UCR) | 2% | |
| 7.08 Coordination of Benefits (COB) | 3% | |
| 7.09 Utilization Review | 4% | |
| 7.10 Employee Assistance Program and MMH | 3% | |
| 7.11 Reporting | 2% | |
| 7.12 Location of Work | 3% | |
| 7.13 Performance Standards | 2% | |
| 7.14 Health Flexible Spending Account (Health FSA) | 2% | |
| 7.15 Provider Discounts | 5% | |
| 7.16 Information Technology/Communication | 3% | |
| 7.17 Client Service/Experience | 3% | |
| 7.18 Pharmacy Benefit Management Services | 3% | |
| 7.19 Clinical Programs | 3% | |
| 7.20 Retail Network | 2% | |
| 7.21 Mail Order | 2% | |
| 7.22 High Deductible Health Plan and HSA Exp. | 1% | |
| 2. 7.23 Cost Proposal | | 40 percent |
| 3. 7.24 Alaska Offeror's Preference | | 10 percent |

**III. Allegation: The Division Rendered Its Non-Cost Evaluation Useless by Assigning One Evaluation Team to Grade Aetna, and then a Different Evaluation Team to Grade Premera.**

Discussion: When it was discovered that Aetna had submitted a complete proposal, the state and Aetna sought a means to have Aetna's proposal evaluated. It is not disputed that the situation was not ideal; however, the state proposed to reconstitute a PEC to the best of its ability. The paramount issue here is that Aetna signed an agreement (Exhibit A) that allowed different evaluation teams to evaluate proposals

submitted by Aetna and Premera. However, after seeing the results of such action, Aetna now attempts to disavow the process it agreed to.

On Wednesday, February 21, 2006, the day after Aetna's missing proposal binder was found, the state and representatives of Aetna and Premera discussed potential alternatives to accomplishing a meaningful evaluation of Aetna's proposal (after the initial award to Premera and Premera's price was disclosed). The fact that Aetna had the advantage of knowing Premera's best and final offer price was also discussed.

On February 21st, the day that Aetna's proposal binder was located, two of the original PEC members that evaluated and scored Premera's proposal in the initial evaluation process were unavailable (Sheri Gray and Michael Williams) One was out of the country for two weeks and another was out of the office for about a week. Another member of the original PEC (Kerry Jarrell) works for the Bering Strait School District in Unalakleet, Alaska. It was impractical to mail Aetna's proposal to Mr. Jarrell, as that would have delayed the evaluation process further. In the end, only two of the original five PEC members that had evaluated and scored Premera's proposal in the initial evaluation process were immediately available (Freda Miller and Pat Shier).

On February 23, 2006, Aetna signed an agreement that addressed, in part, the following areas:

- **Aetna's proposal would be evaluated by three state employees, two of whom were on the original PEC that scored Premera's proposal in the initial evaluation process.**

  As explained above, only two of the original PEC members that evaluated and scored Premera's proposal in the initial evaluation process were immediately available.

  Aetna agreed that a reconstituted, or different, PEC would evaluate and score its proposal. Freda Miller and Pat Shier were included since they were on the original PEC that scored Premera's proposal in the initial evaluation process and both were immediately available. Judy Porter, a state DOT/PF employee in Juneau, was added to the committee. Mr. Shier, being an original member of the PEC that evaluated and scored Premera's offer (although he did not participate in the final round of scoring of that proposal), was familiar with the RFP and the evaluation criteria. And, he was available to immediately participate in the evaluation of Aetna's proposal as a member of the

reconstituted PEC. Mr. Shier had fully read and actually "scored" a substantial portion of the technical categories in Premera's offer. As such, he was considered by the state to be an evaluator of Premera who had been on the original PEC. And, under the circumstances of which the parties were attempting to have Aetna's proposal evaluated and scored as soon as practicable, utilizing as many of the original five PEC members was in the best interests of all involved, including Aetna.

Aetna's proposal received a total technical score of 2,030 out of 2,500 available points from the reconstituted PEC. The proposal submitted by Premera, previously scored by the original PEC, had an existing technical score of 2118.5. It is important to note that the net effect of using a newly comprised PEC to score Aetna's proposal occurred as a direct result of the proposal evaluation process Aetna agreed to in writing (Exhibit A). It is further notable that Aetna's technical score improved by only 21.5 points as a result of the best and final scoring process addressed below.

- **If, after evaluation and scoring, Aetna's proposal was determined to be responsive and reasonably susceptible for award, a date and time would be set for receipt of best and final offers from both Aetna and Premera.**

Aetna's proposal was determined to be reasonably susceptible for award on February 23, 2006. Tuesday, February 28, 2006, noon Alaska Time, was set for the receipt of best and final offers from both Aetna and Premera.

On page five of its protest, Aetna states it agreed to the evaluation process because 1) the evaluation did not involve direct comparability of scores between Aetna and Premera, but only passage of a "susceptibility" threshold; and 2) only one evaluator was being substituted from the original PEC, not two.

Response: It would not have been possible for the state to determine Aetna's "susceptibility for award" under 2 AAC 12.290 without the direct comparison of scores between Aetna and Premera since the RFP utilized a numerical rating system (see 2 AAC 12.260). Also, both Ms. Miller and Mr. Shier were on the original PEC that scored Premera's proposal in the initial evaluation process, as required by the agreement Aetna signed on February 23rd. Therefore, only one evaluator was added (Ms. Porter).

- **The state would disclose Aetna's exact proposal price to Premera and disclose Premera's exact price to Aetna.**

  Aetna and Premera agreed to the disclosure of certain pricing information not normally allowed. As Aetna is well aware, the state had previously disclosed Premera's price of approximately $34 million to Aetna after the initial notice of intent to award was issued by the state. The disclosure of Premera's best and final offer price to Aetna occurred the morning of February 21, 2006, shortly before the state found the final Aetna binder, which resulted in the Notice of Intent being rescinded. At that time, Premera's original proposal price and its best and final offer price was available for public inspection. Premera's proposal price was not disclosed to Aetna; only its best and final offer price. On page three of the protest, Aetna states that when best and final proposals were opened, the cost of the two responsive proposals (submitted by Aetna and Premera) "was virtually identical." I disagree. Premera's cost was $1,103,617 lower than Aetna's cost. This is a significant amount. As such, Premera received 2,000 points for cost and Aetna received 1,931 points. Cost points are determined by a mathematical formula as described in the RFP (see pages 18 and 19 of the RFP, copy attached.).

  It must be noted that Aetna's original cost proposal indicated a grand total for contract-years one through three of (a) $49,163,735 based on mature service fees, and (b) $45,387,171 based on illustrative immature service fees. The state was unable to discern the difference between these two total prices. As such, Aetna was required to submit a single cost proposal in its best and final offer, which it agreed to do.

  After holding discussions authorized under AS 36.30.240 with both parties and with Aetna having the benefit of knowing Premera's price of $34,077,274, Aetna reduced its price offer from $49,163,735 / $45,387,171 (in its original proposal to $32,054,652 in its best and final offer).

- **Discussions under AS 36.30.240 with Aetna and Premera would occur Friday, February 24th and a date and time would be set for receipt of best and final offers from both offerors.**

  The state held discussions with both offerors pursuant to AS 36.30.240. Three pages of clarification/discussion topics were sent to Aetna. On February 28th, Aetna submitted its best and final offer.

Only one page of clarification discussion topics was sent to Premera since, as Aetna knew the state had already held discussions with Premera once before. The three items discussed were:

RFP Section 7.23, Cost Proposal
Premera was allowed to submit another cost proposal.

RFP Section 7.03, Management Plan for the Project
The state asked Premera to provide a single list of costs and fees that would be billed separately from the fees contained in the cost proposal (Aetna was asked the same question during discussions).

RFP Section 7.15 Provider Discounts
The state asked Premera whether it could bill a fee associated with Premera's network discount in a different manner.

The last two items were not specifically addressed in the PEC evaluation form and scoring criteria contained in RFP Attachment 1. Therefore, it was anticipated that Premera's cost proposal, if it chose to submit one, was the only section of its best and final offer that would require scoring.

- **After receipt of best and final offers from Aetna and Premera, both proposals would again be scored; a new notice of intent would then be issued to the winning offeror.**

Scoring occurred at this stage and a new Notice of Intent was issued to Premera based upon best and final offer scoring. Costs for each best and final offer were scored. Premera received 2,000 points for cost and Aetna received 1.931, as dictated by the scoring formula contained in the RFP.

It has been a longstanding practice that when the state receives best and final offers, only the changes addressed in the offer are scored (if required), not the entire proposal. As such, costs for each proposal were scored and the sections of Aetna's best and final offer that altered its technical proposal were scored by the reconstituted PEC, resulting in a 21.5 point total increase.

After the PEC scored Aetna's best and final offer and the procurement officer recalculated the points allotted to cost for both proposals, Premera's total score exceeded Aetna's total score by 136. It was not necessary for the PEC to score the technical section of Premera's best and final response.

Premera responded to all three items as requested by the state during discussions. That is, under RFP Section 7.15 Premera eliminated the network fee entirely and under RFP Section 7.03 Premera stated that there were no additional fees contained in the cost proposal. Under RFP Section 7.23 Premera submitted a new cost proposal which was scored by the procurement officer.

In addition, Premera guaranteed that the total pharmacy rebates received by the State of Alaska would be $3.0 million for each contract year, included an additional 45 hours of training and doubled the dollars at risk in the performance guarantees section. It was not necessary to score these sections since they resulted in substantial improvement to Premera's proposal and since Premera was already ahead of Aetna in scoring. Additionally, these items were not specifically addressed in the PEC evaluation form and scoring criteria in RFP Attachment 1, except for possibly the immaterial addition of 45 additional training hours (ref. RFP section 10.18 h).

I believe the state followed the evaluation process that is customarily performed, as well as being the process agreed to by Aetna and Premera.

Aetna states on page three of the protest, "Points were awarded based on how individual evaluators liked, or disliked, the proposer's approach to a host of issues". This is a misstatement of fact. Each PEC member awarded points based on their independent judgment and in accordance with the PEC evaluation form and scoring criteria in RFP Attachment 1. There is no evidence to the contrary and none is inferred. This is speculation by Aetna.

Aetna states on page five of the protest that it agreed the state would first make a threshold call as to whether Aetna's proposal was reasonably susceptible for award and if Aetna passed that test a subsequent evaluation of new "best and final offers" would be made. That is the exact process the state followed. There is no basis to find the state committed a legal or procedural error.

**IV. Allegation: The Division Created the Appearance of Coaching Premera to Improve Its Score, but it did not Extend Similar Courtesies to Aetna.**

Aetna alleges the state did not afford Aetna "fair and equal treatment with respect to any opportunity for discussion and revision of proposals" under AS 36.30.240(a) and didn't help "Aetna improve its proposal to the same extent as it already had with Premera."

Discussion: Throughout its protest, Aetna mischaracterizes the clarification and discussion processes outlined in the State Procurement Code and Alaska Administrative Code, as well as the process followed by the state with respect to this RFP.

Under 2 AAC 12.285, the state may communicate with offerors in order to clarify uncertainties or eliminate confusion concerning the contents of a proposal. Under AS 36.30.240, discussions may be conducted for the purpose of clarification to assure full understanding of, and responsiveness to, the solicitation requirements. Also, proposal revisions may be submitted under a best and final offer.

The state combined the clarification and discussion processes into a single phase when it held discussions initially with Premera and again when AS 36.30.240 discussions were held with both Premera and Aetna. In each instance, the PEC members developed the specific list of items that were clarified and discussed with each offeror based on their review and evaluation of the proposals. Additionally, before evaluating the proposals, each PEC member received instruction regarding the purpose and intent of Clarification of Offers (RFP Section 2.06) and Discussions with Offerors (RFP Section 2.07).

I believe Premera and Aetna were afforded "fair and equal treatment with respect to any opportunity for discussion and revision of proposals" as required by AS 36.30.240. However, that does not mean the state must discuss the exact items, or the same number of items with each offeror. Such an interpretation is unreasonable considering the variety of RFPs issued by the state and the fact that offerors respond to RFPs in different manners proposing a variety of solutions.

Further, as noted on the first page of Aetna's protest, it is reasonable to conclude that a PEC would have fewer items to clarify and discuss with Aetna, who is the current contractor and has been the provider of the services covered by the RFP for the last 24 years.

Aetna states on page 7 of its protest that the extensive discussions with Premera had the effect of giving Premera detailed advice on how to:

- retract portions of their proposal which, absent a retraction, would leave Premera's proposal unresponsive to the RFP;
- insert items required to be included in the RFP, but originally omitted by Premera; or
- suggest available contract administration measures that could result in lower cost, or increased evaluator attractiveness, and hence higher point scores.

This is an inaccurate portrayal of the state's discussions with Premera. The same conditions apply to the list of clarification and discussion items submitted to Aetna (Aetna protest attachment 3).

On page 7 Aetna also states, "The Division took 62 pages to suggest and elicit specific changes to Premera's original proposal; conversely, the Division made only three pages of minor, technical suggestions to Aetna." Here, liberties are taken to mix the facts. A table on page 8 of Aetna's protest includes this improper comparison.

While the evidence shows there were more items clarified and discussed with Premera than Aetna, the reference to three pages of suggestions to Aetna (attachment 3 to Aetna's protest), excludes Aetna's response. The reference of 62 pages of Premera's clarification to suggest and elicit changes to Premera's original proposal, attachment 4 to Aetna's protest, includes Premera's response.

Examples are provided on pages 9 - 11 of the brief in an attempt to show how apparent inequalities emerged during the state's discussions with Premera and how the state asked Premera to "clarify" points that needed no clarification because, according to Aetna, Premera "unequivocally rejected a condition of the RFP."

One example is specifically detailed on page 10 of the brief. That particular section of Premera's proposal is provided below:

---

a) Administration

i) Customer Service ☐Agree ☒ Disagree

Standard: 85% of telephone calls will be answered within 30 seconds in any given month.
Agree.

Measurement: The offeror will provide the State with its customer service telephone access reports on a monthly basis specifically identifying performance in this area.
Agree.

Amount at risk: $700 for each 1% deviation from target measured monthly, up to a maximum of $7,000 monthly.

Disagree. $7,500 for each 1% deviation from target measured annually, up to a maximum of $90,000.

---

As you can see, Premera checked the "disagree" box. However, immediately below the first item Premera typed "Agree." At the bottom, Premera apparently "disagreed" with the $700 amount at risk - offering $7,000, and "disagreed" with the $7,000 maximum penalty - offering $90,000. It seemed that Premera had agreed with the standard to answer 85% of the telephone calls within 30 seconds, but wanted to increase the penalty amount, which was in the state's best interest (i.e. Premera was subjecting itself to an even greater monetary penalty if it failed to meet this standard). Contrary to Aetna's assertion, this is a perfect example of an item that could be clarified or discussed.

A similar example is found in Aetna's original proposal. Under RFP Section 7.13 c), iv), Aetna checked the disagree box. Since Aetna currently pursues refund overpayments under the existing contract, the state asked Aetna the following question during discussions:

*Considering that Aetna is currently pursuing refund of overpayments in excess of $50, please clarify why Aetna disagreed with this section and proposed two performance guarantees in place of the guarantee outlined in this section.*

As a result of Aetna's response to this question in its best and final offer, Aetna received an additional 5 points.

Aetna mentions, in a similar vein, that Premera clearly declined to offer direct deposit in its original offer, but was convinced by the state to change its mind. Aetna's response to the same item, RFP Section 7.16 c), is provided below:

---

a) Can you offer direct deposit of participant benefit reimbursement?

If yes, for which benefits covered by this proposal?

**Yes ☐ No ☒**

---

Although, Aetna had "unequivocally rejected a condition of the RFP" (a term used to characterize the same action by Premera), the state asked Aetna the following question during discussions:

*Please clarify that although the No box was checked, that Aetna does currently offer EFT to providers in lieu of a mailed EOPP check and that under the Health FSA that the auto-debit payment method to providers could be utilized. Are these service included as part of Aetna's proposal?*

As a result of Aetna's response to this question in its best and final offer, Aetna received 10 additional points.

Additional examples are included in Mr. Wiggins' affidavit under items 23 – 28 in the apparent attempt to infer some form of impropriety concerning the state's discussions with Premera. However, these examples clearly fall under normal topics of clarification and discussion allowed under AS 36.30.240 and similarities can be found in the state's discussions with Aetna as to its proposal. Overall, this shows the offerors were treated equally as required under AS 36.30.240.

Page 10 of the protest states that the Division suggested some "re-packaging" of nearly $6 million of "network access fees" as some other kind of charge and that by agreeing to not call these charges "access fees," Premera was able to lower the cost side of its bid by $6 million.

Premera had initially proposed a network access fee of $5.51 per employee per month (PEPM) that would be billed as a claim charge. I have not researched Aetna's claim that the value of this PEPM charge would have totaled $6 million. In any event, the state's Benefits Manager was concerned that the $5.51 PEPM fee would artificially inflate the actual cost of claims and cause reporting issues. As such, during discussions the state asked Premera whether it was possible "to bill this fee or cost in a different manner, rather than adding the amount to a claim." Premera made adjustments in its best and final offer and was able to eliminate the fee entirely. This so called "re-packaging" is analogous to Aetna's reduction of pharmacy rebate guarantees in its best and final offer. Aetna originally proposed a $3.5 million minimum guarantee for pharmacy rebates. However, after discussions, Aetna reduced the state's guaranteed pharmacy rebate to $750,000 per year, which apparently enabled Aetna to reduce its cost proposal accordingly.

Aetna asks on page 12 of the protest whether the state could have gotten the best deal by engaging in the same discussions with Aetna that it had with Premera, but then Aetna states "we've no idea because equality of treatment never occurred." Once again, the incorrect notion is advanced that the state must clarify and discuss the exact same items, or the same number of items with each offeror. Nowhere do our procurement statutes, regulations, policies, or past practice dictate that the state do so.

Also on page 12, Aetna characterizes the evaluation process as "doomed to inequity from the onset" because the state considered Premera the only qualified bidder up until Aetna's missing proposal binder was located, and one might expect a government agency to communicate exclusively with the only bidder who was qualified for the contract, as the state thought at the time. This observation must be viewed in light of the fact that before Aetna signed the agreement (Exhibit A) that allowed the evaluation

process to proceed as it did. And, Aetna knew the state had dealt exclusively with Premera as the only responsive offeror up to that point. There is basis to conclude the process was "doomed." The state proceeded in good faith under the process agreed to by the parties under Exhibit A.

Finally, an after-the-fact suggestion is made on page 13 of the protest. Aetna alleges the state should have retained a qualified consultant to make sure that a level playing field was created when the missing Aetna binder was found so it could conduct a fair and reliable comparison of the two bids. The day after Aetna's proposal binder was located the state openly developed an evaluation process with an agreed to jointly by Aetna and Premera. The goal was to enable the evaluation process to continue. Aetna was a party to those discussions and signed the final agreement. At no time (until the protest) did Aetna suggest participation of an outside consultant. This protest point is without merit.

**V. Allegation: The Division Failed to Separately Evaluate the Splitting-out of Pharmacy Claim Management Services under a Different Contract, with a Different Contractor.**

Discussion: Aetna is correct the state did not evaluate proposals submitted under Section 9 of the RFP, Pharmacy Network and Benefit Management only.

On February 27, 2006, in accordance with AS 36.30.350 and 2 AAC 12.860, the state properly rejected all proposals received for RFP 2007-0200-5946, Claims Administration and Pharmacy Benefit Management only, under Section 9 of the RFP (Exhibit B).

Under the RFP, offerors were allowed to submit proposals for each RFP Section under the following scenarios:

Section 7 - All Services, or
Section 8 - All Services except Pharmacy Network and Benefit Management, or
Section 9 - Pharmacy Network and Benefit Management only.

In essence, award could be made to a single offeror for Section 7, all services, or up to two contracts could be awarded for Sections 8 and 9. The RFP stated that each scenario would be evaluated for the best value to the state, considering price and technical factors, and that a PEC would score the proposals according to predetermined criteria.

However, the RFP scoring methodology is flawed. It was not possible to compare a proposal submitted for all services under Section 7 to two proposals submitted under the Section 8 and 9 combination.

The scoring criteria for each of the three RFP sections (Exhibit C) indicates that the total possible score for Section 7 is 5,000. However, the combined scores for Sections 8 and 9 total 10,000. The RFP does not describe how the PEC would reconcile this point difference when comparing a single proposal for Section 7 to separate proposals for Sections 8 and 9.

Further, Sections 8 and 9 contain duplicate scoring criteria for "Management Plan for the Project" and "Essential Administrative Services." Each proposal would have to be scored according to these criteria. Therefore, there would be four separate scores under the multiple award combination (Sections 8 and 9), but only two scores for the single award scenario (Section 7). In addition, the maximum possible score for these two areas is 250 points under Section 7, while the score could reach 1,100 points for the same criteria under Sections 8 and 9.

In addition to the scoring discrepancies cited above, there are multiple instances where the maximum possible scores for the same criteria are not equivalent:

| | |
|---|---|
| 7.07 Usual, Customary and Reasonable (UCR) | 100 |
| 8.07 Usual, Customary and Reasonable (UCR) | 150 |
| | |
| 7.11 Reporting | 100 |
| 8.11 Reporting | 150 |
| | |
| 7.12 Location of Work | 150 |
| 8.12 Location of Work | 200 |
| | |
| 7.13 Performance Standards | 100 |
| 8.13 Performance Standards | 150 |
| | |
| 7.14 Health Flexible Spending Account (Health FSA) | 100 |
| 8.14 Health Flexible Spending Account (Health FSA) | 150 |
| | |
| 7.16 Information Technology/Communication | 150 |
| 8.16 Information Technology/Communication | 200 |

| | |
|---|---|
| 7.18 Pharmacy Benefit Management Services | 150 |
| 9.05 Pharmacy Benefit Management Services | 350 |
| 7.19 Clinical Programs | 150 |
| 9.06 Clinical Programs | 500 |
| 7.20 Retail Network | 100 |
| 9.07 Retail Network | 450 |
| 7.21 Mail Order | 100 |
| 9.08 Mail Order | 450 |
| 7.22 High Deductible Health Plan and HSA Experience | 50 |
| 8.18 High Deductible Health Plan and HSA Experience | 150 |

It was not possible to reconcile these scoring discrepancies and compare these two scenarios without making a material change to the RFP evaluation criteria.

