

HOUSE OF REPRESENTATIVES, 2009-2010 8672

11627 HOUSE STATE AFFAIRS

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

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

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

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

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

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

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

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

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

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

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

- On pages 17 and 18, Aetna states that the "Division held extensive discussions with Premera which had the effect of giving Premera detailed advice on how to:
 - Retract portions of their proposal which, absent a retraction, would leave Premera's proposal unresponsive;
 - Insert items required to be included in the RFP but originally omitted by Premera; and
 - Suggest available contract administration measures that could result in lower cost, or increased evaluator attractiveness, and hence higher point scores."

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

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

**RFP Section 7.16 c), Page 8 – Information Technology/
Communication**

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

Aetna responded as follows in its best and final offer:

Yes, we have a very successful Electronic Funds Transfer (EFT) process that we currently administer to some State of Alaska providers in lieu of a mailed check. Both the EFT and Electronic Remittance Advice (ERA) products are rolled out together and providers must sign up for both simultaneously in order to receive payment by electronic transfer. Provider sign up requires an ERA/EFT enrollment form to be filled out and a 10-day pre-note period applies for EFT.

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

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

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

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

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

Aetna responded as follows in its best and final offer:

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

OPERS

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

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

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

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

Aetna responded as follows in its best and final offer:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Chart #1					Monthly
Aetna's Current Contract	Monthly Fee		# of lives	=	Contract Rate
Per employee per month (PEPM)	\$43.02	X	5,464	=	\$235,061
Per retiree per month medical	\$29.22	X	28,128	=	\$821,914
Per retiree per month DVA	\$4.43	X	20,725	=	\$91,812
Per retiree per month LTC	\$0.47	X	19,011	=	\$8,395
Per employee per month Health FSA	\$3.90*	X	1,358	=	\$5,296 + \$70

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

Total Monthly Fee \$1,162,534

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

Total Monthly Fee \$682,577

IX. Conclusion and Request for Relief

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

Sincerely,


Walt Harvey
Contracting Manager

cc: Michael Barnhill
Assistant Attorney General

EXHIBIT 1

X Aetna

Aetna
601 Union Street
Suite 810
Seattle WA 98101

Mike Wiggins
Vice President
National Accounts
(206) 701-8106
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2006 MAR 6 PM 4 28
DIVISION OF GENERAL
SERVICES

March 6, 2006

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

RE: RFP #2007-0200-5946

Dear Mr. Harvey:

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

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

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

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

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

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

Mr. Walt Harvey
March 6, 2006
Page 2 of 2

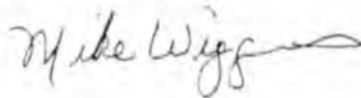
As to this "best and final offer" evaluation, it was our understanding that the same three individuals would perform that evaluation for both Aetna and Premera, and there is nothing in the letter that is inconsistent with that understanding.

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

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

Thank you.

Sincerely,



Mike Wiggins
Vice President
National Accounts

Exhibit 1 page 2 of 2

EXHIBIT 2

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

Date of PEC
 October 6th, 2004

Proposers in Alphabetical Order

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

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

TQ3Navigator						
Names of PEC Members	KG	DJ	ML	JP	JS	
Response to Deliverables (150)	98	66	94	131	108	
Experience & Qualifications (150)	70	45	90	70	85	% Diff
Total	168	111	184	201	193	44.78%

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

EXHIBIT 3

RFP 2006-0600-5772

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

Financial Information

State of Alaska

10.02 Proposed Service Fees

Introduction

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

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

10.02

Illustrative *Immature* Service Fees

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

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

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

Grand Total (years 1-3)	\$29,950,035
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TABULATED SCORE SUMMARY
 PROPOSAL EVALUATION COMMITTEE
 HEALTH PLAN THIRD PARTY ADMINISTRATOR
 RFP 2000-0200-2140

		Aetna	Blue Cross
Administrative Services (35% paragraph 8.03)			
Evaluator:	Ateaga	0	0
	Bell	61	58
	Borg	54	49
	Couzin	51	61
	Hertz	63	66
	Parker	67	60
	Sher	58	60
	Wellington	63	1
Average Score		52.13	51.88
Total		417	415

		Aetna	Blue Cross
Provider Discounts (10% paragraph 8.04)			
Evaluator:	Ateaga	0	0
	Bell	2	4
	Borg	3	5
	Couzin	4	5
	Hertz	4	5
	Parker	4	5
	Sher	4	5
	Wellington	4	5
Average Score		3.13	4.25
Total		25	34

		Aetna	Blue Cross
Information Technology/Communication (10% paragraph 8.05)			
Evaluator:	Ateaga	0	0
	Bell	17	17
	Borg	16	15
	Couzin	14	17
	Hertz	19	20
	Parker	20	19
	Sher	17	16
	Wellington	18	18
Average Score		15.13	15.25
Total		121	122

		Aetna	Blue Cross
Experience and Qualifications (10% paragraph 8.06)			
Evaluator:	Ateaga	0	0
	Bell	17	16
	Borg	15	15
	Couzin	7	12
	Hertz	16	19
	Parker	17	15
	Sher	18	19
	Wellington	17	19
Average Score		13.38	14.38
Total		107	115

