

ALASKA LEGISLATURE COMMITTEES, 2000-2000 80/2

11626 HOUSE STATE AFFAIRS

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

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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

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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

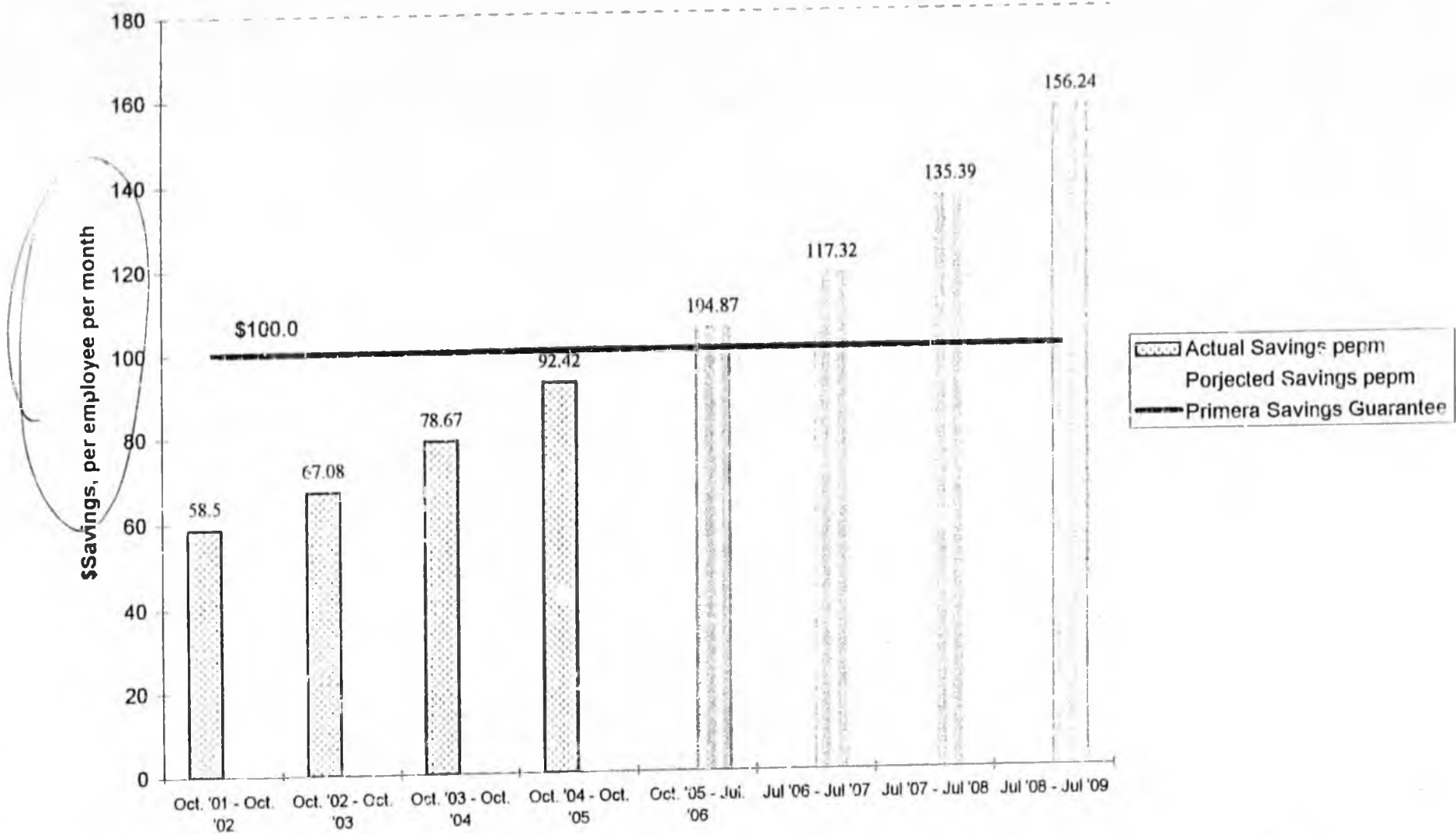
3 year Fees:	\$	30,951,035
3 year Network access fee:	\$	-
3 year Rx Rebate guarantee	\$	(9,000,000)
3 year network savings retained by Premera @ 30%	\$	13,741,949
Total cost to State of Alaska	\$	35,692,984

