



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

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

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



Retired Public Employees of Alaska, APEA/AFT

Anchorage Office

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Phone (907) 274-1703, (800) 478-9992, Fax 907-277-4588

March 24, 2006

The Honorable Frank Murkowski
Governor of the State of Alaska
PO Box 110001
Juneau, AK 99811-0001

Dear Governor Murkowski,

The Executive Board of the Retired Public Employees of Alaska respectfully request that the transfer of the Third Party Administrator (TPA) for AlaskaCare from Aetna to Premera Blue Cross be delayed pending the outcome of the challenge by Aetna to the State's decision to award to Premera Blue Cross. Our request is based on the belief that the bid and selection process was significantly flawed. Here listed are some of our concerns.

1. The selection process may have been violated by assigning different evaluators to the two bidders with only one out of seven persons having evaluated both bids.
2. Members of the retiree peer groups were not included on the evaluation teams nor were they consulted during the entire process. Nor was the usual expert health care consultant hired to advise the State, as had been done during previous contract awards.
3. There seems to be evidence of substantial inequality in soliciting clarifications and improvements to the two bidders.
4. There appears to have been summary rejection of a stand-alone pharmaceutical claim management contract.
5. There was loss by the State of bid documents necessary for the TPA bid from Aetna to be considered in concert with the regular review process.
6. And, there were other numerous inconsistencies, which appear to flaw the bid and selection process.

From past experience (ex: 1999 NylCare to Aetna) any transition from one TPA to another will involve extensive process problems resulting in poor service for over 45,000 AlaskaCare members for a significant period of time. For example: delays in payment of medical insurance claims; denial of legitimate medical insurance claims due to paperwork problems arising from the transfer process; communication problems with and between/among health care providers, recipients, and TPA; problems with coordination of benefits.

We believe the whole bid process should be revisited utilizing correct, objective and legal procedures. As things stand now there are numerous appearances of impropriety, which can and will taint the entire selection process and cause immense distrust among AlaskaCare beneficiaries.

For the Retired Public Employees of Alaska

Jay N. Dulany
Executive Vice-President

cc: Alaska Legislators

Protecting & Enriching

Your Retirement Years

Progression of Premera offer to the State of Alaska

As of February 14, 2006

3 year Fees:	\$	34,077,274
3 year Network access fee:	\$	8,880,513
3 year Rx Rebate guarantee	\$	(9,000,000)
3 year network savings retained by Premera @ 12%	\$	5,496,780
Total cost to State of Alaska	\$	37,454,567

As of February 28, 2006

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

Aetna Best and Final Offer to the State of Alaska

3 year Fees:	\$	32,054,852
3 year Network access fee:	\$	-
3 year Rx Rebate guarantee	\$	(2,250,000)
3 year network savings retained by Aetna*	\$	3,401,127
Total cost to State of Alaska	\$	33,205,780

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SENATOR CON BUNDE

District P

VICE-CHAIR: SENATE FINANCE COMMITTEE
CHAIR: SENATE LABOR & COMMERCE COMMITTEE

March 29, 2006

Commissioner Scott Nordstrand
Department of Administration
PO Box 110200
10th Floor, State Office Building
Juneau, Alaska 99811-0200

Dear Commissioner:

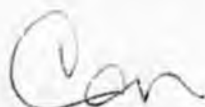
Thank you for coming before the Senate Labor and Commerce Committee on March 24, 2006 to discuss concerns with the members regarding the 3rd party administrator contract award to Premera Blue Cross.

After hearing your testimony regarding the state's response to Aetna's protest, it appears that you believe the Department of Administration carefully evaluated all aspects of the two competing bids to ensure that you received the best overall bid/cost to the State.

Information provided by Aetna after review of the bid documents indicates that when you take into account the administrative fees, network access fees, network savings and pharmacy rebates, the proposal from Premera could likely cost the state \$2 million more over the course of the 3-year contract.

This contrasting information leaves unanswered questions in my mind. Since you did not hire a consultant to advise the Department on analysis of these two bids, I am requesting from you a comparison and analysis of the two bids in each of the four areas mentioned above. Additionally, I would like to know how these costs were taken into account in each proposal's scoring so I may better understand the projected costs to our state's health care system.

Sincerely,



Senator Con Bunde, District P
Chair, Senate Labor and
Commerce Committee

cc: Governor Frank Murkowski

ALASKA BUDGET REPORT™

April 13, 2006

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ALASKA BUDGET REPORT

April 13, 2006

NO ISSUE NEXT THURSDAY

The Legislature will take its traditional Easter-Passover recess from Friday, April 14 until Tuesday, April 17. As is our custom, we do not publish the *ALASKA BUDGET REPORT* during the week following the recess. We will resume regular weekly publication on April 20.

OVERVIEW

Special session speculation, Senate spending

Lots of talk focused this week on the possibility of one or more special sessions. When, what, and how long are subject of speculation, and one's guesses tend to reflect one's political, practical or ideological inclinations. Those who don't want to see the governor's gas pipeline deal go through—and those who don't believe he really has a deal—tend to think a special session either won't happen or will be a relatively brief affair.

Stalwarts like the governor's chief gas line negotiator Jim Clark say there will be a special session immediately after the May 9 adjournment, and legislators should prepare for a long siege: first they'll need to take up some 10 to 20 amendments to the Stranded Gas Development Act and other statutes; then they'll need to approve the 300-page contract Clark says the administration will produce as soon as lawmakers approve an acceptable petroleum production tax. Somehow the public will need to be afforded a minimum of 30 days to review and comment on the behemoth contract, and at some point lawmakers will presumably campaign in advance of the August 22 primary election.

Pessimists see the possibility of a broader special session. "If we don't get the budget done and we don't get the PPT done, those'll be part of the call," House Speaker John Harris told reporters Monday. But House Majority Leader John Coghill said, "I don't know that the budget's going to be that tough—those issues seem small compared to the oil and gas issues."

Still, some speculate that if Senate Finance Co-chair Gary Wilken doesn't get his priority legislation through the House, he could hold up the capital budget, a strategy that proved effective for Senate Republicans last year. Wilken's SB 171, which would reallocate National Petroleum Reserve-Alaska revenue, is currently lodged in House Community and Regional Affairs, where co-chairs Kurt Olsor and Bill Thomas have suggested it will stay. But Wilken is nothing if not tenacious.

Harris expressed his hope that the oil and gas tax legislation will be completed independent of the budget to avoid vote-buying. "I don't want the PPT tied around the capital budget."

Asked if that would argue for delaying the PPT bill to a special session, Harris said that sort of horse-trading could take place anyway, "quietly, behind the scenes."

The respective PPT bills are being considered in the finance committees. At a Senate Finance work session yesterday members reached consensus on several provisions to be included in the committee's draft substitute bill, including a tentative decision to adopt a modified version of the Senate Resources credit of 5000 tax-free barrels to help small producers. The committee is scheduled to continue that work today at 8:00 a.m. Co-chair Lyda Green said she expects to have a draft substitute available for discussion when members return from their long weekend Tuesday.

Down the hall in House Finance, Co-chair Mike Chenault reportedly told colleagues he will have a draft bill to circulate after the break, but in a conversation with a reporter last week, Chenault said he intends to take whatever time is necessary to craft a bill the House can pass by a healthy margin.

Meantime, the Senate Finance Committee moved its operating budget to Rules, and the budget is expected to be on the Senate floor next week. It appeared Democrats, at least the two on Finance, had struck an agreement with the co-chairs. Committee Republicans—primarily the co-chairs—offered far more amendments than minority Democrats, who had an unusually high success rate: seven of ten minority amendments passed, several with Republican co-sponsorship.

Although the committee increased spending through the amendment process, the final committee bill appears to appropriate less money than the committee substitute introduced last week. That's because the final bill shifts \$20 million in debt service payments from the FY 07 column to the FY 06 column. That maneuver helped put the Senate bill \$50 million, or 2.1 percent, under the House bill in general fund spending.

The Senate Finance Committee also got a boost from \$8.5 million in unanticipated revenues from a semi-dormant account called the investment lost trust fund [see **SBS loss trust fund suggested for use in budget**, *ALASKA BUDGET REPORT*, March 3, 1992]. The committee used that money to supplant almost \$3 million in the Division of Elections. The mini-windfall also went to support increases to the Department of Education and Early Development's teacher mentor program, predator-control data collection, the Council on Domestic Violence and Sexual Assault, and other health and social programs.

The Democrats' failing amendments would have appropriated:

- \$350,000 for the Kotzebue domestic violence shelter;
 - \$156,700 for public television to reverse a 25 percent reduction from the governor's request;
- and
- \$763,400 for the Village Public Safety Officer program.

Unlike the House, the Senate bill appropriates the governor's full \$25 million request for power cost equalization (PCE), a program to offset the high cost of energy in rural Alaska.

A conference committee on the not-so-fast-track supplemental spending bill resolved the impasse over rural energy assistance, voting yesterday to approve the House's \$3.3 million for PCE and splitting the difference between the House and Senate positions on the other two open items: the

conference committee approved \$250,000 for the bulk fuel revolving loan fund and \$430,000 for the Arctic Winter Games Host Committee.

The supplemental bill, SB 232, appropriates a whopping \$765 million in additional FY 06 spending, including \$712 million in general funds. Legislative leaders will be quick to note that the general fund tally includes \$600 million "saved" via appropriation to the Alaska Housing Finance Corporation and the public education fund.

The House approved the conference committee report the same day. Minority Leader Ethan Berkowitz said the Democrats agreed to waive the normal 24-hour waiting period to expedite delivery of energy assistance. If the bill had sat, it would not have been taken up until next week. But the Senate has not yet approved the report, and with the governor in the Netherlands, it's unclear when he'll be available to sign the measure.

OIL AND GAS

ANALYSIS: Time running out on Murkowski gas line

Has time run out on Frank Murkowski's gas pipeline dream? The prevailing—though not unanimous—view among legislators, lobbyists and Capitol reporters is that it has, and no Stranded Gas Act contract is likely to be approved by this Legislature. The contract is the key inducement in the Murkowski plan to entice the three oil companies that own the North Slope's huge reserves of "stranded" natural gas to build an Alaska gas pipeline.

Before such a contract can be ratified, an increasingly improbable series of events must unfold, in sequence. The most immediate of these events is the passage of petroleum production tax (PPT) legislation in a form acceptable to BP, ConocoPhillips and ExxonMobil, the firms controlling the bulk of the North Slope's gas reserves.

The Stranded Gas Act contract on which the governor and the producers claim to have reached tentative agreement is designed to incorporate and make permanent for the next 30 years (45 years as it relates to gas) the PPT tax scheme. Every indication is that the legislation will pass—with terms that the three producers have intimated would be unacceptable, including a provision that makes the tax progressive at high oil prices, and possibly a base tax rate above 20 percent. If the companies' protests about these provisions are sincere, the firms would presumably reject any stranded gas contract locking them into such terms. In that case, there would be no contract to send to the Legislature.

Assuming, however, that the governor and the producers do come to agreement on a contract, the next step is to ask the Legislature to change various laws so the state can legally sign such a contract. For example, the Stranded Gas Act doesn't permit the governor to put oil tax terms in the contract. Yet two of the producers insist that they need fiscal certainty on oil as well as gas, and in the tentative contract, Murkowski gave them what they wanted.

To make this, and at least a dozen other deviations from current law legal, Murkowski needs a pile of new legislation, most elements of which are likely to be highly controversial. For example, one element will allow the contract to promise producers that the state will "indemnify" them for any extra taxes levied as a result of legislation passed by initiative.

"That's a poison pill for me, and I think that's the view in the building, not just among Democrats," commented Sen. Kim Elton earlier this week at a Senate Minority press availability.

"I think that would be a hard sell in the Legislature, to say that if the people of Alaska spoke on

an issue that we are going to ignore them," said House Majority Leader John Coghill, commenting on the initiative indemnification provision [see **Secret provision said to neutralize gas reserves tax initiative**, *ALASKA BUDGET REPORT*, March 16, 2006].

"If he calls a special session with that [indemnification amendment] on the agenda, it will be in the wastebasket in three days, and legislators will be on their way home, which is where they will want to be anyway," commented a longtime lobbyist not involved with the issue.

At a meeting last week with reporters, Murkowski chief of staff Jim Clark, confronted by profoundly skeptical reporters, put on a brave face. "We have no plan B," he claimed. The administration fully intends to push forward with the contract, and see it ratified by this Legislature. Peppered with questions about the effect of the impending election campaign season on the administration's plan, Murkowski's own ambivalent status as a potential candidate, and other factors suggesting time has already run out, Clark refused to identify a date after which it would be time to step aside and let the next governor and legislature try again.

"Believe it and it will happen," commented an administration official, explaining the dream-like atmosphere that pervades the narrow circle of advisors Clark has assembled to push the deal.

Rarely, but sometimes, belief alone makes remarkable things happen. The 1990 election of perennial losing candidate Walter Hickel is an example. There is at least one theory as to how the gas line contract could all come together. At the heart of this theory is the notion that the producers are now so afraid—that they will get a PPT tax with higher rates than they bargained for and without fiscal certainty, and that a frustrated public will pass the initiative taxing gas reserves—that they will agree to anything in an effort to forestall passage of the initiative. The producers will therefore give up on their demands for certainty on oil, abandon their desire for indemnification from taxation by initiative, and accept contract terms lasting a mere 20 years. Thus Murkowski will obtain a Stranded Gas Act contract that legislators will be willing to accept.