	Aetna	Blue Cross
Grand Totals--Technical	670	686
Divided by 9 evaluators	83.75	85.75
Lowest Cost Proposal	29,550,035	29,950,035
divided by COST	29,950,035	32,410,092
* cost scoring factor	1.00	0.92
* 50 max points	50	50
	50.00	46.20
Admin Services (Max 70)	52.13	51.88
Provider Discounts (Max 20)	3.13	4.25
Info Tech/Communication (Max 20)	15.13	15.25
Experience and Qualifications (Max 20)	13.38	14.38
Subtotal Technical (Max 130)	83.75	85.75
Cost (Max 50)	50.00	46.20
AK Off Pref (20)	0.00	0.00
Total Score	133.75	131.95

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

5 AETNA LIFE INSURANCE and)
6 AETNA,)
7 v.)
8 DIVISION OF GENERAL SERVICES.)
_____)

OAH No. 05-0230-PRO
RFP No. 2007-0200-5946

9
10 **AFFIDAVIT OF VERN JONES**

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

12
13 1. I am the State of Alaska's Chief Procurement Officer. I have been
14 employed with the Department of Administration and held this position since October
15 1992. I supervise the procurement of supplies, services, and professional services for all
16 Executive Branch Departments as part of my duties. My statutory responsibilities are
17 set forth in AS 36.30.010.

18
19 2. I am familiar with RFP No. 2007-0200-5946 Claims
20 Administration and Pharmacy Benefit Management (hereafter "RFP") issued by the
21 Department of Administration for the Division of Retirement and Benefits, dated
22 November 30, 2005. This procurement was conducted under my authority delegated to
23 the Department of Administration (DOA).

24
25 3. During December 2004, I was advised that Victor Leamer, a
26 Procurement Specialist in the DOA and the procurement officer of record for the RFP,

1
2 was concurrently serving as the procurement officer for several important projects at
3 DOA, notably (1) this RFP "Claims Administration and Pharmacy Benefit
4 Management," (2) RFP 2006-0200-5914 "Human Resources Payroll Systems
5 Replacement," and (3) RFP 2006-0200-5915 "Data Warehouse Project." All of these
6 procurements are complex and time consuming for the procurement officer of record.
7
8 In addition, Mr. Leamer serves as the DOA's lead procurement official and is required
9 to provide procurement assistance to all divisions and agencies within the DOA.

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

18
19 5. With respect to this RFP, I was made aware that on
20 February 18, 2006, the state issued a Notice of Intent to Award a Contract to Premera
21 Blue Cross, and that Aetna's proposal was declared nonresponsive. I was also aware
22 that Mr. Leamer, the former procurement officer of record for this RFP, had previously
23 declared Aetna's proposal nonresponsive because it was incomplete. Further,
24 Mr. Harvey, after assuming the responsibility for this RFP, directed Victor Leamer to
25 ensure that no sections of Aetna's proposal had been overlooked or misplaced. I know
26

1
2 that after performing the search, he assured Mr. Harvey there were no other sections of
3 Aetna's proposal in the state's possession.

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

13
14 7. On February 21, 2006, after Aetna's missing proposal binder had
15 been found, I met with Mr. Harvey and representatives from DOA's Commissioner's
16 Office, the Division of Retirement and Benefits, and the Attorney General's Office to
17 discuss how the state could proceed forward and evaluate Aetna's proposal. As a result
18 of those discussions, it was determined that (1) time was of the essence to act with
19 respect to evaluating Aetna's proposal, (2) it was not possible to reconvene the original
20 proposal evaluation committee (PEC) in a timely manner, (3) there was insufficient time
21 to start over and evaluate both proposals using a completely new PEC, and (4) the state
22 should immediately arrange for a joint meeting with representatives of Aetna and
23 Premera to pursue and develop a mutually acceptable process that would allow the
24 evaluation of Aetna's proposal to proceed forward.

1
2 8. During the February 21 meeting, there was discussion concerning
3 the makeup of a new or reconstituted PEC for evaluation of Aetna's proposal. The
4 original PEC consisted of four state employees (Freda Miller, Sheri Gray,
5 Michael Williams and Pat Shier) and one representative from the Bering Strait School
6 District in Unalakleet, Alaska (Kerry Jarrell). Both Ms. Gray and Mr. Williams were
7 out of the office and unavailable. It was impractical to include Mr. Jarrell in an
8 expedited evaluation process since Aetna's proposal binders (four binders), would have
9 to be mailed to Unalakleet and Mr. Jarrell's attendance in PEC meetings would be
10 telephonic (versus the in-person process he participated in earlier with the Premera
11 proposal). That left Ms. Miller and Pat Shier as the only viable members left from the
12 original PEC who could be immediately available to evaluate Aetna's proposal.
13
14 Judy Porter, a Human Resource Specialist at the Department of Transportation and
15 Public Facilities was suggested as a potential PEC member due to her long-term
16 employment with the state and considerable knowledge of the subject matter addressed
17 in this RFP.
18

19 9. On February 22 & 23, 2006, the state held teleconferences with
20 representatives of Aetna and Premera. I led the discussions and stated that the purpose
21 of the meetings was to bring the parties together and explain where we were at in the
22 proposal review process. I also stated we could not turn back the clock as to the
23 disclosure of Premera's best and final offer price, and there was not enough time to start
24 the evaluation process over again.
25
26

1
2 10. In developing a process that would allow the evaluation of Aetna's
3 proposal and have the procurement move forward to award, I advised Aetna and
4 Premera of two conditions that must be agreed upon. First, that moving forward with
5 the process was in the state's best interest, and second, that the process be as fair to both
6 parties as could be accomplished under the circumstances.