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

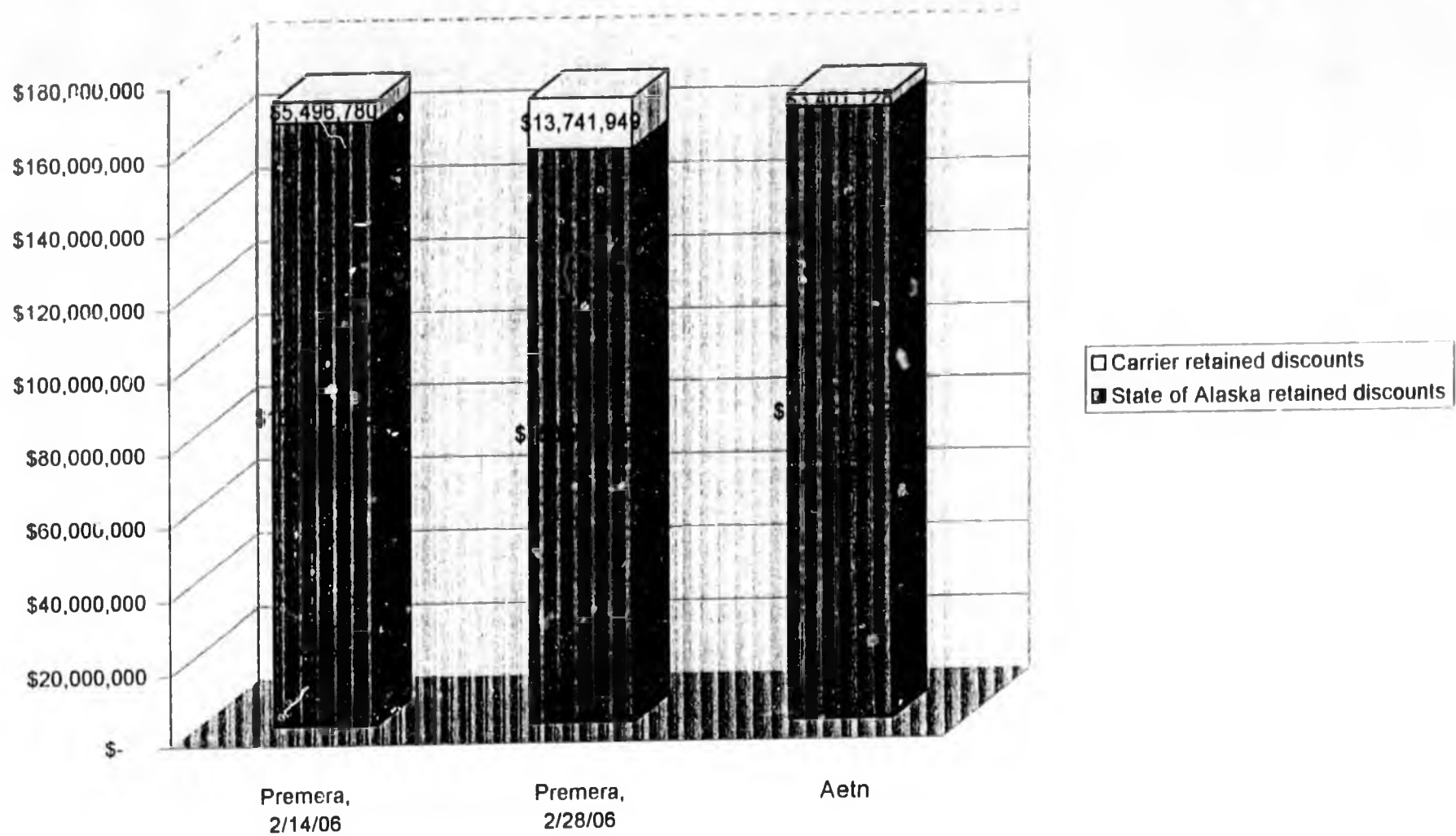
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State Of Alaska