"That's a nice fantasy," commented a long-time oil industry lobbyist.

Rokeberg oil tax break bill to cost state \$157 million

A development incentive bill proposed by Rep. Norman Rokeberg is so broad oil companies could be eligible for more than 100 percent credit on their tax liability, said administration officials testifying on the measure. The House Oil and Gas Committee moved the measure nonetheless, after Chair Vic Kohring suggested the details could be addressed in the House Resources Committee.

HB 498, introduced April 3 by Rokeberg's House Rules Committee, is meant to mesh with the petroleum production tax (PPT) under consideration, Rokeberg said, and is primarily an effort to spur development of less-economic "heavy" oil on Alaska's North Slope. "It is a unique way to help finance that investment," Rokeberg told Oil and Gas members at an April 11 hearing.

The bill authorizes tax credits of 15 percent against the PPT for qualified expenditures on challenged or non-conventional oil or gas, and tax credits of 25 percent on expenditures for alternative energy resources such as wind and solar power. The bill is contingent on passage of a PPT bill. Rokeberg said the bill could move as standalone legislation, or could be added to the PPT bill as an amendment.

"Alaska depends on the oil industry and its development of new tools to sustain production," writes Rokeberg in his sponsor statement. He notes that production is declining and the 17 billion barrels of recoverable oil on the North Slope are increasingly expensive to produce. "Alaska needs to look at ways to encourage development that will provide easier access to these reserves. ... HB

498 is intended to encourage use of new technologies and methods of operation that are experimental and cutting edge.”

Kohring, a self-styled oil and gas industry champion, lauded the proposal. “My only regret is I didn’t think of the idea. ... This is a very good approach in light of the fact that we’re likely to see higher taxes on the industry; this is another way to help offset that.”

Industry representatives voiced strong support for the bill. Brian Wenzel, vice president of finance and administration for ConocoPhillips Alaska, used the opportunity to put in a plug for the governor’s version of the PPT bill, warning that the incentive bill under consideration won’t do much good unless lawmakers “find the right balance” in the PPT.

Officials from BP and Arctic Slope Regional Corporation also testified in favor of the bill, and Chevron U.S.A. Inc. submitted a letter of support.

But administration officials warned that the bill as drafted is overly broad and may result in unintended consequences. Robynn Wilson, director of the Department of Revenue’s Tax Division, expressed concern about administering the bill. “It doesn’t define ‘qualified expenditure.’” She noted that the bill needs clarification regarding time, place and allowable costs of qualified spending.

Regarding time, she said it’s unclear whether credits can be generated on past investment. “In terms of place, research and development are eligible activities even if they’re in Venezuela. It doesn’t say it has to be in Alaska.” The scope and type of allowable costs are likewise unclear.

For renewable energy, she pointed out that the bill provides a credit for both “development and use,” and encouraged lawmakers to consider and clarify their intentions.

Wilson also noted that the bill does not say how costs will be allocated. For example, oil from a given well contains a mix of grades, some of which may qualify for the incentive and some of which may not. Costs will also need to be allocated among owners of jointly owned or operated facilities.

Further, Wilson suggested the bill extends credits to technologies that do not need it. “New technology and more cost-efficient technology makes what was once considered difficult or unconventional now possible.”

As a parting shot, Wilson said many of the projects targeted in the bill qualify for federal credits, credits in pending PPT legislation and the proposed credit in HB 498. She listed the credits, noting, “That does add up to potentially more than 100 percent.” The credits Wilson enumerated sum to 105 percent.

“You’ll be refunding the industry—paying them to go out there and drill?” asked Kohring, who laughed and immediately added, “You don’t have to answer that.”

Wilson, who was not laughing, said, “And that does not include the state income tax deduction.” She said she’d be happy to work with the committee to clarify that the tax credits should not exceed 100 percent.

“I would like to think that’s not the case and I don’t expect it to be the case,” Kohring said. He said he wanted to get the bill out of committee and asked Wilson to work with Rokeberg and Resources Co-chair Ralph Samuels to address the issues she raised.

Bill Van Dyke, who directs the Department of Natural Resources’ Oil and Gas Division, added his concerns. He acknowledged that viscous and heavy oil on the North Slope are economically challenged. “But that being said, I would urge a little bit of restraint when considering incentives. ... The bill as drafted probably contains some unintended consequences.”

Van Dyke cited definitions and terms that "leave you wide open," and reiterated that the bill creates "a pretty challenging cost allocation down the road." He suggested, for example, that Rokeberg's definition of "heavy oil" needs to be tightened and linked to different measures, and that "fields" need to be narrowed to more specific locations.

Samuels, who also serves on the Oil and Gas Committee, noted the bill's inclusion of incentives for natural gas development. "If the gas line moves forward, that changes the economics of everything."

"I'd agree," said Van Dyke.

"Does that translate to, we don't need gas incentives?" asked Rokeberg.

Van Dyke replied, "What I struggle with today is I just don't know." He said in a year it will be clear.

Samuels said the Resources Committee had the same "chicken-and egg" debate during PPT hearings regarding incentives for Point Thomson: if there's a gas pipeline, the incentives aren't needed; if there's no gas line, the incentives aren't enough to make development economic.

Rep. Lesil McGuire suggested legislators could pass a bill with incentives for heavy oil only, and add provisions for gas once the outcome of gas line negotiations are clear.

Samuels flagged other issues, such as deductibility of seemingly unlimited research and development costs, even if the research and development takes place outside Alaska for projects outside Alaska. He also pointed out that the pending PPT legislation will provide a method of cost recovery because it taxes net profits. "If all your costs are [pre-tax], it shouldn't make as big a difference as under the current system."

During Wilson's testimony, Samuels asked, "How would you stop overhead from getting counted?"

"I'm not sure what the intention is in terms of overhead," Wilson said.

ConocoPhillips' Wenzel suggested even out-of-state research and development can benefit Alaska. "It's a question of whether Alaska wants to wait and let someone else do it, or accelerate development of this resource."

Rokeberg said he'd work with the department to narrow the scope of the bill and clarify terms. Kohring made it clear he wanted to move the bill on to better its chances of passage this year, and said he would draft a letter of intent for the Resources Committee.

The bill moved from committee without objection. Kohring and Rokeberg signed "do pass" on the committee report; Reps. David Guttenberg, Nancy Dahlstrom and McGuire signed "amend," and Samuels signed "no recommendation."

At press time Kohring had not released his letter of intent. His staff said the letter would likely ask the Resources Committee to address some or all of the following issues:

- whether or not to include incentives for natural gas development; or limit incentives to heavy oil;
- whether or not to include out-of-state research and development for out-of-state projects, and narrow the scope of qualified research and development;
- whether or not to limit the incentive to development of new fields;

- add sideboards to the definition of heavy oil;
- define qualified expenditures; and
- address the concern about credits exceeding 100 percent of a taxpayer's liability.

A fiscal note from Revenue projects the bill will cost \$138 million in FY 07 at Revenue's official oil price forecast, or \$157 million at \$60 per barrel. Costs include foregone revenue as well as costs of administering the tax break, which include three new auditor positions and one engineering geologist. The fiscal note was not discussed during the hearing.

EDUCATION

H. Finance weighs K-12 aid; Chenault pushes reallocation

Although the House disposed of its operating budget plan in March, the House Finance Committee just last week began serious consideration of how much money to spend on K-12 education.

"Even with the proposed \$90 million [increase] to the base student allocation, districts are experiencing large deficits up to 6 percent," Wrangell Superintendent Susan Sciabbarrasi told House Finance Committee members at an April 7 hearing on HB 362, the governor's proposal to increase state aid to districts. HB 362 and companion SB 238, which has not yet had a hearing, would raise the base student allocation by 8.8 percent, from \$4919 to \$5352 per pupil. Because the per-pupil allotment is adjusted as it goes through the foundation formula, the increase would boost the amount districts receive by 11 percent, a projected \$90 million over FY 06.

Those testifying expressed appreciation for the governor's proposal, but of the 15 people who spoke, only John Ringstad, representing the Fairbanks North Star Borough School District, indicated the governor's proposal would be adequate to forestall budget cuts in the coming year. School districts around the state told the committee that even with an additional \$90 million, retirement and health cost increases and other unavoidable costs would mean burgeoning class sizes and cuts to staff and programs.

"The PERS and TRS [retirement system contribution] impact is staggering," said Sarah Welton of the Matanuska-Susitna school board. The largest and fastest-growing district in the state, Mat-Su expects 580 new students next year and is facing health insurance cost increases of 27 percent next year, Welton said.

Stephanie Allison, a Juneau school board member, said the delay in the House Finance meeting (which was postponed from 9 a.m. to 1:30 p.m.) allowed her to bake several dozen brownies for her son's elementary school bake sale. The proceeds, she said, would be used to support a 100-percent-funded weekly art program at the school.

Few were surprised when Finance Co-chair Mike Chenault circulated an amendment to partially implement new district cost factors, district-specific differentials meant to offset the cost of providing education in different areas of the state. Chenault's amendment would implement 25 percent of the new cost factors recommended in a 2005 study by the University of Alaska's Institute for Social and Economic Research (ISER) [see *New school cost study would boost aid to rural districts*, *ALASKA BUDGET REPORT*, March 3, 2005].

Chenault, who represents the financially strapped Kenai Peninsula School District, has been trying to win approval of the new cost factors, and he said his proposal to phase in just one-fourth of the new cost factors is a compromise: "I'll probably have half the people in my district screaming at

me that it's not enough. But we've got to make forward motion, we can't continue to tell kids and parents and teachers in districts around the state that we don't care."

Chenault got sympathy from National Education Association-Alaska President Bill Bjork, who during public testimony called the Kenai district a "poster child" for struggling schools. "That school district has cut everything, and now they're cutting 70 more teachers," Bjork said.

ISER found school costs nearly 20 percent higher on the Kenai Peninsula than in Anchorage, the benchmark district. Kenai's current cost factor is 0.4, which suggests Kenai education costs are less than one-half percent higher than in Anchorage.

But inherent in any redistribution are winners and losers. The districts that gain little or nothing under the ISER study happen to include the populous and politically powerful Anchorage, Fairbanks and the Matanuska-Susitna Borough districts. The table on page 9 shows the distribution of the governor's proposed \$90 million increase and the \$24 million required to implement Chenault's proposal.

Chenault's co-chair, Anchorage Rep. Kevin Meyer, was forthright about his ambivalence: "I don't think there is anyone here who doesn't agree that there should be some sort of cost differential addition to this amount. But the way that it's set up is that the largest school district, the one I represent, gets nothing."

Meyer suggested simply distributing more money through the existing formula by adding to the base student allocation "so the larger school districts would also benefit."

Chenault contended that adding to the base student allocation simply exacerbates the existing inequities. "Every dollar that we add to the base widens the gap between districts that are short in the cost factor and those that are not."

Rep. Mike Hawker, also an Anchorage Republican, agrees that inequity exists; he said ISER's conclusions aren't perfect, but he's willing to support Chenault's amendment: "The answer before us is no more correct than the problem it's trying to solve. But it's a move in the right direction."

While House leaders other than Chenault may be reluctant to embrace ISER's recommendations, some Senate leaders are outright hostile toward the study.

"I have too much respect for the foundation formula to bastardize it with a study that is not valid or reliable," Fairbanks Republican and Senate Finance Co-chair Gary Wilken told a reporter last week. When ISER's Bradford Tuck presented his findings last year, Wilken issued a sharp critique, concluding, "With all due respect, Mr. Tuck, I'm not sure your study isn't a conclusion waiting for a study."

The existing cost factors were written into a 1998 rewrite of K-12 education funding statutes engineered largely by Wilken. The 1998 legislation required the Department of Education and Early Development to update the cost factors periodically, but department staff said the 1998 methodology was flawed, primarily because it had been based on historic spending patterns; they said the study ratified and institutionalized inequities in past appropriations [see *DOE criticizes McDowell cost study*, *ALASKA BUDGET REPORT*, February 25, 1998].