7
8 11. During the initial meetings with Premera and Aetna
9 representatives, I presented the following facts: (1) that Premera's proposal had met all
10 the RFP criteria, (2) it had been scored, and (3) the state moved to discussions followed
11 by a best and final offer. I also stated that Premera's best and final cost proposal had
12 been disclosed to an Aetna representative before the missing sections of Aetna's
13 proposal were located and before the Notice of Intent was rescinded. I further stated
14 that time was of the essence and it was impossible to reconvene the original PEC in a
15 timely manner.
16

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

21 13. Throughout these meetings with Aetna and Premera, I stressed the
22 fact that time was of the essence. At no time did I state that a single PEC would
23 evaluate both proposals (i.e., a rescore of Premera, and an initial score of Aetna). In
24 fact, neither Aetna nor Premera requested such action. The agreed upon process was for
25 Aetna's proposal to be evaluated and scored by the reconstituted PEC, with best and
26

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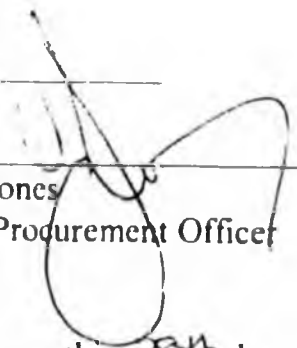
final offer discussions to follow with the procurement officer (not the PEC). The practice of having a PEC evaluate all aspects of a best and final offer is not required by statute, regulations or administrative policy, nor has it ever been the state's practice.

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

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

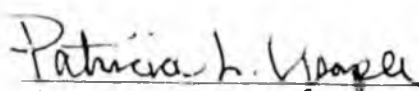
Further your affiant sayeth naught.

DATED: 4/28/06



Vern Jones
Chief Procurement Officer

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



Notary Public In and For Alaska

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




Exhibit A

RRP No. 2007-0200-6948

Agreed upon process by State of Alaska (State), offeror Premiera Blue Cross Blue Shield of Alaska (Premiera), 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 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.

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DIVISION OF GENERAL
SERVICES & SUPPLYExhibit A page 1 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: [Signature] 2/24/06
Date
Vern Jones
Chief Procurement Officer

Pravera 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

*YJM
2/23/06*

RRP No. 2007-0200-5948

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:

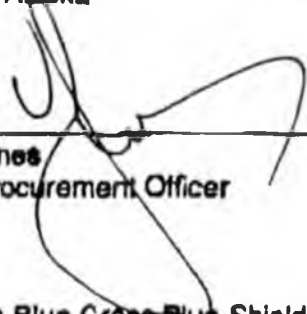
1. Thursday, February 23, 2006, Aetna proposal evaluation and scoring process is underway, and is anticipated to be completed by the reconstituted Procurement Evaluation Committee (PEC) which consists of three members, two of whom were on the original PEC that scored Premiera's proposal in the initial 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 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 38.30.240:
 - 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 38.30.240 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 24 AM 9 52
DIVISION OF GENERAL
SERVICES & SUPPLY

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

State of Alaska

By:



Vern Jones
Chief Procurement Officer

2/24/06

Date

Premier Blue Cross Blue Shield of Alaska

By:



Yoda Millo
Chief Legal Officer

2/24/06

Date

Aetna

By:

Mike Robinson
Western Regional Head
National Accounts

Date

Robert K. Stewart, Jr.
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(907) 257-5300
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Attorneys for Premera Blue Cross Blue Shield of Alaska

BEFORE THE ALASKA DEPARTMENT OF ADMINISTRATION
OFFICE OF ADMINISTRATIVE HEARINGS

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

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

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

I. INTRODUCTION

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

The award resulted from a modified evaluation process which was necessitated

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

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

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

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

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

II. STATEMENT OF FACTS

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

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

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

B. The Division's Discussions with Premera.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

E. Premera's New Best and Final Offer.

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

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

F. The Division's Best Interest Determination.

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

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

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

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

G. Premera's Implementation of the Contract.

Premera has been working diligently to implement the Contract, so as to ensure a smooth transition of administrative responsibilities from Aetna to Premera. In particular, Premera wants to make certain that the State's employees and retirees do not have a disruption in service and that Premera meets its contractual commitments. Due to the short time between contract award and the date services are to begin⁵, Premera has mobilized a dedicated team including representatives from all areas of its business to meet the implementation timeline. Davis Aff., ¶ 20.

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

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

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

\$2.3 million. Id., ¶ 21.

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

III. LEGAL DISCUSSION

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

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

who had actually scored Premera's best and final technical offer. Second, Aetna argues that Premera's best and final technical offer should have been completely rescored a third time by the same three member committee which evaluated its technical proposal.

Neither of those arguments have merit.

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

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

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

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

Agreement, ¶ 1 (emphasis supplied).

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

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

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

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

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

Agreement, ¶ 4.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

faith.

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

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

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

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

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

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

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

The following hypothetical illustrates these principles. An initial proposal

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

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

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

7.16(c), Information Technology, where the evaluation committee noted that Aetna stated it would not offer direct deposit; Section 7.16(f), Information Technology, where the evaluation committee noted that Aetna had simply not responded; Section 7.17(e), Client Service/Experience, where the evaluation committee noted that Aetna had failed to provide the required reference from a client which had terminated its relationship⁸; Section 7.19(j), Clinical Programs, where there were noted concerns that Aetna failed to provide necessary rebate information; and Section 7.21(t), Mail Order, where the evaluation committee found that Aetna had not identified a point of sale claims procedure. Aetna Attachment 3. Aetna fails to disclose in its briefing that it benefited from the very same type of input from the Division that it complains was unfair.