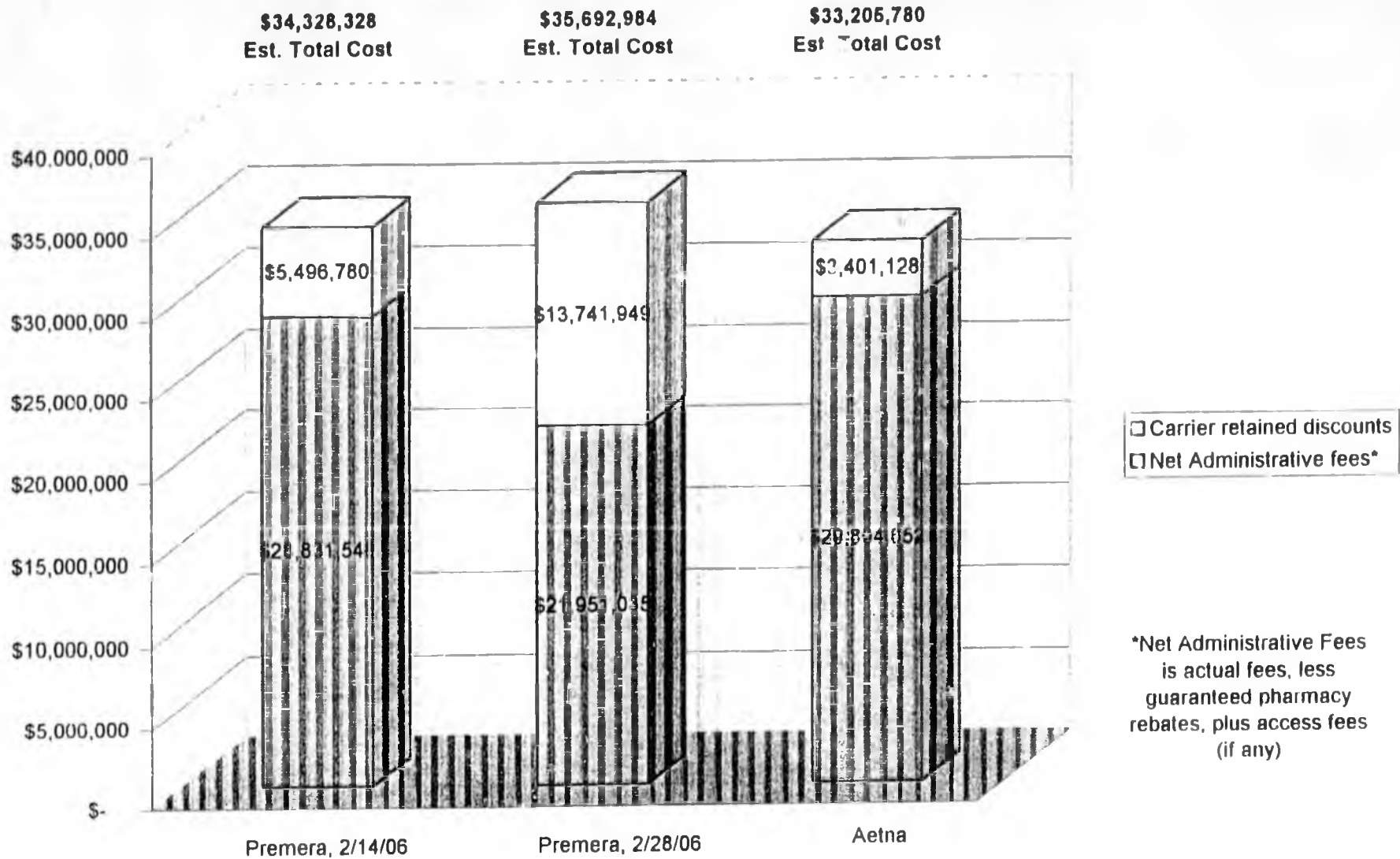


From Reed

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	% increase in savings over prior period
		N/A
		14.7%
		17.3%
		17.5%
		13.5%
\$ 114.79	\$ 2.53	11.9%
\$ 132.09	\$ 3.30	15.4%
\$ 152.57	\$ 3.67	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 actual g'tee was offered
Year 3	\$ 325,874	>> assumed @ year 1 level, as no actual g'tee was offered
3 year total:	\$ 977,622	

Combined 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 :	\$ 156,935,898	\$ 167,276,720	

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

Upside to fee fr

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.

DEPARTMENT OF ADMINISTRATION

DIVISION OF GENERAL SERVICES

March 21, 2006

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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 Premiera 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.

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. 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.

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.

X 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.

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 services 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 show 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 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 prejudice 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 Vander
Assistant Attorney General



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.