Proposed increased state aid to districts

Gov's Increase plus district cost factors as proposed by Chenault
(thousands)

District	BSA increase to \$5,352	cost factor (1/4 ISER)	inc. due to cost factor
Aleutians East	\$352	\$435	124%
Kake	\$102	\$126	123%
Chatham	\$215	\$264	123%
Hydaburg	\$42	\$49	116%
Klawock	\$73	\$74	101%
Bering Strait	\$2,216	\$2,097	95%
Annette Island	\$251	\$237	94%
Hoonah	\$169	\$156	92%
Lower Yukon	\$2,319	\$2,088	90%
Lake & Peninsula	\$609	\$525	86%
Yakutat	\$107	\$92	86%
Southeast Island	\$151	\$116	76%
Petersburg	\$432	\$309	71%
Alaska Gateway	\$436	\$308	71%
Yukon Flats	\$329	\$231	70%
Kuspuk	\$571	\$366	64%
Saint Mary's	\$178	\$110	62%
Mt. Edgecumbe	\$248	\$150	60%
Tanana	\$65	\$39	60%
Pribilof	\$144	\$85	59%
North Slope	\$1,942	\$1,135	58%
Southwest Region	\$825	\$467	57%
Haines	\$227	\$126	55%
Sitka	\$993	\$543	55%
Northwest Arctic	\$2,427	\$1,306	54%
Kodiak Island	\$1,934	\$1,022	53%
Iditarod Area	\$313	\$165	53%
Yupit	\$570	\$301	53%
Bristol Bay	\$183	\$94	51%
Ketchikan Gateway	\$1,507	\$758	50%
Kashunamiut	\$347	\$174	50%
Unalaska	\$368	\$179	49%
Wrangell	\$267	\$130	48%
Kenai Peninsula	\$6,030	\$2,900	48%
Pelican	\$16	\$7	45%
Juneau	\$3,341	\$1,280	38%
Cordova	\$350	\$132	38%
Yukon/Koyukuk	\$973	\$366	38%
Craig	\$431	\$161	37%
Lower Kuskokwim	\$4,699	\$1,632	35%
Copper River	\$571	\$194	34%
Chugach	\$104	\$35	34%
Aleutian Region	\$69	\$23	34%
Nome	\$669	\$203	30%
Delta/Greely	\$823	\$244	30%
Valdez	\$504	\$119	24%
Dillingham	\$477	\$104	22%
Mat-Su	\$9,843	\$1,614	16%
Nenana	\$378	\$34	9%
Fairbanks	\$9,419	\$809	9%
Skagway	\$97	\$5	5%
Denali	\$451	\$14	3%
Galena	\$925	\$13	1%
Anchorage	\$29,110	\$0	0%
TOTAL	\$90,198	\$24,146	27%

In 2001 lawmakers appropriated money for a new study meant to focus on actual costs of delivering education across the state. That study, done by a California-based team at the American Institutes for Research, actually *reduced* most rural districts' cost factors, but those recommendations languished after lawmakers and experts questioned key assumptions and data used [see **Lawmakers question new school cost study**, *ALASKA BUDGET REPORT*, January 29, 2003 and **ISER says 2002 school cost study flawed**, February 11, 2004]. ISER was hired in 2004 to revise AIR's study, and came to vastly different conclusions, with cost factors increasing by an average of 24 percent.

Alaska Kids Count, a statewide parent network lobbying for increased education funding, is recommending an increase of \$150 million in state aid, either through an additional \$60 million over the governor's increase to the base student allocation, or 50 percent implementation of ISER's district cost factors, a move that would also add roughly \$60 million, albeit distributed differently.

Mary Hakala, a Juneau parent who coordinates the volunteer network, said 25-percent implementation would boost Juneau's state aid by \$1.3 million but would still leave the district with a \$700,000 deficit: "Part of that deficit can be made up by increased local contribution. But how long can a community keep going to the cap? ... There are very few communities in this state that can meet that property tax burden any longer."

Wrangell is among several southeast communities that have a cost factor of 1.000, meaning its costs are presumed to be no higher than costs in Anchorage. Sciabbarrasi, the Wrangell school superintendent, testified in support of the new cost study, reminding legislators that they've been ignoring their own 1998 mandate to update the cost factors.

Last year Chenault attempted to push through the new cost factors by appending them to a high-priority school debt reimbursement bill, but burdened with that controversial freight, the bill, HB 13, stalled in House Rules. Legislators attached the school debt reimbursement extension to another bill during a special session [see **School aid change loaded on debt reimbursement bill**, *ALASKA BUDGET REPORT*, April 28, 2005, and **Special session final status**, May 31, 2005]. HB 13, having lain dormant since last May, is scheduled for a hearing in House Rules on April 20.

On the final day of last year's regular session, a frustrated Chenault created a legislative task force to address school cost factors, but that effort led to little more than an emotional outcry and political stalemate [see **Denied district cost factor fix, Chenault opts for task force**, *ALASKA BUDGET REPORT*, May 11, 2005 and **School cost study task force ends in limbo**, January 19, 2006].

The committee did not take action on Chenault's amendment or on the bill, which Meyer held in committee. Meyer said he'd like to add \$6 million more to the foundation formula by raising the base student allocation to \$5380, and adopt Chenault's amendment. The total foundation formula increase under that scenario would be \$120 million, according to DEED projections; Anchorage would see an additional \$2 million.

CONTRACTS

DOA botches benefits bidding, denies Aetna allegation

Department of Administration bungling has plunged the state into a dispute over who will be awarded a contract to administer more than \$300 million in annual health benefit payments to 68,000 state employees, retirees, and their dependents.

Murkowski administration officials admit key portions of the bid from Aetna and Aetna Life Insurance Company were misplaced in a locked, sixth-floor storeroom in Juneau's State Office Building, resulting in Aetna's disqualification. DOA initially awarded the contract to the only other bidder, Premera Blue Cross Blue Shield of Alaska, and later reaffirmed the award, saying Premera's proposal will save the state \$10.9 million over the three-year course of the contract.

"The basic procedure seems really screwed up," said Anchorage Sen. Con Bunde, one of several lawmakers who have expressed concern over the botched bidding. The Legislative Budget and Audit Committee on April 4 approved Bunde's request for an audit of the department's professional services procurement process over the last two years.

At a House State Affairs Committee hearing last month Rep. Norman Rokberg said that if it gets the state contract, Premera's share of the state's health insurance market could rise to 80 percent. He suggested DOA should have considered the effect the increased concentration might have on Alaskans' access to affordable health care.

At least once every five years the state is required to issue a competitive request for proposals seeking a contractor to administer its health benefit plans. Aetna, which has held the contract for the past 24 years, is scheduled to transfer benefits administration to Premera on July 1, notwithstanding a pending appeal.

Missing binders

Aetna says it received notice February 18 that the state had issued a statement of its intent to award the contract to Premera. According to Aetna's March 10 protest and request for stay of the award: "A subsequent phone call to Mr. Walt Harvey, the ... procurement officer, disclosed that the Division [of General Services] had lost the meat of Aetna's proposal, consisting of some four boxes of binders in which were contained a critical portion of Aetna's overall proposal."

Aetna says it submitted its bid in December, and didn't know until the February notification that its bid had been deemed unresponsive: "Over those two intervening months, the Division had never simply contacted Aetna ... and asked why there was such a gaping omission in its bid."

"The initial award to Premera was therefore, and in essence, predicated on the erroneous conclusion that Premera was the sole responsive bidder," Aetna concludes.

In the division's March 21 denial of Aetna's protest, Harvey, the procurement officer, admitted that the errant binders later turned up in the sixth-floor storeroom.

"There was a mistake, and we recognized it ... but we all took the responsible steps moving forward," said Vern Jones, the state's chief procurement officer. Jones says the state remedied the situation by rescinding the notice of intent to award the contract and asking Aetna and Premera to submit new best and final offers under a modified process agreed to by both parties.

Aetna, which had by then seen Premera's initial \$34-million-per-year bid, submitted a best and final offer of \$32 million per year. But Premera's new offer was \$31 million. On February 28 the state issued a new notice of intent to award a contract to Premera.

Allegations of unfair bid practices

At the heart of Aetna's complaint is the allegation that state officials broke state procurement laws by "coaching" Premera to improve its bid score and assigning different evaluators to review the two competing bids.

For example, Aetna alleges, Premera re-categorized "network access fees" following advice from the state, resulting in an apparent reduction of nearly \$7 million in its bid—a reduction Aetna considers deceptive.

Harvey, the procurement officer, doesn't deny that he worked with Premera on network access fees, explaining in his denial of Aetna's protest: "The state's benefits manager was concerned that the fee would artificially inflate the actual cost of claims and cause reporting issues. As such, the state asked Premera whether it was possible to bill this as a fee or cost in a different manner, rather than adding to the amount as a claim. Premera made adjustments in its best and final offer."

But Harvey contends similar discussions with Aetna resulted in a reduction of nearly \$3 million in Aetna's pharmacy rebate guarantee, which enabled Aetna to reduce its cost proposal accordingly.

State law allows such consultation under certain circumstances (AS 36.30.240):

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

Aetna says the state's communications were heavily weighted toward Premera: according to Aetna's protest, the state submitted 62 pages of questions and answers and had several private conversations with Premera, but had only had 3 pages of questions for Aetna. As a result, Aetna claims, Premera gained 629 points over its initial score, while Aetna gained just 21 points.

Harvey responds that because Aetna had the contract for so long, there was less to clarify, and that the state discussed different matters with Aetna. "Once again, the incorrect notion is advanced that the state must clarify and discuss the exact same items, or the same number of items with each offeror."

Premera spokesperson Scott Forslund said Aetna's allegation looks only at the "ear of the elephant." The bottom line, he says, is Premera will save the state money: "The [Premera] system is able to deliver much better network discounts than Aetna can deliver. Over the three-year contract we expect [the state's] overall claims cost savings to be somewhere in the range of \$45 million."

In a recent interview, Jones offered a similar argument: "Had we not lost their binder and disclosed Premera's price of \$34 million, do you think Aetna's proposal would have gone down by \$12 million? It defies logic."

Aetna's original bid was for \$45.4 million, compared to Premera's \$34.4 million. Aetna claims it's an apples-to-oranges comparison because various costs in the complex multi-part contract had been categorized differently.

Aetna's other main point of contention is that different evaluators scored the two competing proposals. "It is a rule of the most obvious and fundamental nature that an RFP cannot succeed unless the grades being compared come from the same judge," wrote Jon Tillinghast, a Juneau attorney representing Aetna.

"It is not disputed that the situation is not ideal," agrees Harvey, "however, the state proposed to reconstitute a Proposal Evaluation Committee to the best of its ability. The paramount issue here is that Aetna signed an agreement that allowed different evaluation teams to evaluate proposals submitted by Aetna and Premera."

That agreement, signed February 23 by Aetna, states that the new committee will consist of two of the three original committee members. But Aetna says the state used *two* new committee members.

"We would never have accepted such a major change in the agreement," said Aetna's west coast vice president Mike Robinson in a sworn affidavit.

In an interview, Robinson noted that the sole evaluator who judged both proposals gave Aetna a higher score. The final tally—the sum of the three evaluators' scores—was 4618.5 for Premera and 4482.5 points for Aetna, a difference of about 3 percent.

Aetna says the state should have retained a qualified outside consultant to ensure there was a level playing field after the missing binders were discovered. Jones dismissed that argument, saying, "We did exactly what the law dictates and we did what we said we would do."

Aetna seeks new scoring process

Aetna's appeal requests the state: re-score the parties' final proposals using a three-person team of qualified personnel assisted by a mutually agreeable expert consultant; consider total costs to the state; and cancel the contract with Premera and award a contract to Aetna if the new evaluation committee finds Aetna's proposal to be most advantageous to the state.

The department's response to Aetna's protest is due April 28.

Officials seemed uncertain about the scope of the administrative law judge's options for resolving the appeal. "That's been a question for some time," said Jones, the chief procurement officer. "I've been told that damages are limited to bid preparation costs, and yet there is some precedent for judges saying to re-bid a contract."

Administration Commissioner Scott Nordstrand, in testimony to the House State Affairs Committee on March 17, claimed re-bidding isn't an option. But Jim Duncan, a former commissioner of administration now with the Alaska State Employees Association said a hearing officer in a procurement dispute can reject the protest, find the protest has merit but not enough to throw out the contract, or require the state to re-bid the contract.

Assistant attorney general Marjorie Vander, representing DOA in the appeal, declined to discuss the scope of permissible rulings.

Aetna argues that there is precedent for canceling a contract on the basis of procurement violations. Its appeal cites the 1995 *Paul Wholesale v. State* case. "In that case, the Department of Transportation and Public Facilities cancelled all parties' rights in a procurement that had already resulted in a contract award to two different bidders because of certain alleged *ex parte* communications between one party and DOT&PF. ... Here, there exist specific statutory and regulatory prohibitions on precisely the kind of one-sided *ex parte* communications in which Premera and the Division engaged."

Legislators dismayed

At a March 17 Ways and Means Committee hearing, lawmakers questioned Nordstrand about the contract award. Nordstrand had come to share the good news that excess reserves had accrued in the state's retiree health trust fund, and \$50 million had been transferred to the state's retirement funds to help offset the retirement systems' multi-billion-dollar unfunded liability.

As the committee probed how the excess money had accrued, Chair Bruce Weyhrauch asked whether any of the state's savings was attributable to cost-saving measures by Aetna, the state's third-party health benefits administrator.

Aetna was responsible for implementing many of the cost-saving measures, Nordstrand said, but the policy decisions were the state's and would be carried out by any third-party administrator.

Nordstrand deflected questions on the contract controversy: "This will undoubtedly be the subject of litigation. It would be inappropriate for me to comment on the specifics."

Rep. Peggy Wilson expressed concern about changing administrators before the dispute is resolved. She asked, and Nordstrand confirmed, that effective July 1 every beneficiary would receive new health insurance cards with new phone numbers and contacts. "I'm not sure it's wise for us to proceed until this is settled," Wilson said.