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

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

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

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

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

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

Id. at 131.

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

presenting a less desirable approach than that of Premera.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Exhibit 1.

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

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

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

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

2005 actual discount savings percentage of 13.6% supported by State and Aetna data.

Milliman concludes that Premera's assumptions, rather than those of Aetna, are

"reasonable assumptions" based on those data trends. It also notes that billed charge

trends are not anywhere near as high as 15.4% using national data. In fact, they are only about half that amount:

Our experience, nationally, indicates that billed charge trends have ranged over the past several years from the mid single digits to the high single digits (i.e., 5%-9%) for medical services (excluding Rx). Group by group variations in PEPM trend occur, however, such variations are generally driven by material changes in population risk, which we would not expect for the State of Alaska employee group, or other factors that cannot be foreseen at this time.

We observe nothing on the horizon to indicate that, at least nationally, billed charge trends will be materially increasing over the next two to three years. Hence, use of a historical trend as an indicator of future trends is a reasonable assumption.

Nightingale Aff., Exhibit 1.

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

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

month on its network discounts.

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

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

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

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

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

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

IV. FACTORS RELEVANT TO ANY REMEDY

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

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

A. Degree Of Prejudice To Premera.

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

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

B. Premera's Good Faith.

At no time during the course of this bid protest and appeal has there been any suggestion that Premera has acted in anything other than utmost good faith. Id. None of the issues raised by Aetna have implicated the conduct of Premera in any manner.

C. The Urgency Of This Procurement.

The State has a statutory obligation to issue a new contract for the administration of its health care plan. Since its contract with Aetna will expire on June 30, 2006, the State was required to enter into a new contract for these administrative services. The process for some members to make determinations about their benefit plan for the next contract year takes place in May and the Contract requires identification cards to be delivered by June 1. Realistically, there is no time for any work other than the work plan in place for Premera to assume administration of the State's plan.

D. The Extent To Which Premera Has Performed To Date.

Premera has been implementing the Contract diligently in accordance with its contractual obligations. It has spent over \$1.2 million already and will have spent a total of over \$2.3 million by the time of a decision in this case in implementing the Contract.

Davis Aff., ¶ 21.

Working closely with the State, Premera has accomplished the following: 1) completed implementation project planning; 2) hired various personnel, including

operations manager, care facilitation specialists, customer service representatives; 3) designed the members' identification card; 4) developed membership and billing procedures; 5) purchased Ingenix HCS System for provider reimbursement; 6) established banking arrangements, including appropriate accounts; 7) worked on finalizing contracts with vendors; 8) established toll-free numbers for 24-hour per day healthline and EAP provider; 9) held frequent meetings with the State to reach agreement on implementation details; 10) initiated system changes necessary to support the State's program; 11) developed required reports; and 12) entered into a letter of intent for the lease of office space in Juneau and started to build out that space to ensure that it will comply with the Contract by July 1, 2006. Id., ¶¶ 21, 22. The interests of Alaska state employees and retirees are best served by affirming the Contract award to Premera and avoiding the costs and delays which would result from termination of the Contract.


V. CONCLUSION

Aetna's arguments are without merit. Premera's proposal is superior on both administrative costs and technical aspects. The State fairly conducted a procurement process agreed to by all parties and there were no inappropriate discussions with Premera. Therefore, Premera submits that the decision of the contracting officer denying Aetna's protest should be affirmed.

Dated this 28th day of April, 2006.

Davis Wright Tremaine
Attorneys for Premera Blue Cross
Blue Shield of Alaska

By: _____

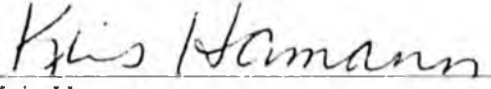

Robert K. Stewart, Jr.
Alaska Bar No. 8506082

Certificate of Service

The undersigned also certifies that on the 6th day of April, 2006, a copy of the foregoing was served via U.S. mail and e-mail on the following:

Jon Tillinghast
Simpson, Tillinghast & Sorensen
One Sealaska Plaza, Suite 300
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Attorneys for Premiera Blue Cross Blue Shield of Alaska

BEFORE THE ALASKA DEPARTMENT OF ADMINISTRATION

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

AFFIDAVIT OF THOMAS E. NIGHTINGALE

STATE OF GEORGIA)
) ss.
COUNTY OF FULTON)

Thomas E. Nightingale, being first duly sworn on oath, deposes and says as follows:

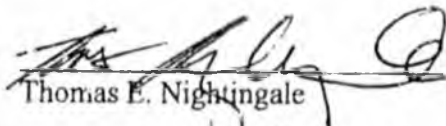
1. I am a Consulting Actuary with Milliman Consultants and Actuaries ("Milliman"). Milliman is one of the largest actuarial and consulting firms in the United States. I am competent to make this affidavit, and do so on the basis of personal knowledge except as may be otherwise stated below.

2. I have 17 years of work experience in actuarial science, having spent 13 years with Milliman and 4 years with Excellus Health Plans and its divisions, where my last position being Vice President and Chief Actuary for all Excellus Health Plan divisions. I

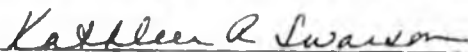
have worked extensively in the area of government contracting. I have a Bachelor of Arts from the University of the State of New York. I am a Fellow of the Society of Actuaries and a Member of the American Academy of Actuaries.