The RFP stated on page ten, "wherever possible, the State seeks to reduce administrative costs by awarding multiple features to a single contractor." In this instance, the award of a single contract would reduce costs when considering the burden of administering two separate contracts, one for Pharmacy Network and Benefit Management and one for all other services required under RFP 2007-0200-5946. This opinion is shared by the state's Benefits Manager.

For the record, the score sheets attached to the protest under Chart 1 are inaccurate. Some minor errors appear to be caused because a different averaging or rounding method was used. However, the second chart titled PREMERA'S FIRST EVALUATIONS SCORES lists an average of 1,379.5 points. That amount should be 1,489.5. It appears the error initially occurred on the following page because Williams' scores were not included in the calculation.

The table attached to the protest titled REBATES INTEGRATED PHARMACY Rx PREMERA – COMPARED TO AETNA INTEGRATED RX REBATES UNDER SECTION 9 is highly speculative at best. The reason is that Premera did not submit a separate proposal for RFP Section 9. In addition, any award under Section 9 would have been combined with an award under Section 8. In Aetna and Premera's initial proposals, both appeared to charge a premium for services provided under Section 8. Because of these discrepancies, the state did not validate the referenced rebates or annual estimates.

The state also did not validate the calculations and estimates used under the "Progression of Premera offer to the State of Alaska" document that was attached to the protest.

One final issue to be addressed is Mr. Wiggins affidavit where he asserts the state "has only provided us with evaluation notes that appear incomplete and confusing." My records show that on March 1, 2006, the state provided Aetna's lobbyist with a complete set of the score sheets and evaluation notes. On March 6th, Mr. Wiggins called and complained that the information provided to Aetna contained errors. The state offered to walk through the alleged errors with Mr. Wiggins in order to identify any discrepancies. Mr. Wiggins replied that he didn't have the copies available because they had been sent to his legal firm and he only had an email from the firm that discussed the errors. It appeared to the state, based on Mr. Wiggins' description of the errors, that Aetna had somehow mixed up the score sheets. In any event, that same day the state provided Mr. Wiggins with another complete and accurate set of the score sheets that had been verified by the state. One more complete and accurate set of the score sheets and evaluation notes are attached to this protest response (Exhibit C).

The Corrective Action Was Agreed To by Aetna; No Prejudice to Aetna; State Acted in Good Faith

The state took appropriate corrective action in this procurement when the error concerning the completeness of Aetna's proposal was discovered. And, it took the corrective action only after coming to an agreement with Aetna and Premera (Exhibit A). Further, the corrective action was performed in a manner that was not prejudicial to Aetna. In fact, Aetna can only be said to have benefited from the corrective action. It had the benefit of knowing Premera's first round of best and final price; a price that was approximately $13 million less than Aetna's originally proposed offer when it (Aetna) had the chance to make its best and final offer.

What Aetna has "not" argued or shown, is that the state's decision -- after going through the "agreed to" evaluation process and the second round of best and final offers - had no reasonable basis to support the award to Premera. In order to show that the state's action was arbitrary or capricious or otherwise inconsistent with law, Aetna must how that the state's action was prejudicial to Aetna. *SDS International v. United States*, 48 Fed. Cl. 742 (Feb. 21, 2001). Aetna also fails to note that the state is entitled to broad discretion in evaluating proposals in a "best value" procurement, as here. *Id.*

Also, Aetna has not shown that it would have been awarded the contract if the corrective action had not been taken. To show prejudice, Aetna must demonstrate that there was a reasonable likelihood that, absent the corrective action complained of here, it would have been awarded the contract. *Id., citing Alfa Laval Separation, Inc v. United States*, 175 F. 3d 1365, 1367 (Fed. Cir. 1999).

Aetna's complaint that it would have not participated had it known that Pat Shier's scores of were not part of the final tally of Premera's scores is also without merit. Aetna agreed to a "differently constituted" PEC and the state provided two of the original five that evaluated Premera's offer. The third member of the new PEC was entirely new to the process. Aetna has not proven that there was any bias in favor of Premera on the basis of the make-up of the reconstituted PEC. In fact, Aetna has asserted no credible evidence to support even a presumption of bias by the PEC or any individual member. *See Galen Medical Associates, Inc. v. United States*, 369 F. 3d 1324, 1331 (2004) (to establish prejudice, protestor must show there was a "substantial chance it would have received the contract but for that error.") (citations omitted). Aetna apparently only wanted to participate in the corrective action process it agreed to (Exhibit A) only "if" it won the contract.

The *Galen* case is relevant to this protest in other respects, as follows: (1) the court held that even though two of the successful bidder's references were on the evaluation panel, that did not support a presumption of bias against the losing bidder (*Id.* at 1335); (2) the court found that the discussions with the winning offeror was allowable because the law provides for the agency to receive clarifying information from offerors during bidding process (*Id.* at 1332-33); and (3) and the court held that best and final offer materials submitted by the successful bidder which might have been received both before and after the BAFO request date did not prove bias on part of agency and late receipt was not necessarily improper (*Id.* at 1339).

Finally, Aetna has overlooked a basic premise of procurement law - the presumption that state officials acted in good faith. Absent evidence that the PEC acted in an arbitrary or capricious manner when evaluating the offers, the PEC is presumed to have acted in good faith and in compliance with law. *See Bruno v. Peterson*, 944 P.2d 43, 49 (Alaska 1997) (agency personnel and procedure are presumed to be honest and impartial until a [claimant] makes a showing of actual bias or prejudgment). Aetna has provided no evidence of actual misconduct by the PEC in this case; it only complains (after agreeing to a different make-up of the PEC - Exhibit A), that use of a different PEC is the reason it did not win the contract. However, this is speculation and it does not

overcome the presumption of honesty and impartiality of procurement officials. That presumption can be overcome only "[w]ith convincing evidence that 'a risk of actual bias or prejudgment is present'. In other words, any alleged prejudice on the part of the decision maker must be evident from the record and cannot be based on speculation or inference." *Navistar Int'l Transportation Corp. v. United States Environmental Protection Agency*, 941 F.2d 1339, 1360 (6th Cir. 1989)(citation omitted).

Conclusion

For the reasons set forth above, Aetna's protest and its request for a stay of award under AS 36.30.575 are denied in total. Aetna may file an appeal of this decision to the Commissioner of Administration within 10 days of receipt of this decision. AS 36.30.590. If an appeal is filed, a copy must be provided to the undersigned. Further, the appeal must contain the information required under AS 36.30.560 and include a copy of this decision and identify the factual and/or legal errors in the decision that form the basis of the appeal.

Sincerely,

Walt Harvey
Contracting Manager

cc: Margie Vandor
Assistant Attorney General

Exhibit A

Aetna

# Fax Cover Sheet

TO: Vern Jones, Chief Procurement Officer State of Alaska

FAX: (907)465-~~5804~~ 2189

DATE: February 23, 2006

# PAGES: 2 + cover

Message:

Vern,

Per your request, I have reviewed and signed the process overview. Please call me with any questions.

Title

2006 FEB 23 PM 4 52
DIVISION OF GENERAL SERVICES & SUPPLY

*Michael T. Robinson*
*Vice President*
*National Accounts – West*
*2526 Shadelands Dr.*
*Walnut Creek, CA. 94596*
*(925) 948-4205*
*(925) 948-4902*

Exhibit A

RFP No. 2007-0200-5946

Agreed upon process by State of Alaska (State), offeror Premera Blue Cross Blue Shield of Alaska (Premera), and offeror Aetna, per teleconference calls held between the parties' representatives on February 22 and 23, 2006:

**Modified Evaluation Process Steps:**

1. Thursday, February 23, 2006, Aetna proposal evaluation and scoring process is underway, and is anticipated to be completed by the reconstituted Procurement Evaluation Committee (PEC) which consists of three members, two of whom were on the original PEC that scored Premera's proposal in the initial evaluation process. All PEC members are State employees.

2. If, after Step 1, it is determined by the State that Aetna's proposal is both responsive and reasonably susceptible for award, the following will occur as to disclosure of Aetna's original price and Premera's price upon which the original notice of intent to award was based (now rescinded) so that the State may proceed to conducting discussions with both offerors under AS 36.30.240:

a. Prior to release of Aetna's price, the State will ensure agreement with Aetna officials as to the accuracy of its offer (total figure) provided. Only the exact three-year price total provided in Aetna's proposal will be disclosed to Premera after confirmation from Aetna: and

b. The State will obtain confirmation from Premera as to their exact three-year price total upon which the original notice of intent to award was based, and provide that figure to Aetna.

3. Discussions under AS 36.30.240 with Aetna and Premera will occur Friday, February 24. During discussions, a date and time will be set for receipt of best and final offers from both offerors (tentatively set for Tuesday, February 28, noon Alaska Time).

4. After receipt of best and final offers from Aetna and Premera, both proposals will be scored and a new notice of intent to award will be issued. The State anticipates the notice of intent to award will be issued on or before March 2, 2006.

5. The normal protest and appeal process will be available after the new Notice of Intent to Award is issued as set out in Step. 4.

2006 FEB 23 PM 4 52
DIVISION OF GENERAL
SERVICES / SUPPLY

Exhibit 1

The undersigned parties agree, and to take no exception to the process as set forth in Steps 1 through 5 above:

State of Alaska

By: _____ 2/24/06
Vern Jones Date
Chief Procurement Officer

Premera Blue Cross Blue Shield of Alaska

By: _____
Yori Milo Date
Chief Legal Officer

Aetna

By: _____ 2-23-2006
Mike Robinson Date
Western Regional Head
National Accounts

Exhibit B

MEMORANDUM
STATE OF ALASKA
*Department of Administration*
*Division of General Services*

Phone Number: 465-2250
FAX Number: 465-2189
TDD Number: 465-2205

**TO:** Vern Jones
Chief Procurement Officer

**DATE:** February 27, 2006

**FROM** Walt Harvey
Contracting Manager

**SUBJECT:** Rejection of a Single Proposals for RFP 2007-0200-5946, Section 9

In accordance with AS 36 30 350 and 2 AAC 12 860, I recommend the rejection of all proposals received for RFP 2007-0200-5946, Claims Administration and Pharmacy Benefit Management, Section 9, "Pharmacy Network and Benefit Management only." By rejecting proposals submitted under Section 9, award can only be made to a single offeror under Section 7

You and I previously discussed this issue on February 22, 2006.

Offerors were allowed to submit proposals for each section under the following scenarios

Section 7 - All Services, or
Section 8 - All Services except Pharmacy Network and Benefit Management, or
Section 9 - Pharmacy Network and Benefit Manageme .t only.

In essence, award could be made to a single offeror for Section 7, all services, or two contracts could be awarded for Sections 8 & 9 The RFP stated that each scenario would be evaluated for the best value to the state, considering price and technical factors, and that a proposal evaluation committee (PEC) would score the proposals according to predetermined criteria The PEC score sheets were contained in three RFP attachments, one for each section.

Two offerors responded to Section 9, Aetna and Walgreens However, Walgreens proposal was determined to be nonresponsive as they did not possess a valid Alaska Business License at the time designated for opening of the proposals The single remaining proposal submitted by Aetna for Section 9 has not been evaluated by the PEC

It must also be noted that the rejection of a single proposal is permitted under 2 AAC 12 270 There are various reasons why it's in the state's best interest to reject the single proposal for Section 9

Exhibit B

- **The RFP scoring methodology is flawed**
  - The scoring criteria for each of the three RFP sections (see attached criteria) indicates that the total possible score for Section 7 is 5,000. However, the combined scores for Sections 8 & 9 total 10,000. The RFP does not describe how the PEC would reconcile this point difference when comparing a single proposal for Section 7 to separate proposals for Sections 8 & 9.

  - Sections 8 & 9 contain duplicate scoring criteria for "Management Plan for the Project" and "Essential Administrative Services." Each proposal would be scored according to this criteria. Therefore, there would be four separate scores under the multiple award combination (Sections 8 & 9), but only two scores for the single award scenario (Section 7). In addition, the maximum possible score for these two areas is 250 points under Section 7, while the score could reach 1,100 points for the same criteria under Sections 8 & 9.

  - In addition to the scoring discrepancies cited above, there are multiple instances where the maximum possible scores for the same criteria are not equivalent.

| | |
|---|---|
| 7.07 Usual, Customary and Reasonable (UCR) | 100 |
| 8.07 Usual, Customary and Reasonable (UCR) | 150 |
| 7.11 Reporting | 100 |
| 8.11 Reporting | 150 |
| 7.12 Location of Work | 150 |
| 8.12 Location of Work | 200 |
| 7.13 Performance Standards | 100 |
| 8.13 Performance Standards | 150 |
| 7.14 Health Flexible Spending Account (Health FSA) | 100 |
| 8.14 Health Flexible Spending Account (Health FSA) | 150 |
| 7.16 Information Technology/Communication | 150 |
| 8.16 Information Technology/Communication | 200 |
| 7.18 Pharmacy Benefit Management Services | 150 |
| 9.05 Pharmacy Benefit Management Services | 350 |
| 7.19 Clinical Programs | 150 |
| 9.06 Clinical Programs | 500 |
| 7.20 Retail Network | 100 |
| 9.07 Retail Network | 450 |
| 7.21 Mail Order | 100 |
| 9.08 Mail Order | 450 |
| 7.22 High Deductible Health Plan and HSA Experience | 50 |
| 8.18 High Deductible Health Plan and HSA Experience | 150 |

It would not be possible to reconcile these scoring discrepancies and ensure a fair and equal comparison of the two scenarios without making a material change to the RFP evaluation criteria.

Exhibit B

- **Single Award**
  The RFP stated "wherever possible, the State seeks to reduce administrative costs by awarding multiple features to a single contractor." In this instance, I believe the award of a single contract would reduce costs when considering the burden of administering two separate contracts, one for Pharmacy Network and Benefit Management and one for all other services required under RFP 2007-0200-5946. This opinion is shared by the state's Benefits Manager.

- **Time Constraints**
  For various reasons, the award of a contract did not occur on February 1, 2006 as stated in RFP amendment #6. Considering that significant transition must occur if a company other than the current contractor is awarded the contract, coupled with the fact that implementation must occur on July 1, 2006 for both active and retirees, there is insufficient time to:

  - evaluate and score the two proposals submitted under Section 7 (including discussions/best and final proposals) and determine a winner,
  - evaluate and score the proposals submitted under Sections 8 & 9 (including discussions/best and final proposals if warranted), and determine the winner(s),
  - attempt to compare the two scenarios to determine best value (which as previously stated is not possible), and
  - potentially negotiate and award two separate contracts under the Sections 8 & 9 scenario.

- **Increased Costs**
  Cost was only one of the evaluation factors and proposals submitted for Sections 8 & 9 were not evaluated. However, it appears that the actual cost to the state could be greater under a combined Section 8 & 9 scenario than a single award under Section 7.

If approved, I will reject the single proposal submitted under Section 9 of the RFP.

[X] Approved [ ] Disapproved

Vern Jones
Chief Procurement Officer

2/27/06
Date

# RFP 2007-0200-5946 Scoring Criteria

Exhibit B

## Section 7 - All Services

| | |
|---|---|
| 7 03 Management Plan for the Project | 100 |
| 7 04 Essential Administrative Services | 150 |
| 7 05 Appeals Procedure | 50 |
| 7 06 Vision Services | 50 |
| 7 07 Usual, Customary and Reasonable (UCR) | 100 |
| 7 08 Coordination of Benefits (COB) | 150 |
| 7 09 Utilization Review | 200 |
| 7 10 Employee Assistance Program and MMH | 150 |
| 7 11 Reporting | 100 |
| 7 12 Location of Work | 150 |
| 7 13 Performance Standards | 100 |
| 7 14 Health Flexible Spending Account (Health FSA) | 100 |
| 7 15 Provider Discounts | 250 |
| 7 16 Information Technology/Communication | 150 |
| 7 17 Client Service/Experience | 150 |
| 7 18 Pharmacy Benefit Management Services | 150 |
| 7 19 Clinical Programs | 150 |
| 7 20 Retail Network | 100 |
| 7 21 Mail Order | 100 |
| 7 22 High Deductible Health Plan and HSA Experience | 50 |
| 7 23 Cost Proposal | 2,000 |
| 7 24 Alaska Offeror s Preference | 500 |
| | 5,000 |

## Section 8 - All Services except Pharmacy Network and Benefit Management

| | |
|---|---|
| 8 03 Management Plan for the Project | 150 |
| 8 04 Essential Administrative Services | 200 |
| 8 05 Appeals Procedure | 50 |
| 8 06 Vision Services | 50 |
| 8 07 Usual, Customary and Reasonable (UCR) | 150 |
| 8 08 Coordination of Benefits (COB) | 150 |
| 8 09 Utilization Review | 200 |
| 8 10 Employee Assistance Program and MMH | 150 |
| 8 11 Reporting | 150 |
| 8 12 Location of Work | 200 |
| 8 13 Performance Standards | 150 |
| 8 14 Health Flexible Spending Account (Health FSA) | 150 |
| 8 15 Provider Discounts | 250 |
| 8 16 Information Technology/Communication | 200 |
| 8 17 Client Service/Experience | 150 |
| 8 18 High Deductible Health Plan and HSA Experience | 150 |
| 8 19 Cost Proposal | 2,000 |
| 8 20 Alaska Offeror's Preference | 500 |
| | 5,000 |

## Section 9 - Pharmacy Network and Benefit Management only

| | |
|---|---|
| 9 03 Management Plan for the Project | 250 |
| 9 04 Essential Administrative Services | 500 |
| 9 05 Pharmacy Benefit Management Services | 350 |
| 9 06 Clinical Programs | 500 |
| 9 07 Retail Network | 450 |
| 9 08 Mail Order | 450 |
| 9 09 Cost Proposal | 2,000 |
| 9 10 Alaska Offeror s Preference | 100 |
| | 5,000 |

LAW OFFICES OF
SIMPSON, TILLINGHAST & SORENSEN, P.C.

ONE SEALASKA PLAZA, SUITE 300 JUNEAU, ALASKA 99801
TELEPHONE 907-586-1400 FAX 907-586-3065

**HAND DELIVERED**

March 10, 2006

Mr. Walt Harvey
Procurement Officer
Alaska Department of Administration
Procurement Officer
P.O Box 110210
Juneau, Alaska 99811-0210

Re. Protest and Request for Stay of Award in RFP No. 2007-0200-5946
OUR FILE NO.: 1467.1

Dear Mr Harvey:

This firm represents Aetna and Aetna Life Insurance Company ("Aetna"). The purpose of this letter is to respectfully file a protest by Aetna, under AS 36.30.560, of the Division of General Service's ("Division's") February 28, 2006 Final Notice of Intent to Award a Contract under the above-referenced RFP to Premera Blue Cross. The protest is supported by this letter; a Protest Memorandum dated this date, an affidavit and supplemental affidavit of Mr. Michael Wiggins, and attachments, exhibits and charts appended to those materials.

**Request for Stay of Contract Award.** Aetna also respectfully requests, pursuant to AS 36.30.575, that any award of a contract under the above-referenced RFP be staying pending the outcome of this protest and any appeal on a protest under AS 36.30.590. The bases for this request are as follows:

1. **The Merits of the Protest.** Aetna's claims are that the Division violated basic principles of competitive bidding by assigning different evaluators to award discretionary points to two different bidders; treating the two bidders with substantial inequality in soliciting clarifications and improvements to the two bidders; and apparently summarily rejecting the solicited option of awarding a stand-alone pharmaceutical claim management contract. These are the type of errors that courts (and independent hearing officers) tend to find destructive of the competitive bidding process, and are therefore also the kind of errors that can and do lead to compelled cancellation of any contract that may be let to

Premera in the interim. Ignoring these claims, and executing a contract with Premera would represent a high-risk gamble with the public's money, because if Aetna ultimately prevails, and contract cancellation is ordered, it will be the Division, and the general fund, that will be saddled with sorting out the resultant mess. A prudent administrator would not award a long-term contract under the RFP under these circumstances, and Aetna is hopeful that prudence will prevail here. The protest and appeal procedures are not lengthy ones. Balancing that short delay against the consequence of a ruling adverse to the Division counsels for granting the stay, and

2. **The Best Interest of the State.** This is not a case where a contract needs to be let to complete a public improvement that is currently non-existent or for which there is a pressing public need that is currently not being fulfilled. To the contrary, all of the services covered by the RFP are today being provided efficiently and reliably by Aetna. *Wiggins Aff.* ¶30. Aetna is prepared to continue to provide those services under an amendment to its existing contract at the same prices that it is currently charging. *Id at* ¶31. We understand the requirement of AS 39.30.090(a)(5) that the State's group insurance specifications must be made available every five years. But the State has satisfied that requirement with the RFP; there is no deadline on completion of the RFP process; and, as a factual matter, the state has already extended its Life/Disability Contract with Unum, and its current contract with its benefit consultants, beyond the 5-year period. *Id* at ¶32. The State, then, is free to extend its contract with Aetna (if need be) to continue to provide services beyond June 30, 2006.

Additionally, in assessing the state's best interest, the Division must consider the hardship and disruption that will attend the near-immediate cessation of Aetna services. The State's existing clientele has been accustomed to relying on Aetna to promptly service claims; conversely, and particularly given the extraordinary number of retirees served by the State's system, substitution of managers will cause confusion; delay and loss of prescriptions and other medical services; and mental distress among both employees and retirees. This coupled with the disruption attended the transition to a new manager promises a sustained period of hardship on State employees and retirees if and when the transition is made. *See Wiggins Aff.* ¶¶31-41. In the long run, these are not reasons to avoid a transition, but they are definitely reasons not to <u>hurry</u> to judgment, when time and some studied thought may prove the transition unnecessary, if not illegal.

For the foregoing reasons, Aetna respectfully requests that the award of any contract under the RFP be stayed pending disposition of the protest and any appeal.

Sincerely,

SIMPSON, TILLINGHAST & SORENSEN

Jon K. Tillinghast

BEFORE THE ALASKA DEPARTMENT OF ADMINISTRATION

| | |
|---|---|
| *In the Matter of Protest of Final Notice of Intent to Award a Contract, RFP 2007-0200-5946* | **PROTEST BY AETNA LIFE INSURANCE COMPANY AND AETNA** |

## I. Introduction

Pursuant to AS 36.30.560, Aetna and Aetna Life Insurance Company ("Aetna") respectfully protests the Department of Administration's, Division of General Service's (the "Division") February 28, 2006 Final Notice of Intent to Award a Contract pursuant to the above-referenced Request for Proposal ("RFP") to Premera Blue Cross. [1/]

## II. Overview

On December 22, 2005, Aetna submitted a complete, responsive and responsible proposal to provide medical and pharmaceutical claim management services to the State of Alaska pursuant to the above-referenced RFP. *Wiggins Aff.* ¶11. Having heard nothing in response for nearly two months, Aetna finally received a form Notice of Intent to Award the contract to Premera on February 18, 2006. *Id.* at ¶13. A phone call to the Division disclosed that the Division had lost the meat of Aetna's proposal, consisting of some four boxes of binders in which were contained a critical portion of Aetna's overall proposal. *Id.* Rather than asking Aetna, who, through itself and its

[1/] Aetna is an "interested party" in the RFP. *See 2 AAC 12.990(a)(7).* Aetna submitted a timely, responsive and responsible bid. *Wiggins Aff.* ¶11. Aetna and its affiliates have been the provider of the services covered by the RFP for 24 consecutive years, and the economic impact on Aetna of the loss of this long-standing business will be severe. *Id. at* ¶¶40-41.