Nordstrand said the procurement process requires a contract to go forward unless there are extraordinary circumstances. AS 36.30.585, concerning protest remedies, states that if a protest is sustained, "the protestor's damages are limited to reasonable bid or proposal preparation costs."

"You don't undo contracts, you don't un-lease buildings," Nordstrand said. "The state has an interest in having things go forward in an orderly process."

Rokeberg, who for years chaired the House Labor and Commerce Committee, said one of his primary goals as a legislator has been removing barriers to new entrants into Alaska's insurance market. Premera is already Alaska's biggest insurer, he said, and its share of Alaska's market may go from 60 percent to 80 percent with the state's contract award. "Did you consider in any way when you awarded the contract [to Premera] the impact on health care availability in the state?"

Nordstrand said he guessed that factor was not considered. Jones, in a later interview, confirmed that a bidder's market share was not considered. Jones said he didn't know how that could be factored in under state procurement laws.

Rep. Raiph Samuels noted that he'd heard from Aetna representatives, and the evaluation process they described "sure sounded odd to me."

Wilson again asked if it's possible to get out of the contract if Aetna's protest is found to be merited.

Nordstrand reiterated his claim that it doesn't work that way. He said the superior court process can take a year, and a Supreme Court appeal can take another two years: "The system is not set up to stop and wait. If you were to simply stop the award of state contract [or] you were three years later to undo contracts that had been performed by innocent bidders, that would grind the procurement system to a halt."

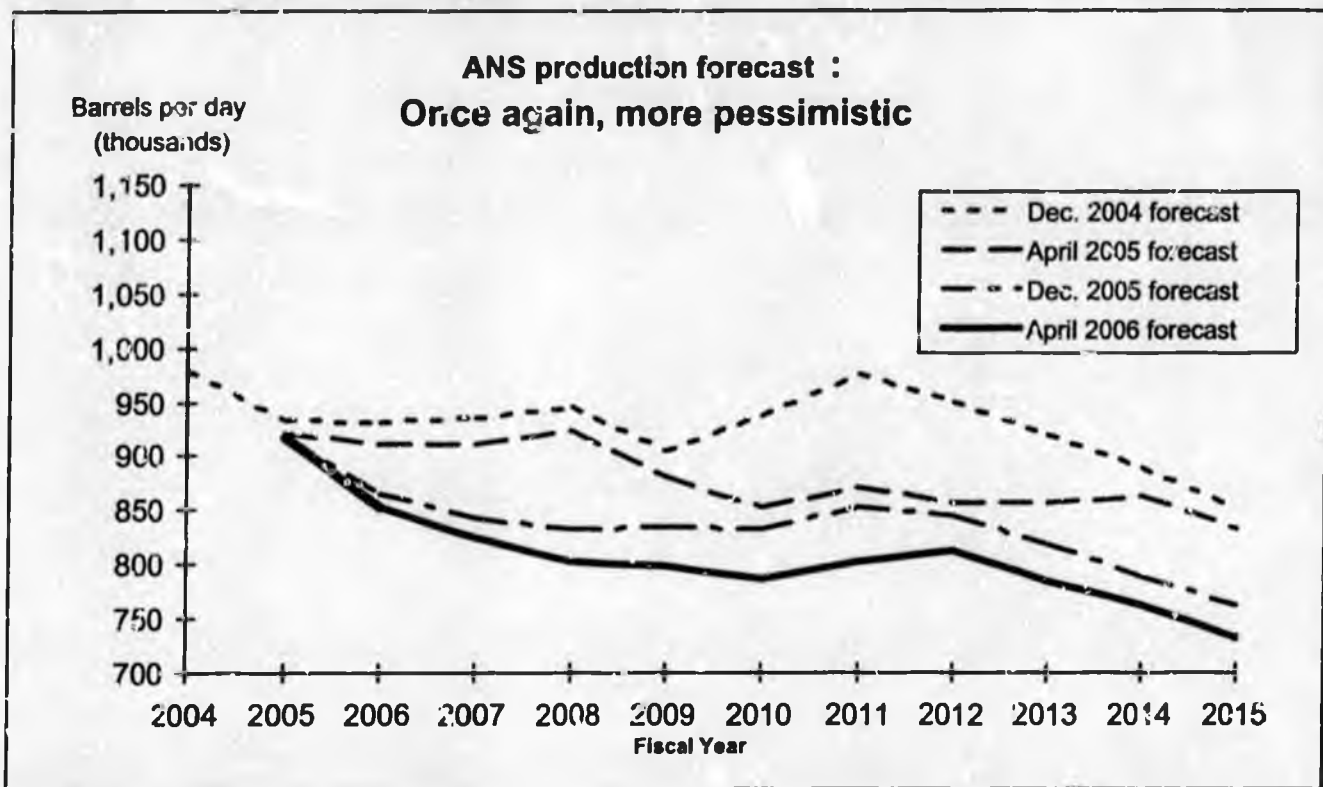
Nordstrand reminded the committee that the two companies drove down each other's initial bids, and noted that the department expects Premera to save the state an average of \$3.3 million per year for three years. "In this case, competition worked rather well."

REVENUE

DOR cuts production outlook, assumes big budget cut in FY 08

Early last month the Department of Revenue gave legislators and the public an advance peek at the key numbers in the state's official spring forecast, revealing a \$160 million boost in unrestricted general fund revenue in the current fiscal year—\$297 million more in FY 07, and \$391 million more in FY 08 [see DOR bumps up revenue forecast; Gov. says "save" it, *ALASKA BUDGET REPORT*, March 9, 2006].

Last Friday the department followed up with the full official forecast. As Revenue's contract petroleum engineer Dudley Platt warned in March, the department substantially scaled back its long-run forecast for Alaska North Slope production. Total production over the nine fiscal years from FY 07 to FY 15 is down by 4 percent from the amounts predicted five months ago in December 2005, and down 14 percent from the December 2004 forecast. The chart below shows the progression of forecasters' increasingly gloomy production outlook.



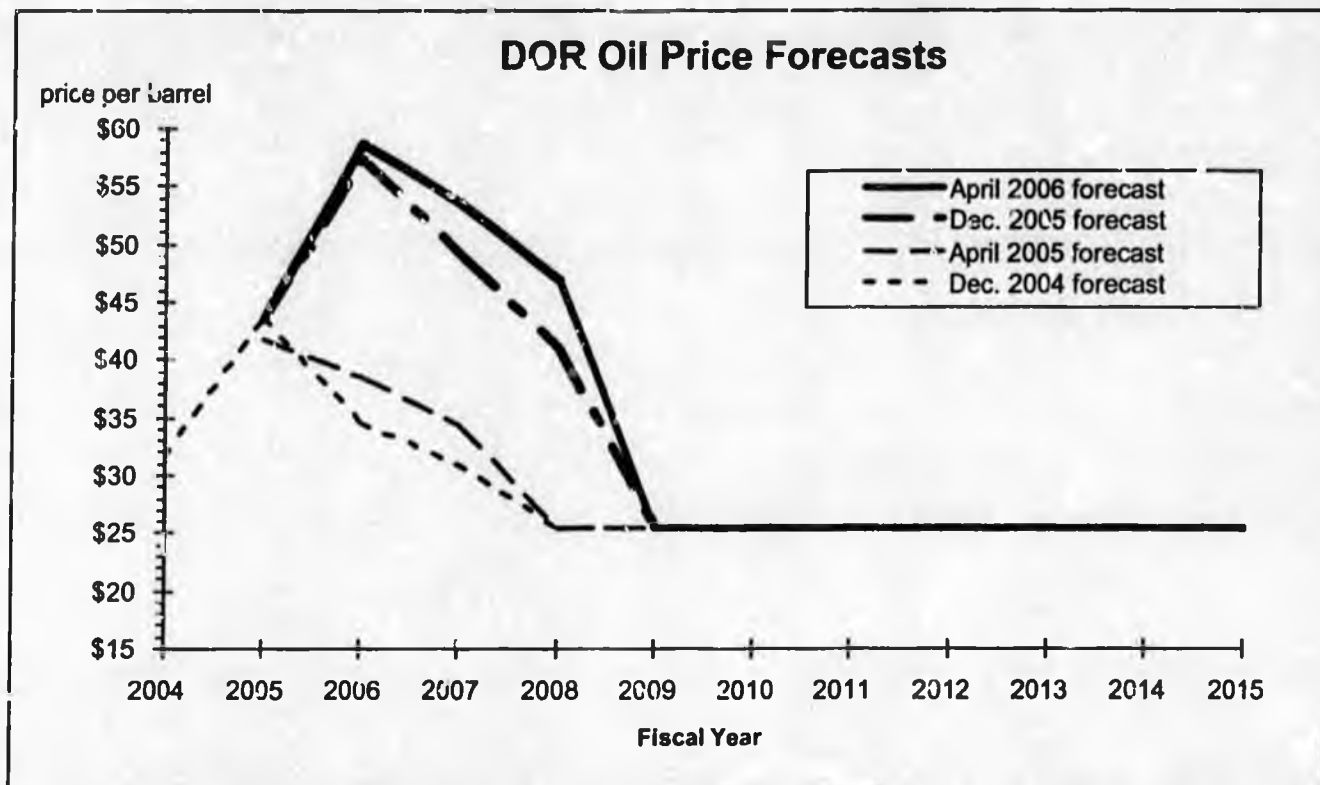
During March 15 hearings on Governor Frank Murkowski's proposed petroleum profits tax legislation, North Slope producers noted the reductions in successive state production forecasts. "We see the precipitous decline in those forecasts," said BP's Angus Walker. Walker suggested the current level of North Slope oil investment—\$1 to \$1.5 billion per year—translates to future production declines of 6 percent per year.

In his April 6 letter transmitting the forecast, Revenue Commissioner Bill Corbus predicted a much lower rate of decline: "After FY 2007 the decline of ANS production will slow to a ten-year average of 0.8 percent per year, due to smaller fields under development coming on line and the start-up of production from NPR-A in fiscal 2011."

Corbus acknowledged, however, the effects of unpredictable events, noting that a recent event has disrupted short-run production: "Since our production forecast was created there has been an oil spill from a feeder line at Prudhoe Bay, ... and about 10 percent of Prudhoe Bay's output was 'shut in.' ... Should production return by April 15, 2006 to pre-event levels, our fiscal 2006 production volume forecast could be revised downward by ... 1.3 percent, from 853,000 barrels per day to 842,000 barrels per day."

As of last week production remained at about 760,000 barrels per day, well below its pre-accident levels.

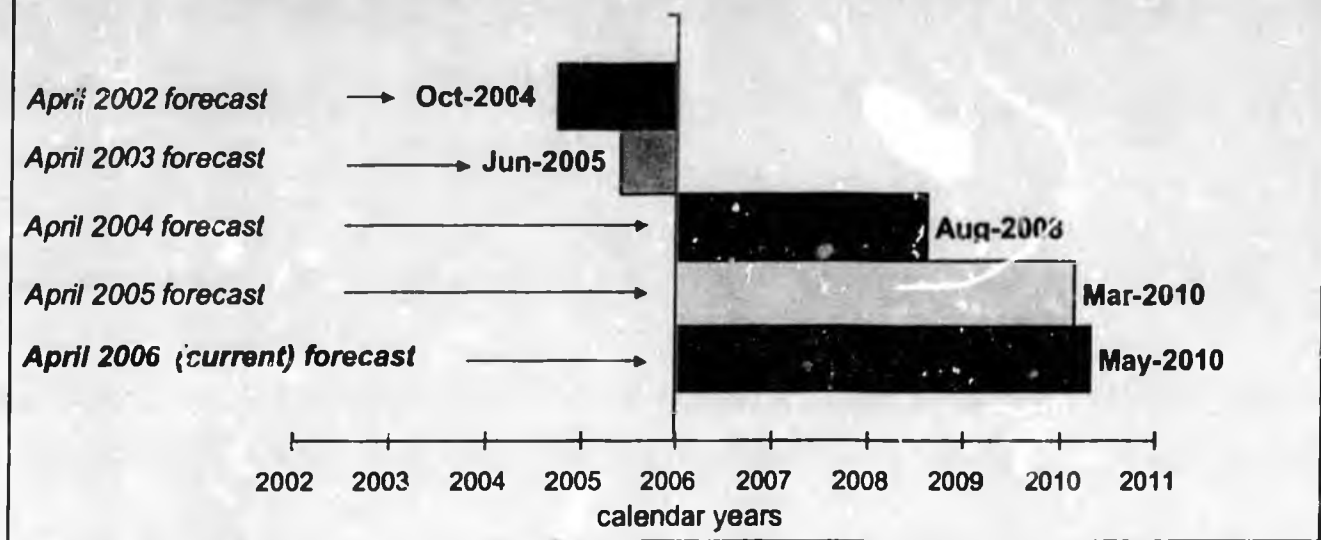
Oil prices, on the other hand, remain higher than predicted. But over the longer term Revenue sees a return to much lower prices. The chart below shows the official price outlook in the current and prior four forecasts.