3. At the request of Premera Blue Cross ("Premera") I performed a review of the information prepared by David Braza, Vice President of Actuarial Services for Premera, which analyzes the financial aspects of the bids submitted by Premera and Aetna for the administration of the state of Alaska's health benefit plan. My conclusions are included in my letter dated April 28, 2006, a copy of which is attached to this Affidavit as Exhibit 1.

Dated this 28th day of April, 2006.


Thomas E. Nightingale

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


Notary Public in and for the State of Georgia
My commission expires: August 13, 2009
Printed Name: Kathleen R. Swanson



A MILLIMAN GLOBAL FIRM

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April 28, 2006

Via Email

Mr. John Pierce
Special Counsel
Premera Blue Cross
7001 220th Street SW
Mountlake Terrace, WA 98043

Re: State of Alaska Employee Benefit Administration Contract Award

Dear John:

Per your request, we have reviewed the State of Alaska, Total Cost Comparison, Premera vs. Aetna ("Total Cost Comparison"), prepared by David Braza. As part of our review we have considered a similar cost comparison described in the March 28, 2006 Appeal of Denial of Protest of Intent to Award in RFP No. 2007-0200-5946 ("Aetna's Appeal document"), submitted to the Alaska Department of Administration on behalf of Aetna by their outside counsel.

Provided below is an overview of the Total Cost Comparison methodology used by Mr. Braza. We also provide below our comments regarding the reasonableness of the underlying premises and assumptions used in the methodology and contrast them to the premises and assumptions used in Aetna's Appeal document.

This letter and any attached exhibits are intended for Premera Blue Cross. If this letter is released to third parties, it should be released in its entirety. Further, release of this letter is not intended to imply any commitment to such third parties.



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Overview of the Total Cost Comparison

As noted in David Braza's description of the Total Cost Comparison (Attachment 1), the purpose of his analysis was:

"To compare the *total costs* of the Premera and Aetna 2/28/2006 BAFO ("Best and Final Offer") for the State of Alaska. Total costs include costs that are both fixed and variable. Administration Fees and Pharmacy (Rx) Rebate credits are examples of fixed costs. Medical Claim Costs, Medical Shared Savings Fees, and Rx Claim Costs are examples of variable costs."

The Total Cost Comparison has a narrative which describes the methodology, starting premises and underlying assumptions. The narrative also documents the information Mr. Braza had available to him for the cost comparison. In addition, there are four exhibits, as follows:

1. **Exhibit 1** – Summary of projected costs for both Premera and Aetna in each contract year and for all years combined, with the difference in cost between Aetna and Premera noted. Projected costs are split into the following categories for each company:
 - Administrative Fee – Development is documented on Exhibit 2;
 - Medical Claim Cost – Development is documented on Exhibit 3;
 - Medical Shared Savings Fee – Development is documented on Exhibit 3;
 - Rx (Prescription Drug) Claim Cost – Development is documented on Exhibit 4; and
 - Rx Rebates – Development is documented on Exhibit 4.

The total net difference in projected cost as shown on Exhibit 1 for all cost categories and all years indicates Premera is less expensive than Aetna by \$10.7 million (\$3.02 million in year 1, \$4.22 million in year 2, and \$3.45 million in year 3). However, as noted above, the amounts shown on Exhibit 1 are developed in Exhibits 2, 3 and 4.

The Aetna Appeal document also contains a cost comparison that projects Aetna to be \$2.5 million less expensive than Premera over the three contract years. This is contained in the Affidavit of Matt McGuinness (Attachment 2). That cost comparison focuses only on administrative fees, the medical shared savings fee (termed Carrier Retained Discounts in the Aetna Appeal document) and Rx rebates. It does not address either projected medical or Rx claim cost.



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2. **Exhibit 2** – Overview of guaranteed administrative fees for both Premera and Aetna as stated in each company's Best and Final Offer (BAFO).

The Aetna Appeal document, and the Affidavit of Matt McGuinness, agree with Mr. Braza's summary of administrative fees. There appears to be no dispute that Premera is projected to be \$1.1 million less expensive than Aetna over the three contract years in administrative fees.

3. **Exhibit 3** – Development of projected medical claim cost, provider discounts and the medical shared savings fee for the three contract years. Critical assumptions in this exhibit include:

- Mr. Braza assumes that medical claim costs for the State of Alaska employees and their dependents will not differ between Premera and Aetna. Without having actual knowledge of either Aetna's or Premera's provider discounts in Alaska and other member locations, this appears to be a reasonable assumption.
- The most important difference between Exhibit 3 in the Total Cost Comparison and the Aetna Appeal document is the medical cost trend used to project the medical shared savings fee. Mr. Braza assumes that billed charges will trend at 6.6% per annum and that average discounts will remain constant at 13.6% of billed charges over the three contract years. As this is the key difference between the Total Cost Comparison and the Aetna Appeal Document, we discuss this in greater detail below (see section heading Trend in Medical Shared Savings Fee).

The Aetna Appeal document does not appear to directly address medical claim costs. However, in the Affidavit of Matt McGuinness, where he develops the medical shared savings fee (carrier retained discounts), he accords a starting value for discounts that is equal to Aetna's own experience (see page 3, part 17, second bullet). Aetna's implied assumption of equality of claim cost and discounts is, as noted above, in accordance with Mr. Braza's assumption in the Total Cost Comparison.

As noted above, the key difference in assumptions between the Total Cost Comparison and the Aetna Appeal document is the trend used to project the medical shared savings fee. In the Affidavit of Matt McGuinness, Aetna uses a trend of 15.4% per annum. We address this in more detail below (section Trend in Medical Shared Savings Fee).