SIMPSON, TILLINGHAST & SORENSEN
One Sealaska Plaza, Suite 300
Juneau, Alaska 99801
(907) 586-1400 FAX (907) 586-3065

affiliates, had been providing these services to the State for the past 24 years, why there was such a gaping omission in its bid, the Division simply declared Aetna "nonresponsive" for failure to submit a complete bid *Id* After considerable pleading by Aetna that these boxes most definitely were delivered on time, the Division looked again, and found them in a store room after a mere hour's search *Id* at ¶14

The State promptly rescinded the Notice of Intent, and commenced another evaluation process that is the subject of this protest *Id at ¶17*

This protest is filed because, following the lost-bid episode, the Division committed three errors that made it impossible for the Division, or anyone else, to compare Aetna's response to Premera's response. [2/] When comparability becomes impossible, there is simply no way for the State (or anyone else) to intelligently decide which proposal is better for Alaska and its taxpayers That is what happened here.

The services for which the RFP solicited proposals—*i.e.* to provide a wide range of medical and pharmacy insurance management services to the State--have been provided economically and efficiently by Aetna itself, or through its affiliates, for some 24 years *Wiggins Aff.*, ¶4 Because many factors other than cost bore on the State's choice of suppliers (factors such as expertise, system compatibility, ability to serve clientele, and the like), a "Request for Proposal" format was utilized, rather than a Request for Sealed Bids. Under the RFP cost accounted for only 40% of the total bid evaluation, all the other relevant factors (loosely called "Non-Cost Factors") were including in the remaining 60% As to those Non-Cost Factors, each individual

[2/] There were, in fact, four bidders in response to the RFP, including Coresource and Walgreens Neither of these latter two bids, however, were responsive (*see Attachment 8*), and this Protest will accordingly focus on the RFP's failure to provide a means of comparing Premera and Aetna

SIMPSON, TILLINGHAST & SORENSEN
One Sealaska Plaza, Suite 300
Juneau, Alaska 99801
(907) 586-1400 FAX (907) 586-3065

evaluator awarded points based upon that evaluator's personal judgment as to how the proposer dealt with each Non-Cost Factor.

When final proposals were opened, the *cost* of the two responsive proposals was virtually identical. On the cost side, Premera was awarded 2000 points for having the lowest cost bid, while Aetna was awarded 1930 points for having a cost bid that was only marginally higher than Premera's. *Attachments 5B and 5D.* The outcome of the bidding process would thus depend on the point-evaluation process for the Non-Cost Factors. Unfortunately, it was there that all three errors occurred. Those errors were these:

**III. The Division Rendered Its Non-Cost Evaluation Useless by Assigning one Evaluation Team to Grade Aetna, and then a Different Evaluation Team to Grade Premera.**

The ultimate goal of the competitive bidding process—the one on which its "integrity" turns—is to provide "the opportunity to *compare* multiple responsible bids." *Laidlaw Transit Inc. v. Anchorage School District*, 118 P.3[rd] 1018 (Alaska 2005), *emphasis added*. Any error that undermines the State's ability to meaningfully compare competing proposals injures the unsuccessful bidder, to be sure, but more importantly, it deprives the public, the courts, and the legislature of any basis to assess the propriety of the agency's choice, and it renders the agency's action intrinsically arbitrary.

In this case, the points for Non-Cost Factors were awarded based on an evaluation of largely qualitative (as opposed to quantitative) factors, ranging from the suitability of appeals procedures to transition and training concerns. *Wiggins Aff. ¶43.* Points were awarded based on how individual evaluators liked, or disliked, the proposer's approach to a host of issues. The Division assigned one 3-person evaluation team to evaluate

SIMPSON, TILLINGHAST & SORENSEN
One Sealaska Plaza, Suite 300
Juneau, Alaska 99801
(907) 586-1400 FAX (907) 586-3065

Aetna's bid, and then assigned a separate 3-person evaluation team to evaluate Premera's bid. The two teams had only one member in common (that is, only one evaluator out of a total of five actually evaluated both proposers); the other two members of each team evaluated only the proposer who was assigned to that team. Each individual on these separate teams then awarded point grades to a long list of subjective standards—standards that would translate into very different point totals, depending on the evaluators' individual background, grading policies and priorities.

The evaluators' separate scores for the subjective, 60% Non-Cost Evaluation illustrate how idiosyncratic the Division's criteria really were:

| Evaluator | Evaluated | Score |
|---|---|---|
| Miller | Aetna | 2440 |
| | Premera | 2160 |
| Gray | Premera Only | 2207 |
| Porter | Aetna Only | 2120 |
| Williams | Premera Only | 1990 |
| Shier | Aetna Only | 1585 |

*Wiggins Aff., Attachments 5B and 5D.* The Division then took the average of each evaluator's scores (*i.e.*, Aetna's score was based on the average of Miller's, Porter's and Shier's evaluation, while, Premera's was based on the average of Miller's, Gray's and

SIMPSON, TILLINGHAST & SORENSEN
One Sealaska Plaza, Suite 300
Juneau, Alaska 99801
(907) 586-1400 FAX (907) 586-3065

Williams' evaluation), and (because of the near-identity of the cost score), the proposer with the highest average evaluation won [3]

It is also apparent that compromising the rating process by using non-comparable, idiosyncratic scoring affected the outcome For example, the only evaluator who evaluated both applications, Ms Miller, rated Aetna significantly higher than Premera

Aetna, it needs to be stressed, never consented to such a procedure Once the Division discovered the missing boxes of Aetna bid materials, it knew that it must give Aetna a fair opportunity to compete for the contract And so it agreed, first, to make a threshold call as to whether Aetna's proposal was "reasonably susceptible for award." *Wiggins Aff.*, ¶17; *Attachment 2* If Aetna passed that first test (which it did), a subsequent evaluation of new "best and final offers" would be made

Because one of the evaluators who had evaluated Premera's first bid was absent, the State needed to substitute <u>one</u> evaluator who had been on Premera's original three person team in order to have three persons available to make the threshold "susceptibility for award" review. *Id* Aetna agreed to this process, for two obvious reasons: (1) the evaluation did not involve direct comparability of scores between Aetna and Premera, but only passage of a "susceptibility" threshold, and (2) only one evaluator was being substituted, not two. [4]

Aetna's assumption was that, once the new substitute evaluator was chosen, that same team (*i.e.* two original Premera evaluators and the one substitute) would be available to evaluate the "best and final offers" of <u>both</u> offerors—Premera as well as

---

[3] *Attachment 5B at 2 (Aetna "best and final" summary sheet), Attachment 5D at 2 (Premera "best and final" summary sheet*

SIMPSON, TILLINGHAST & SORENSEN
One Sealaska Plaza, Suite 300
Juneau, Alaska 99801
(907) 586-1406 FAX (907) 586-3065

Aetna. No further substitutions would be necessary. This is why paragraph 4 of the Agreement letter (*Attachment 2*), which deals with the final evaluation of best and final offers, says nothing about different contestants having different teams of evaluators.

The fact of the matter was that no bidder in his or her right mind would agree to be scored by a team, a majority of which were different individuals from those who scored the bidder's competitor. A suggestion that Aetna agreed to such an approach is inherently not credible.

In a nutshell, it is of no probative value that Mr. Shier awarded Aetna 1585 points for certain bidding variables, while one Mr. Mike Williams awarded Premera 1990 points for those same variables. It is a rule of the most obvious and fundamental nature that an RFP cannot succeed unless the grades being compared came from the same judge. The Division's decision to use two different evaluators for each proposer is remarkable.

## IV. The Division Created the Appearance of Coaching Premera to Improve its Score, but it did not Extend Similar Courtesies to Aetna.

Under AS 36.30.240 and 2 AAC 12.290, the Division may discuss proposals with proposers "reasonably susceptible of being selected for award" in order to flush out proposal details, and, those discussions can lead to changes in the proposer's so-called "best and final offer."

This authority, however, is subject to a caveat—that all such proposers "shall be accorded fair and equal treatment with respect to any opportunity for discussion and revision of proposals" (AS 36.30.240(a)), and that "[t]he opportunity for confidential

---

[4] / As events would have it, the Division substituted two new evaluators even for the threshold "suitability" evaluation. But Aetna never agreed to this, and was not informed at that time that the Division was substituting two evaluators.



SIMPSON, TILLINGHAST & SORENSEN
One Sealaska Plaza, Suite 300
Juneau, Alaska 99801
(907) 586-1400 FAX (907) 586-3065

discussions, if held, must be extended to all offerors submitting proposals deemed reasonably susceptible for award." 2 AAC 12.290(a)

The Division held extensive discussions with Premera which had the effect of giving Premera detailed advice on how to:

- retract portions of their proposal which, absent a retraction, would leave Premera's proposal unresponsive to the RFP,
- insert items required to be included in the RFP, but originally omitted by Premera, or
- suggest available contract administration measures that could result in lower cost, or increased evaluator attractiveness, and hence higher point scores.

*Wiggins Aff. ¶¶ 21-28a, Attachments 4A and 4B* Not surprisingly, Premera accepted virtually every suggestion, and the gross point total from its Non-Cost factor evaluation resultantly rose by 629 points from its original proposal. *Compare Attachments 5C and 5D*

Aetna was offered no similar opportunity. The Division took 62 pages to suggest and elicit specific changes to Premera's original proposal, conversely, the Division made only three pages of minor technical suggestions to Aetna (*Wiggins Aff., ¶ 19. Attachment 3)* Further, email messages document at least three private conversations between the procurement officer and Premera officials (on February 7, 9 and 15). *See Attachments 4A and 4B*

The raw page difference in communications between offerors yielded commensurate differences in the final point awards. And so, while Premera benefited by

SIMPSON, TILLINGHAST & SORENSEN
One Sealaska Plaza, Suite 300
Juneau, Alaska 99801
(907) 586-1400 Fax (907) 586-3065

629 additional points from the Division's extensive communications. Aetna's perfunctory dialogue with the Division yielded it only 21 additional points. *Compare Attachments 5A and 5B with Attachments 5C and 5D*

The relative impact of those questions on the scoring process was as follows:

| COMPANY | EXTENT OF BIDDER QUESTIONING | ADDITIONAL POINTS FROM ANSWERS |
|---|---|---|
| Premera | 62 pages of questions and answers, several private conversations | 629 |
| Aetna | 3 pages | 18 |

The extra points granted to Premera were doubly significant:

- *First*, in the initial grading of the two proposers (the grading of the initial proposals, before the Division's extensive assistance to Premera), Aetna won the Non-Cost Scoring (*i.e.* the 60% of the bid that reflects proposal quality) by 541 points. *Compare Attachments 5A and 5C*; while
- *Second*, even after its extensive assistance from the Division, Premera was able to beat Aetna's Non-Cost score by only 71 points. *Compare Attachments 5B and 5D*. It is apparent, then, that without these extensive suggestions from the Division, Premera would not have won the Non-Cost Scoring on the final "best and final" round; and, since the cost component of those bids was essentially equally for Aetna and Premera, Premera therefore would not have won the competition as a whole. The

SIMPSON, TILLINGHAST & SORENSEN
One Sealaska Plaza, Suite 300
Juneau, Alaska 99801
(907) 586-1400 FAX (907) 586-3065

summary of all of these scores is contained in *Chart 1* that is appended to this protest

Unlike a request for bids, a request of proposals (or "RFP") allows the bidding agency to ask follow-up questions for the purpose of curing proposed deficiencies in the bid. *Gunderson v. University of Alaska, Fairbanks*, 922 P.2nd 229 (Alaska 1996). However, because of the potential for abuse in private bidder/agency conversations, courts are insistent on all bidders being given the "same opportunity" in curing bid shortcomings *Id.* at 235, AS 46.30.240 (all qualified bidders shall be "accorded fair and equal treatment"; 2 AAC 12.290(a) (the same opportunity "must be extended to all offerors.")

"Fair" contract bidding, and ensuring that no bidder "has received an unfair competitive advantage," is critical in order to ensure the best possible offer emerges from the bidding process *McBirney & Associates v. State*, 753 P.2d 1132, 1135 (Alaska 1988).

As the Division found, Aetna was an offeror whose offer was reasonably susceptible of award. As such, it was entitled to equal treatment in post-opening discussions with the Division. Courts are historically wary of inequality in Request for Proposal communications, because of the obvious potential for abuse in giving bidding agencies discretion to engage in private conversations with bidders. As a result, courts have been especially alert in demanding equality in substance, and not just in form, in an agency's treatment of competing proposers.

Here, the danger of apparent inequality emerges from the Division's own wording in its questions to Premera. Time-and-time again, the Division asks Premera to "clarify,

SIMPSON, TILLINGHAST & SORENSEN
One Sealaska Plaza, Suite 300
Juneau, Alaska 99801
(907) 586-1400 FAX (907) 586-3065

a point that needed no clarification. In one class of cases, for example, Premera's original offer unequivocally rejected a condition of the RFP. The Division, instead of simply asking Premera to reverse its position, asked it to "clarify" that it would accept the condition, despite the fact that its original proposal made it clear that it would not. Capable of taking a hint, Premera routinely agreed to "clarify" that it would, after all, abide by the RFP.

Mr. Mike Wiggins offers several examples of this in his affidavit (*id.* at ¶¶21-28A), including the following:

> *The RFP asks the offeror to agree that it will answer 85% of all telephone calls within 30 seconds in any given month, or face penalties. RFP, §10.11(a)(1). In its original proposal, Premera "disagreed" with this element of the RFP. . . . This caused Premera to lose points on this issue in its first proposal, receiving only 2 points from one evaluator (Gray) and 0 from another (Williams) out of a possible 5 points. . . . To raise Premera's point total, the Department asked Premera to "clarify" that it would answer 85% of all calls on a monthly basis, despite what it said in its proposal. . . . In response to the State's suggestion that Premera change its position, Premera agreed to the State's demand. . . . As a result, Premera received 3.5 added points from one evaluator (Gray) and additional points on this particular Performance Standard issue and additional points from another (Miller) in its "best and final" proposal).*

*Id.* at ¶21. In a similar vein: (1) Premera clearly declined to offer direct deposit in its original offer, but was convinced by the Division to change its mind (*id.* at ¶22), (2) the Division asked Premera to "agree" to a service that it had unequivocally not agreed to provide in it proposal. *Id.* at §23, and (3) at the last minute, the Division suggested some re-packaging of nearly $6 million of "network access fees" as some other kind of charge. *Id.* at ¶28A. By agreeing to not call these charges "access fees," Premera was able to lower the cost side of its bid by $6 million (since "access fees" <u>are</u> counted in computing proposal costs), and then recapture those same funds as "claim charges," which are <u>not</u>

SIMPSON, TILLINGHAST & SORENSEN
One Sealaska Plaza, Suite 300
Juneau, Alaska 99801
(907) 586-1400 FAX (907) 586-3065

*included* in the so-called "cost" of the bid *Id* The net result was to make Premera's bid look $6 million more attractive, without offering any overall cost savings at all *Supplemental Affidavit of Mike Wiggins*

Additional "clarifications" that in fact resulted in significant point increases are given as examples at ¶¶23-28 of Mr Wiggins' affidavit, and *Attachments 4D and 4E* are rife with them

In *Dynacs Engineering Company v United States*, 48 Fed Cl 124 (2000), the government made a disproportionate effort to enhance one RFP proposer's bid, offering it multiple opportunities to cure deficiencies and working with the favored bidder to cure nine shortcomings while point out only two deficiencies in the other bidder's proposal The government tried to justify this substantive inequality by claiming that it had made some effort to work with both bidders The court disagreed, holding that, in RFP discussions, the equality of treatment among proposers must be "meaningful," and both sides must be given the "same opportunity" to address weaknesses A bidding agency cannot get by with "not telling [one bidder] about its continuing weaknesses, [while continuing to inform the other bidder] about each of [its] weaknesses until [that other bidder] got it right" 48 Fed Cl at 130. The disparity in both the frequency and substance of the communications among the two bidders in our case, and the vastly different results that the two sets of "discussions" achieved, proved that precisely the same inequity occurred here

To the same effect is *Dubinsky v United States*, 43 Fed Cl 243 (1999), *appeal dismissed* 215 F 3rd 1350 (Fed Cir 1999), where the government also used the device of common discussions with potentially successful proposers to improve one bidder's

SIMPSON, TILLINGHAST & SORENSEN
One Sealaska Plaza Suite 300
Juneau, Alaska 99801
(907) 586-1400 FAX (907) 586-3065

proposal, while giving *pro forma* attention to the other. Without substantive equality in the discussions between proposers, the court held, "discussions with offerors readily would be subject to abuse, merely becoming a cover for an agency's discussions with the offeror it has selected to receive the contract prior to the formal selection decision." *Id* at 263-4; *see also Paramax Systems Corp v CAE-Link Corp*, *1993 WL 485205 (Com Gen.) (October 27, 1993)*, (where bidders "were not treated equally since they were not given the same opportunity to participate in discussions and to amend their cost/price proposals after BAFO," Comptroller General recommended a new round of BAFO's and, if necessary, cancellation of the originally-successful contract).

So, once again, the Division has frustrated competition here, by refusing to put the two bidders on the same playing field. Could the Division have gotten the best deal for Alaskans by engaging in the same discussions with Aetna that it had undertaken with Premera? We've no idea, because equality of treatment never occurred, and we are therefore left, again, to compare Premera's apple to Aetna's orange

It may be that the evaluation was doomed to inequality from the outset, when the Division first concluded that Aetna had failed to file the bulk of its bid From that point, and until the mistake was discovered, the Division considered Premera the only qualified bidder, and one might expect a government agency to communicate exclusively with the only bidder who (as the Division thought at the time) was qualified for the contract. That spin gives the Division every benefit of the doubt. But even if that were the case, the Division's ultimate failure came in its refusal to give Aetna's proposal the same individual assistance once the Division learned that Aetna was a qualified bidder whose bid was "susceptible for award." Once that happened, it was incumbent on the Division

SIMPSON, TILLINGHAST & SORENSEN
One Sealaska Plaza, Suite 300
Juneau, Alaska 99801
(907) 586-1400 FAX (907) 586-3065

*included* in the so-called "cost" of the bid *Id* The net result was to make Premera's bid look $6 million more attractive, without offering any overall cost savings at all *Supplemental Affidavit of Mike Wiggins*

Additional "clarifications" that in fact resulted in significant point increases are given as examples at ¶¶23-28 of Mr Wiggins' affidavit, and *Attachments 4D and 4E* are rife with them

In *Dynacs Engineering Company v United States*, 48 Fed Cl 124 (2000), the government made a disproportionate effort to enhance one RFP proposer's bid, offering it multiple opportunities to cure deficiencies and working with the favored bidder to cure nine shortcomings while point out only two deficiencies in the other bidder's proposal The government tried to justify this substantive inequality by claiming that it had made some effort to work with both bidders The court disagreed, holding that, in RFP discussions, the equality of treatment among proposers must be "meaningful," and both sides must be given the "same opportunity" to address weaknesses A bidding agency cannot get by with "not telling [one bidder] about its continuing weaknesses, [while continuing to inform the other bidder] about each of [its] weaknesses until [that other bidder] got it right" 48 Fed Cl at 130. The disparity in both the frequency and substance of the communications among the two bidders in our case, and the vastly different results that the two sets of "discussions" achieved, proved that precisely the same inequity occurred here

To the same effect is *Dubinsky v United States*, 43 Fed Cl 243 (1999), *appeal dismissed* 215 F 3rd 1350 (Fed Cir 1999), where the government also used the device of common discussions with potentially successful proposers to improve one bidder's

SIMPSON, TILLINGHAST & SORENSEN
One Sealaska Plaza Suite 300
Juneau, Alaska 99801
(907) 586-1400 FAX (907) 586-3065

to level the playing field, by helping Aetna improve its proposal to the same extent as it already had with Premera. The Division, in a word, cannot excuse such clear inequality of treatment by its own mistake, particularly when the Division later had every opportunity to rectify that mistake. As part of rectifying its error, the Division should have retained a qualified consultant, as it has customarily done in the past, to make sure that a level playing field was created at the end of the process, and that the State could therefore conduct a fair and reliable comparison of the two bids.

## V. The Division Failed to Separately Evaluate the Splitting-out of Pharmacy Claim Management Services under a Different Contract, with a Different Contractor.

Pharmacy claim management services are included within the scope of work of the RFP, however, the Division recognized, in the RFP, that the State might benefit by breaking out pharmacy services on a stand-alone basis, and award a contract for those services separate from the main body of the work. *RFP at 9-10* [1] To that end, offerors were invited to submit stand-alone bids for pharmacy claim management, and the State, in turn, committed to separately evaluate stand-alone proposals. *Id.*

Aetna, in fact, timely submitted a stand-alone proposal to manage pharmacy services in conformity with the RFP. *Wiggins Aff.* ¶ 12. But the Division never evaluated that proposal as part of the overall cost of the project. From the February 28, 2006 Final Notice of Intent (*Attachment 8*), it appears that that Aetna's proposal was simply "rejected" out of hand.

---

[1] Since the RFP is in the possession of the Division, a separate copy of that document is not being appended as an Attachment. Aetna respectfully requests that the RFP and all amendments thereto be made a part of the record of this protest.