"Our forecast for fiscal 2009 and beyond is \$25.50—a price level set in the spring of 2004," wrote Corbus. "Yes, this is lower than today's markets, and certainly lower than many pundits predict. We are cautious in our approach, and do not frequently change our long-term price forecast."

Every official forecast reveals a new date at which the constitutional budget reserve is expected to run dry. The CBR drop-dead date in the new forecast is May 2010, three months later than the date in the December 2005, and two months later than the estimate a year ago. The chart on page 17 shows the progression of drop-dead dates in the current and previous four forecasts.

CBR "Drop-dead" Dates in Five Official Forecasts



In addition to oil production rates and oil prices, the key assumption in predicting the drop-dead date is the size of the state budget. DOR now assumes a general fund budget of \$3.7 billion in FY 07, and \$3.2 billion thereafter. Should spending not shrink by that improbable \$500 million, the CBR will run dry much sooner.

TRANSITIONS

Bartholomew leaves permanent fund to build, climb, sail

Bob Bartholomew is resigning his job as chief operating officer of the Alaska Permanent Fund Corporation. He joined state government in 1987 as a project accountant at the Department of Transportation and Public Facilities, moving to Department of Revenue's tax division before joining the APFC as administrative officer in 2000. In 2005 he earned \$127,197.

"You never really hire Bob, you just rent him for a while," said former boss and fan Bob Storer, a retired APFC executive director. Storer noted that this isn't the first time Bartholomew has interrupted the standard career progression. During the 1990s he took more than a year off to serve as a professional Juneau firefighter and paramedic.

"I think it's important to have balance in your life," said Bartholomew, in explaining his current decision to leave state service for a while. The main item on his agenda is helping develop the Juneau Family Birth Center, a non-profit corporation formed by his spouse, Kaye Kanne, and others in 1998. Kanne is a direct-entry midwife. "They are in leased quarters now, but are planning a \$3 million construction project for their own space near the hospital," said Bartholomew in an interview yesterday. In addition to helping with that project, Bartholomew serves on the Birth Center's finance committee.

An experienced mountaineer with two ascents of 20,322-foot Mt. McKinley to his credit, Bartholomew is planning an expedition next December and January to scale Argentina's Mt. Aconcagua. At 22,833 feet, it's the highest point in South America. "In mountaineering terms, it's the next level up."

Also on the agenda is sailing his recently purchased 30-foot Rawson pilothouse sloop around Southeast Alaska, with a possible view toward voyages to more exotic destinations—"if Kaye and I get comfortable that we know what we are doing."

Bartholomew worked tirelessly to convince legislators to support the percent-of-market-value (POMV) constitutional amendment advocated by the permanent fund board, in which distributions from the fund would be based on the fund's total worth, not its investment income [see **Permanent fund trustees finalize POMV proposal**, *ALASKA BUDGET REPORT*, April 16, 2003].

The legislature's failure in 2003 to put that amendment to voters was a major disappointment. "The current formula is archaic. It's only a matter of time [until it's replaced], but it may not happen until something breaks." [See **Fund recovers after market slide eats \$400 million hole in principal**, *ALASKA BUDGET REPORT*, September 17, 2002.]

One such "break" could occur if permanent fund dividend (PFD) payments reach one of their cyclic highs during a period when poor earnings and high inflation-proofing requirements are eroding the fund's reserves. The dividend cycle is now on the upswing, with PFD outlays over the next four to five years expected to rise much faster than fund income. Projections show the PFD will reach \$2013 per person in 2009 [see **New projections show soaring PFD**, *ALASKA BUDGET REPORT*, March 2, 2006].

Bartholomew, 42, says he will likely return to state service sometime in the future: "I missed being tier 1 by some nine months. I've got a ways to go to real retirement." His last day at APFC will be June 2.

Quotable

"If we had another Prudhoe Bay we'd be tripping over ourselves to get there. We'd be digging a well with shovel; if we had to."

—Pat Foley, Pioneer Natural Resources' Alaska manager, suggesting the National Petroleum Reserve-Alaska is unlikely to yield another giant oil field, *Senate Finance*, April 7

Corrections and clarifications

Legislative Finance Division figures indicate the Senate Finance Committee's proposed FY 07 operating budget reduces Medicaid general fund appropriations by 2.5 percent, not 10 percent as reported in the April 6 issue. That issue also misstated Rep. Mike Kelly's first name.

A clarification to last week's table comparing alternative petroleum production tax proposals' treatment of the 470 fund: The House Resources bill redistributes the current five-cent-per-barrel response and prevention surcharge, reducing the response charge to 1¢ and increasing the prevention charge to 4¢. The Senate Resources bill *increases* the surcharge to 6¢, reducing the response portion to 1¢ and increasing the prevention surcharge to 5¢.

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

AETNA LIFE INSURANCE and)
AETNA,)
)
v.)
)
DIVISION OF GENERAL SERVICES.)

OAH No. 06-0230-PRO
RFP No. 2007-0200-5946

SCHEDULING ORDER

On April 3, 2006, the administrative law judge convened a telephonic prehearing conference. The participants were Jon Tillinghast, counsel for Actna, and Marjorie Vandor, Assistant Attorney General, counsel for the Division of General Services. James Sheehan, co-counsel for Actna, listened to the call.

I. General Considerations

Ms. Vandor confirmed that Primera has been notified of the protest as required by AS 36.30.570.

The parties agree that this matter can be resolved on written briefing, affidavits, and documentary evidence. Actna stated that its case in chief is fully presented in its March 28 appeal document and exhibits.

Although the administrative law judge's schedule would permit him to take up and decide this matter in the third week of April, Ms. Vandor must prepare for and conduct a major trial that will occupy her until April 21. To accommodate this commitment without requiring the Attorney General's Office to allocate an additional attorney to this appeal, the briefing schedule was pushed back by about two weeks from what might otherwise have been set. Ms. Vandor did not indicate that the additional delay of about two weeks in reaching a decision will alter appreciably the calculus for determining a remedy under AS 36.30.585(b), should the protest be upheld in whole or in part.

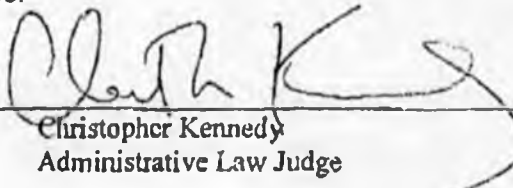
II. Schedule

The parties agreed to the following schedule:

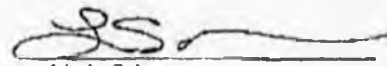
- a. No discovery is required.

- b. By close of business on April 28, 2006, the division will file and will deliver to counsel for Aetna its responsive brief and exhibits. The protest report under AS 36.30.605(a) may be combined with the responsive brief and exhibits, but shall in no event be filed later than April 28, 2006.
- c. Aetna will have until midnight on May 3, 2006 to file and serve a reply. Filing should be accomplished by hand delivery or pdf transmission to OAH in Anchorage. The reply will subsume any comments on the protest report under AS 36.30.605(c).
- d. If the administrative law judge desires oral argument, he will schedule it at his discretion.

DATED this 4th day of April, 2006.

By: 
Christopher Kennedy
Administrative Law Judge

The undersigned certifies that on April 4, 2006, this Prehearing Conference Order was distributed by fax to the following: Jon Tillinghast and James Sheehan, counsel for Aetna; Marjorie Vandor, Assistant Attorney General, counsel for the Division of General Services.


Linda Schwass

MEMORANDUM

*Department of Administration
Division of General Services
vern_jones@admin.state.ak.us*

STATE OF ALASKA

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

TO: Members of
the House Ways & Means and
the Senate Labor & Commerce
Committees

DATE: March 22, 2006

FROM: Vern Jones
Chief Procurement Officer

SUBJECT: Aetna TPA Protest and
Response

Attached, for your information is a copy of Aetna's protest to the State's award of the Third Party Administrator RFP (#2007-0200-5946) and the State's response.

DEPARTMENT OF ADMINISTRATION

DIVISION OF GENERAL SERVICES

March 21, 2006

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

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

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

Dear Mr. Tillinghast.

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

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

Stay Request.

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

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

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

Protest Issues

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

I. Introduction

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

II. Overview

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

RFP Section 7.23, Cost Proposal

Premera was allowed to submit another cost proposal.

RFP Section 7.03, Management Plan for the Project

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

RFP Section 7.15 Provider Discounts

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

The last two items were not specifically addressed in the PEC evaluation form and scoring criteria contained in RFP Attachment 1. Therefore, it was anticipated that Premera's cost proposal, if it chose to submit one, was the only section of its best and final offer that would require scoring.

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

Scoring occurred at this stage and a new Notice of Intent was issued to Premera based upon best and final offer scoring. Costs for each best and final offer were scored. Premera received 2,000 points for cost and Aetna received 1,931, as dictated by the scoring formula contained in the RFP.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

a) Administration

i) Customer Service Agree Disagree

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

Agree.

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

Agree.

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

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

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

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

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

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

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

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

If yes, for which benefits covered by this proposal?

Yes No

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

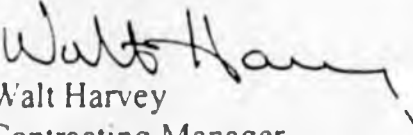
Finally, Aetna has overlooked a basic premise of procurement law - the presumption that state officials acted in good faith. Absent evidence that the PEC acted in an arbitrary or capricious manner when evaluating the offers, the PEC is presumed to have acted in good faith and in compliance with law.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

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

Conclusion

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

Sincerely,


Walt Harvey
Contracting Manager

cc: Margie Vandor
Assistant Attorney General



Fax Cover Sheet

TO: Vern Jones, Chief Procurement Officer
 State of Alaska

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

DATE: February 23, 2006

PAGES: 2 + cover

Message:

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

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

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

Exhibit A

RRP No. 2007-0200-5946

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

2006 FEB 23 PM 4 52

DIVISION OF GENERAL
SERVICES & SUPPLY

Exhibit A

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

State of Alaska

By: 

2/24/06
Date

Vern Jones
Chief Procurement Officer

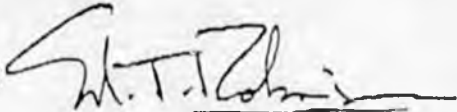
Pravera Blue Cross Blue Shield of Alaska

By: _____

Date

Yori Milo
Chief Legal Officer

Aetna

By: 

2-23-2006
Date

Mike Robinson
Western Regional Head
National Accounts

MEMORANDUM
STATE OF ALASKA
Department of Administration
Division of General Services

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

TO: Vern Jones
Chief Procurement Officer

DATE: February 27, 2006

FROM: Walt Harvey
Contracting Manager

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

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

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

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

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

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

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

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

- **The RFP scoring methodology is flawed**

- The scoring criteria for each of the three RFP sections (see attached criteria) indicates that the total possible score for Section 7 is 5,000. However, the combined scores for Sections 8 & 9 total 10,000. The RFP does not describe how the PEC would reconcile this point difference when comparing a single proposal for Section 7 to separate proposals for Sections 8 & 9.
- Sections 8 & 9 contain duplicate scoring criteria for "Management Plan for the Project" and "Essential Administrative Services." Each proposal would be scored according to this criteria. Therefore, there would be four separate scores under the multiple award combination (Sections 8 & 9), but only two scores for the single award scenario (Section 7). In addition, the maximum possible score for these two areas is 250 points under Section 7, while the score could reach 1,100 points for the same criteria under Sections 8 & 9.
- In addition to the scoring discrepancies cited above, there are multiple instances where the maximum possible scores for the same criteria are not equivalent.