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4. **Exhibit 4** – Development of Rx claim costs and guaranteed rebates. Mr. Braza uses information about Aetna Rx discounts as provided in their BAFO along with his own knowledge of Premera Rx discounts to project Rx claims costs for each company. Rebate amounts for each company are based on the guarantees provided in the BAFOs. While there is a small projected difference in Rx claim expense due to discount differences, the primary difference in projected cost between Premera and Aetna results from the significantly higher rebate guarantee provided by Premera.

The Aetna Appeal document does not appear to directly address Rx claim costs. The Affidavit of Matt McGuinness, Exhibit 2, has rebates imbedded with the administrative fee costs; however, we were able to back them out of the total. While Aetna's estimate of rebates for each company differs from Premera's estimate, there does not appear to be disagreement that Premera's rebate guarantee is significantly better (i.e., less costly) to the State of Alaska.

Summary of Difference in Projected Cost Between Premera and Aetna

Table 1 below contrasts the results of the two projections: Premera's Total Cost Comparison (prepared by David Braza) and Aetna's Appeal Document as shown on Exhibit 2 of the Affidavit of Matt McGuinness. Positive values in Table 1 indicated that Aetna is projected to be more expensive and negative numbers indicate that Premera is projected to be more expensive.

It is significant to note that the only negative amount in Table 1 is the medical shared savings fee differential being projected by Aetna. While there are minor differences for the other categories of cost, there appears to be general agreement between the two projections that, for all other categories combined, Premera will be more cost effective (i.e., less expensive) than Aetna. Since the medical shared savings fee is the primary area of disagreement between the two projections, we have addressed this in detail in the next section.



Table 1
Three Year Difference in Cost¹
As Projected by

<u>Cost Component</u>	<u>Premera</u> <u>Projection of</u> <u>Difference</u>	<u>Aetna</u> <u>Projection of</u> <u>Difference</u>
Administrative Fee	\$1,103,617	\$1,103,617
Medical Claim Cost	\$0	\$0 ²
Medical Shared Savings Fee ³	\$ 268,985	(10,340,821)
Rx Claim Cost	\$1,496,053	\$0 ²
<u>Rx Rebates</u>	<u>\$7,818,673</u>	<u>\$6,750,000</u>
Total Projected Cost Difference	\$10,687,328	(\$2,487,204)

Notes:

1. A positive difference indicates Aetna is projected to be more expensive. A negative difference indicates Premera is projected to be more expensive.
2. Not specifically addressed by Aetna, hence we have assumed they project no difference.
3. This is termed Carrier Retained Discounts in the Aetna Appeal document, Affidavit of Matt McGuinness.

Trend in Medical Shared Savings Fee

As noted above, the primary difference between the Premera projection of cost and savings between the companies and Aetna's projection of cost and savings between the two companies is the value of the medical shared savings fee *for Premera*. Aetna states in their appeal (see Exhibit 2 of Affidavit of Matt McGuinness) that their medical shared savings fee (Carrier Retained Discounts) is \$3.4 million dollars, which Mr. Braza has accepted and uses in his projection. Hence, there is no disagreement between the two projections on this point. However, there is considerable difference in the value of Premera's medical shared savings fee as projected by Mr. Braza and as projected in the Affidavit of Matt McGuinness. The key underlying assumption that develops the difference is the trend in per employee per month (PEPM) discount savings achieved. Both projections begin with an approximately equal discount savings of \$92 PEPM, but they trend this base estimate at different rates to each contract period. Dave Braza's Total Cost Projection uses a trend of 6.6% per annum, while the Affidavit of Matt McGuinness uses a trend of 15.4% per annum.



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The 6.6% trend in the medical shared savings fee used by Mr. Braza is the result of two assumptions: (1) that PEPM billed charges will increase at an annual rate of 6.6%; and (2) that the average discount savings of 13.6% be constant from the base period to all contract years. In our opinion these are reasonable assumptions for several reasons:

- Mr. Braza developed the 6.6% trend using the actual State of Alaska data available to him. He also developed the 2005 discount savings percentage of 13.6% using actual State of Alaska data and Aetna data available to him.
- Our experience, nationally, indicates that billed charge trends have ranged over the past several years from the mid single digits to the high single digits (i.e., 5%-9%) for medical services (excluding Rx). Group by group variations in PEPM trend occur; however, such variations are generally driven by material changes in population risk, which we would not expect for the State of Alaska employee and retiree group, or other factors that cannot be foreseen at this time.
- We observe nothing on the horizon to indicate that, at least nationally, billed charge trends will be materially increasing over the next two to three years. Hence, use of a historical trend as an indicator of future trends is a reasonable assumption.
- Use of a constant discount assumption is also in accordance with Milliman experience over the past several years. We have not observed Blue Cross Blue Shield discounts materially increasing or decreasing as a percentage of billed charges.

Unfortunately, the Affidavit of Matt McGuinness does not document the source of Aetna's assumed 15.4% annual trend. Without such documentation it is difficult to adequately evaluate this value; however, as we noted above, nationally, billed charge trends are not anywhere near this high (they are about half this amount). We therefore question the reasonableness of such a high trend, as it is outside of our expected range.

Claims Runout

Exhibit 5 of the Total Cost Comparison shows the expected cost of processing incurred but not reported (IBNR) claims upon termination of the contract. The estimated cost of approximately \$2 million is based on average IBNR levels for Premera's Medicare Supplement business in Alaska (with a 4% processing fee), which is reasonable basis for estimating the claim lag given the high percentage of retirees in the population.