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

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

Exhibit A

RRP No. 2007-0200-5946

Agreed upon process by State of Alaska (State), offeror Premiera Blue Cross Blue Shield of Alaska (Premera), and offeror Aetna, per teleconference calls held between the parties' representatives on February 22 and 28, 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 Premiera'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 Premiera'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 Premiera after confirmation from Aetna: and
 - b. The State will obtain confirmation from Premiera 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 Premiera 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 Premiera, 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: [Signature] 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: [Signature] 2-23-2006
Date
Mike Robinson
Western Regional Head
National Accounts

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 is in the state's best interest to reject the single proposal for Section 9.

- 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.

- **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:

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

Approved Disapproved



Vern Jones
Chief Procurement Officer

2/27/06
Date

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	<u>500</u>
	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	<u>500</u>
	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	<u>100</u>
	5,000

ALASKA CARE

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

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

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

Doesn't include network access 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 incumbent.
It demonstrates the lack of expertise among the
reviewers and procurement

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 reference 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 reference to network savings share
Aetna - \$3,401,127 (est)
Premera - \$13,741,949 (est)



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

ALASKA CARE

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*	<u>(\$1.2 M)</u>
		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

ALASKA CARE

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	<u>\$2.1 M</u>
		Savings	\$10.9 M

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

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
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
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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.

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

4 **I. BACKGROUND**

5 **A. The Request for Proposals**

6 On November 30, 2005, the Division of Retirement and Benefits issued the RFP
7 for claim management and pharmacy benefit services. The RFP comprehensively set
8 forth the services sought, the procurement procedure and how the proposals were to be
9 evaluated. See RFP No. 2007-0200-5946.
10

11 The RFP also set forth the schedule for the process. *Id.* at Sec. 1.02. If an
12 offeror had questions regarding the RFP, they were to be submitted by
13 December 18, 2005. *Id.* at Sec. 1.07.² The deadline for proposals was initially
14 December 28, 2005 (Sec. 1.01), but was later extended to January 6, 2006. See
15 Amendment No. 6.
16

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

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

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

24 ³ Posted at:
25 [http://notes4.state.ak.us/pn/pubnotic.nsf/0/60f7691928714c18892570ca007faa6b/\\$FILE/2007-0200-5946++Amendment+6.pdf](http://notes4.state.ak.us/pn/pubnotic.nsf/0/60f7691928714c18892570ca007faa6b/$FILE/2007-0200-5946++Amendment+6.pdf).
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2 received by the procurement officer at least ten days before the
3 proposal opening. This will allow issuance of any necessary
4 amendments. It will also help prevent the opening of a defective
5 solicitation and exposure of offeror's proposals upon which award
6 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.*

7 RFP, Sec. 1.06 (emphasis added). Prior to the deadline for proposals, several questions
8 were asked. The Division issued amendments with the answers. See Amendment Nos.
9 1 -4. No offeror, however, objected to the content of the solicitation or to the manner in
10 which the RFP proposed to score the proposals.
11

12 The RFP advised offerors that both communications and discussions would be
13 permitted with offerors reasonably susceptible to award. RFP, Sec. 2.06 – 2.07. The
14 purpose of communications was limited to clarification of uncertainties and to eliminate
15 confusion regarding a proposal. RFP, Sec. 2.06. The purpose of discussions was to
16 ensure full understanding of the requirements of the RFP and the proposal. RFP, Sec.
17 2.07. The RFP permitted proposal modifications following discussions. *Id.*
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19 With respect to the evaluation of the proposals, the RFP provided that the
20 "evaluation committee will be made up of the procurement officer and at least two
21 active State employees and one PERS/TRS employer." RFP, Sec. 2.09. The RFP made
22 no guarantee, however, that the individuals on the evaluation committee would stay the
23 same throughout the process.
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2 The RFP requested that offerors submit proposals describing services for three
3 different scenarios: (1) all services; (2) all services except pharmacy network and
4 benefit management; and (3) pharmacy network and benefit management. RFP, Secs.
5 7 – 9.⁴

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

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

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

18 B. Evaluation of the Proposals

19 The Division received four proposals by January 6, 2006: Premera, Aetna,
20 Coresource and Walgreens. The Division declared the proposals from Coresource and
21 Walgreens to be non-responsive since they did not possess a valid Alaska business
22 license. The proposal from Aetna was determined to be non-responsive because it was
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25 ⁴ Ultimately, the Division did not evaluate the proposals for the second scenario
26 and rejected all proposals for the third scenario. Accordingly, the scoring was based
only on the proposals for the first scenario—all services.