SIMPSON, TILLINGHAST & SORENSEN
One Sealaska Plaza, Suite 300
Juneau, Alaska 99801
(907) 586-1400 FAX (907) 586-3065

The three phase rating system in the RFP—that is, a separate scoring system for comprehensive, comprehensive-less-pharmacy, and pharmacy-stand-alone programs (*id* at *Sections* 10-12) recognizes the State's uncertainty as to the most cost-efficient means of providing these services, and likewise recognizes the value of a three-part scoring system to resolve that uncertainty. As the RFP recognized, it may be more economical for the State to award one contract, to one contractor, for the all contract services except pharmacy, and another contract for pharmaceutical claims management only to a second contractor

Indeed, as Mr Wiggins explains in his affidavit (¶42 and *Exhibit 1*), publicly-available information now demonstrates that the Division would have saved approximately $3 million if it had awarded the pharmaceutical claim management portion of the contract to Aetna, and the remainder of the contract to Premera This is precisely the scenario that the Division thought might happen in the RFP, and it was an arbitrary departure of the RFP for the Division to ignore that scenario in the final bid evaluation

## VI. Relief Requested

For the foregoing reasons, Aetna respectfully requests that

(1) The State rescind the Notice of Award for the RFP to Premera, and the services envisioned by the RFP continue to be provided by Aetna under Aetna's existing contract, as extended, with the Division for a period of not less than six months,

(2) if a contract with Premera is executed before this relief is granted, the contract with Premera be cancelled,

SIMPSON, TILLINGHAST & SORENSEN
One Sealaska Plaza, Suite 300
Juneau, Alaska 99801
(907) 586-1400 FAX (907) 586-3065

(3) the Division utilize the intervening six months as a necessary cooling off period,

(4) at the close of the cooling-off period, the State solicit new Best and Final Offers from Aetna and Premera;

(5) the new Best and Final Offers be evaluated by a qualified evaluation team that includes one consultant with demonstrated expertise in medical claim benefit management and acceptable to the Division, Premera and Aetna, and

(6) during any period of continued provision of service by Aetna under paragraph (2), Aetna will provide that service at current contract costs with the Division

DATED May 10 2006

SIMPSON, TILLINGHAST & SORENSEN
Attorneys for Aetna

By: Jon K. Tillinghast
Alaska Bar Assn. No 7410109

SIMPSON, TILLINGHAST & SORENSEN
One Sealaska Plaza, Suite 300
Juneau, Alaska 99801
(907) 586-1400 Fax (907) 586-1065

## AETNA'S FIRST EVALUATION SCORES

| Evaluators: | Miller | Shier | Porter | Average |
|---|---|---|---|---|
| Total Evaluator Scores From Aetna's First Evaluation | 2415 | 1570 | 2105 | 2030.0 |

## PREMERA'S FIRST EVALUATION SCORES

| Evaluators: | Gray | Jarrell | Miller | Williams | Average |
|---|---|---|---|---|---|
| Total Evaluator Scores From Premera's First Evaluation | 1692 | 1290.5 | 1156 | 1810 | 1379.5 |

## AETNA'S SECOND EVALUATION SCORES

| Evaluators: | Miller | Shier | Porter | Average |
|---|---|---|---|---|
| Total Evaluator Scores From Aetna's Second Evaluation | 2440 | 1585 | 2120 | 2048.3 |

## PREMERA'S SECOND EVALUATION SCORES

| Evaluators: | Gray | Miller | Williams | Average |
|---|---|---|---|---|
| Total Evaluator Scores From Premera's Second Evaluation | 2207 | 2160 | 1990 | 2119.0 |

## CHART 1

# PREMERA'S FIRST EVALUATION SCORES

| Technical Proposal | Gray | Jarrell | Miller | Williams | Average |
|---|---|---|---|---|---|
| 10.01 | 40 | 55 | 25 | 75 | 40.0 |
| 10.02 | 81 | 67.5 | 83.5 | 80 | 77.3 |
| 10.03 | 50 | 25 | 25 | 45 | 33.3 |
| 10.04 | 26.5 | 14 | 4 | 20 | 14.8 |
| 10.05 | 40 | 55 | 40 | 60 | 45.0 |
| 10.06 | 62 | 85 | 51 | 125 | 66.0 |
| 10.07 | 166.5 | 91 | 127 | 190 | 128.2 |
| 10.08 | 127.5 | 85 | 87 | 120 | 99.8 |
| 10.09 | 80 | 32.5 | 11 | 90 | 41.2 |
| 10.10 | 67 | 60 | 50 | 100 | 59.0 |
| 10.11 | 75 | 42.5 | 63.5 | 75 | 60.3 |
| 10.12 | 84 | 45 | 54 | 85 | 61.0 |
| 10.13 | 191 | 155 | 171 | 200 | 172.3 |
| 10.14 | 135 | 90 | 72 | 125 | 99.0 |
| 10.15 | 104 | 50 | 62.5 | 65 | 72.2 |
| 10.16 | 79 | 90 | 40 | 100 | 69.7 |
| 10.17 | 91 | 85 | 51 | 70 | 75.7 |
| 10.18 | 69 | 70 | 46.5 | 90 | 61.8 |
| 10.19 | 80.5 | 65 | 67 | 70 | 70.8 |
| 10.20 | 43 | 28 | 25 | 25 | 32.0 |
| Total | 1692 | 1290.5 | 1156 | 1810 | 1379.5 |

# AETNA'S FIRST EVALUATION SCORES

| Technical Proposal | Miller | Shier | Porter | Average |
|---|---|---|---|---|
| 10.01 | 100 | 55 | 100 | 85.0 |
| 10.02 | 125 | 80 | 75 | 93.3 |
| 10.03 | 50 | 30 | 50 | 43.3 |
| 10.04 | 35 | 25 | 40 | 33.3 |
| 10.05 | 100 | 70 | 75 | 81.7 |
| 10.06 | 150 | 85 | 150 | 128.3 |
| 10.07 | 200 | 120 | 165 | 161.7 |
| 10.08 | 150 | 85 | 140 | 125.0 |
| 10.09 | 100 | 70 | 100 | 90.0 |
| 10.10 | 150 | 75 | 120 | 115.0 |
| 10.11 | 90 | 50 | 95 | 78.3 |
| 10.12 | 100 | 70 | 90 | 86.7 |
| 10.13 | 225 | 200 | 225 | 216.7 |
| 10.14 | 140 | 85 | 120 | 115.0 |
| 10.15 | 150 | 90 | 90 | 110.0 |
| 10.16 | 150 | 95 | 135 | 126.7 |
| 10.17 | 150 | 120 | 135 | 135.0 |
| 10.18 | 100 | 60 | 60 | 73.3 |
| 10.19 | 100 | 80 | 90 | 90.0 |
| 10.20 | 50 | 25 | 50 | 41.7 |
| Total | 2415 | 1570 | 2105 | 2030.0 |

# PREMERA'S SECOND EVALUATION SCORES

| Technical Proposal | Gray | Miller | Williams | Average |
|---|---|---|---|---|
| 10.01 | 80 | 75 | 75 | 76.7 |
| 10.02 | 128 | 125 | 100 | 117.7 |
| 10.03 | 50 | 45 | 45 | 46.7 |
| 10.04 | 50 | 45 | 35 | 43.3 |
| 10.05 | 90 | 100 | 70 | 86.7 |
| 10.06 | 122 | 125 | 125 | 124.0 |
| 10.07 | 176.5 | 200 | 190 | 188.8 |
| 10.08 | 142.5 | 125 | 120 | 129.2 |
| 10.09 | 92 | 100 | 90 | 94.0 |
| 10.10 | 150 | 100 | 100 | 116.7 |
| 10.11 | 88.5 | 80 | 80 | 82.8 |
| 10.12 | 86 | 100 | 90 | 92.0 |
| 10.13 | 207 | 225 | 200 | 210.7 |
| 10.14 | 145 | 100 | 130 | 125.0 |
| 10.15 | 133.5 | 100 | 130 | 121.2 |
| 10.16 | 150 | 125 | 100 | 125.0 |
| 10.17 | 115 | 140 | 90 | 115.0 |
| 10.18 | 75 | 100 | 90 | 88.3 |
| 10.19 | 83 | 100 | 90 | 91.0 |
| 10.20 | 43 | 50 | 40 | 44.3 |
| Total | 2207 | 2160 | 1990 | 2119.0 |

# AETNA'S SECOND EVALUATION SCORES

| Technical Proposal | Miller | Shier | Porter | Average |
|---|---|---|---|---|
| 10.01 | 100 | 55 | 100 | 85.0 |
| 10.02 | 125 | 80 | 75 | 93.3 |
| 10.03 | 50 | 30 | 50 | 43.3 |
| 10.04 | 50 | 35 | 40 | 41.7 |
| 10.05 | 100 | 70 | 75 | 81.7 |
| 10.06 | 150 | 85 | 150 | 128.3 |
| 10.07 | 200 | 120 | 165 | 161.7 |
| 10.08 | 150 | 85 | 140 | 125.0 |
| 10.09 | 100 | 70 | 100 | 90.0 |
| 10.10 | 150 | 75 | 120 | 115.0 |
| 10.11 | 90 | 50 | 100 | 80.0 |
| 10.12 | 100 | 70 | 90 | 86.7 |
| 10.13 | 225 | 200 | 225 | 216.7 |
| 10.14 | 150 | 95 | 130 | 125.0 |
| 10.15 | 150 | 90 | 90 | 110.0 |
| 10.16 | 150 | 95 | 135 | 126.7 |
| 10.17 | 150 | 120 | 135 | 135.0 |
| 10.18 | 100 | 60 | 60 | 73.3 |
| 10.19 | 100 | 75 | 90 | 88.3 |
| 10.20 | 50 | 25 | 50 | 41.7 |
| Total | 2440 | 1585 | 2120 | 2048.3 |

# AFFIDAVIT OF MIKE WIGGINS

STATE OF ALASKA )
) ss.
FIRST JUDICIAL DISTRICT )

1. I, MIKE WIGGINS, being first duly sworn, to depose and say that

2. I am 51 years old. My home address is 6628 138th PL SW, Edmonds, WA 98026

3. My current position for Aetna is Vice President National Account, Seattle, Washington. I have worked for Aetna for 8 years.

4. The RFP that is the subject of this protest is to provide medical and/or pharmacy benefit management claim services for the State of Alaska. Aetna and its affiliates have held this contract for these services for 24 years.

5. My own job experience in this field involves 25 years – directly related to the pricing, operational monitoring, and consulting on health insurance related matters.

6. In terms of involvement with health management related RFPs, I have had, in addition to the current RFP in question, involvement with the prior (2) five year bids, one with NYLCare, another with Aetna and (1) prior State of Alaska RFP with Blue Cross of Washington and Alaska.

7. My previous past job titles have included Manager of Actuarial and Underwriting – Medical Service Corporation of Eastern Washington, now a subsidiary of Blue Cross of Washington and Alaska, Manager of Experience Underwriting, Vice President of Underwriting, Vice President Large Group Consulting and Product Development (All positions with Blue Cross of Washington and Alaska), Senior Benefit Consultant, William M. Mercer, Solo Consulting Practice – Health Care Tactical Partners, Director of Public Programs – NYL Care, a subsidiary of New York Life.

8. My current job function includes overall account management responsibility for government entities with more than 3,000 employees in part of

SIMPSON, TILLINGHAST & SORENSEN
One Sealaska Plaza, Suite 300
Juneau, Alaska 99801
(907) 586-1400 FAX (907) 586-3065

Aetna's West region. This includes [illegible] the State of Alaska, State of Idaho, State of Nevada, King County, and the City of Seattle. In that role, I am working with entities such as the State of Alaska in a consultative capacity to help them design health care programs to meet the financial challenges they face in delivering benefits to their active and retired employees. In my current role, I also act as the point person in negotiating future administrative fees, responding to Requests for Proposals, and service related issues.

9. Specifically for the State of Alaska proposal at issue in this protest, I coordinated the responses to the bid questions and the responses that crossed many different disciplines within Aetna. At least 10 Aetna staff members were committed to insuring Aetna's bid response was complete and reflected answers to the questions raised by the State.

10. By virtue of this experience, I have personal knowledge and am competent to testify regarding the subject matter of this affidavit

**Aetna's bid response to RFP 2007-200-5945 – Issued November 30th 2005**

11. On December 22, 2005, AETNA submitted a timely, complete, responsive and responsible proposal on the above referenced RFP. The cover page of Aetna's submission is attached as *Attachment 1*. Aetna's bid response contained separate responses to Section 7 (Medical, Dental, LTC and Pharmacy Services), Section 8 (Mental, Dental and LTC Services) and Section 9 (Pharmacy Benefit Management Services). The separate requested responses to the RFP were submitted because one of the stated purposes of the RFP was to allow the State to determine whether it was more economical to award all services on one contractor, or award a stand-alone Pharmacy Benefit Management Services contract to a second contractor.

12. Prior to Jan. 20, 2006, the first scheduled award date of any parts of the RFP in question; I contacted Victor Lemur, who was then the initial procurement officer, asking if there were any problems with the Aetna RFP response. This was due to the fact that Aetna had heard nothing to date about our response to the RFP. His response was no comment and that the bid evaluation would take longer than the original stated date of Jan. 20th

13. On Saturday, February 18th, 2006, AETNA was notified that its proposal to RFP 2007-0200-5946 was being rejected as being non-responsive. This came in the form of a faxed Notice of Intent to Award the contract to Premera which Aetna received on that Saturday. Subsequently, I was informed via a telephone call with Mr. Walt Harvey, who was now the procurement officer, that Aetna's bid response was being rejected as non-responsive because it was missing key requested information that was part of the RFP. In the course of this conversation I informed Mr. Harvey that he was mistaken. Together, we confirmed what Aetna material he had in his hands and what materials he should have had. Based upon this conversation, it became obvious that Mr. Harvey was missing a 6 inch binder which contained the meat of Aetna's responses to which Aetna sent multiple copies to the State. Again I stated I had confirmation that the State received our RFP bid materials. At this point Walt said he would get back to me within an hour.

14. One hour later, Aetna's multi-copied bid responses were found in their boxes in a storeroom. No explanation was given as to how or why the boxes were lost, just an apology. Also, no explanation was given as to why they didn't call Aetna sooner.

15. Upon discovering the State's mistake, Mr. Harvey immediately withdrew the State's Notice of Intent previously given to Premera.

16. Mr. Harvey also stated that he needed to speak with the Attorney General to determine what steps needed to be taken.

17. Following internal dialog, a scheduled meeting was held. The meeting included Aetna, Premera and State Representatives at which time the State laid out its next steps in the procurement process which included: (1) Aetna's newly discovered RFP response would receive a threshold evaluation to see if it was "reasonably susceptible to award"; (2) since one of the evaluators who had evaluated Premera's first offer was absent, we agreed that the State could substitute one reviewer on our reviewer panel for the purpose of determining whether we met the threshold of "reasonably susceptible to award"; (3) if we met that threshold, the State would share with Premera, Aetna's original offer because the State had shared with Aetna, Premera's unsolicited original "best final and final offer", and (4) Aetna and Premera would then be allowed submit another "best and final offer" that would be subject to comparative evaluation and the best offer would receive the contract. It was always our understanding that this second evaluation, in which

Aetna and Premera would be directly compared, would be evaluated by the same individuals. That agreement is reflected in the letter appended as *Attachment 2*. Note that this agreement only permits one different reviewer to review the threshold question of whether Aetna's proposal was "reasonably susceptible to award" (Aetna was not told, and was not made aware at the time, that the Division substituted two evaluators for even the first "reasonably susceptible to award" evaluation). Nowhere in that agreement did Aetna agree to multiple different reviews in comparing the final "best and final offers" that would be submitted by both sides, and under no circumstances would Aetna have agreed to such an arrangement.

18. Aetna's initial responses were deemed "reasonably susceptible of award," and therefore, thereafter, both Aetna and Premera submitted best and final offers.

19. The Division advised both proposers that they would submit certain questions to both proposers to clarify or improve both parties' proposals. However, the letter to Aetna only posed three pages of very limited clarifications. These clarifications questions appended as *Attachment 3*.

20. On the other hand, the Division served 62 pages of detailed questions on Premera over the course of apparently several weeks. The questions submitted to Premera are appended as *Attachment 4*

21. The RFP asks the offeror to agree that it will answer 85% of all telephone calls within 30 seconds in any given month, or face penalties. RFP § 10.11(a)(1). In its original proposal, Premera "disagreed" with this element of the RFP. *See Attachment 5C* at Miller's Evaluation Notes. *See Attachment 5C* at Gray's Evaluation Notes. This caused Premera to lose point on this issue in its first proposal, receiving only 2 points from one evaluator (Gray) and 0 from another (Miller) out of a possible 5.5 points. *See Attachment 5C* at Miller's Evaluation Notes; *See Attachment 5C* at Gray's Evaluation Notes. To raise Premera's point total, the Department asked Premera to "clarify" that it would answer 85% of all calls on a monthly basis, despite what it said in its proposal. *Premera Response* at pg 27. In response to the State's suggestion that Premera change its position, Premera agreed to the State's demand. Id. As a result, Premera received 3.5 added points from one evaluator (Gray) on this particular Performance Standard issue and additional points from another (Miller) on this particular Performance Standard section in its "best and final" proposal. *See*

*Attachment 5D* at Miller's Evaluation Notes; *See Attachment 5D* at Gray's Evaluation Notes.

22. The RFP asked whether the offeror is prepared to offer [illegible] point of participant benefit reimbursement. RFP § 10.14(c). In its original proposal, Premera answered "no" to this question in the RFP. *See Attachment 5C* at Miller's Evaluation Notes; *See Attachment 5C* at Gray's Evaluation Notes. This caused Premera to lose points on this issue in its first proposal, receiving only 10 points from one evaluator (Gray) and 0 points from another (Miller) out of a possible 25 points. *See Attachment 5C* at Miller's Evaluation Notes; *See Attachment 5C* at Gray's Evaluation Notes. To raise Premera's point total, the Department asked Premera, when it had already clearly answered "no" in its original proposal, to describe how Premera would meet the need for direct deposit. *Premera Response* at pg 33. In response to the State's suggestion that Premera change its position, Premera agreed that it would offer this service. Id. As a result, Premera received 9 added points from one evaluator (Gray) on this particular Performance Standard issue and additional points from another (Miller) on this particular Performance Standard section in its "best and final" proposal. *See Attachment 5D* at Miller's Evaluation Notes; *See Attachment 5D* at Gray's Evaluation Notes.

23. The RFP asks the "offeror whether it agrees to allow fees within the greater of 10% or $10 of UCR without reduction". RFP § 10.05(e). In its original proposal, Premera answered "no" to this section of the RFP. *See Attachment 5C* at Miller's Evaluation Notes; *See Attachment 5C* at Gray's Evaluation Notes. This caused Premera to lose points on this issue in its first proposal, receiving 0 points from two of the evaluators (Gray and Miller) out of a possible 20 points. *See Attachment 5C* at Miller's Evaluation Notes; *See Attachment 5C* at Gray's Evaluation Notes. To raise Premera's point total, the Department explained to Premera that "the RFP required offerors' to agree to the UCR procedures" and asked Premera whether it could agree to this procedure although it originally answered that it could not. *Premera Response* at pg 12. In response to the State's explanation and question Premera changed its position, Premera agreed to the State's demand. Id. As a result, Premera received 20 added points from evaluators (Gray and Miller) on this particular Performance Standard issue in its "best and final" proposal. *See Attachment 5D* at Miller's Evaluation Notes; *See Attachment 5D* at Gray's Evaluation Notes.

24. The RFP asks to the offeror "[t]o what degree does the offeror agree that they shall reimburse the State for any overpayment error in excess of $50.00

RFP § 10.11(g)(1). In its original proposal, Premera "disagreed" with this element of the RFP. *See Attachment 5C* at Miller's Evaluation Notes; *See Attachment 5C* at Gray's Evaluation Notes. This caused Premera to lose points on this issue in its first proposal, receiving only 3 points from one evaluator (Gray) and 0 from another (Miller) out of a possible 5.5 points. *See Attachment 5C* at Miller's Evaluation Notes; *See Attachment 5C* at Gray's Evaluation Notes. To raise Premera's point total, the Department asked the question a second time when Premera clearly "disagreed" with this element of the RFP. *Premera Response* at pg 27. In response to the State's suggestion that Premera change its position, Premera agreed to the State's demand. Id. As a result, Premera received 2.5 added points from one evaluator (Gray) on this particular Performance Standard issue and additional points from another (Miller) on this particular Performance Standard section in its "best and final" proposal. *See Attachment 5D* at Miller's Evaluation Notes; *See Attachment 5D* at Gray's Evaluation Notes.

25. The RFP asks whether "the offeror agrees to use a data processing system that is compatible with the State's system and that can produce reports [containing key statistics] in a timely fashion?" RFP § 10.02(A)(e). In its original proposal, Premera could only produce annual reports containing key statistics. *See Attachment 5C* at Miller's Evaluation Notes. This caused Premera to lose points on this issue in its first proposal, receiving only 6 points from one evaluator (Gray) and 0 points from another (Miller) out of a possible 12 points. *See Attachment 5C* at Miller's Evaluation Notes; *See Attachment 5C* at Gray's Evaluation Notes. To raise Premera's point total, the Department asked Premera to "clarify" that it could produce monthly reports that included key statistics. *Premera Response* at pg 2. In response to the State's suggestion that Premera change its position, Premera agreed to the State's demand. Id. As a result, Premera received 6 added points from one evaluator (Gray) on this particular Performance Standard issue and additional points from another (Miller) on this particular Performance Standard section in its "best and final" proposal. *See Attachment 5D* at Miller's Evaluation Notes; *See Attachment 5D* at Gray's Evaluation Notes.

26. The RFP asks

> To what extent did the offeror agree that some or all of the work associated with this RFP would be performed in Alaska within six months of contract implementation"

> How well did the offeror adequately describe which Alaskans will perform and list the approximate number of positions? Did they also note where these positions would be located?

RFP § 10.10(a) & (b). In its original proposal, Premera answered "No" without an explanation to the first question and gave an inadequate answer to the second question. *See Attachment 5C* at Miller's Evaluation Notes. *See Attachment 5C* at Gray's Evaluation Notes. This caused Premera to lose points on this issue in its original proposal, receiving only 67 points from one evaluator (Gray) and 83 from another (Miller) out of a possible 150 points. *See Attachment 5C* at Miller's Evaluation Notes; *See Attachment 5C* at Gray's Evaluation Notes. One evaluator (Miller) noted that Premera's answer was inadequate. *See Attachment 5C* at Miller's Evaluation Notes. To raise Premera's point total, the Department told Premera to "define the number of dedicated full time employees that will compose the team, defined by function and listed by location." *Premera Response* at pg 24. In response to the State's suggestion Premera added a chart describing (1) the functions Alaskans will perform, (2) the number of positions, and (3) where positions would be located. Id. As a result, Premera received 50 additional points from one evaluator (Miller) and 83 from another (Gray) on this particular Performance Standard section in its "best and final" proposal. *See Attachment 5D* at Miller's Evaluation Notes. *See Attachment 5D* at Gray's Evaluation Notes.