The Aetna Appeal document also comments on Premera's IBNR processing fee at termination of the contract. Aetna estimates the fee to be almost \$5 million. This estimate appears high in light of Premera's claim lag for Medicare Supplement business.



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Conclusion

The Total Cost Comparison, prepared by David Braza, as well as the similar comparison contained in Aetna's Appeal document, is based on assumptions about the future that may vary from actual experience. We have noted, above, some of the key assumptions and commented on the likelihood that actual experience will vary from those assumptions. However, in our opinion, the assumptions used by Mr. Braza are reasonable and appropriate and are in accordance with our best estimate of future experience, given the information we have available to us.

In performing our review we have relied on information provided to us by Premera. If that information is inaccurate or incomplete, then the results of our review could likewise be inaccurate or incomplete.

Please let us know if you have any questions or need additional assistance.

Sincerely,

Thomas Nightingale, FSA, MAAA
Principal and Consulting Actuary

cc: John Bauerlein

Attachment 1

Total Cost Comparison
Prepared by David Braza of Premera Blue Cross

EXHIBIT 1

State of Alaska Total Cost Comparison Premera vs. Aetna

Purpose

To compare the *total costs* of the Premera and Aetna 2/28/2006 BAFO ("Best and Final Offer") for the State of Alaska. Total costs include costs that are both fixed and variable. Administration Fees and Pharmacy (Rx) Rebate credits are examples of fixed costs. Medical Claim Costs, Medical Shared Savings Fees, and Rx Claim Costs are examples of variable costs.

Data Sources

In performing a *total cost* comparison, I projected both the fixed and variable costs that the State of Alaska will likely see over the course of the future contract period. To do so, I used information that was made available to Premera during the bidding process, supplemental information made public from Aetna, and internal information relating to Premera that was not included in the Rx portion of the bid. The information used in the *total cost* projection includes:

- 1) Medical Claim Dollars by year for 2003, 2004, and YTD2005 (data through September). The Medical Claim Dollars were split between the active and retiree populations.
- 2) Employee/Member counts for 2003, 2004, and YTD2005.
- 3) Estimated Future Employee/Member counts from Aetna's 12/28/2005 bid.
- 4) Aetna Medical Network Savings (History) – As reported in Aetna's 12/28/2005 bid, page 2 of 7. Aetna also included an estimated calendar year 2005 savings using actual savings data through September of 2005.
- 5) Retail and Mail Prescription Claims - From Mike Wiggins' March 10th Affidavit - Exhibit 1.
- 6) Rx Rebate Guarantees – These guarantees were included in both Premera and Aetna's 2/28/2006 BAFO.
- 7) Aetna Rx Retail/Mail Discounts and Dispensing Fees - From Aetna's 2/28/2006 BAFO.
- 8) Premera Rx Retail/Mail Discounts and Dispensing Fees – Premera offered a straight pass-through of discounts and dispensing fees from our Rx vendor (presently Medco).

Note: The total cost comparison looks at all costs that the State of Alaska may incur – both fixed and variable (with the exception of dental claims). In contrast, the cost comparison produced by Matt McGuinness in his Affidavit, dated 3/28/2006, focused primarily on the fixed costs only with one variable cost component considered, namely, Medical Shared Savings Fees.

Total Cost Comparison – Explanation and Supporting Exhibits

Total Cost Comparison (Exhibit 1) – This exhibit summarizes the total expected dollar difference in costs for Administration Fees (fixed cost), Medical Claim Cost (variable), Medical Shared Savings Fee (variable), Rx Claim Cost (variable), and Rx Rebates (fixed). The total cost savings expected from the Premera bid is estimated to be 10.7 million dollars over the course of the three-year contract term. The savings are broken down as follows:

Administration Fee – 1.1M.
Medical Claim Costs – 0.0M.
Medical Shared Savings Fee – 0.3M.
Rx Claim Costs – 1.5M.
Rx Rebates – 7.8M.
Total – 10.7M.

Administration Fee (Exhibit 2) – The fees for both Aetna and Premera are as reported from Section 7.23 – Cost Proposal (All Services) – BAFO, dated 2/28/2006.

Aetna Medical Claim Cost Projection (Exhibit 3, Page 1 of 2)

Historical Periods – 2003, 2004, and YTD2005 (annualized)

The basis for the Aetna medical claim cost projection is the historical Aetna paid medical claim dollars and members over the period 2003, 2004, and YTD2005 (annualized). The medical claim dollars and members are used to derive Paid PMPM (Per Member Per Month) costs. The Paid PMPM costs were then converted to an Allowed PMPM costs. To do this, I assumed the member would be responsible for 10% of the provider allowed charges. Members are liable and pay providers for certain items, such as deductibles, coinsurance, and copays, if any.

Note: The 10% member responsibility assumption is used throughout the historical and projection period and is also used in the Premera projection.

Aetna Discounts and Savings PEPM – 2003, 2004, and YTD2005 (annualized)

The Allowed PMPM is converted to a Billed PMPM using the reported historical savings from Aetna's 12/28/2005 bid, page 2 of 7. Converting the Paid PMPM to Allowed PMPM and then to a Billed PMPM enabled me to impute an average historical discount and Savings PEPM (Per Employee Per Month) for Aetna. The average discounts using this imputation technique for 2003, 2004, and YTD2005 (annualized) are 11.9%, 12.4%, and 13.6%, respectively. The Savings's PEPM are 71.41, 78.90, and 91.91 for 2003, 2004, and YTD2005 (annualized), respectively.