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

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

12	Technical Proposal:	1,490
13	Cost Proposal:	2,000
14	Alaska Offeror's Preference:	<u>500</u>
	Total:	3,990

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

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

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

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

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2	Technical Proposal:	2,119
3	Cost Proposal:	2,000
4	Alaska Offeror's Preference:	<u>500</u>
	Total:	4,619

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

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

14 On February 22 and 23, Aetna, Premera and the Division held teleconferences to
15 decide how to proceed. See Exhibit B at ¶ 8-15 (Affidavit of Vern Jones). At this point,
16 it was clear that Aetna had gained a tremendous competitive advantage in the process
17 because its cost proposal totaled \$45 million, which was significantly higher than
18 Premera's bid of \$34 million. Aetna now had information to make its cost proposal
19 competitive with Premera's.
20

21 The parties agreed to salvage the process through a modified evaluation process.
22 First, the parties agreed that Aetna's proposal would be scored by the reconstituted
23 evaluation committee made up of "three members, two of whom were on the original
24 PEC that scored Premera's proposal in the initial evaluation process." See Exhibit A
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2 (Modified Evaluation Process Agreement). The members of the reconstituted
3 committee were Freda Miller, Pat Shier and Judy Porter.

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

8
9 Next, the parties agreed that the Division would enter into discussions with both
10 parties to be followed by the submission of best and final offers. Finally, the parties
11 agreed that the proposals would be scored and a new notice of intent to award would be
12 issued. Aetna, Premera and the Division each signed this agreement. *See Exhibit A*
13 (Modified Evaluation Process Agreement).

14 Following the signing of the agreement, the Division proceeded to implement it.
15 First, the evaluation committee scored Aetna's proposal to determine whether it was
16 reasonably susceptible to award. The evaluation committee scored Aetna's proposal as
17 follows:
18

19	Technical Proposal:	2,030
20	Cost Proposal:	1,502
21	Alaska Offeror's Preference:	<u>500</u>
	Total:	4,032

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

24 Next, the Division disclosed Aetna's cost proposal to Premera, which as noted
25 above was \$45 million. The Division then entered into discussions with both Premera
26

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

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

6 Premera:

7
8 Technical Proposal: 2,120
9 Cost Proposal: 2,000
10 Alaska Offeror's Preference: 500
11 Total: 4,620

12 Aetna:

13 Technical Proposal: 2,048
14 Cost Proposal: 1,931
15 Alaska Offeror's Preference: 500
16 Total: 4,479

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

23 **II. ARGUMENT**

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

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2 **A. The Modified Evaluation Process Did Not Disadvantage Aetna and**
3 **Was Legally Permissible**

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

7 First, Aetna gained a competitive advantage that it never would have had
8 otherwise. It learned the bid of its only competitor. With this incredibly valuable
9 information Aetna was able to lower its cost proposal from \$45 million to \$32 million, a
10 29 percent decrease. It is highly doubtful that Aetna would have been able to underbid
11 Premera's original bid without the disclosure of this information.⁶

12
13 Second, the reconstituted evaluation committee was legally permissible. A
14 leading treatise on procurement states that the composition of an evaluation committee
15 may be changed during an evaluation process:

16
17 ⁶ A leading commentator confirms that this kind of disclosure to level the playing
18 field is an appropriate approach: "When there has been an improper disclosure of
19 pricing or technical information, the contracting officer must decide on a course of
20 action to minimize the harm. The general rule stated by the Comptroller General is that
21 the requirement for full and open competition overrides the prohibitions against
22 improper disclosure." Ralph C. Nash, et al, *Competitive Negotiation* at 685 (2d ed.
23 1999).

24 Notably, however, the treatise states that a procurement officer would be justified
25 in disqualifying an offeror that made use of a competitor's inadvertently disclosed
26 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.

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

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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

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

7
8 Finally, the fact that the reconstituted evaluation committee did not completely
9 rescore the two proposals following the submission of the best and final offers was
10 permissible. A leading treatise on procurement law states:

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

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

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

19
20 In summary, the modified evaluation process did not disadvantage Aetna—to the
21 contrary it conferred a tremendous competitive advantage upon Aetna. Moreover, the
22 reconstituted evaluation committee was both legally permissible and agreed to by the
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25 ⁷ Moreover, the treatise goes on to say, "[t]here is no requirement that the final
26 proposals be evaluated by the same evaluators that scored the original proposals." *Id.*
at 699.