27. The RFP asks "[t]o what extent are third party subcontractors being used to satisfy parts of this RFP?" RFP § 10.9.1(a). In its original proposal, Premera did not include in its answer discussions regarding subcontractors PointShare, Submo and CareMark. *Premera Response* at pg 1. This caused Premera to lose points on this issue in its original proposal, receiving 5 points from one evaluator (Gray) and 0 points from another (Miller) out of a possible 20 points. *See Attachment 5C* at Miller's Evaluation Notes; *See Attachment 5C* at Gray's Evaluation Notes. To raise Premera's point total, the Department told Premera to discuss its relationship with subcontractors PointShare, Submo and CareMark. *Premera Response* at pg 1. In response to the State's suggestion, Premera filled in the issue. Id. at 1-2. As a result, Premera received 15 added points from one evaluator (Gray) on this particular Performance Standard issue and additional points from another (Miller) on this particular Performance Standard section in its "best and final" proposal. *See Attachment 5D* at Miller's Evaluation Notes; *See Attachment 5D* at Gray's Evaluation Notes.

28. The RFP asks "[t]o what extent did the offeror offer other dedicated or customized services to the State?" RFP, § 16.1(a)(ii). In its original proposal, Premera did not offer any other services. *See Attachment 5C* at Miller's Evaluation Notes. One evaluator noted that "[c]ustomization not addressed" and "[n]o other services offered." *See Attachment 5C* at Miller's Evaluation Notes. This caused Premera to lose points on this issue in its first proposal, receiving 0 points from one evaluator (Miller) and 6 from another (Gray) out of a possible 125 points. *See Attachment 5C* at Miller's Evaluation Notes. *See Attachment 5C* at Gray's Evaluation Notes. To raise Premera's point total, the Department asked Premera, when it clearly did not offer any other services, to re-answer this question. *Premera Response* at pg 36. In response to the State's suggestion, Premera filled in the issue. Id. As a result, Premera received 0.5 added points from one evaluator (Gray) on this particular Performance Standard issue and additional points from another (Miller) on this particular Performance Standard section in its "best and final" proposal. *See Attachment 5D* at Miller's Evaluation Notes. *See Attachment 5D* at Gray's Evaluation Notes.

28A. In their original response, Premera indicated that they would be charging a $5.51/person network access fee--a fee that would total about $6 million over the three-year contract period. On February 24, just four days before Premera was due to file its "best and final offer," the Division suggested to Premera that they find some way to categorize this cost other than as a "fee." Per-person charges tend to be very visible in cost calculations. Premera took the Division's cosmetic suggestion, eliminating all network access fees. As a result, Premera received 16 additional points from one evaluator (Gray) and 54 from another (Miller) on this particular Performance Standard section in its "best and final" proposal. *See Attachment 5D* at Miller's Evaluation Notes. *See Attachment 5D* at Gray's Evaluation Notes.

29. We also repeatedly requested that the State provide us with the evaluation notes of all evaluations. However, the State has only provided us with evaluation notes that appear incomplete and confusing. The evaluator notes that the state did provide us are appended as *Attachment 5(1)-(4)*.

30. These are the services that Aetna is currently delivering to the State under the existing medical claims administrative contract.

* Medical
* Dental
* Vision – Managed and Indemnity
* Pharmacy – Retail Card, Mail Order, Specialty Pharmacy and Rebates
* COBRA Administration
* Individual Billing Administration
* Employee Assistance Programs (EAP)
* Flexible Spending Account Administration
* Managed Behavioral Health
* Long Term Care
* Preferred Provider Arrangements
* Centers of Excellence
* Medicare D Administration

31 Aetna is the nation's third largest medical carrier with 13.5 million medical lives, 13.1 million dental lives and has a significant presence in the nation's top 500 largest companies. Aetna is ready, willing and able to perform all current services without interruption if it is allowed to continue to perform under its existing contract pending the outcome of this protest and appeal.

32 As a company, Aetna is committed to insuring that the State's employees have uninterrupted services during the protest and appeal period. Should the ultimate outcome of the protest process be a re-bid or an extension of the existing Aetna contract, we will work with the State to develop a process to continue our existing fees and administration until the protest and appeal is resolved. Although the State by statute is required to re-bid some services every (5) years there is precedence to extend a contract for a period of time beyond (5) years if it is in the best interest of the State and its employees. For example, the current extension of the State's Life/Disability contract with Unum went beyond the statutorily (5) years and the present (1) year extension of its current contract with its benefit consultants beyond (5) years.

33 On the other hand, if Aetna is not allowed to continue to perform under its existing contract pending the outcome of this appeal and protest, a significant amount of short-term harm will occur. The following is based upon an intimate knowledge of the State of Alaska's employee population and observations of 2 transitions by this population to new carrier platforms in the last 10 years – (Aetna to NYLCARE and NYLCARE to Aetna). In addition, it is also based upon

recent discussions with Municipal clients and potential new clients who were determining lead times of when to go to bid and the appropriate transition period. Lead times averaged 10 to 12 months.

34. The State of Alaska has a total membership of approximately 61,500. Of this number 14,500 are active members and 34,000 are retired members residing in all 50 states and several foreign countries. Due to the high number of retirees many State members are undergoing care for chronic diseases which involves constant interaction with the medical community and any change of benefit administrators must include intensive communication with the affected parties to insure that disruption of service to these ill State of Alaska members who are in course of treatment does not occur.

35. Additionally, because of the high retiree population, the State has almost 1,000,000 prescriptions filled annually. This significant utilization of prescription drugs requires by law some interaction with medical providers to obtain a prescription. The State must acknowledge that in many cases a new prescription and a subsequent office call and in some cases multiple office calls will be required to obtain a new prescription to be submitted to the new Administrator.

36. Presently, the State is undertaking a positive open enrollment process for its retiree population to insure that only eligible dependents are covered by the State's benefit plans. At present this is an un-completed task that will require huge man power commitment to complete. This process must be completed so that only truly eligible retiree members receive Identification Cards from the new Administrator.

37. The State has only limited ability to communicate to its retiree populations on the complexity of any transition to a new administrator. In a short period of time the State will be challenged to communicate significant number of changes and by the sheer volume of information it will appear confusing to this population.

38. Presently, it is also on State's docket to draft new benefit booklets for its retiree population. Again this will be significant manpower commitment by the State as it is planning a transition to a new Administrator. Significant questions will be asked of the State of Alaska by retirees who are mailed these booklets.

39. Lastly, the State's Retirement and Benefits is already scheduled to bring a new retirement system online this summer. Even without a transition to a new carrier the division's resources have been stretched to the maximum.

40. There will also be hardship caused to Aetna from a multitude of issues including the following:

Closure of the Aetna Juneau Office
Closure of the Aetna Anchorage Office
Loss of Alaska jobs by both Aetna and Magellan
Overall potential loss of 40 jobs in just Aetna – some of these staff have 20+ tenures in servicing the State of Alaska employees, many have at least 10 year tenures

41. It has been difficult to get qualified individuals to reside in Alaska and we don't want to lose the one's we have. Today there is also significant walk-in traffic to both Aetna Alaska offices by retirees by virtue of the complexity of their bills and by legislative staff during session. Over time many deep personal relationships have been established between Aetna staff and the members it serves have served diligently. This transition will be very difficult for all because of the close personal ties to Alaska Care staff both in Juneau, Anchorage, and Seattle.

42. Aetna submitted a separate proposal for providing only pharmaceutical benefit management services. This type of stand-alone proposal was specifically requested in the RFP and was therefore responsive to the RFP. Although the RFP promised that these stand-alone proposals would be evaluated for the overall cost evaluation of providing the services covered by the RFP. The State never conducted such an overall evaluation, and therefore had no basis for determining whether it would have been more economical to split the contract between one contractor for medical and other non-pharmaceutical services and another contractor for pharmaceutical services. Based on public information now available to us, and set out in Exhibit 1 to this Affidavit, it is apparent that the State would have saved approximately $3 million over the course of the contract by selecting Aetna's stand-alone pharmacy offer (the numbers in Exhibit 1 show higher pharmacy numbers for Aetna than for Premera). However it is important to note that pharmacy numbers are reported as rebate numbers refundable to the State so that the higher the rebate number, the lower the cost to the State.

45. It must be noted that a significant portion the RFP scoring must contain a great deal of variability in scoring by individual scorers for the non - cost ( portion they reviewed. This variability or statistical bias can be observed from different scorers totals. For this reason the need to have the same reviewers is statistically important so that all scores reflect the same bias in their totals. It also important that all bids have the same number of reviewers, if not, the weighting of a different number of scores will distort the outcome of the scoring process.

Further your affiant sayeth naught.

Dated this 8 day of March, 2006, at Juneau, Alaska.

Mike Wiggins

SUBSCRIBED AND SWORN to before me this 8th day of March, 2006.

Notary Public in and for Alaska
My commission expires 9-21-2009

# Rebates Integrated Pharmacy Rx Premera - Compared to Aetna Integrated RX Rebates Under Section 9

**Aetna proposed rebates**

| | Year 1 2006 | Year 2 2007 | Year 3 2008 | |
|---|---|---|---|---|
| Retail rebate g'tee | $ 4.53 | $ 5.03 | $ 4.77 | |
| MOD rebate g'tee | $ 15.05 | $ 16.70 | $ 15.86 | |
| Basis | Per valid Script | Per rebateable Script | Per rebateable Script | |
| Estimated annual retail scripts | 770,418 | 707,871 | 707,871 | |
| Estimated annual MOD scripts | 95,220 | 87,490 | 87,490 | |
| Estimated annual retail rebates | $ 3,489,994 | $ 3,560,591 | $ 3,376,545 | $ 10,427,129 |
| Estimated annual MOD rebates | $ 1,433,061 | $ 1,461,083 | $ 1,387,591 | $ 4,281,735 |
| Estimated total rebates | $ 4,923,055 | $ 5,021,674 | $ 4,764,136 | **$ 14,708,865** |

Note information contained in Aetna Section 9 Response

**Premera proposed rebates**

| | Year 1 2006 | Year 2 2007 | Year 3 2008 | |
|---|---|---|---|---|
| Retail rebate g'tee | $ 3.08 | $ 3.40 | $ 3.50 | |
| MOD rebate g'tee | $ 9.77 | $ 10.66 | $ 10.98 | |
| Basis | Per Script | Per Script | Per Script | |
| Estimated annual retail scripts | 854,400 | 854,400 | 854,400 | |
| Estimated annual MOD scripts | 105,600 | 105,600 | 105,600 | |
| Estimated annual retail rebates | $ 2,631,552 | $ 2,904,960 | $ 2,990,400 | $ 8,526,912 |
| Estimated annual MOD rebates | $ 1,031,712 | $ 1,125,696 | $ 1,159,488 | $ 3,316,896 |
| Estimated total rebates | $ 3,663,264 | $ 4,030,656 | $ 4,149,888 | **$ 11,843,808** |

Note Information contained in Premera's Integrated Medical Response

Exhibit 1

# SUPPLEMENTAL AFFIDAVIT OF MIKE WIGGINS

STATE OF Washington

COUNTY OF King

I, MIKE WIGGINS, being first duly sworn, do depose and say that

1. This affidavit supplements the information contained in paragraph 28 of my March 8, 2006 affidavit;

2. The network access fees discussed in that paragraph totaled approximately $6 million over the course of the contract,

3. At the Division's request, Premera stopped referring to these charges as "network access fees," and labeled them instead as claim charges. Because network access fees are included in the reported "cost" of the project, while client charges are not, this had the effect of appearing to reduce Premera's bid by $6 million, when, in reality, that $6 million had actually just been moved to another category where it would not show up as a project cost;

4. The methodology and information I used to reach this conclusion is appended to this Supplemental Affidavit as Attachment 1.

Further your affiant sayeth not.

DATED this 10th day of March, 2006 at 10:57 am, Seattle, WA

Mike Wiggins

Mike Wiggins

SUBSCRIBED AND SWORN to before me this 10th day of March, 2006.

Notary Public in and for Washington
My commission expires January 21, 2007

Attachment 1

Progression of Premera offer to the State of Alaska

| As of February 14, 2006 | | |
|---|---|---|
| 3 year Fees | $ | 30,951,035 |
| 3 year Network access fee | $ | 6,680,913 |
| 3 year Rx Rebate guarantee | $ | (9,000,000) |
| 3 year network savings retained by Premera @ 12% | $ | 4,779,925 |
| Total cost to State of Alaska | $ | 33,611,473 |

| As of February 28, 2006 | | |
|---|---|---|
| 3 year Fees | $ | 30,951,035 |
| 3 year Network access fee | $ | - |
| 3 year Rx Rebate guarantee | $ | (9,000,000) |
| 3 year network savings retained by Premera @ 30% | $ | 11,949,813 |
| Total cost to State of Alaska | $ | 33,900,849 |

*The following network savings guarantee replaces the answer provided for Section 10.11, page 25 in the Best and Final Offer Clarification Questions – State of Alaska submitted on February 13, 2006.*

Please explain the network discount guarantee arrangement as mentioned on page 37 of Premera's proposal.

Premera Blue Cross Blue Shield of Alaska will guarantee network savings of $100.00 per employee per month resulting from the use of Premera's Alaska and Washington networks and the national Blue Cross Blue Shield BlueCard network program. The following table represents aggregate network savings outside of the state of Alaska.

| Aggregate Network Discounts (outside of Alaska) | | | |
|---|---|---|---|
| Arizona | California | Oregon | Washington |
| 57% | 52% | 39% | 39% |

Network savings in excess of $100.00 per employee per month will be shared between the State of Alaska and Premera Blue Cross Blue Shield of Alaska. The State of Alaska will retain 70% of the amounts over $100.00 per employee per month. Premera Blue Cross Blue Shield of Alaska will retain 30%. In the event that the savings are less than $100.00 per employee per month, Premera Blue Cross Blue Shield of Alaska will reimburse the State of Alaska 30% of the difference between the savings amount per employee per month and $100.00 per employee per month.

Approach

Premera Blue Cross Blue Shield of Alaska will produce a quarterly report identifying billed charges for in-network medical claims compared to the in-network provider allowable charges. The difference between these two charges is savings. The savings are turned into per employee per month savings over the quarter by dividing by the number of employees covered over the three-month period. The report will be produced 30 days after the end of each quarter and the quarterly results will be settled 45 days after the quarter ends. The final amounts due, if any, will be reconciled and due 90 days after the close of the policy year.



An Independent Licensee of the Blue Cross Blue Shield Association

PREMERA

Please itemize the following components of your service fee for year 1
(This is for informational purposes only)

| | | |
|---|---|---|
| Precertification and Utilization Review | $5.16 | $3.78 |
| Large Case Management | Included in Precertification | Included in Precertification |
| COBRA Continuation Administration | $0.39 | $0.28 |
| High Risk Maternity | Included in Precertification | Included in Precertification |
| Wellness/Patient Education | Included in Precertification | Included in Precertification |
| EAP/Managed Mental Health | $3.29 | $2.09 |
| Pharmacy Network/Administration | No charge | No charge |
| Vision Network Administration | No charge | Not applicable |

Note (1): In the event of termination of administration services, an administration fee of 4% of claims paid after the date of termination will be made

Note (2): A $12 per month billing fee will be applied to all self-paying retirees

included in fee?

PREMERA | BLUE CROSS BLUE SHIELD OF ALASKA

February 27, 2008

Mr. Walt Harvey
Contracting Manager
Department of Administration
Division of General Services
333 Willoughby Avenue, 7th Floor State Office Building
Juneau, AK 99811-0208

Dear Mr. Harvey,

Thank you again for the opportunity to provide additional clarification and our "Best and Final" offer. I am personally pleased to reaffirm our commitment to the State of Alaska. I believe Premera Blue Cross Blue Shield of Alaska is uniquely qualified to deliver the lowest net cost while providing outstanding service to the State of Alaska and its members.

The highlights of Premera Blue Cross Blue Shield of Alaska's proposal to the State include:

- Significant Claims Savings:
  The State of Alaska will achieve at least $45 million in net additional claims savings in the next three years (before health cost inflation) through the use of the Blue Cross Blue Shield networks. These savings are over and above the savings now achieved using your current administrator's network and after sharing any upside performance with Premera. To support this claim, we have reduced our administrative fees by 10%, eliminated our pharmacy fees and network access fees, and placed additional amounts at risk for claims discount performance. In other words, the State will not pay unless Premera Blue Cross Blue Shield of Alaska delivers the network claims savings. Meeting our savings commitments was a big element to our success with Microsoft and Weyerhaeuser, both clients will be happy to validate this achievement.

- No Surprises:
  The State of Alaska will have the security of an all-inclusive fee arrangement, other than for clearly identified optional services. This includes removal of the pharmacy administration fee proposed when the State requested acceptance of full pharmacy rebates, as well as removal of the separately billed charge for use of the national BlueCard network. Additionally, we have now included 65 hours of training provided by Compsych, the EAP vendor partner.

- Guaranteed Results:
  In addition to waiving our pharmacy administration fee, we are now guaranteeing a minimum of $3 million in annual pharmacy rebates. Moreover, the State can also share our confidence in our ability to meet our commitments as we are doubling the dollars at risk in our other Performance Guarantees in each category.

dedicated customer service representatives. These representatives serve current Premera Blue Cross Blue Shield of Alaska members.

The original bid noted a customer service staff of five located in Alaska. The five included the two marketing liaisons and one customer service representative noted above, in addition to the two new Marketing Liaisons dedicated to the State of Alaska. These three staff were noted because they can provide back-up to the dedicated State of Alaska staff.

All other State of Alaska customer service and claims staff will be located in Mountlake Terrace, WA. However if customer service volumes in Anchorage or Juneau indicate a need for additional staff, Premera Blue Cross Blue Shield of Alaska will add appropriate staff to the meet the volume.

3) Pages 30 and 31 of 47; answer to 10.13 d).

**Provide in dollars the BlueCard access fees and administration fees expected to be charged annually by the State of Alaska for use of the Blues network for our population? Is there a cap on these fees?**

As outlined in the Performance Guarantee section of the RFP, there is an access fee charge for the use of the BlueCard network. The access fee is charged as a claim charge. The guaranteed access fee is $5.51 per employee per month. As the fee is guaranteed as a per employee per month charge, the cap is $5.51 times the number of employees per month times 12 months.

The access fee works with the network savings guarantee as follows:

Premera Blue Cross Blue Shield of Alaska will guarantee network savings of $100.00 per employee per month resulting from the use of Premera's Alaska and Washington networks and the national Blue Cross Blue Shield BlueCard network program. The following table represents aggregate network savings outside of the state of Alaska.

Network savings in excess of $100.00 per employee per month will be shared between the State of Alaska and Premera Blue Cross Blue Shield of Alaska. The State of Alaska will retain 88% of the amounts over $100.00 per employee per month, Premera Blue Cross Blue Shield of Alaska will retain 12%. In the event that the savings are less than $100.00 per employee per month, Premera Blue Cross Blue Shield of Alaska will reimburse the State of Alaska 24% of the difference between the savings amount per employee per month and 100.00 per employee per month.

Approach

Premera Blue Cross Blue Shield of Alaska will produce a quarterly report identifying billed charges for in-network medical claims compared to the in-network provider allowable charges. The difference between these two charges minus the **BlueCard access fees**, is savings. The savings are turned into per employee per month savings over the quarter by dividing by the number of employees covered over the 3 month period. The report will be produced 30 days after the end of each quarter and the quarterly results will be settled 45 days after the quarter ends. The final amounts due, if any, will be reconciled and due 90 days after the close of the policy year.

4) Page 33 of 47; answer to 10.14 a),

**The State of Alaska plans produce over 100,000 claims per month, not including pharmacy. PBC reflects that 90% of claims from our population will be auto adjudicated. Currently, based on December 2005 volume: 116,119 claims; the actual auto adjudication rate experienced was 40%, with 60% of claims manually processed, which is the typical percentage experienced over time. Please describe the rationale that PBC used to conclude that 90% of all State of Alaska claims per month will be auto adjudicated. PBC must confirm that it can process in excess of 100,000 claims per month regardless of the adjudication ratio.**

Premera Blue Cross Blue Shield of Alaska is very confident that it can process in excess of 100,000 claims per month regardless of the adjudication rate.

The following definitions and calculations provide further clarification as to the process for determining the appropriate number of claims processors for the State of Alaska.

Assume 100,000 claims per month received for processing

- 10,000 claims will require manual entry and adjudication
- 90,000 claims will be electronically entered into the system – either through EDI or Optical Character Recognition (OCR)
  - 45,000 of these claims will be pended for manual review and adjudication
  - 45,000 of these claims will be paid through the system with no manual intervention

RECEIVED
MAR 28 2006
DEPARTMENT OF ADMINISTRATION
COMMISSIONER'S OFFICE

LAW OFFICES OF
SIMPSON, TILLINGHAST & SORENSEN, P.C.

ONE SEALASKA PLAZA, SUITE 300 JUNEAU, ALASKA 99801
TELEPHONE: 907-586-1400 FAX: 907-586-3065

**HAND DELIVERED**

March 28, 2006

The Honorable Scott Norstrand
Commissioner of Administration
Alaska Department of Administration
10th Floor, State Office Building
Juneau, Alaska 99811-0200

Re: Appeal of Denial of Protest of Intent to Award in
RFP No. 2007-0200-5946
OUR FILE NO.: 1467.1

Dear Commissioner Nordstrand:

Enclosed, pursuant to AS 36.30.590, is the Appeal of Aetna Life Insurance Company and Aetna ("Aetna") of the procurement officer's denial of Aetna's protest in the above-captioned matter. The appeal and supporting documentation include all of the material required by that statute.

Aetna would respectfully request that your office immediately transfer this appeal to the Office of Administrative Hearings under AS 44.64.060. Given that you have already announced your recusal from this matter, Aetna does not believe there is any purpose served by retaining the file at the Department of Administration, and the parties to this proceeding will have need of current access to a hearing officer to establish procedures for resolution of the merits of this case.

The purpose of this letter is also to advise you that, pursuant to my telephone conversation with Asst. Attorney General Margie Vandor, the procurement office is being simultaneously served with this appeal by service on Ms. Vandor.