Future Periods – 7/06 to 6/07, 7/07 to 6/08, and 7/08 to 6/09

The historical information is then used as the basis to project Aetna's medical claim costs into future periods. Using the historical data, I was able to derive a per annum claims trend of 6.6% as the difference in Billed PMPM figures from 2003 to 2004.

The 6.6% per annum trend is applied to the YTD2005 (annualized) Billed PMPM to project Billed PMPM figures into the future contract periods. Because the 2005 data (data available through September 2005) was annualized, the center of the YTD2005 claims is 7/1/2005. To project the Billed PMPM to the first contract period of 7/06 to 6/07, 18 months of trend was used. From there, only 12 months of trend was needed to move from the first to the second and from the second to the third contract periods.

Once the Billed PMPM figures for the future contract periods are established, I was able to derive an Allowed PMPM by assuming the provider discounts remain at 2005 levels - 13.6%. This produces PEPM Savings of 101.46, 108.07, and 115.17 for contract years 7/06 to 6/07, 7/07 to 6/08, and 7/08 to 6/09, respectively. The basis for this assumption is that as providers change their billing practices (pressure from self-pay lawsuits) discounts are anticipated to flatten in the future. Although, the discounts are anticipated to remain flat at 13.6%, the Savings PEPM will continue to grow as medical inflation continues to push costs higher.

Also, to test the sensitivity of the projection to higher than anticipated trends, I chose a 12.0% trend, which is nearly double the actual trend observed in the State's own experience from 2003 to 2004. The 12.0% per annum trend produces PEPM Savings of 109.26, 122.28, and 136.92 for contract years 7/06 to 6/07, 7/07 to 6/08, and 7/08 to 6/09, respectively. The total costs savings produced from the Premera offer (using the 12.0% trend) is still substantially more than Aetna, at 5.2M versus 10.7M over the course of the three-year contract period.

Finally, to calculate the projected Aetna Medical Claim Costs, the future Paid PMPM figures are multiplied by the anticipated members. As noted above, the member responsibility is assumed to remain at 10% of the provider allowed charges.

Premera Medical Claim Cost Projection (Exhibit 3, Page 2 of 2)

The starting point for the Premera Medical Claim Cost projection is the Billed PMPM figures from the Aetna Medical Claim Cost projection. The goal of the Premera Medical Claim Cost projection is to mirror the Aetna projection. Each projection uses the same assumptions. Although, we anticipate having significant claim savings versus the Aetna bid as referenced in Gubby Barlow's letter to the State of Alaska on 2/28/2006 (favorable provider discount differences that we have in the regions in which State employees live versus Aetna), the difference in claims over the course of the contract is reported to be the same as Aetna; meaning, network discounts achievable by Aetna and Premera are equal for purposes of this analysis.

Aetna Medical Shared Savings Fee

The Aetna Shared Savings Fee of 3.4M over the course of the contract term is obtained from the Matt McGuinness Affidavit, Page 7 of 8, dated 3/28/2006. It should be noted that Mr. McGuinness states that \$2,423,506 of that fee is for Aetna's "National Advantage Program". That program is described as a program based on Aetna's "special negotiated discounts on certain PPO out of network and indemnity claims". This fee is similar to the network discount fee that Premera eliminated from its final BAFO. Lastly, due to Aetna confidentiality designations, I was not able to independently validate the accuracy of the McGuinness Shared Savings Fee calculation.

Premera Medical Shared Savings Fee (Exhibit 3, Page 2 of 2)

The Premera Medical Shared Savings Fee is calculated based on the guarantee reported in the Premera BAFO, dated 2/28/2006. The guarantee is that Premera would obtain at least 100.0 PEPM savings from the provider discount arrangements. To the extent that the PEPM savings are less than 100.0 PEPM, Premera will reimburse the State of Alaska 30% of the difference between the actual savings PEPM and 100.0 PEPM. In this projection, I anticipate that over the course of the contract the shared savings fee charges to the State of Alaska would be 3.1M dollars.

As stated above in the "Premera Medical Claim Cost Projection", we anticipate having significant claim savings versus the Aetna bid. Our estimate is based on favorable provider discount differences that we have in the regions in which State employees and retirees live versus Aetna.

Base Rx Claim Cost Data (Exhibit 4, Page 1 of 3) – Both for Aetna and Premera

To project future Rx Claim Costs for both Aetna and Premera, base data from Exhibit 4, Page 1 of 3 was used. The base Rx claim counts for Retail and Mail were obtained from Mike Wiggins' March 10th Affidavit – Exhibit 1. The base Rx claim counts were further split between brand and generic drugs, assuming that 52% are brand drugs and 48% are generic drugs (the 52%/48% split is based on averages obtained from Premera internal experience). This split was necessary to project future Rx claim costs. Rx provider discounts are separately reported and split between the retail/mail setting and within the retail/mail setting by brand/generic. Paper claims were taken from the Aetna 12/28/2005 bid and assumed to remain at the 8,000 per year level for future contract periods.

In addition to the Rx claim counts, the Average Wholesale Price (AWP) per claim is needed to project future Rx claim costs. The AWP prices for retail/mail are estimates based on Premera's block-of-business. Future AWP prices are assumed to increase at the rate of 8.0% per annum (the 8.0% is based on historical and future experience that is anticipated by Premera over the course of the contract period). The average discounts as shown in Exhibit 4, Page 2 and 3 of 3 are applied to the AWP per claim to derive the net