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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

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2 ar 1 submits new calculations that may have a subjective element. Respectfully, the
3 Division suggests that this Office may safely ignore such calculations. Aetna has
4 waived this argument by not timely objecting to the cost proposal.

5 **C. The Division Coached No One – Communications and Discussions**
6 **Were Permissible**

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

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

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

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

22 Aetna characterizes the communications and discussions between the Division
23 and Premera as improper. But the fact is that between opening of the proposals on
24 January 6 and the discovery of the misplaced Aetna binders on February 21, the
25 Division understood Premera to be the only offeror reasonably susceptible to award.
26 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

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2 statute, regulations and RFP allowed: clarify uncertainties, eliminate confusion and
3 ensure full understanding. The law permits revisions to proposals during this process.
4 When uncertainties are clarified, confusion eliminated and fuller understanding
5 achieved, it should come as no surprise that an offeror's score will increase. That is
6 exactly what the law contemplates and that is exactly what happened here.⁸
7

8 Once the Division realized it had misplaced a portion of Aetna's proposal, it
9 afforded Aetna the same opportunity for discussions as it did Premera. In the modified
10 evaluation process agreement, the parties agreed that "[d]iscussions under AS 36.30.240
11 with Aetna and Premera will occur Friday, February 24." See Exhibit A. Aetna had the
12 opportunity to request extra time for discussions. It did not. It is now too late for Aetna
13 to complain about not having enough time for discussions, when it had the perfect
14 opportunity to do so two months ago.
15

16 In summary, the Division's communications and discussions with Premera were
17 appropriate and legal. There is no appearance of impropriety. Aetna was given an
18 equal and fair opportunity to have discussions, and agreed with the Division on the
19 extent to which it would have such discussions.
20

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25 ⁸ "The primary objective of discussions is to maximize the Government's ability to
26 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).

1
2 **III. CONCLUSION**

3 A leading commentator on procurement law confirms that agencies have "broad
4 discretion in the evaluation process." Ralph C. Nash, et al, *Competitive Negotiation* at
5 536 (2d ed. 1999). However, evaluations must not be irrational or arbitrary. The
6 commentator concludes that "evaluations will not be overturned if they are based on
7 errors which are merely minor or nonprejudicial." *Id.*

8
9 The Division does not dispute it made an error in this process by misplacing a
10 portion of Aetna's proposal. This error, however, was corrected in a way that conferred
11 a competitive advantage upon Aetna. The Division and the parties agreed to salvage the
12 process in a legally sound and appropriate way. The Division followed the agreed-to
13 process, and at the end of the process Premera won and Aetna lost. There was nothing
14 irrational or arbitrary about the process, the scoring or the award.
15

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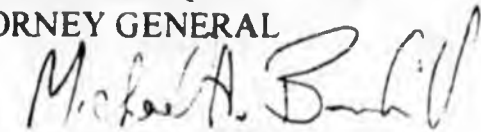
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2 Accordingly, the Division respectfully requests that this Office sustain the award
3 to Premera and dismiss Aetna's appeal.

4 DATED this 28th day of April, 2006.

5 DAVID W. MARQUEZ
6 ATTORNEY GENERAL

7 By:



8 Michael Barnhill
9 Assistant Attorney General
10 Alaska Bar No. 9311063
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Exhibit A
page 1 of 2

RRP No. 2007-0200-6948

Agreed upon process by State of Alaska (State), offeror Premiera 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 Premiera'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 acceptable for award, the following will occur as to disclosure of Aetna's original price and Premiera'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 Premiera after confirmation from Aetna: and
 - b. The State will obtain confirmation from Premiera 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 Premiera 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 Premiera, 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:

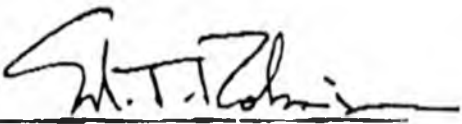
State of Alaska

By:  _____ 2/24/06
Vern Jones 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

1
2 BEFORE THE STATE OF ALASKA OFFICE OF ADMINISTRATIVE HEARINGS
3 ON REFERRAL BY THE COMMISSIONER OF THE DEPARTMENT OF
4 ADMINISTRATION

4 In the Matter of:)
5 Aetna Life Insurance and Aetna)
6 _____) OAH No. 06-0230-PRO
RFP No. 2007-0200-5946

7 **AFFIDAVIT OF WALT HARVEY**

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

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

13
14 2. I assumed principal responsibility for RFP No. 2007-0200-5946,
15 claims administration and pharmacy benefit management, on January 31, 2006.