Sincerely,

SIMPSON, TILLINGHAST, SORENSEN
& LONGENBAUGH

Jon K. Tillinghast

RECEIVED
MAR 29 2006
DEPARTMENT OF ADMINISTRATION
COMMISSIONER'S OFFICE

**BEFORE THE ALASKA DEPARTMENT OF ADMINISTRATION**

| | |
|---|---|
| *In the Matter of:*<br>AETNA LIFE INSURANCE<br>and AETNA | **APPEAL OF DENIAL OF CONTRACT PROTEST (AS 36.30.590)** |
| | DGC RFP No. 2007-0200-5946 |
| | Dept. of Administration Case No. 07-____ |

## I. Introduction

Pursuant to AS 36.30.590, Aetna and Aetna Life Insurance Company ("Aetna") respectfully appeal the Department of Administration, Division of General Service's (the "Division's") March 21, 2006 denial of Aetna's March 10, 2006 Protest of a February 28, 2006 Final Notice of Intent to Award a Contract pursuant to the above-referenced Request for Proposal ("RFP") to Premera Blue Cross (the *"Protest Decision"*). A copy of the Protest Decision is appended to this memorandum as *Attachment 10*.

## II. Background

On December 22, 2005, Aetna submitted a complete, responsive and responsible proposal to provide medical and pharmaceutical claim management services to the State of Alaska pursuant to the above-referenced RFP. *Wiggins Aff.*, ¶11. After shipping the complete bid, Mr. Wiggins telephoned then-procurement officer Victor Leamer, and Mr. Leamer confirmed to Mr. Wiggins that Aetna's application had been timely received. *Fourth Wiggins Aff.*, ¶4.

Having heard nothing in response for nearly two months, Aetna finally received a form Notice of Intent to Award the contract to Premera on February 18, 2006. *Id.* at

SIMPSON, TILLINGHAST & SORENSEN
One [illegible]aska Plaza, Suite 300
Juneau, Alaska 99801
(907) 586-1400 FAX (907) 586-3065

¶13. A subsequent phone call to Mr. Walt Harvey, the employee who had replaced Mr. Leamer as procurement officer, disclosed that the Division had lost the meat of Aetna's proposal, consisting of some four boxes of binders in which were contained a critical portion of Aetna's overall proposal. *Id.* Over those two intervening months, the Division had never simply contacted Aetna (who, through itself and its affiliates, had been providing these services to the State for the past 24 years), and asked why there was such a gaping omission in its bid. Rather, the Division simply declared Aetna "nonresponsive" for failure to submit a complete bid. *Id.* [1]

The initial award to Premera was therefore, and in essence, predicated on the erroneous conclusion that Premera was the sole responsive bidder.

The Division initially scored Premera's proposal under the RFP's point system around January 20, awarding it 1489.5 points for the more subjective, technical elements of the RFP (called here the "Non-Cost Factors"), which counted the most (50%) in proposal evaluation. *See Section VI post; See also Chart I (attached directly to this memorandum); See Attachment 3(c)*

Shortly thereafter, the Division began extensive private communications with Premera aimed at improving its offer. These included 21 pages of questions on Premera's proposals for various Non-Cost Factors in the RFP, each question being designed to solicit a more beneficial answer. *Attachment 4(a).* Premera answered those questions in a 49-page reply on February 13, 2006. *Attachment 4(b) at 7-56. See, generally, Section VIII. post.*

---

[1] / In rejecting Aetna's protest, the procurement officer claimed that it would have been improper to contact Aetna, as the receipt of late bids is prohibited. *Attachment 10* at 3. The purpose of such a query, however, would not have been to solicit a late bid. Rather, it would have been to enquire

STOEL RIVES, TILLINGHAST & SORENSEN
One Juneau Plaza, Suite 300
Juneau, Alaska 99801
(907) 586-1400 FAX (907) 586-3065

Aetna, of course, knew nothing of any of this.

As a result of Premera's answers (and even though Premera ostensibly had no competition at this point, Aetna's proposal still being lost), the Division rescored Premera's proposal on February 16-17, 2006; *Attachment 5(d); Attachment 11 (email response from Walt Harvey).* The Division's extensive work with Premera had succeeded in increasing Premera's point total for the Non-Cost factors by 629 points—to 2119 points. *Attachment 5(d) at 1-2; Chart 1.*

One day after this re-scoring, the Division issued its initial Notice of Intent to Award, and Aetna placed its phone call to the Division. After considerable pleading by Aetna that it had timely delivered a comprehensive and complete proposal, the Division looked again, and found all of the missing boxes in a store room after a mere hour's search. *Id.* at ¶14.

The State promptly rescinded the Notice of Intent, and commenced another evaluation process that is the subject of this protest. *Id. at ¶17.* This process is explained in: (i) ¶17 of the *Mike Wiggins Affidavit*; (ii) a confirming memorandum found at *Attachment 2*; (iii) the *Fifth Affidavit of Mike Wiggins;* and (iv) the *Affidavits of Mike Robinson and Reed Stoops*, all of whom were participants in a phone conference that resulted in the agreement contained at *Attachment 2.* The essence of that agreement is as follows:

Because of vacation plans, the same full evaluation team that had scored Premera could not be reformed to evaluate Aetna's newly-found bid. To accommodate a quick resolution of the matter, Aetna agreed that the Division could "reconstitute" the original

---

into the inarguably odd fact that the huge middle of the incumbent contractor's bid was nowhere to be found.



SIMPSON, TILLOGHAST & SORENSEN
Alaska Plaza, Suite 300
Juneau, Alaska 99801
(907) 586-1460 FAX (907) 586-3065

evaluation team so that it "consist[ed] of three members, two of whom were on the original [evaluation committee] that scored Premera's proposal." *Attachment 2* at ¶1. This "reconstituted" team would first perform a threshold evaluation of Aetna's newly-discovered bid to determine whether that bid was "reasonably susceptible for award." *Id.* [2] By "reconstituting" the team in this manner, Aetna was assured that the scores of the "reconstituted" committee would be as comparable as possible to the scores of the original committee, since 2/3 of the scores of the "reconstituted" committee would come from individuals who had actually also scored Premera. *Robinson Aff.* ¶7; *Stoops Aff.*, ¶6; *Fifth Wiggins Aff.*, ¶7. [3]

Unfortunately, the Division breached the agreement, and appointed only one person who had actually scored Premera to the "reconstituted" committee. Neither of the other two members of the "reconstituted" committee had scored Premera on either of the two Premera scorings. *Section VII, post; see also Chart I and pp. 1-2 of Attachments 5(a)-(d).* [4]

There was then a second undisclosed breach of the agreement. After the "reconstituted" committee completed its initial scoring of Aetna, and if Aetna's proposal passed its threshold evaluation (which it did [*Wiggins Aff.*, ¶18]), the agreement

---

[2] Under Alaska's procurement code, the Procurement Officer is allowed to discuss first proposals, on an even-handed basis, with all bidders who are "reasonably susceptible of being selected for award," and this for the purpose of ultimately soliciting a "best and final offer" from this final pool of bidders. AS 36.30.240. This initial process does not constitute a scoring of one proposor against another, but rather a look at the intrinsic strengths and weaknesses of a proposal, so as to see whether, if improved, it might plausibly become the "best and final offer."

[3] It is worth noting that Aetna would have been well within its rights to demand that the Division comply with 2 AAC 12.260(a), and have its "found" proposal evaluated by exactly the same "committee" that had evaluated Premera's bid. Aetna was being collegial here. But as we shall shortly see, no good deed goes unpunished.

[4] Aetna had no knowledge of the Division's breach at the time, and thus no opportunity to correct it.

STOEL RIVES, TILLINGHAST & SORENSEN
Office
Juneau, Alaska 99801
(907) 586-1400 FAX (907) 586-3065

provided that each party would have the opportunity to submit a best and final offer. In conjunction with that best and final offer, the Division would contact both parties to obtain new responses on Non-Cost Factor issues that were of concern to the Division. *Attachment 2*, ¶3. Once those offers, and the parties answers' to the Division's questions, were submitted, the agreement provided that "both proposals will be scored," and a winner would be selected. *Id.* at ¶4.

It was Aetna's understanding that this paragraph meant that the entire "proposal" (both cost and Non-Cost Factor components) would be evaluated. *Robinson Aff.* ¶10. This was very important to Aetna, since this last scoring would be the only opportunity when both proposals would be re-scored by single, identical review committee--the so-called "reconstituted committee. *Id.*

Indeed, until the Division responded to Aetna's protest on March 21, 2006 (*see Section V, post*), Aetna had assumed that a Premera scoring table entitled "*2nd Score After Best and Final, Premera*" and found at *Attachment 5(d)* was the promised scoring of Premera's last proposal by the "reconstituted" committee. It was not until service of the Division's response to Aetna's protest that Aetna learned that, contrary to ¶4 of the agreement, there had been no rescoring of Premera's Non-Cost Factors by the "reconstituted" committee. Rather, the rescoring found at *Attachment 5(d)* was actually the rescoring of Premera's proposal that had been done on February 17—before Aetna's "lost" proposal had been found. *Attachment 10 at 8-10; Attachment 11*.

Apparently, the only things done with the parties' final proposals under the agreement were a comparison of the new cost bids, and a brief revisiting of three Non-Cost topics in Aetna's final proposal. *Attachment 10* at 9. It was on that basis that the

SIVE[illegible], TILLINGHAST & SORENSEN
Ol[illegible]laska Plaza, Suite 300
Juneau, Alaska 99[illegible]
(907) 586-1400 FAX (907) 586-3065

Procurement Officer issued his February 28 Notice of Intent to award the contract to Premera.

And so, at the time the final Notice of Intent Award had been issued, Aetna's and Premera's final proposals have never been scored by either an identical review committee, nor even by separate committees that had more than one common member between them.

And yet despite all the disadvantages thrown Aetna's way in this unfortunate process, when all was said and done, out of a 5000-point evaluation process, Premera was able to top Aetna by only 141 points.

### III. Aetna's Protest

Aetna's protest is appended as *Attachment 9* to this Appeal. In a nutshell, Aetna claimed that the procurement:

- violated state statute (AS 36.30.240) and regulation (2 AAC 12.290(a)), and created an appearance of impropriety that undermined the integrity of the competitive bidding process, because, while the Department held prolonged and extensive discussions with Premera to produce its "best and final offer," the counterpart discussions with Aetna were only perfunctory. Because state law requires that all proposors be accorded fair and equal treatment with respect to any opportunity for discussion and revision of proposals" (AS 36.30.240(a)), and "[t]he opportunity for confidential discussions, if held, must be extended to all offerors submitting proposals deemed reasonably susceptible for award" (2 AAC 12.290(a)), Aetna contended that the procurement was illegal and subverted the

JAMESON, TILLINGHAST & SORENSEN
Or aska Plaza, Suite 300
Junea, Alaska 99801
(907) 586-1400 FAX (907) 586-30

competitive process. It also contended that this process actually affected the outcome of the evaluation; and

- For the "best and final offer" evaluation, the Division used separate evaluation teams to evaluate the two bidders, with only one member of these three-member teams being in common. Because many of the factors on which the evaluation was based were subjective, and hinged on personal idiosyncrasy, the absence of common evaluators rendered the evaluation useless for determining which proposal was "most advantageous to the state" as required by AS 36.30.250(a), and impaired, if not destroyed altogether, the integrity of the competitive bidding process. [5] Aetna also asserted that this procedure clearly affected outcome of the procurement. Nor did the process comply with 2 AAC 12.260(a), which only authorizes the Division to score RFP's through a single "evaluation committee."

## IV. Aetna's Request for a Stay of Award

Contemporaneous with its protest, Aetna filed a request with the Procurement Officer, pursuant to AS 36.30.575, to stay award of the contract pending disposition of Aetna's protest and any subsequent administrative appeal. *Attachment 9 at Cover Letter.* The Department never ruled on that request before simply going ahead, and signing the contract. Without notice of any kind to Aetna, the Department executed the contract on March 13, 2006.

[5] / A third issue raised in the protest—*i.e.*, that the Division failed to separately score an Aetna proposal to provide pharmaceutical claim services only (an alternative specifically called for the RFP), is not being appealed, and does not receive further discussion in this Appeal.



SIMPSON, TILLINGHAST & SORENSEN
Ol laska Plaza, Suite 300
Juneau, Alaska 99801
(907) 586-1400 FAX (907) 586-3065

## V. The Procurement Officer's Response to Aetna's Protest; Identification of Erroneous Factual Findings and Resultantly Erroneous Legal Conclusions

On March 21, 2006, the procurement officer rejected Aetna's protest. *Attachment 10.* The procurement officer's principal findings and conclusions were as follows:

- The Division had complied with the parties' agreement, and had evaluated Aetna's proposal using a three-person review team comprised of two persons who had actually scored Premera's first proposal;
- The communications between the Division and Aetna, on the one hand, and Premera, on the other, were essentially equal;
- Any difference in communications between the Division and Aetna, on the one hand, and Premera, on the other hand, did not create an appearance of impropriety; [6]
- Neither the use of different evaluation teams nor the disparity in treatment between proposors affected the outcome of the procurement; and
- The Division acted in good faith.

From these factual findings, the procurement officer drew the ultimate legal conclusion that Aetna's protest was without merit. As required by AS 36.30.590(b)(2), Aetna respectfully submits that each of the above-described factual findings was erroneous, and that if any of those findings is reversed, Aetna will be entitled to appropriate relief as a matter of law.

---

[6] / "Whether an appearance of impropriety exists is a factual question..." *In the Matter of J&S Services, Inc.*, Alaska Dept. of Administration Case No. 02.01 (Sept. 16, 2002) ("*J&S Services*") at 5.

SIVEN, TILLINGHAST & SORENSEN
Juneau Plaza, Suite 300
Juneau, Alaska 99801
(907) 586-1400 FAX (907) 586-3065

## VI. The Nature of the Contract Being Awarded

To evaluate Aetna's claims, a brief background on the contract at issue here is warranted.

The services for which the RFP solicited proposals were to provide a wide range of medical and pharmacy insurance claim management services to the State. *Request for Proposals*, §1.03. [7] Those services have been provided economically and efficiently by Aetna itself, or through its affiliates, for some 24 years. *Wiggins Aff.*, ¶4. The State of Alaska self-insures both its medical and pharmaceutical claims; however, it still needs an agent to evaluate and process those claims. *Third Wiggins Aff.*, ¶5; *RFP*, §6.06. The agent charges a per-employee and per-retiree fee for providing those administrative services, and its proposal consists, in part, on the proposed amount of those fees. *Id.*; *RFP at Section 7.23.*

However, because many factors other than cost bore on the State's choice of suppliers (factors such as expertise, system compatibility, ability to serve clientele, and the like), a "Request for Proposal" format was utilized, rather than a Request for Sealed Bids. Under the RFP, cost accounted for only 40% of the total bid evaluation; all the other relevant factors (loosely called "Non-Cost Factors") were in the technical portion of the RFP, and were collectively allocated 50% of the total scoring. *RFP*, §10. [8] As to those Non-Cost Factors, each individual evaluator awarded points based upon that evaluator's personal judgment as to how the proposor dealt with each Non-Cost Factor.

[7] The lengthy RFP for this contract has not been appended as an exhibit to this Appeal because of its bulk. It is on file with the Procurement Officer, and Aetna would respectfully request that it be made part of this Appeal record by reference.

[8] The remaining 10% was allocated for preference points.

SIS & TILLINGHAST & SORENSEN
On aska Plaza, Suite 300
Juneau, Alaska 99801
(907) 586-1400 FAX (907) 586-3065

When the so-called "best and final" proposals were opened, the *cost* of the two responsive proposals appeared virtually identical. On the cost side, Premera was awarded 2000 points for having the lowest cost bid, while Aetna was awarded 1930 points for having a cost bid that was only marginally higher than Premera's. *Attachment 10* at 7.. However, Premera's cost bid was understated (and in fact materially higher than Aetna's) because some large costs that should have been included as part of Premera's administrative fees were in fact disclosed only in other, more subjective portions of Premera's proposal that are not added into the cost component of the proposal. *See, generally, Affidavit of Matt McGuinness.*

**VII. The Department Violated AS 36.30.250(a) and 2 AAC 12.260(a) by Using Different Evaluation Teams to Score the Two Applicants, Making it Impossible to Determine Which Proposal was "Most Advantageous to the State." The Division Erred in Finding that: (a); Aetna Had Agreed to this Process; and (b) any Error did not Affect the Outcome of the Procurement.**

A. *In the absence of any agreement, the use of different evaluation teams to score different proposals is unlawful, and in this case affected the outcome of the procurement.* In its decision on Aetna's protest (*Attachment* 10), the Division does not contend that, absent some special agreement, it is permissible to use two different evaluation committees to score two different proposals under an RFP. After all, 2 AAC 12.260(a) only authorizes the Division to review RFPs through an "evaluation committee," *singular*, and for good reason.

SIVE, TILLINGHAST & SORENSEN
Office Alaska Plaza, Suite 300
Juneau, Alaska 99801
(907) 586-1400 FAX (907) 586-3065

The ultimate goal of the competitive bidding process—the one on which its "integrity" turns—is to provide "the opportunity to *compare* multiple responsible bids." *Laidlaw Transit Inc. v. Anchorage School District*, 118 P.3rd 1018, 1033 (Alaska 2005); *emphasis added*. Any error that undermines the State's ability to meaningfully compare competing proposals deprives the public and the courts of any basis to assess the legality of the agency's choice.

In this case, the points for Non-Cost Factors were awarded based on an evaluation of largely qualitative (as opposed to quantitative) factors, ranging from the suitability of appeals procedures to transition and training concerns. *Wiggins Aff., ¶43.* Points were awarded based on how individual evaluators reacted to the proposor's approach to a long list of subjective issues—responses that would translate into very different point totals among different evaluators, depending on each evaluator's individual background, grading policies and priorities.

The evaluators' separate final scores for the subjective, 50% Non-Cost Evaluation illustrate how idiosyncratic this scoring process really was:

| Evaluator | Evaluated | Score |
|---|---|---|
| Miller | Aetna | 2440 |
| | Premera | 2160 |
| Gray | Premera Only | 2207 |
| Porter | Aetna Only | 2120 |
| Williams | Premera Only | 1990 |
| Shier | Aetna Only | 1585 |

SIV[illegible]S, TILLINGHAST & SORENSEN
Or[illegible]aska Plaza, Suite 300
Juneau, Alaska 99801
(907) 586-1400 FAX (907) 586-3065

*Attachment 5(b) and (d) at 1-2.* The Division then took the average of each evaluator's scores (*i.e.*, Aetna's score was based on the average of Miller's, Porter's and Shier's evaluation, while, Premera's was based on the average of Miller's, Gray's and Williams' evaluation), and (because of the near-identity of the cost score), the proposor with the highest average evaluation won. [9]

It is also apparent that compromising the rating process by using non-comparable, idiosyncratic scoring affected the outcome. For example: (I) the only evaluator who evaluated both applications, Ms. Miller, rated Aetna significantly higher than Premera; while (ii) one of the evaluators who scored only Aetna (Shier) gave Aetna aberrationally low scores (535 points lower than Porter), and 855 points lower than Miller. Given that Premera ultimately received only 141 more points than Aetna, it is apparent that point swings of up to 855 points that were due entirely to the use of different evaluators plainly affected the procurement's outcome.

B. *Aetna did not agree to this procedure.* The Division's only defense to its unusual procedure here is that Aetna agreed to it. *Attachment 10* at 5-9. Aetna agreed to a process, but it did not agree to this process.

As discussed in *Section II, ante*, the parties' February 24, 2006 agreement provided that both Aetna's and Premera's final proposals would be reviewed by a so-called "reconstituted" Procurement Evaluation Committee (or "PEC") that would:

> *...consist of three members, two of whom were on the original PEC that scored Premera's proposal in the initial evaluation process.*

[9] / *Attachment 5(b) at 2 (Aetna "best and final" summary sheet); Attachment 5(d) at 2 (Premera "best and final" summary sheet).*

SIMPSON, TILLINGHAST & SORENSEN
One Sealaska Plaza, Suite 300
Juneau, Alaska 99801
(907) 586-1400 FAX (907) 586-3655

*Attachment 2*, ¶1; *emphasis added.* The members "who scored Premera's" proposal," on the one hand, and the members of the "reconstituted" committee who scored Aetna's proposal, can be found in summary fashion on *Chart 1* to this memorandum, and more directly on the scoring tally sheets for both Aetna and Premera at pp. 1-2 of *Attachments 5(a)-5(d).*

From those documents, one can see that there was, in fact, only ***one*** member of the "reconstituted" team, and not two as the agreement requires, who had also "scored Premera's proposal." That lone individual was Freda Miller.

The Division's answer is that Mr. Pat Shier was also a member of the evaluation team that "scored Premera's proposal." *Attachment 10* at 5-6. That is not true. The evaluation team score sheets for Premeras' first and second proposals are found, respectively, at pages 1-2 of *Attachments 5(c) and 5(d).* The reader will see that Mr. Shier's name has been ***crossed off*** the list of evaluators on both score sheets, and not a single Premera scoring sheet contains any score from Mr. Shier.

The Division's explanation is that Mr. Shier did begin to score Premera's first proposal. But Shier abruptly ceased his partial scoring just over half-way through the scoring factors; left his half-done worksheet incomplete; was resultantly ***scratched off*** the Premera evaluation team; and was never heard from again on any Premera proposal, first or second. [10]/

The reason that Aetna insisted that a majority of the reconstituted team be comprised of employees who had "scored Premera's proposal" was to ensure

[10] / Shier's partial scoring of Premera's first proposal is found at *Attachment 5(c), pp. 114-136.* The remaining items that Shier did not score can be found (in the evaluation sheets of a different reviewer) at *Attachment 5(c), pp. 159-170.*

SIMPSON, TILLINGHAST & SORENSEN
One Sealaska Plaza, Suite 300
Juneau, Alaska 99801
(907) 586-1400 FAX (907) 586-3065

comparability of Aetna's and Premera's scores. *Robinson Aff.*, ¶7; *Fifth Wiggins Aff.*, ¶ 7; *Stoops Aff.*, ¶6. Premera's first and second scores were not affected in the slightest by Shier, and so an Aetna score that include scoring by Shier would be less comparable, not more. As Mr. Robinson, who attended the negotiations and signed the agreement for Aetna, explains:

> *It never occurred to us, and it was never mentioned, that one of the two "original" PEC members would be a member that did not score Premera. Such an individual would have been of no value in reconstituting a comparable-as-possible review team, and we would never have accepted such a major change in the agreement.*

*Robinson Aff.*, ¶7.

It is frivolous for the Division to maintain that Mr. Shier was a member of the evaluation committee "that scored Premera's proposal." The allegation, in fact, is the best illustration of the Division's bad faith in this entire procurement process.