7 07 Usual, Customary and Reasonable (UCR)	100
8 07 Usual, Customary and Reasonable (UCR)	150
7 11 Reporting	100
8 11 Reporting	150
7 12 Location of Work	150
8 12 Location of Work	200
7 13 Performance Standards	100
8 13 Performance Standards	150
7 14 Health Flexible Spending Account (Health FSA)	100
8 14 Health Flexible Spending Account (Health FSA)	150
7 16 Information Technology/Communication	150
8 16 Information Technology/Communication	200
7 18 Pharmacy Benefit Management Services	150
9 05 Pharmacy Benefit Management Services	350
7 19 Clinical Programs	150
9 06 Clinical Programs	500
7 20 Retail Network	100
9 07 Retail Network	450
7 21 Mail Order	100
9 08 Mail Order	450
7 22 High Deductible Health Plan and HSA Experience	50
8 18 High Deductible Health Plan and HSA Experience	150

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

• **Single Award**

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

• **Time Constraints**

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

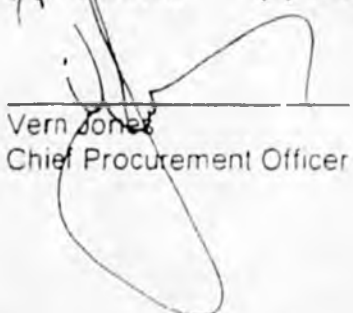
- o evaluate and score the two proposals submitted under Section 7 (including discussions/best and final proposals) and determine a winner,
- o evaluate and score the proposals submitted under Sections 8 & 9 (including discussions/best and final proposals if warranted), and determine the winner(s),
-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

• **Increased Costs**

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

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

Approved Disapproved



Vern Jones
Chief Procurement Officer

2/27/06
Date

Section 7 - All Services

7 03 Management Plan for the Project	100
7 04 Essential Administrative Services	150
7 05 Appeals Procedure	50
7 06 Vision Services	50
7 07 Usual, Customary and Reasonable (UCR)	100
7 08 Coordination of Benefits (COB)	150
7 09 Utilization Review	200
7 10 Employee Assistance Program and MMH	150
7 11 Reporting	100
7 12 Location of Work	150
7 13 Performance Standards	100
7 14 Health Flexible Spending Account (Health FSA)	100
7 15 Provider Discounts	250
7 16 Information Technology/Communication	150
7 17 Client Service/Experience	150
7 18 Pharmacy Benefit Management Services	150
7 19 Clinical Programs	150
7 20 Retail Network	100
7 21 Mail Order	100
7 22 High Deductible Health Plan and HSA Experience	50
7 23 Cost Proposal	2,000
7 24 Alaska Offeror's Preference	<u>500</u>
	5,000

Section 8 - All Services except Pharmacy Network and Benefit Management

8 03 Management Plan for the Project	150
8 04 Essential Administrative Services	200
8 05 Appeals Procedure	50
8 06 Vision Services	50
8 07 Usual, Customary and Reasonable (UCR)	150
8 08 Coordination of Benefits (COB)	150
8 09 Utilization Review	200
8 10 Employee Assistance Program and MMH	150
8 11 Reporting	150
8 12 Location of Work	200
8 13 Performance Standards	150
8 14 Health Flexible Spending Account (Health FSA)	150
8 15 Provider Discounts	250
8 16 Information Technology/Communication	200
8 17 Client Service/Experience	150
8 18 High Deductible Health Plan and HSA Experience	150
8 19 Cost Proposal	2,000
8 20 Alaska Offeror's Preference	<u>500</u>
	5,000

Section 9 - Pharmacy Network and Benefit Management only

9 03 Management Plan for the Project	250
9 04 Essential Administrative Services	500
9 05 Pharmacy Benefit Management Services	350
9 06 Clinical Programs	500
9 07 Retail Network	450
9 08 Mail Order	450
9 09 Cost Proposal	2,000
9 10 Alaska Offeror's Preference	<u>100</u>
	5,000

LAW OFFICES OF
SIMPSON, TILLINGHAST & SORENSEN, P.C.

ONE SEALASKA PLAZA, SUITE 300
TELEPHONE: 907-586-1400

JUNEAU, ALASKA 99801
FAX: 907-586-3065

HAND DELIVERED

March 10, 2006

Mr. Walt Harvey
Procurement Officer
Alaska Department of Administration
Procurement Officer
P.O. Box 110210
Juneau, Alaska 99811-0210

Re: Protest and Request for Stay of Award in RFP No.
2007-0200-5946
OUR FILE NO.: 1467.1

Dear Mr. Harvey:

This firm represents Aetna and Aetna Life Insurance Company ("Aetna"). The purpose of this letter is to respectfully file a protest by Aetna, under AS 36.30.560, of the Division of General Service's ("Division's") February 28, 2006 Final Notice of Intent to Award a Contract under the above-referenced RFP to Premera Blue Cross. The protest is supported by this letter; a Protest Memorandum dated this date, an affidavit and supplemental affidavit of Mr. Michael Wiggins, and attachments, exhibits and charts appended to those materials.

Request for Stay of Contract Award. Aetna also respectfully requests, pursuant to AS 36.30.575, that any award of a contract under the above-referenced RFP be staying pending the outcome of this protest and any appeal on a protest under AS 36.30.590. The bases for this request are as follows:

1. **The Merits of the Protest.** Aetna's claims are that the Division violated basic principles of competitive bidding by assigning different evaluators to award discretionary points to two different bidders; treating the two bidders with substantial inequality in soliciting clarifications and improvements to the two bidders; and apparently summarily rejecting the solicited option of awarding a stand-alone pharmaceutical claim management contract. These are the type of errors that courts (and independent hearing officers) tend to find destructive of the competitive bidding process, and are therefore also the kind of errors that can and do lead to compelled cancellation of any contract that may be let to

Premiera in the interim. Ignoring these claims, and executing a contract with Premiera would represent a high-risk gamble with the public's money, because if Aetna ultimately prevails, and contract cancellation is ordered, it will be the Division, and the general fund, that will be saddled with sorting out the resultant mess. A prudent administrator would not award a long-term contract under the RFP under these circumstances, and Aetna is hopeful that prudence will prevail here. The protest and appeal procedures are not lengthy ones. Balancing that short delay against the consequence of a ruling adverse to the Division counsels for granting the stay; and

2. **The Best Interest of the State.** This is not a case where a contract needs to be let to complete a public improvement that is currently non-existent or for which there is a pressing public need that is currently not being fulfilled. To the contrary, all of the services covered by the RFP are today being provided efficiently and reliably by Aetna. *Wiggins Aff.*, ¶30. Aetna is prepared to continue to provide those services under an amendment to its existing contract at the same prices that it is currently charging. *Id.* at ¶31. We understand the requirement of AS 39.30.090(a)(5) that the State's group insurance specifications must be made available every five years. But the State has satisfied that requirement with the RFP; there is no deadline on completion of the RFP process; and, as a factual matter, the state has already extended its Life/Disability Contract with Unum, and its current contract with its benefit consultants, beyond the 5-year period. *Id.* at ¶32. The State, then, is free to extend its contract with Aetna (if need be) to continue to provide services beyond June 30, 2006.

Additionally, in assessing the state's best interest, the Division must consider the hardship and disruption that will attend the near-immediate cessation of Aetna services. The State's existing clientele has been accustomed to relying on Aetna to promptly service claims; conversely, and particularly given the extraordinary number of retirees served by the State's system, substitution of managers will cause confusion; delay and loss of prescriptions and other medical services; and mental distress among both employees and retirees. This coupled with the disruption attended the transition to a new manager promises a sustained period of hardship on State employees and retirees if and when the transition is made. *See Wiggins Aff.*, ¶¶31-41. In the long run, these are not reasons to avoid a transition, but they are definitely reasons not to hurry to judgment, when time and some studied thought may prove the transition unnecessary, if not illegal.

For the foregoing reasons, Aetna respectfully requests that the award of any contract under the RFP be stayed pending disposition of the protest and any appeal.

Sincerely,

SIMPSON, TILLINGHAST & SORENSEN



Jon K. Tillinghast

1 affiliates. had been providing these services to the State for the past 24 years, why there
2 was such a gaping omission in its bid, the Division simply declared Aetna
3 "nonresponsive" for failure to submit a complete bid. *Id.* After considerable pleading
4 by Aetna that these boxes most definitely were delivered on time, the Division looked
5 again, and found them in a store room after a mere hour's search. *Id.* at ¶14.

6 The State promptly rescinded the Notice of Intent, and commenced another
7 evaluation process that is the subject of this protest. *Id.* at ¶17.

8 This protest is filed because, following the lost-bid episode, the Division
9 committed three errors that made it impossible for the Division, or anyone else, to
10 compare Aetna's response to Premera's response.^{2/} When comparability becomes
11 impossible, there is simply no way for the State (or anyone else) to intelligently decide
12 which proposal is better for Alaska and its taxpayers. That is what happened here.

13 The services for which the RFP solicited proposals—*i.e.*, to provide a wide range
14 of medical and pharmacy insurance management services to the State—have been
15 provided economically and efficiently by Aetna itself, or through its affiliates, for some
16 24 years. *Wiggins Aff.*, ¶4. Because many factors other than cost bore on the State's
17 choice of suppliers (factors such as expertise, system compatibility, ability to serve
18 clientele, and the like), a "Request for Proposal" format was utilized, rather than a
19 Request for Sealed Bids. Under the RFP cost accounted for only 40% of the total bid
20 evaluation; all the other relevant factors (loosely called "Non-Cost Factors") were
21 including in the remaining 60%. As to those Non-Cost Factors, each individual

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^{2/} There were, in fact, four bidders in response to the RFP, including Coresource and Walgreens. Neither of these latter two bids, however, were responsive (*see Attachment 8*), and this Protest will accordingly focus on the RFP's failure to provide a means of comparing Premera and Aetna.

SIMPSON, TILGHMIST & SORENSEN
One Sealaska Plaza, Suite 300
Juneau, Alaska 99801
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1 evaluator awarded points based upon that evaluator's personal judgment as to how the
2 proposer dealt with each Non-Cost Factor

3 When final proposals were opened, the cost of the two responsive proposals was
4 virtually identical. On the cost side, Premera was awarded 2000 points for having the
5 lowest cost bid, while Aetna was awarded 1930 points for having a cost bid that was only
6 marginally higher than Premera's *Attachments 5B and 5D*. The outcome of the bidding
7 process would thus depend on the point-evaluation process for the Non-Cost Factors.
8 Unfortunately, it was there that all three errors occurred. Those errors were these

9 **III. The Division Rendered Its Non-Cost Evaluation Useless by Assigning one**
10 **Evaluation Team to Grade Aetna, and then a Different Evaluation Team**
11 **to Grade Premera.**

12 The ultimate goal of the competitive bidding process—the one on which its
13 “integrity” turns—is to provide “the opportunity to compare multiple responsible bids.”
14 *Laidlaw Transit Inc. v Anchorage School District*, 118 P 3^d 1018 (Alaska 2005),
15 *emphasis added*. Any error that undermines the State's ability to meaningfully compare
16 competing proposals injures the unsuccessful bidder, to be sure, but more importantly, it
17 deprives the public, the courts, and the legislature of any basis to assess the propriety of
18 the agency's choice, and it renders the agency's action intrinsically arbitrary.
19

20 In this case, the points for Non-Cost Factors were awarded based on an evaluation
21 of largely qualitative (as opposed to quantitative) factors, ranging from the suitability of
22 appeals procedures to transition and training concerns. *Wiggins Aff.*, ¶43. Points were
23 awarded based on how individual evaluators liked, or disliked, the proposer's approach
24 to a host of issues. The Division assigned one 3-person evaluation team to evaluate
25
26

1 Aetna's bid, and then assigned a separate 3-person evaluation team to evaluate Premera's
2 bid. The two teams had only one member in common (that is, only one evaluator out of
3 a total of five actually evaluated both proposers); the other two members of each team
4 evaluated only the proposer who was assigned to that team. Each individual on these
5 separate teams then awarded point grades to a long list of subjective standards—
6 standards that would translate into very different point totals, depending on the
7 evaluators' individual background, grading policies and priorities.

8 The evaluators' separate scores for the subjective, 60% Non-Cost Evaluation
9 illustrate how idiosyncratic the Division's criteria really were.

10 Evaluator	11 Evaluated	12 Score
13 Miller	14 Aetna	15 2440
	16 Premera	17 2160
18 Gray	19 Premera Only	20 2207
21 Porter	22 Aetna Only	23 2120
24 Williams	25 Premera Only	26 1990
	Aetna Only	1585

19 *Wiggins Aff., Attachments 5B and 5D* The Division then took the average of each
20 evaluator's scores (i.e., Aetna's score was based on the average of Miller's, Porter's and
21 Shier's evaluation, while, Premera's was based on the average of Miller's, Gray's and
22

Williams' evaluation), and (because of the near-identity of the cost score), the proposer with the highest average evaluation won.³

It is also apparent that compromising the rating process by using non-comparable, idiosyncratic scoring affected the outcome. For example, the only evaluator who evaluated both applications, Ms. Miller, rated Aetna significantly higher than Premera

Aetna, it needs to be stressed, never consented to such a procedure. Once the Division discovered the missing boxes of Aetna bid materials, it knew that it must give Aetna a fair opportunity to compete for the contract. And so it agreed, first, to make a threshold call as to whether Aetna's proposal was "reasonably susceptible for award." *Wiggins Aff.*, ¶17; *Attachment 2*. If Aetna passed that first test (which it did), a subsequent evaluation of new "best and final offers" would be made.

Because one of the evaluators who had evaluated Premera's first bid was absent, the State needed to substitute one evaluator who had been on Premera's original three person team in order to have three persons available to make the threshold "susceptibility for award" review. *Id.* Aetna agreed to this process, for two obvious reasons: (1) the evaluation did not involve direct comparability of scores between Aetna and Premera, but only passage of a "susceptibility" threshold; and (2) only one evaluator was being substituted, not two.⁴

Aetna's assumption was that, once the new substitute evaluator was chosen, that same team (*i.e.* two original Premera evaluators and the one substitute) would be available to evaluate the "best and final offers" of both offerors—Premera as well as

³ *Attachment 5B at 2 (Aetna "best and final" summary sheet), Attachment 5D at 2 (Premera "best and final" summary sheet)*

1 Aetna No further substitutions would be necessary This is why paragraph 4 of the
2 Agreement letter (*Attachment 2*), which deals with the final evaluation of best and final
3 offers, says nothing about different contestants having different teams of evaluators.

4 The fact of the matter was that no bidder in his or her right mind would agree to
5 be scored by a team, a majority of which were different individuals from those who
6 scored the bidder's competitor A suggestion that Aetna agreed to such an approach is
7 inherently not credible.