16
17 3. When I began work on the RFP, my understanding was that the
18 Department of Administration had received only one responsive proposal. The only
19 responsive offeror was Premera.

20 4. My first task was to direct the evaluation committee to determine
21 whether Premera's proposal was reasonably susceptible to award. Prior to my taking
22 responsibility for this RFP, the following individuals had been selected to be on the
23 committee: Sheri Gray, Kerry Jarrell, Freda Miller, Pat Shier and Mike Williams. All of
24 these individuals were State of Alaska employees, except Kerry Jarrell who was a
25 representative from the Bering Strait School District in Unalakleet, Alaska.
26

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

1
2 5. The evaluation committee scored Premera's proposal. The average
3 of their scores was:

4 Technical Proposal: 1,490
5 Cost Proposal: 2,000
6 Alaska Offeror's Preference: 500
7 Total: 3,990

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

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

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

19
20 8. On February 17, Premera submitted its best and final offer. The
21 evaluation committee scored the BAFO as follows:

22 Technical Proposal: 2,119
23 Cost Proposal: 2,000
24 Alaska Offeror's Preference: 500
25 Total: 4,619

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

1
2 10. On February 21, representatives from Aetna contacted me to
3 inquire why their proposal had been declared non-responsive. Aetna's lobbyist,
4 Reed Stoops, also asked what Premera's cost proposal was. Because the notice of intent
5 to award had been issued, that information was now public, and so I disclosed that
6 Premera's bid was approximately \$34 million.

7
8 11. On the afternoon of February 21, we discovered that a portion of
9 Aetna's proposal had been misplaced. I rescinded the notice of intent to award the
10 contract to Premera.

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

17	Technical Proposal:	2,030
18	Cost Proposal:	1,502
19	Alaska Offeror's Preference:	<u>500</u>
20	Total:	4,032

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

23 14. Following the submission of the best and final offers, I directed the
24 evaluation committee to score the changes to the proposals. In my experience, we never
25 re-score an entire proposal following the submission of best and final offers unless the
26

1
2 entire proposal has changed. My understanding was that the parties had not requested
3 that the proposals be entirely re-scored.

4 15. The final results of the evaluation committee were:

5 Premera:

6 Technical Proposal: 2,120
7 Cost Proposal: 2,000
8 Alaska Offeror's Preference: 500
9 Total: 4,620

10 Aetna:

11 Technical Proposal: 2,048
12 Cost Proposal: 1,931
13 Alaska Offeror's Preference: 500
14 Total: 4,479

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

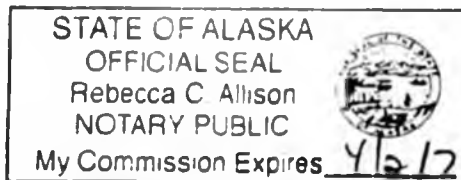
16 17. On March 13, 2006, the State entered into the contract with
17 Premera for third party administrator services.

18 Further your affiant sayeth naught.

19 DATED: 4/28/06

20 Walt Harvey
21 Walt Harvey
22 Procurement Officer

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



27 Rebecca C. Allison
28 Notary Public In and For Alaska

STATE OF ALASKA

DEPARTMENT OF ADMINISTRATION

DIVISION OF GENERAL SERVICES

April 28, 2006

Protest Report

FRANK H. MURKOWSKI, GOVERNOR

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

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 McGuinness 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.

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. AS 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:

<u>Awarded Points</u>	<u>Available Points</u>
1,490 Awarded Feb. 6 th (original proposal)	2,500 - Technical Proposal
629 Awarded Feb. 17 th (1 st best & final)	
2,000	2,000 - Cost
<u>500</u>	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:

<u>Awarded Points</u>	<u>Available Points</u>
2,030	2,500 - Technical Proposal
1,502	2,000 - Cost
<u>500</u>	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 evaluators 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.

///

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///

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.