Finally, the Division breached its promise that "both [final] proposals will be scored" by the "reconstituted evaluation committee." *Attachment 2*, ¶4. Instead, the Division simply looked at the new cost component of the proposals and three minor items in Aetna's new proposal. *Attachment 10* at 8-9.

Mr. Harvey explained that it is a "longstanding practice" to review only the cost component of final proposals, unless changes to other components of the proposal had been made. But the parties' agreement here had little to do with "longstanding practice"—it was, in many respects, a very unique arrangement. The obvious rationale for not rescoring unchanged portions of a final proposal is that the <u>*same evaluation committee*</u> had already scored the unchanged portions. But here, there was a new, "reconstituted" evaluation committee, and a comprehensive review of both parties' final

STOEL RIVES, TILLINGHAST & SORENSEN
One Alaska Plaza, Suite 300
Juneau, Alaska 99801
(907) 586-1400 FAX (907) 586-3065

proposals gave the Division its only chance to have both parties' proposals scored, from top to bottom, by the same people.

The importance of this level playing field was why Aetna took the agreement at its word, and properly assumed that "proposal" meant the entire proposal, and not just a portion of the "proposal" that represented only 40% of the scoring weight (*i.e.* the cost component). *Robinson Aff.*, ¶10. [11] The Division's failure to follow the plain wording of the agreement here makes it doubly difficult for the Division to justify its conduct on the basis of that agreement.

**VIII. The Division Violated AS 36.30.240 and 2 AAC 12.290, and Created an Appearance of Impropriety that Actually Affected the Outcome of the Procurement. By Engaging in Prolonged and Complex Negotiations With Premera, But Only Perfunctory Correspondence With Aetna, Before Soliciting "Best and Final Offers." The Division Erred in Finding that: (a) the Communications with Aetna and Premera Were Equivalent; (b) any Difference did not Raise an Appearance of Impropriety or Influence the Outcome of the Procurement**

"The appearance of impropriety and impropriety in fact are sufficient to void procurement contracts." *Paul Wholesale v. State*, 908 P.2nd 994, 1000 (Alaska 1995); *Dick Fisher Development No. 2 v. Department of Administration*, 838 P.2nd 263, 269

[11] / Aetna's interpretation of ¶4 of the agreement is consistent with Section 7.26 of the Agreement, which makes it clear the the "proposal" includes the offeror's responses to all of the sections of the RFP, including, but not limited to, the cost section.



SIS[illegible] N. TILLINGHAST & SORENSEN
Ch[illegible] aska Plaza, Suite 306
Juneau, Alaska 99801
(907) 586-1400 FAX (907) 586-3065

(Alaska 1992); *In the Matter of J&S Services, Inc.*, Alaska Dept. of Administration Case No. 02.01 (Sept. 16, 2002) ("*J&S Services*") at 5.

The appearance-of-impropriety rule was applied in *Paul Wholesale*, 753 P.2nd 1132. In that case, DOT&PF cancelled all parties' rights in a procurement that had already resulted in a contract award to two different bidders because of certain alleged *ex parte* communications between one party and DOT&PF. In upholding DOT&PF's cancellation, the Supreme Court reaffirmed its holding in *Dick Fisher* that the appearance of impropriety was enough to void a procurement. Further, it held that "subjective bad faith," or actual "bias" on the part of the agency, is not required. Bad faith was only one relevant factor; equally important was "the amount of agency discretion and whether the agency violated the relevant law." *Id.* at 1002.

Similarly, in *J&S Services*, the hearing officer ruled that extensive *ex parte* communications between a member of the evaluation committee and one proposer created a "substantial and material appearance of impropriety." *Id.* at 7.

In assessing whether apparent impropriety warrants relief, one relevant consideration is whether the impropriety violated specific statutes and regulations written to avoid that impropriety. *Paul Wholesale*, 908 P.2nd at 1002; *J.S. Services, ante* at 7; *Keco Industries v. United States*, 492 F.2nd 1200, 1203 (Ct. Cl. 566 (1974). Here, there exist specific statutory and regulatory prohibitions on precisely the kind of one-sided, *ex parte* communications in which Premera and the Division engaged.

Under AS 36.30.240 and 2 AAC 12.290, the Division may discuss proposals with proposers who are "reasonably susceptible of being selected for award" in order to flush

STOEL RIVES TILLINGHAST & SORENSEN
One Seaska Plaza, Suite 300
Juneau, Alaska 99801
(907) 586-1400 FAX (907) 586-3065

out proposal details; and, those discussions can lead to changes in the proposer's so-called "best and final offer." [12]/

This authority, however, is subject to a caveat—that all such proposers "shall be accorded fair and equal treatment with respect to any opportunity for discussion and revision of proposals" (AS 36.30.240(a)), and that "[t]he opportunity for confidential discussions, if held, must be extended to all offerors submitting proposals deemed reasonably susceptible for award." 2 AAC 12.290(a).

Ostensibly under these laws, the Division held extensive discussions with Premera which had the effect of giving Premera detailed advice on how to:

- retract portions of their proposal which, absent a retraction, would leave Premera's proposal unresponsive to the RFP;

---

[12] / In addition, 2 AAC 12.285 permits the Division to communicate with an offeror and ask clarifying questions to eliminate confusion concerning the contents of a proposal, but the questions may not result in a substantive change in the proposal. 2 AAC 12.285 does not avail the Division here. Section 12.285 says:

> In order to determine if a proposal is reasonably susceptible for award, communications by the procurement officer or the procurement evaluation committee are permitted with an offeror to clarify uncertainties or eliminate confusion concerning the contents of a proposal which does not result in a material or substantive change to the proposal.

*Emphasis added.* The extensive discussions between the Division and Premera from 2/12/06 to 2/14/06, concerning Non-Cost Factors, resulted in a near 50% increase in Premera's point total from 1489.5 to 2119. *Chart 1; Attachment 5(c) at 1-2, Attachment 5(d) at 1-2.* The additional points were the product of Premera's significantly changing its answers to many RFP questions. *See Attachment 4(b) at 7 et seq.* And, further discussions between the Division and Premera, on 2/24/06, enabled Premera to lower its Best and Final proposal by more than $6.88 million in costs. *Wiggins Aff. ¶¶ 2-11; McGuinness Aff. ¶¶ 10-23.* All of these changes to Premera's proposal were obviously material and substantive, and therefore beyond the scope of 2 AAC 12.285. Moreover, that regulation authorizes only "clarifying" questions. The questions asked by the Division here were not "clarifications," but rather suggestions by the Division to Premera to change its proposal. *See text, post.*

STOEL RIVES, TILLINGHAST & SORENSEN
One Jaska Plaza, Suite 300
Juneau, Alaska 99801
(907) 586-1400 FAX (907) 586-3065

- insert items required to be included in the RFP, but originally omitted by Premera; and
- suggest available contract administration measures that could result in lower cost, or increased evaluator attractiveness, and hence higher point scores.

*Wiggins Aff. ¶¶ 21-29; Attachments 4(a) and 4(b).* Premera accepted virtually every suggestion given by the Division, and as a direct result: (1) Premera's gross point total from its Non-Cost factor evaluation rose by 629 points from its original proposal; and (2) Premera was able to move $6.88 million in real, direct costs to the State into a category that was not counted as a proposed "cost," resulting, in turn, in a $6.88 million understatement of its Best and Final cost bid. *Compare Attachments 5(c) and 5(d); Wiggins 3rd Aff. ¶¶ 2-11; McGuinness Aff. ¶¶ 10-23; Attachment 4(b) at 58; Attachment 4(c) at 1.*

On February 7, 2006, the Division began extensive private communications with Premera aimed at improving its offer. [13] On February 12-14, the Division and Premera exchanged 62 pages of "clarification" questions and answers on Premera's proposals for various Non-Cost Factors in the RFP, each question being aimed at soliciting a more beneficial answer. *Attachment 4(a) at 2-19; 4(b) at 7-56.* At the conclusion of these communications, the Division rescored Premera's heavily-revised proposal and, as a direct result of the Division's efforts to make Premera's proposal more attractive, Premera's proposal gained 629 points in the Non-Cost Factor category—a near 50%

[13] / Email messages document at least three private conversations between the procurement officer and Premera officials (on February 7, 9 and 15). *See Attachments 4(a) at 1 & 20-21 and 4(b) at 6.*

SIMPSON, TILLINGHAST & SORENSEN
Or... aska Plaza, Suite 300
Juneau, Alaska 99801
(907) 586-1400 FAX (907) 586-3065

increase in Premera's point total. *See Chart 1; Compare Attachments 5(c) and 5(d), pp. 1-2.*

Aetna was never offered any similar opportunity, leaving Aetna so far behind the competitive curve that even Department of Administration Commissioner Nordstrand was forced to admit to the Alaska Legislature that the playing field was "[n]ot entirely level" because the answers Premera resubmitted to the Division on February 14, 2006 were the equivalent of a "second offer." *Attachment 12 at 24.*

The second round of questions occurred on February 24, 2006, during the evaluation process called for by the parties' agreement, when the Division asked questions of both Aetna and Premera pursuant to paragraph 3 of that agreement. *Attachment 2.* Here, the different treatment that the Division gave Aetna and Premera was substantive. Aetna, on the one hand, was given only three pages of minor, technical suggestions that ultimately resulted in awarding a mere 21 extra points to Aetna (*Wiggins Aff., ¶ 19; Attachment 3).* Conversely, the Division's communications to Premera gave Premera a clear road map as to how to reclassify $6.88 million of its proposed costs to a category that would not appear in the "cost" section of the bid, and thereby artificially lower Premera's cost bid by that same $6.88 million. *Third Wiggins Aff., ¶¶ 2-11; see also McGuinness Aff. ¶¶ 10-23; see also text, post.*

And so, while Premera benefited from the Division's extensive communications by an 629 additional points and was also able to decrease its cost proposal by more than $6.88 million in its final bid, Aetna's perfunctory dialogue with the Division yielded it only 21 additional points. *Compare Attachments 5(a) and 5(b) with Attachment 5(c) and 5(d).*

SIVE[illegible], TILLINGHAST & SORENSEN
Of[illegible]aska Plaza, Suite 300
Juneau, Alaska 99801
(907) 586-1400 FAX (907) 586-3065

The relative impact of those questions on the scoring process was as follows:

| COMPANY | EXTENT OF BIDDER QUESTIONING | ADDITIONAL POINTS FROM ANSWERS COST BID IMPACT |
|---|---|---|
| Premera | 62 pages of questions and answers, several private conversations | 629 points<br>$6.88 million cost bid reduction |
| Aetna | 3 pages of questions | 21 points<br>No cost bid impact |

The extra points granted to Premera were doubly significant:

- *First*, in the initial grading of the two proposers (the grading of the initial proposals, before the Division's extensive assistance to Premera), Aetna won the Non-Cost Scoring portion (*i.e.* the 50% of the bid that reflects proposal quality) by 541 points. *Compare Attachments 5(a) and 5(c)*; while
- *Second*, even after its extensive assistance from the Division, Premera was able to beat Aetna's Non-Cost score by only 71 points. *Compare Attachments 5(b) and 5(d).* It is apparent, then, that without these extensive suggestions from the Division, Premera would not have won the Non-Cost Scoring on the final "best and final" round. The summary of all of these scores is contained in *Chart 1*, which is appended to this appeal.

As a result, the impropriety plainly affected the outcome of the solicitation—another factor counseling for relief. *Keko*, 492 F.2nd at 1203; *J&S Services*, *ante* at 6.

Because of the potential for abuse in private bidder/agency conversations, courts are insistent on all qualified proposers in an RFP being given the "same opportunity" in curing proposal shortcomings. *Gunderson v. University of Alaska, Fairbanks*, 922 P.2nd

SHOUP, TILLINGHAST & SORENSEN
One Alaska Plaza, Suite 300
Juneau, Alaska 99801
(907) 586-1400 FAX (907) 586-3065

229, 235 (Alaska 1996). "Fair" contract solicitation, and demanding that no proposer "receive[] an unfair competitive advantage," are critical to ensuring that the best possible offer emerges from the bidding process. *McBirney & Associates v. State*, 753 P.2nd 1132, 1135 (Alaska 1988).

Hence, Aetna was entitled to equal treatment in post-opening discussions with the Division. Indeed, because of the obvious potential for abuse in statutes giving bidding agencies the authority to engage in private conversations with qualified RFP proposers, courts have been especially alert in demanding equality in the substance of those communications, and not just in form.

Here, the danger of apparent inequality emerges from the Division's own wording in its questions to Premera. Time-and-time again, the Division asks Premera to "clarify" a point that needed no clarification. In one class of cases, for example, Premera's original offer unequivocally rejected a condition of the RFP. The Division, instead of simply asking Premera to reverse its position, asked it to "clarify" that it would accept the condition, despite the fact that its original proposal made it clear that it would not. Capable of taking a hint, Premera routinely agreed to "clarify" that it would, after all, abide by the RFP, which resulted in material and substantive changes to Premera's proposal.

Mr. Mike Wiggins offers several examples of this in his affidavit (*id.* at ¶¶21-29; *Wiggins 3rd Aff. ¶¶ 2-11*), including the following:

> *The RFP asks the offeror to agree that it will answer 85% of all telephone calls within 30 seconds in any given month, or face penalties. RFP, §10.11(a)(1). In its original proposal, Premera "disagreed" with this element of the RFP. ... This caused Premera to lose points on this issue in its first proposal, receiving only 2 points from one evaluator (Gray) and 0 from another (Williams) out of a possible 5 points. ... To raise Premera's*

SIMPSON, TILLINGHAST & SORENSEN
(illegible) Alaska Plaza, Suite 250
Juneau, Alaska 99801
(907) 586-1400 FAX (907) 586-3065

> *point total, the Department asked Premera to "clarify" that it would answer 85% of all calls on a monthly basis, despite what it said in its proposal ... In response to the State's suggestion that Premera change its position, Premera agreed to the State's demand. ... As a result, Premera received 3.5 added points from one evaluator (Gray) and ... additional points from another (Miller) in its "best and final" proposal."*

*Id.* at ¶21. In a similar vein: (1) Premera clearly declined to offer direct deposit in its original offer, but was convinced by the Division to change its mind (*id.* at ¶22); and (2) the Division asked Premera to "agree" to a service that it had unequivocally not agreed to provide in it proposal. *Id.* at ¶23. Additional "clarifications" that in fact resulted in significant point increases and cost decreases are given as examples at ¶¶23-29 of Mr. Wiggins' affidavit, and *Attachments 4(a) and 4(b)* are rife with them.

Wiggins and Mr. Matt McGuinness also discuss in their affidavits how the Division suggested the re-packaging of nearly $6.88 million of "Network Access Fees," which effectively helped lower Premera's Best and Final cost proposal by at least that amount. *Third Wiggins Aff., ¶¶ 2-11; see also McGuinness Aff. ¶¶ 10-23.* Premera's initial bid was understated by a significant amount, since its $34 million bid did not include $6.88 million in "Network Access Fees." *Wiggins Aff., ¶ 10.* Premera accomplished this by calling these fees "claim charges," which are not included in the cost portion of the bid. *Id.* [14] The Division advised Premera, in "clarification" questions dated February 24, 2006, that these "Network Access Fees" were not "claim charges" and needed to be billed in a different manner. *Attachment 4(b) at 2 & 57.* Premera informed the procurement officer, in its February 28, 2006 Best and Final

[14] The "cost" of the proposal to the State (which, again, is worth 40% of the total proposal) is supposed to be disclosed in response to Section 7.23 of the RFP. In all fairness, all costs being charged to the State as a result of the proposal should be included in the response to Section 7.23. The point of this narrative is that, in Premera's case, they were not.

SIMPSON, TILLINGHAST & SORENSEN
One ... aska Plaza, Suite 300
Juneau, Alaska 99801
(907) 586-1400 FAX: (907) 586-3065

Response, that these fees were "eliminated." *Attachment 4(b) at 57.* Those fees, however, were not "eliminated." Rather, Premera merely removed "Network Access Fees" from the category of claim charges, but recouped the amount of those formerly-called "Network Access Fees" ($6.88 million) by increasing the cost associated with a Non-Cost Factor. *McGuinness Aff. ¶ 19.* The net result was to bury $6.88 million in real, direct costs to the state in a Non-Cost Factor portion of the proposal, artificially reducing the cost proposal itself by that same amount. *Id.* And, none of this would have been possible without the guidance that had been supplied by the Division over the month of February.

In *Dynacs Engineering Company v. United States*, 48 Fed.Cl. 124 (2000), the government made a disproportionate effort to enhance one RFP proposer's bid, offering it multiple opportunities to cure deficiencies and working with the favored bidder to cure nine shortcomings while pointing out only two deficiencies in the other bidder's proposal. The government tried to justify this substantive inequality by claiming that it had made some effort to work with both bidders. The court disagreed, holding that, in RFP discussions, the equality of treatment among proposers must be "meaningful," and both sides must be given the "same opportunity" to address weaknesses. A bidding agency cannot get by with "not telling [one bidder] about its continuing weaknesses, [while continuing to inform the other bidder] about each of [its] weaknesses until [that other bidder] got it right." 48 Fed.Cl. at 130. The disparity in both the frequency and substance of the communications among the two bidders in our case, and the vastly different results that the two sets of "discussions " achieved, proved that precisely the same inequity occurred here.

SIVE, TILLINGHAST & SORENSEN
Chr. Alaska Plaza, Suite 300
Juneau, Alaska 99801
(907) 586-1400 FAX (907) 586-3065

To the same effect is *Dubinsky v. United States*, 43 Fed. Cl. 243 (1999), *appeal dismissed* 215 F.3rd 1350 (Fed. Cir. 1999), where the government also used the device of common discussions with potentially successful proposers to improve one bidder's proposal, while giving *pro forma* attention to the other. Without substantive equality in the discussions between proposers, the court held, "discussions with offerors readily would be subject to abuse, merely becoming a cover for an agency's discussions with the offeror it has selected to receive the contract prior to the formal selection decision." *Id.* at 263-4; *see also Paramax Systems Corp. v. CAE-Link Corp., 1993 WL 485205 (Com. Gen.) (October 27, 1993)*; (where bidders "were not treated equally since they were not given the same opportunity...to participate in discussions and to amend their cost/price proposals after BAFO [Best and Final Offer]," Comptroller General recommended a new round of BAFO's and, if necessary, cancellation of the originally-successful contract).

By selling Aetna short in the negotiation process, the big loser could well have been the Alaska public. Could the Division have gotten the best deal for Alaskans by engaging in the same discussions with Aetna that it had undertaken with Premera? As the court in *McBirney* stressed, we've no idea, because equality of treatment never occurred, and we thus do not know what kind of alternative proposal might have emerged from a similarly intensive effort with Aetna. 753 P.2nd at 1138.

Arguably, the genesis of the unequal treatment may have arisen from the Division's misplacement of Aetna's bid. From that point, and until the mistake was discovered, the Division considered Premera the only qualified bidder, and one might expect a government agency to communicate exclusively with the only bidder who (as the Division thought at the time) was qualified for the contract. That spin gives the

SP N, TILLINGHAST & SORENSEN
Ch laska Plaza, Suite 301
Juneau, Alaska 99801
(907) 586-1400 FAX (907) 586-3065

Division every benefit of the doubt. But even if that were the case, the Division's ultimate failure came in its refusal to give Aetna's proposal the same individual assistance once the Division learned that Aetna was a qualified bidder whose bid was "susceptible for award." As Commission Norstrand acknowledged, by that time the playing field was "not entirely level," but the Division did nothing to level it. *Attachment 12 at 24.* It was incumbent on the Division to level that playing field, by helping Aetna improve its proposal to the same extent as it already had with Premera. The Division, in a word, cannot excuse such clear inequality of treatment by its own mistake; particularly when the Division later had every opportunity to rectify that mistake. The plain fact remains that the contract was awarded based on a process that treated the two proposors with patent inequality—a fact that proves not only a material statutory and regulatory violation, but as well a "serious[] impair[ment] of the purpose of the competitive bidding statutes" that warrants voiding the contract. *Earthmovers of Fairbanks, Inc. v. State,* 765 P.2nd 1360, 1369 (Alaska 1989).

**IX. The Appropriate Remedy Here is to: (a) Re-Score the Parties' Previously-Submitted Final Proposals in their Entirety, Using a Three-Person Team Comprised of Uninvolved, Qualified and Unbiased Personnel Assisted by a Mutually-Agreeable Consultant With Expertise in Evaluating Health Claim Management Service Proposals; (b) Have the Evaluation Team include Total Costs (as Defined in this Section) in the Cost Proposal Required by Section 7.23 of the RFP; and (c) Cancel Premera's Existing Contract, and Award**

SIS N. TILLINGHAST & SORENSEN
On aska Plaza, Suite 300
Juneau, Alaska 99801
(907) 586-1400 FAX (907) 586-3065

**the Contract to Aetna, if the new Evaluation Committee Finds Aetna's Final Proposal to be Most Advantageous to the State**

The deciding officer's discretion to grant relief in this case is defined by AS 36.30.585, which broadly authorizes the grant of "an appropriate remedy." §585(a). Subsection (b) of that section guides the deciding officer in determining what remedy is appropriate:

> *In determining an appropriate remedy, the procurement officer shall consider the circumstances surrounding the solicitation or procurement including the seriousness of the procurement deficiencies, the degree of prejudice to other interested parties or to the integrity of the procurement system, the good faith of the parties, the extent to which the procurement has been accomplished, costs to the agency and other impacts on the agency of a proposed remedy, and the urgency of the procurement to the welfare of the state.*

These remedies can include "award of bid or proposal preparation costs; termination of an existing contract;.. re-evaluation...[and other appropriate relief]." *In the Matter of Bachner Company Inc. and Bowers Investment Company,* Ak. Dept. of Administration Case No. 03.10 (Feb. 10, 2004) at 7 ("*Bachner*"); *J&S Services, ante* at 5. To the extent that the basis for the remedy is impropriety in the procurement, the deciding officer should also consider the factors set out in *Keko*, 492 F.2nd at 1203. *J&S Services, ante* at 6.

Aetna's proposed remedy requests the deciding officer to direct the Division to appoint a three-person uninterested, [15]/ qualified and unbiased review team that includes a mutually-agreeable consultant (as the State has used in the past) to re-score the parties'

[15] / As used in these Sections IX and X, "uninterested" means team members who have had no involvement in any evaluation process related to this procurement, nor any other substantive involvement in the procurement. None of the new team members should be made aware of any prior evaluation scores.