8 In a nutshell, it is of no probative value that Mr Shier awarded Aetna 1585 points
9 for certain bidding variables, while one Mr Mike Williams awarded Premera 1990 points
10 for those same variables. It is a rule of the most obvious and fundamental nature that an
11 RFP cannot succeed unless the grades being compared came from the same judge. The
12 Division's decision to use two different evaluators for each proposer is remarkable.

13
14 **IV. The Division Created the Appearance of Coaching Premera to Improve
15 its Score, but it did not Extend Similar Courtesies to Aetna.**

16 Under AS 36.30.240 and 2 AAC 12 290, the Division may discuss proposals with
17 proposers "reasonably susceptible of being selected for award" in order to flush out
18 proposal details; and, those discussions can lead to changes in the proposer's so-called
19 "best and final offer."
20

21 This authority, however, is subject to a caveat—that all such proposers "shall be
22 accorded fair and equal treatment with respect to any opportunity for discussion and
23 revision of proposals" (AS 36.30 240(a)), and that "[t]he opportunity for confidential
24

25
26 ⁴ / As events would have it, the Division substituted two new evaluators even for the threshold
"suitability" evaluation. But Aetna never agreed to this, and was not informed at that time that
the Division was substituting two evaluators.

discussions, if held, must be extended to all offerors submitting proposals deemed reasonably susceptible for award." 2 AAC 12 290(a)

The Division held extensive discussions with Premera which had the effect of giving Premera detailed advice on how to:

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

Wiggins Aff ¶¶ 21-28a, Attachments 4A and 4B Not surprisingly, Premera accepted virtually every suggestion, and the gross point total from its Non-Cost factor evaluation resultantly rose by 629 points from its original proposal. *Compare Attachments 5C and 5D*

Aetna was offered no similar opportunity. The Division took 62 pages to suggest and elect specific changes to Premera's original proposal, conversely, the Division made only three pages of minor technical suggestions to Aetna (*Wiggins Aff, ¶ 19, Attachment 3*). Further, email messages document at least three private conversations between the procurement officer and Premera officials (on February 7, 9 and 15). See *Attachments 4A and 4B*

The raw page difference in communications between offerors yielded commensurate differences in the final point awards. And so, while Premera benefited by

629 additional points from the Division's extensive communications, Aetna's perfunctory dialogue with the Division yielded it only 21 additional points. Compare Attachments 5A and 5B with Attachments 5C and 5D

The relative impact of those questions on the scoring process was as follows:

COMPANY	EXTENT OF BIDDER QUESTIONING	ADDITIONAL POINTS FROM ANSWERS
Premera	62 pages of questions and answers, several private conversations	629
Aetna	3 pages	18

The extra points granted to Premera were doubly significant:

- o First, in the initial grading of the two proposers (the grading of the initial proposals, before the Division's extensive assistance to Premera), Aetna won the Non-Cost Scoring (i.e. the 60% of the bid that reflects proposal quality) by 541 points. Compare Attachments 5A and 5C; while
- o Second, even after its extensive assistance from the Division, Premera was able to beat Aetna's Non-Cost score by only 71 points. Compare Attachments 5B and 5D. It is apparent, then, that without these extensive suggestions from the Division, Premera would not have won the Non-Cost Scoring on the final "best and final" round; and, since the cost component of those bids was essentially equally for Aetna and Premera, Premera therefore would not have won the competition as a whole. The

summary of all of these scores is contained in *Chart 1* that is appended to
this protest

Unlike a request for bids, a request of proposals (or "RFP") allows the bidding agency to ask follow-up questions for the purpose of curing proposed deficiencies in the bid. *Gunderson v. University of Alaska, Fairbanks*, 922 P.2nd 229 (Alaska 1996). However, because of the potential for abuse in private bidder/agency conversations, courts are insistent on all bidders being given the "same opportunity" in curing bid shortcomings. *Id.* at 235, AS 46.30.240 (all qualified bidders shall be "accorded fair and equal treatment"; 2 AAC 12.290(a) (the same opportunity "must be extended to all offerors")

"Fair" contract bidding, and ensuring that no bidder "has received an unfair competitive advantage," is critical in order to ensure the best possible offer emerges from the bidding process. *McBirney & Associates v. State*, 753 P.2nd 1132, 1135 (Alaska 1988).

As the Division found, Aetna was an offeror whose offer was reasonably susceptible of award. As such, it was entitled to equal treatment in post-opening discussions with the Division. Courts are historically wary of inequality in Request for Proposal communications, because of the obvious potential for abuse in giving bidding agencies discretion to engage in private conversations with bidders. As a result, courts have been especially alert in demanding equality in substance, and not just in form, in an agency's treatment of competing proposers.

Here, the danger of apparent inequality emerges from the Division's own wording in its questions to Premera. Time-and-time again, the Division asks Premera to "clarify

1 a point that needed no clarification. In one class of cases, for example, Premera's
2 original offer unequivocally rejected a condition of the RFP. The Division, instead of
3 simply asking Premera to reverse its position, asked it to "clarify" that it would accept the
4 condition, despite the fact that its original proposal made it clear that it would not.
5 Capable of taking a hint, Premera routinely agreed to "clarify" that it would, after all,
6 abide by the RFP.

7 Mr. Mike Wiggins offers several examples of this in his affidavit (*id.* at ¶¶21-
8 28A), including the following:

9 *The RFP asks the offeror to agree that it will answer 85% of all*
10 *telephone calls within 30 seconds in any given month, or face penalties*
11 *RFP, §10 11(a)(1). In its original proposal, Premera "disagreed" with this*
12 *element of the RFP. This caused Premera to lose points on this issue in*
13 *its first proposal, receiving only 2 points from one evaluator (Gray) and 0*
14 *from another (Williams) out of a possible 5 points. To raise Premera's*
15 *point total, the Department asked Premera to "clarify" that it would answer*
16 *85% of all calls on a monthly basis, despite what it said in its proposal. In*
17 *response to the State's suggestion that Premera change its position, Premera*
18 *agreed to the State's demand. As a result, Premera received 3.5 added*
19 *points from one evaluator (Gray) and additional points on this particular*
20 *Performance Standard issue and additional points from another (Miller) in*
21 *its "best and final" proposal)*

22 *Id.* at ¶21. In a similar vein: (1) Premera clearly declined to offer direct deposit in its
23 original offer, but was convinced by the Division to change its mind (*id.* at ¶22), (2) the
24 Division asked Premera to "agree" to a service that it had unequivocally not agreed to
25 provide in its proposal. *Id.* at ¶23, and (3) at the last minute, the Division suggested some
26 re-packaging of nearly \$6 million of "network access fees" as some other kind of charge.
Id. at ¶28A. By agreeing to not call these charges "access fees," Premera was able to
lower the cost side of its bid by \$6 million (since "access fees" are counted in computing
proposal costs), and then recapture those same funds as "claim charges," which are not

included in the so-called "cost" of the bid. *Id.* The net result was to make Premier's bid look \$6 million more attractive, without offering any overall cost savings at all.

Supplemental Affidavit of Mike Wiggins

Additional "clarifications" that in fact resulted in significant point increases are given as examples at ¶¶23-28 of Mr. Wiggins' affidavit, and *Attachments 4D and 4E* are rife with them.

In *Dynacs Engineering Company v. United States*, 48 Fed Cl. 124 (2000), the government made a disproportionate effort to enhance one RFP proposer's bid, offering it multiple opportunities to cure deficiencies and working with the favored bidder to cure nine shortcomings while point out only two deficiencies in the other bidder's proposal. The government tried to justify this substantive inequality by claiming that it had made some effort to work with both bidders. The court disagreed, holding that, in RFP discussions, the equality of treatment among proposers must be "meaningful," and both sides must be given the "same opportunity" to address weaknesses. A bidding agency cannot get by with "not telling [one bidder] about its continuing weaknesses, [while continuing to inform the other bidder] about each of [its] weaknesses until [that other bidder] got it right." 48 Fed Cl. at 130. The disparity in both the frequency and substance of the communications among the two bidders in our case, and the vastly different results that the two sets of "discussions" achieved, proved that precisely the same inequity occurred here.

To the same effect is *Dubinsky v. United States*, 43 Fed. Cl. 243 (1999), *appeal dismissed* 215 F.3d 1350 (Fed. Cir. 1999), where the government also used the device of common discussions with potentially successful proposers to improve one bidder's

1 proposal, while giving *pro forma* attention to the other. Without substantive equality in
2 the discussions between proposers, the court held. "discussions with offerors readily
3 would be subject to abuse, merely becoming a cover for an agency's discussions with the
4 offeror it has selected to receive the contract prior to the formal selection decision." *Id.* at
5 263-4; see also *Paramax Systems Corp v CAE-Link Corp*, 1993 WL 485205 (Com
6 Gen.) (October 27, 1993), (where bidders "were not treated equally since they were not
7 given the same opportunity to participate in discussions and to amend their cost/price
8 proposals after BAFO," Comptroller General recommended a new round of BAFO's and,
9 if necessary, cancellation of the originally-successful contract).

10 So, once again, the Division has frustrated competition here, by refusing to put the
11 two bidders on the same playing field. Could the Division have gotten the best deal for
12 Alaskans by engaging in the same discussions with Aetna that it had undertaken with
13 Premera? We've no idea, because equality of treatment never occurred, and we are
14 therefore left, again, to compare Premera's apple to Aetna's orange

15 It may be that the evaluation was doomed to inequality from the outset, when the
16 Division first concluded that Aetna had failed to file the bulk of its bid. From that point,
17 and until the mistake was discovered, the Division considered Premera the only qualified
18 bidder, and one might expect a government agency to communicate exclusively with the
19 only bidder who (as the Division thought at the time) was qualified for the contract. That
20 spin gives the Division every benefit of the doubt. But even if that were the case, the
21 Division's ultimate failure came in its refusal to give Aetna's proposal the same
22 individual assistance once the Division learned that Aetna was a qualified bidder whose
23 bid was "susceptible for award." Once that happened, it was incumbent on the Division
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25
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1 included in the so-called "cost" of the bid. *Id.* The net result was to make Premier's bid
2 look \$6 million more attractive, without offering any overall cost savings at all.
3
4 *Supplemental Affidavit of Mike Wiggins*

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13 some effort to work with both bidders. The court disagreed, holding that, in RFP
14 discussions, the equality of treatment among proposers must be "meaningful," and both
15 sides must be given the "same opportunity" to address weaknesses. A bidding agency
16 cannot get by with "not telling [one bidder] about its continuing weaknesses, [while
17 continuing to inform the other bidder] about each of [its] weaknesses until [that other
18 bidder] got it right." 48 Fed Cl at 130. The disparity in both the frequency and
19 substance of the communications among the two bidders in our case, and the vastly
20 different results that the two sets of "discussions" achieved, proved that precisely the
21 same inequity occurred here.

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23 *dismissed* 215 F.3d 1350 (Fed. Cir. 1999), where the government also used the device of
24 common discussions with potentially successful proposers to improve one bidder's
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1 to level the playing field, by helping Aetna improve its proposal to the same extent as it
2 already had with Premera. The Division, in a word, cannot excuse such clear inequality
3 of treatment by its own mistake, particularly when the Division later had every
4 opportunity to rectify that mistake. As part of rectifying its error, the Division should
5 have retained a qualified consultant, as it has customarily done in the past, to make sure
6 that a level playing field was created at the end of the process, and that the State could
7 therefore conduct a fair and reliable comparison of the two bids.

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

11 Pharmacy claim management services are included within the scope of work of
12 the RFP, however, the Division recognized, in the RFP, that the State might benefit by
13 breaking out pharmacy services on a stand-alone basis, and award a contract for those
14 services separate from the main body of the work. *RFP at 9-10*. To that end, offerors
15 were invited to submit stand-alone bids for pharmacy claim management, and the State,
16 in turn, committed to separately evaluate stand-alone proposals. *Id.*

17 Aetna, in fact, timely submitted a stand-alone proposal to manage pharmacy
18 services in conformity with the RFP. *Wiggins Aff.*, 142. But the Division never
19 evaluated that proposal as part of the overall cost of the project. From the February 28,
20 2006 Final Notice of Intent (*Attachment 8*), it appears that that Aetna's proposal was
21 simply "rejected" out of hand.

22 _____
23 ¹⁷ Since the RFP is in the possession of the Division, a separate copy of that document is not
24 being appended as an Attachment. Aetna respectfully requests that the RFP and all amendments
25 thereto be made a part of the record of this protest.
26

1 The three phase rating system in the RFP—that is, a separate scoring system for
2 comprehensive, comprehensive-less-pharmacy, and pharmacy-stand-alone programs (*id*
3 at Sections 10-12) recognizes the State's uncertainty as to the most cost-efficient means
4 of providing these services, and likewise recognizes the value of a three-part scoring
5 system to resolve that uncertainty. As the RFP recognized, it may be more economical
6 for the State to award one contract, to one contractor, for the all contract services except
7 pharmacy, and another contract for pharmaceutical claims management only to a second
8 contractor

9 Indeed, as Mr. Wiggins explains in his affidavit (¶42 and *Exhibit 1*), publicly-
10 available information now demonstrates that the Division would have saved
11 approximately \$3 million if it had awarded the pharmaceutical claim management portion
12 of the contract to Aetna, and the remainder of the contract to Premera. This is precisely
13 the scenario that the Division thought might happen in the RFP, and it was an arbitrary
14 departure of the RFP for the Division to ignore that scenario in the final bid evaluation.