ST N. TILLINGHAST & SORENSEN
OI Alaska Plaza, Suite 500
Juneau, Alaska 99801
(907) 586-1400 FAX (907) 586-3065

last proposals [16]/ in their entirety; and, if the evaluation team determines that Aetna's proposal is the most advantageous to the state (using the RFP's point system), (i) cancel the contract awarded March 13, 2006 to Premera; and (ii) award the contract to Aetna. [17]/

Before re-evaluation, the evaluation team should modify the parties' proposals in one respect only: the price offer made under Section 7.23 of the RFP should include ***total costs*** to the state. [18]/ As explained in *Section VIII, ante,* and in the *Third Affidavit of Mike Wiggins* and the *Affidavit of Matt McGuinness*, by including "total costs," the cost portion of the bid would capture (among other cost items) network savings sharing arrangements. These sharing arrangements represent a true, direct cost to the state, because they deny the State a portion of these otherwise important savings (in a nutshell, putting money in the contractor's pocket that would otherwise go into the state's pocket—here to the tune of $6.88 million). *Id.* [19]/ By not including those savings sharing arrangements as a

---

[16] / The parties' last proposals are comprised of their RFP responses; all of their answers to the various questions propounded by the Division that have heretofore been disclosed to the parties and included in the *Attachments* to this Appeal; and the so-called Best and Final Offer submitted on February 28, 2006.

[17] / This proposed remedy is premised on the assumption that this Appeal can be resolved on an expedited basis. If the appeal is not expedited, or it is not expedited sufficiently, then Aetna reserves the right to request alternative relief, and to seek such stays and interim relief as circumstances may warrant.

[18] / As used in these Sections IX and X, "total costs" include program administration fees, pharmacy rebate sharing arrangements, network savings sharing arrangements, run out fees in the event of termination, banking arrangements, and other terms that affect cost. Pharmacy rebates are being included because it is common practice to offset administration fees with rebate sharing guarantees. This approach is referenced as a preferred approach in the RFP under 3.08 "Proposed Payment Arrangements".

[19] / In fact, Premera was able not only to effectively obscure the $6.88 million in "Network Access Fees" discussed throughout this memorandum, but also to add additional costs to the State that were not disclosed in the cost section of Premera's proposal, such that the total amount of undisclosed costs ultimately totaled $13.74 million (using reasonable underwriting assumptions). *Id.*

SP N. TILLINGHAST & SORENSEN
O Taska Plaza, Suite 300
Juneau, Alaska 99801
(907) 586-1400 FAX: (907) 586-3065

"cost," the proposor's bid understates the cost to the state of the proposal by the corresponding amount. [20]/

Aetna submits that, taken as a whole and fairly balanced, the factors set out in §585 support such a remedy. For example:

- The initial factor listed in §585—the "seriousness of the procurement deficiencies," and the "degree of prejudice to...the integrity of the procurement system" plainly argue for re-evaluation and (if necessary) cancellation of the existing contract.

The extent to which the Division's statutory and regulatory violations have undermined the purpose of Alaska's competitive bidding laws has been extensively discussed *ante*. The extensive, one-sided contacts held with one bidder have undermined the purpose of AS 36.30.240 and 2 AAC 12.290, which is to guard against the potential for abuse inherent in pre-award conversations with proposors by placing strict limits of equality in dealings with all qualified proposors. And, as the court stressed in *McBirney v. State*, 753 P.2nd 1132, the failure of the Division to work just as intensely with Aetna as it did with Premera to improve its proposal frustrated the central purpose of our competitive bidding system—to obtain the deal "most advantageous to the state" (AS 36.30.250(a))—

[20] / It should be noted that the relief requested here is considerably less favorable to Aetna than the relief originally requested in the Protest. *Attachment 9* at 16-17. That is because one of the material factors for shaping relief under AS 36.30.585 has changed since the protest was submitted—*i.e.*, the status of the procurement. The ultimate standard for relief under §585 is "appropriateness," which is plainly a function of current realities. But if the Division can erect some arbitrary barrier to this Appeal's request, then the relief sought in the Protest is incorporated herein by reference. Of course, the deciding officer is not limited, in fashioning relief, to that set out in the parties' papers.

SP[illegible]ON, THLINGHAST & SORENSEN
[illegible] Alaska Plaza, Suite 300
Juneau, Alaska 99801
(907) 586-1401 FAX (907) 586-3065

by focusing on just one proposor, while short-shrifting a competitor who might, in fact, have been able to offer a superior alternative.

Additionally, it is self-evident that the use of different evaluation teams for the two different proposors horribly undermines the competitive system. Such a system is not, in fact, "competitive" at all, but a whimsical game of chance.

Finally, and as this memorandum has shown, both irregularities affected the outcome of the procurement.

- With respect to "the extent to which the procurement has been accomplished," and the "degree of prejudice to other interested parties," the contract has been signed, but only on March 13, 2006. The contract performance period does not begin until July 1, 2006. *RFP, Section 1.02.* In the interim, Premera will be expending funds in preparation for assuming the state's program in July. As of some point *after* July 1, 2006, these start-up funds will eventually approximate $614,000. *See Affidavit of Robert Moore;* ¶5. However:
  - A portion of these expenditures will be incurred after contract commencement on July 1, 2006. *Id.* at ¶7;
  - The funds will be incurred only incrementally over the next three months (that is, the number today does not approach $614,000). The earlier the merits of this appeal can be resolved, the fewer start-up funds at stake. *Id.* at ¶5; and

STOEL RIVES, TILLINGHAST & SORENSEN
One Alaska Plaza, Suite 300
Juneau, Alaska 99801
(907) 586-1400 FAX: (907) 586-3065

- Even the entire $614,000 is considerably less than the $2.48 million that the state would save by accepting Aetna's proposal, [21] / and a fraction of the $30 million-plus contract price

Thus, this is not a case where a building has already been constructed (*Bachner*) or a jet completely retrofitted to meet unique state specifications (*J&S Services*). It is, rather, a case where contract performance has not even commenced, and mobilization costs are, to this point, a small fraction of ultimate contract cost. [22]/

- The Division did not, in Aetna's judgment, proceed "in good faith" here—another factor relevant under both §585(b) and *Keko*. To the extent that the Division's extensive *ex parte* contacts arose from the Division's original loss of Aetna's bid documents, there is no good faith that emerges from that ostensible "mistake." Four entire boxes were "lost." And they were not lost very well, since the Division was able to find them within an hour of Aetna's notification that the materials had, in fact, been timely filed. An agency acting in good faith would have surely questioned why the State's long-time existing contractor had "omitted" the bulk of its bid, and either spent the requisite hour to find the documents much earlier, or simply contacted Aetna. Further, once the materials

[21] / *McGuinness Aff.*

[22] / If the contract is ultimately awarded to Aetna, Premera's damages, if any, would be governed by *Earthmovers of Fairbanks, Inc. v. State*, 765 P.2nd 1360 (Alaska 1988). Under *Earthmovers*: (i) if Premera's original contract is void because "the defect in the award seriously impair[ed] the purpose of the competitive bidding statutes" (*id.* at 1369), then Premera would be due no damages under the contract, but could receive reimbursement of those out-of-pocket expenses that the factfinder determined fair; and (ii) if the contract is not void, it would be cancelable under Appendix A, Article 5 of the contract (*Attachment 13*), which provides for termination for the Division's convenience, and allows Premera to recover only "for services rendered before the effective date of termination." While this is not the appropriate forum to resolve Premera's damages (and in fact the issue is not yet even ripe, since Premera's contract has not yet been canceled), the extent of those conceivably-available damages does warrant note.

SP[illegible]ON, TELLINGHAST & SORENSEN
[illegible] Alaska Plaza, Suite 301
Juneau, Alaska 99801
(907) 586-1400 FAX (907) 586-3065

were found, the Division undertook no effort to level the now-stilted playing field before finally awarding the contract—a playing field even the agency's commissioner admits was "not entirely level." *Attachment 12* at 24.

With respect to the different evaluation teams, the Division's unilateral and undisclosed conversion of an agreement to use ***one*** different evaluator for an initial threshold review of Aetna's original bid into a process that used a ***majority*** of different evaluators for the two companies' final proposals does not reflect good faith.

And finally, the Division's contention now that Patrick Shier was a member of the evaluation team that "scored Premera's proposal" is a naked manifestation of bad faith.

- The "costs to the agency and other impacts on the agency of [Aetna's] proposed remedy, and the urgency of the procurement to the welfare of the state" weigh in Aetna's favor. As just discussed *ante*, those costs, if any, are at this juncture relatively minor, since the contract has just been awarded; performance does not commence until July 1, 2006, and currently-ongoing mobilization costs are an order of magnitude less than the longer-term sums at stake here.
- Nor is the procurement urgent. The services solicited under the procurement have been satisfactorily provided by Aetna and its affiliates for 24 years, and, even if it became necessary to extend the start-up date under the new contract past July 1, 2006, Aetna stands ready to continue to provide those services at the

STOEL RIVES, TILLINGHAST & SORENSEN
Alaska Plaza, Suite 300
Juneau, Alaska 99801
(907) 586-1400 FAX (907) 586-3065

existing contract price until a fair procurement process can be completed. *Attachment 9 at Cover Letter, p. 2; Wiggins Aff., ¶¶ 30-31.* [23]/

- Finally, and with respect to the remaining *Keko* factors: (1) Premera's offer was not "clearly superior" (*cf. J&S Services, ante* at 7), but in fact likely inferior in cost and quality than Aetna's [24]/; and (2) as we have seen in Section VIII, *ante*, the Division's impropriety in its grossly disproportionate communications with Premera violated specific statutory and regulatory prohibitions designed to avoid the precise misconduct that occurred here, and in a way that affected the outcome of the solicitation.
- Finally, failure to grant Aetna's remedy would cause extraordinary disruption to the State's provision of health care coverage to its employees and retirees. The switching of health care claim management inevitably leads to confusion and delays in obtaining payment for or reimbursement of health care expenses, and invariably causes extreme hardship on the insured—and in particular, retirees, who are dependent on prescription drug coverage. *See Wiggins Aff.*, ¶¶31-41.

[23] / In any event, an extension beyond July 1 is probably not necessary. Because there is currently no stay in effect, Premera is beginning the mobilization process to assume control of the programs at issue—a process described in the *Affidavit of Robert Moore*. That process will continue, unless and until an expedited evaluation of new final proposals from Aetna and Premera concludes that Aetna's proposal is the one most advantageous to the state. Should Aetna prevail, its current infrastructure to continue providing these same services would have remained intact. *Wiggins Aff., ¶¶ 30-31.* And, the re-evaluation process requested in this Appeal should not be time-consuming. Bear in mind, in this regard, that it took the Division only *four days* from its February 24 "agreement" to reconstitute the evaluation committee, solicit and review new best and final offers and responses to the Division's substantive questions, and issue a new Notice of Intent.

[24] / *See McGuinness Aff.*

STOEL RIVES, TILLINGHAST & SORENSEN
One Alaska Plaza, Suite 300
Juneau, Alaska 99801
(907) 586-1400 FAX (907) 586-3065

On balance, then, Aetna's proposed remedy best serves the public interest; is clearly the remedy that best protects the purposes of Alaska's competitive bidding laws; and at this point will pose no great hardship on other parties.

**X. Conclusion and Request for Relief**

For the foregoing reasons, Aetna respectfully requests that the deciding officer:

(1) direct the Division that the previously-submitted proposals be scored on an expedited basis by an uninterested, qualified and unbiased three-person evaluation team that includes one consultant with demonstrated expertise in medical claim benefit management and acceptable to the Division, Premera and Aetna. If the parties cannot agree on a consultant, the deciding officer should choose the consultant from among the parties' nominees. The evaluation committee shall amend the submitted proposals to include total costs (as defined in this memorandum) in the parties' response to RFP Section 7.23. The process required by this subsection should be completed in no more than seven days;

(2) direct the Division that, if Aetna's proposal is found to be most advantageous to the state (on the basis of the point system set out in the RFP), award the contract to Aetna and cancel the contract awarded to Premera on March 13, 2006. The award and, if necessary, the contract cancellation, should be issued in final form, without any further Notice of Intent to Award, within one week of entry of the final decision in this appeal; and

SHOUP, TILLINGHAST & SORENSEN
Glacier Alaska Plaza, Suite 300
Juneau, Alaska 99801
(907) 586-1400 FAX (907) 586-3065

(3) award Aetna such other relief as the deciding officer finds warranted under AS 36.30.585.

DATED: March 28, 2006

SIMPSON, TILLINGHAST & SORENSEN
Attorneys for Aetna

By: Jon K. Tillinghast
Alaska Bar Assn. No. 7410109

By: James Sheehan
Alaska Bar Assn. No. 0506056

SIMPSON, TILLINGHAST & SORENSEN
C alaska Plaza, Suite 300
Juneau, Alaska 99801
(907) 586-1400 FAX (907) 586-3065

## AETNA'S FIRST EVALUATION SCORES

| Evaluators: | Miller | Shier | Porter | Average |
|---|---|---|---|---|
| Total Evaluator Scores From Aetna's First Evaluation | 2415 | 1570 | 2105 | 2030.0 |

## PREMERA'S FIRST EVALUATION SCORES

| Evaluators: | Gray | Jarrell | Miller | Williams | Average |
|---|---|---|---|---|---|
| Total Evaluator Scores From Premera's First Evaluation | 1692 | 1290.5 | 1156 | 1810 | 1489.5 |

## AETNA'S SECOND EVALUATION SCORES

| Evaluators: | Miller | Shier | Porter | Average |
|---|---|---|---|---|
| Total Evaluator Scores From Aetna's Second Evaluation | 2440 | 1585 | 2120 | 2048.3 |

## PREMERA'S SECOND EVALUATION SCORES

| Evaluators: | Gray | Miller | Williams | Average |
|---|---|---|---|---|
| Total Evaluator Scores From Premera's Second Evaluation | 2207 | 2160 | 1990 | 2119.0 |

## CHART 1

# PREMERA'S FIRST EVALUATION SCORES

| Technical Proposal | Gray | Jarrell | Miller | Williams | Average |
|---|---|---|---|---|---|
| **10.01** | 40 | 55 | 25 | 75 | 40.0 |
| **10.02** | 81 | 67.5 | 83.5 | 80 | 77.3 |
| **10.03** | 50 | 25 | 25 | 45 | 33.3 |
| **10.04** | 26 5 | 14 | 4 | 20 | 14.8 |
| **10.05** | 40 | 55 | 40 | 60 | 45.0 |
| **10.06** | 62 | 85 | 51 | 125 | 66.0 |
| **10.07** | 166.5 | 91 | 127 | 190 | 128.2 |
| **10.08** | 127.5 | 85 | 87 | 120 | 99.8 |
| **10.09** | 80 | 32.5 | 11 | 90 | 41.2 |
| **10.10** | 67 | 60 | 50 | 100 | 59.0 |
| **10.11** | 75 | 42.5 | 63.5 | 75 | 60.3 |
| **10.12** | 84 | 45 | 54 | 85 | 61.0 |
| **10.13** | 191 | 155 | 171 | 200 | 172.3 |
| **10.14** | 135 | 90 | 72 | 125 | 99.0 |
| **10.15** | 104 | 50 | 62.5 | 65 | 72.2 |
| **10.16** | 79 | 90 | 40 | 100 | 69.7 |
| **10.17** | 91 | 85 | 51 | 70 | 75.7 |
| **10.18** | 69 | 70 | 46.5 | 90 | 61.8 |
| **10.19** | 80.5 | 65 | 67 | 70 | 70.8 |
| **10.20** | 43 | 28 | 25 | 25 | 32.0 |
| Total | 1692 | 1290.5 | 1156 | 1810 | 1379.5 |

# PREMERA'S SECOND EVALUATION SCORES

| Technical Proposal | Gray | Miller | Williams | Average |
|---|---|---|---|---|
| 10.01 | 80 | 75 | 75 | 76.7 |
| 10.02 | 128 | 125 | 100 | 117.7 |
| 10.03 | 50 | 45 | 45 | 46.7 |
| 10.04 | 50 | 45 | 35 | 43.3 |
| 10.05 | 90 | 100 | 70 | 86.7 |
| 10.06 | 122 | 125 | 125 | 124.0 |
| 10.07 | 176.5 | 200 | 190 | 188.8 |
| 10.08 | 142.5 | 125 | 120 | 129.2 |
| 10.09 | 92 | 100 | 90 | 94.0 |
| 10.10 | 150 | 100 | 100 | 116.7 |
| 10.11 | 88.5 | 80 | 80 | 82.8 |
| 10.12 | 86 | 100 | 90 | 92.0 |
| 10.13 | 207 | 225 | 200 | 210.7 |
| 10.14 | 145 | 100 | 130 | 125.0 |
| 10.15 | 133.5 | 100 | 130 | 121.2 |
| 10.16 | 150 | 125 | 100 | 125.0 |
| 10.17 | 115 | 140 | 90 | 115.0 |
| 10.18 | 75 | 100 | 90 | 88.3 |
| 10.19 | 83 | 100 | 90 | 91.0 |
| 10.20 | 43 | 50 | 40 | 44.3 |
| Total | 2207 | 2160 | 1990 | 2119.0 |

# AETNA'S FIRST EVALUATION SCORES

| Technical Proposal | Miller | Shier | Porter | Average |
|---|---|---|---|---|
| **10.01** | 100 | 55 | 100 | 85.0 |
| **10.02** | 125 | 80 | 75 | 93.3 |
| **10.03** | 50 | 30 | 50 | 43.3 |
| **10.04** | 35 | 25 | 40 | 33.3 |
| **10.05** | 100 | 70 | 75 | 81.7 |
| **10.06** | 150 | 85 | 150 | 128.3 |
| **10.07** | 200 | 120 | 165 | 161.7 |
| **10.08** | 150 | 85 | 140 | 125.0 |
| **10.09** | 100 | 70 | 100 | 90.0 |
| **10.10** | 150 | 75 | 120 | 115.0 |
| **10.11** | 90 | 50 | 95 | 78.3 |
| **10.12** | 100 | 70 | 90 | 86.7 |
| **10.13** | 225 | 200 | 225 | 216.7 |
| **10.14** | 140 | 85 | 120 | 115.0 |
| **10.15** | 150 | 90 | 90 | 110.0 |
| **10.16** | 150 | 95 | 135 | 126.7 |
| **10.17** | 150 | 120 | 135 | 135.0 |
| **10.18** | 100 | 60 | 60 | 73.3 |
| **10.19** | 100 | 80 | 90 | 90.0 |
| **10.20** | 50 | 25 | 50 | 41.7 |
| Total | 2415 | 1570 | 2105 | 2030.0 |

# AETNA'S SECOND EVALUATION SCORES

| Technical Proposal | Miller | Shier | Porter | Average |
|---|---|---|---|---|
| 10.01 | 100 | 55 | 100 | 85.0 |
| 10.02 | 125 | 80 | 75 | 93.3 |
| 10.03 | 50 | 30 | 50 | 43.3 |
| 10.04 | 50 | 35 | 40 | 41.7 |
| 10.05 | 100 | 70 | 75 | 81.7 |
| 10.06 | 150 | 85 | 150 | 128.3 |
| 10.07 | 200 | 120 | 165 | 161.7 |
| 10.08 | 150 | 85 | 140 | 125.0 |
| 10.09 | 100 | 70 | 100 | 90.0 |
| 10.10 | 150 | 75 | 120 | 115.0 |
| 10.11 | 90 | 50 | 100 | 80.0 |
| 10.12 | 100 | 70 | 90 | 86.7 |
| 10.13 | 225 | 200 | 225 | 216.7 |
| 10.14 | 150 | 95 | 130 | 125.0 |
| 10.15 | 150 | 90 | 90 | 110.0 |
| 10.16 | 150 | 95 | 135 | 126.7 |
| 10.17 | 150 | 120 | 135 | 135.0 |
| 10.18 | 100 | 60 | 60 | 73.3 |
| 10.19 | 100 | 75 | 90 | 88.3 |
| 10.20 | 50 | 25 | 50 | 41.7 |
| Total | 2440 | 1585 | 2120 | 2048.3 |

**Constance Hartle**

**From:** Englehart, Tom J. [TJEnglehart@magellanhealth.com]
**Sent:** Tuesday, March 21, 2006 11:06 AM
**To:** Sen. Con Bunde
**Subject:** Aetna protest of State Employees & Retirees Medical Plan Administration award

Hello, Senator Bunde:

I represent a 26 year old Alaskan company, Magellan Health Services, based in Anchorage, which currently provides employee assistance and managed mental health services to State of Alaska employees and retirees. We have served the State for the past thirteen years as a subcontractor to Aetna Healthcare which currently administers the overall benefit plan (medical, dental, vision, etc.).

As you are aware, in the recent bidding process for the State's health plan administration contract that goes into effect 7/1/2006, there were substantial inequities and "irregularities". As a result of this seriously flawed process, the State signed a contract with Premera Blue Cross/Blue Shield in the past week, replacing Aetna. I am writing to respectfully request that you question the Department of Administration about the details of this flawed RFP process and support Aetna's effort to have the contract with Premera cancelled.

Aetna is exercising its right to protest this award on the following bases:

- Two different teams of evaluators graded the Aetna and Premera non-cost proposals
- The State appeared to coach Premera to improve its evaluation score without offering the same opportunity to Aetna
- The State failed to evaluate at all Aetna's separate Pharmacy Claims Management proposal that could save the State $3M

A number of other anomalies also occurred in the RFP process, including the "misplacement" of a major portion of Aetna's original proposal that led to an initial rejection of the Aetna proposal as "non-responsive" to the RFP. These portions of Aetna's proposal were later "found" and evaluated by the aforementioned different teams.

I understand that the State's award and Aetna's protest will be addressed at your Thursday Labor and Commerce Committee meeting. A proposed fair resolution to the situation is to extend the current Aetna contract and seek a re-bid at a later date under a more equitable process for evaluation of the proposals.

If the current decision stands, we at Magellan stand to lose a number of jobs in our Anchorage and Wasilla offices. We are fully aware that business is won and lost through competitive processes, but we do not feel that the process in this case was equitable to all the bidding parties. The Premera package includes employee assistance services from a company based in Chicago that has no physical presence in Alaska or Alaskan employees.

I will call your office in the next day or so to respond to any questions you may have about this issue. Thank you for your consideration.

Tom Englehart
General Manager
Magellan Health Services
Alaska Care Management Center
907-273-9232 Direct
907-563-6340 Fax
800-478-2812, Ext 9232
tjenglehart@magellanhealth.com