16 VI. Relief Requested

17 For the foregoing reasons, Aetna respectfully requests that

- 18 (1) The State rescind the Notice of Award for the RFP to Premera, and the
19 services envisioned by the RFP continue to be provided by Aetna under
20 Aetna's existing contract, as extended, with the Division for a period of not
21 less than six months,
- 22 (2) if a contract with Premera is executed before this relief is granted, the
23 contract with Premera be cancelled,
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- (3) the Division utilize the intervening six months as a necessary cooling off period,
- (4) at the close of the cooling-off period, the State solicit new Best and Final Offers from Aetna and Premera;
- (5) the new Best and Final Offers be evaluated by a qualified evaluation team that includes one consultant with demonstrated expertise in medical claim benefit management and acceptable to the Division, Premera and Aetna; and
- (6) during any period of continued provision of service by Aetna under paragraph (2), Aetna will provide that service at current contract costs with the Division

DATED March 10, 2006

SIMPSON, TILLINGHAST & SORENSEN
Attorneys for Aetna



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AETNA'S FIRST EVALUATION SCORES

Evaluators:	Miller	Shier	Porter	Average
Total Evaluator Scores From Aetna's First Evaluation	2415	1570	2105	2030.0

PREMERA'S FIRST EVALUATION SCORES

Evaluators:	Gray	Jarrell	Miller	Williams	Average
Total Evaluator Scores From Premera's First Evaluation	1692	1290.5	1156	1810	1379.5

AETNA'S SECOND EVALUATION SCORES

Evaluators:	Miller	Shier	Porter	Average
Total Evaluator Scores From Aetna's Second Evaluation	2440	1585	2120	2048.3

PREMERA'S SECOND EVALUATION SCORES

Evaluators:	Gray	Miller	Williams	Average
Total Evaluator Scores From Premera's Second Evaluation	2207	2160	1990	2119.0

CHART 1

PREMERA'S FIRST EVALUATION SCORES

Technical Proposal	Gray	Jarrell	Miller	Williams	Average
10.01	40	55	25	75	40.0
10.02	81	67.5	83.5	80	77.3
10.03	50	25	25	45	33.3
10.04	26.5	14	4	20	14.8
10.05	40	55	40	60	45.0
10.06	62	85	51	125	66.0
10.07	166.5	91	127	190	128.2
10.08	127.5	85	87	120	99.8
10.09	80	32.5	11	90	41.2
10.10	67	60	50	100	59.0
10.11	75	42.5	63.5	75	60.3
10.12	84	45	54	85	61.0
10.13	191	155	171	200	172.3
10.14	135	90	72	125	99.0
10.15	104	50	62.5	65	72.2
10.16	79	90	40	100	69.7
10.17	91	85	51	70	75.7
10.18	69	70	46.5	90	61.8
10.19	80.5	65	67	70	70.8
10.20	43	28	25	25	32.0
Total	1692	1290.5	1156	1810	1379.5

AETNA'S FIRST EVALUATION SCORES

Technical Proposal	Miller	Shier	Porter	Average
10.01	100	55	100	85.0
10.02	125	80	75	93.3
10.03	50	30	50	43.3
10.04	35	25	40	33.3
10.05	100	70	75	81.7
10.06	150	85	150	128.3
10.07	200	120	165	161.7
10.08	150	85	140	125.0
10.09	100	70	100	90.0
10.10	150	75	120	115.0
10.11	90	50	95	78.3
10.12	100	70	90	86.7
10.13	225	200	225	216.7
10.14	140	85	120	115.0
10.15	150	90	90	110.0
10.16	150	95	135	126.7
10.17	150	120	135	135.0
10.18	100	60	60	73.3
10.19	100	80	90	90.0
10.20	50	25	50	41.7
Total	2415	1570	2105	2030.0

PREMERA'S SECOND EVALUATION SCORES

Technical Proposal	Gray	Miller	Williams	Average
10.01	80	75	75	76.7
10.02	128	125	100	117.7
10.03	50	45	45	46.7
10.04	50	45	35	43.3
10.05	90	100	70	86.7
10.06	122	125	125	124.0
10.07	176.5	200	190	188.8
10.08	142.5	125	120	129.2
10.09	92	100	90	94.0
10.10	150	100	100	116.7
10.11	88.5	80	80	82.8
10.12	86	100	90	92.0
10.13	207	225	200	210.7
10.14	145	100	130	125.0
10.15	133.5	100	130	121.2
10.16	150	125	100	125.0
10.17	115	140	90	115.0
10.18	75	100	90	88.3
10.19	83	100	90	91.0
10.20	43	50	40	44.3
Total	2207	2160	1990	2119.0

AETNA'S SECOND EVALUATION SCORES

Technical Proposal	Miller	Shier	Porter	Average
10.01	100	55	100	85.0
10.02	125	80	75	93.3
10.03	50	30	50	43.3
10.04	50	35	40	41.7
10.05	100	70	75	81.7
10.06	150	85	150	128.3
10.07	200	120	165	161.7
10.08	150	85	140	125.0
10.09	100	70	100	90.0
10.10	150	75	120	115.0
10.11	90	50	100	80.0
10.12	100	70	90	86.7
10.13	225	200	225	216.7
10.14	150	95	130	125.0
10.15	150	90	90	110.0
10.16	150	95	135	126.7
10.17	150	120	135	135.0
10.18	100	60	60	73.3
10.19	100	75	90	88.3
10.20	50	25	50	41.7
Total	2440	1585	2120	2048.3

AFFIDAVIT OF MIKE WIGGINS

STATE OF ALASKA)
) ss:
FIRST JUDICIAL DISTRICT)

1. I, MIKE WIGGINS, being first duly sworn, to depose and say that

2. I am 51 years old. My home address is 6628 138th PL SW, Edmonds, WA 98026

3. My current position for Aetna is Vice President National Account, Seattle, Washington. I have worked for Aetna for 8 years.

4. The RFP that is the subject of this protest is to provide medical and/or pharmacy benefit management claim services for the State of Alaska. Aetna and its affiliates have held this contract for these services for 24 years

5. My own job experience in this field involves 25 years - directly related to the pricing, operational monitoring, and consulting on health insurance related matters.

6. In terms of involvement with health management related RFPs, I have had, in addition to the current RFP in question, involvement with the prior (2) five year bids, one with NYLCare, another with Aetna and (1) prior State of Alaska RFP with Blue Cross of Washington and Alaska.

7. My previous past job titles have included: Manager of Actuarial and Underwriting - Medical Service Corporation of Eastern Washington, now a subsidiary of Blue Cross of Washington and Alaska, Manager of Experience Underwriting, Vice President of Underwriting, Vice President Large Group Consulting and Product Development (All positions with Blue Cross of Washington and Alaska), Senior Benefit Consultant, William M. Mercer, Solo Consulting Practice - Health Care Tactical Partners, Director of Public Programs - NYI Care, a subsidiary of New York Life

8. My current job function includes overall account management responsibility for government entities with more than 3,000 employees in part of

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Aetna's West region. This includes, for example, the State of Utah, State of Idaho, State of Nevada, King County, and the City of Seattle. I have also worked with entities such as the State of Alaska in a consultative capacity to help them design health care programs to meet the financial challenges they face in delivering benefits to their active and retired employees. In my current role, I also act as the point person in negotiating future administrative fees, responding to Requests for Proposals, and service related issues.

9. Specifically for the State of Alaska proposal at issue in this protest, I coordinated the responses to the bid questions and the responses that crossed many different disciplines within Aetna. At least 10 Aetna staff members were committed to insuring Aetna's bid response was complete and reflected answers to the questions raised by the State.

10. By virtue of this experience, I have personal knowledge and am competent to testify regarding the subject matter of this affidavit.

Aetna's bid response to RFP 2007-200-5946 - Issued
November 30th 2005

11. On December 22, 2005, AETNA submitted a timely, complete, responsive and responsible proposal on the above referenced RFP. The cover page of Aetna's submission is attached as *Attachment 1*. Aetna's bid response contained separate responses to Section 7 (Medical, Dental, LTC and Pharmacy Services), Section 8 (Mental, Dental and LTC Services) and Section 9 (Pharmacy Benefit Management Services). The separate requested responses to the RFP were submitted because one of the stated purposes of the RFP was to allow the State to determine whether it was more economical to award all services on one contractor, or award a stand-alone Pharmacy Benefit Management Services contract to a second contractor.

12. Prior to Jan. 20, 2006, the first scheduled award date of any parts of the RFP in question; I contacted Victor Lemur, who was then the initial procurement officer, asking if there were any problems with the Aetna RFP response. This was due to the fact that Aetna had heard nothing to date about our response to the RFP. His response was no comment and that the bid evaluation would take longer than the original stated date of Jan. 20th.

13. On Saturday, February 18th, 2006, AETNA was notified that its proposal to RFP 2007-0200-5946 was being rejected as being non-responsive. This came in the form of a faxed Notice of Intent to Award the contract to Premiera which Aetna received on that Saturday. Subsequently, I was informed via a telephone call with Mr. Walt Harvey, who was now the procurement officer, that Aetna's bid response was being rejected as non-responsive because it was missing key requested information that was part of the RFP. In the course of this conversation I informed Mr. Harvey that he was mistaken. Together, we confirmed what Aetna material he had in his hands and what materials he should have had. Based upon this conversation, it became obvious that Mr. Harvey was missing a 6 inch binder which contained the meat of Aetna's responses to which Aetna sent multiple copies to the State. Again I stated I had confirmation that the State received our RFP bid materials. At this point Walt said he would get back to me within an hour.

14. One hour later, Aetna's multi-copied bid responses were found in their boxes in a storeroom. No explanation was given as to how or why the boxes were lost, just an apology. Also, no explanation was given as to why they didn't call Aetna sooner.

15. Upon discovering the State's mistake, Mr. Harvey immediately withdrew the State's Notice of Intent previously given to Premiera.

16. Mr. Harvey also stated that he needed to speak with the Attorney General to determine what steps needed to be taken.

17. Following internal dialog, a scheduled meeting was held. The meeting included Aetna, Premiera and State Representatives at which time the State laid out its next steps in the procurement process which included: (1) Aetna's newly discovered RFP response would receive a threshold evaluation to see if it was "reasonably susceptible to award"; (2) since one of the evaluators who had evaluated Premiera's first offer was absent, we agreed that the State could substitute one reviewer on our reviewer panel for the purpose of determining whether we met the threshold of "reasonably susceptible to award"; (3) if we met that threshold, the State would share with Premiera, Aetna's original offer because the State had shared with Aetna, Premiera's unsolicited original "best final and final offer", and (4) Aetna and Premiera would then be allowed submit another "best and final offer" that would be subject to comparative evaluation and the best offer would receive the contract. It was always our understanding that this second evaluation, in which

Aetna and Premera would be directly compared, would be evaluated by the same individuals. That agreement is reflected in the letter appended as *Attachment 2*. Note that this agreement only permits one different reviewer to review the threshold question of whether Aetna's proposal was "reasonably susceptible to award" (Aetna was not told, and was not made aware at the time, that the Division substituted two evaluators for even the first "reasonably susceptible to award" evaluation). Nowhere in that agreement did Aetna agree to multiple different reviews in comparing the final "best and final offers" that would be submitted by both sides, and under no circumstances would Aetna have agreed to such an arrangement.

18. Aetna's initial responses were deemed "reasonably susceptible of award," and therefore, thereafter, both Aetna and Premera submitted best and final offers.

19. The Division advised both proposers that they would submit certain questions to both proposers to clarify or improve both parties' proposals. However, the letter to Aetna only posed three pages of very limited clarifications. These clarifications questions appended as *Attachment 3*.

20. On the other hand, the Division served 62 pages of detailed questions on Premera over the course of apparently several weeks. The questions submitted to Premera are appended as *Attachment 4*.

21. The RFP asks the offeror to agree that it will answer 85% of all telephone calls within 30 seconds in any given month, or face penalties. RFP § 10.11(a)(1). In its original proposal, Premera "disagreed" with this element of the RFP. See *Attachment 5C* at Miller's Evaluation Notes. See *Attachment 5C* at Gray's Evaluation Notes. This caused Premera to lose point on this issue in its first proposal, receiving only 2 points from one evaluator (Gray) and 0 from another (Miller) out of a possible 5.5 points. See *Attachment 5C* at Miller's Evaluation Notes; See *Attachment 5C* at Gray's Evaluation Notes. To raise Premera's point total, the Department asked Premera to "clarify" that it would answer 85% of all calls on a monthly basis, despite what it said in its proposal. *Premera Response* at pg 27. In response to the State's suggestion that Premera change its position, Premera agreed to the State's demand. *Id.* As a result, Premera received 3.5 added points from one evaluator (Gray) on this particular Performance Standard issue and additional points from another (Miller) on this particular Performance Standard section in its "best and final" proposal. See