

Paul Georgeson, Esq.

**Reply to: Reno
(775) 388-2000**

August 7, 2017

RECEIVED

AUG 07 2017

**GOVERNOR'S FINANCE OFFICE
BUDGET DIVISION**

Via Hand Delivery

Director Jim Wells
Clerk, Board of Examiners
Nevada Department of Administration
209 E. Musser Street, Room 200
Carson City, Nevada 89701

Re: Dental benefits administrator contract

Dear Director Wells:

Delta Dental (“Delta”) submits this letter regarding the Division of Health Care Finance and Policy’s (“DHCFP”) request for approval of the contract for dental benefits administrator services (“Contract”) by the Board of Examiners (“Board”). The Contract is the product of Request for Proposal 3425 (“RFP 3425”) issued by the Division of Health Care Finance and Policy (“DHCFP”) to select a dental benefits administrator. By this letter, Delta requests the Board refuse to approve the Contract, or alternatively to delay consideration of the Contract until the conclusion of pending appeal over the award of RFP 3425. As more specifically stated below, it is Delta’s position that the Contract was improperly awarded as a result of an unlawful solicitation and unlawful scoring procedure and is currently the subject of an ongoing appeal. NRS 333.370(6) provides that “[a] notice of appeal filed in accordance with the provisions of this section operates as a stay of action in relation to any contract until a determination is made by the hearing officer on the appeal.”¹ Thus, Delta submits that, pursuant to NRS 333.370(6), the Board is prohibited from approving the contract until after the hearing officer approves the decision. As such, Delta respectfully requests that the Board refuse to approve the Contract at this time.

Further, even if the hearing officer issues a decision rejecting Delta’s appeal prior to the Board of Examiner meeting, Delta requests the Board refuse to approve the contract and order Purchasing to re-solicit bids for dental benefits administrator. Alternatively, Delta requests the Board delay approval of the Contract until the litigation over the legality of the solicitation and award is complete.

¹ NRS 333.370(6).

Because of the complexity of this issue, Delta respectfully requests ten minutes be allocated to Delta during public comment at the Board's meeting scheduled for Tuesday, August 8, 2017 to address the matters raised in this letter.

I. Background

a. The Purchasing Division ("Purchasing") releases and awards Request for Proposal 3290 ("RFP 3290"), a \$400 million solicitation for a dental benefits administrator.

The Contract is the result of RFP 3425. However, in order to properly understand the pending litigation associated with RFP 3425, it is necessary to point your attention to an immediately preceding request for proposal, RFP 3290. RFP 3290 was released on November 7, 2016 on behalf of the DHCFP for purposes of selecting a dental benefits administrator for the State's Medicaid and CHIP programs.² In total, RFP 3290 constituted a potential \$400 million dollar solicitation. Six companies responded to RFP 3290: Delta, DentaQuest, Liberty Dental ("Liberty"), MCNA, Scion and United Healthcare ("United").³

On January 13, 2017, Purchasing issued the RFP 3290 notice of award ("RFP 3290 NOA"), identifying Delta as the winning vendor.⁴ Delta had the highest score in each of the six specifically designated scoring categories.⁵ Following Delta in the order of scoring was MCNA, Scion, United, Liberty, and DentaQuest.⁶ Of these, only one respondent was within 100 points of Delta's average score.⁷ At the same time, Purchasing made public Delta's response to RFP 3290, including its bid price. Purchasing did so, however, before all parties executed the final contract, in violation of NAC 333.170(5) and NAC 333.185(1).

On January 23, 2017, ten days after issuance of the RFP 3290 NOA, MCNA filed a notice of appeal of the RFP 3290 NOA.⁸ On February 10, 2017, before the hearing was held on the appeal and before there were any substantive proceedings in the appeal, Purchasing rescinded the RFP 3290 NOA.⁹ In cancelling the award, Purchasing, in a phone conference with Delta representatives, indicated that it intended to rebid the contract, citing the need to make material changes to the scope of work, though it also noted that the material changes should not require substantial additional work (beyond what had been done for RFP 3290) on behalf of respondents. Purchasing further noted that the cancellation was precipitated by the arrival of new personnel at

² RFP 3290.

³ Responses to RFP 3290.

⁴ RFP 3290 NOA at 1.

⁵ RFP 3290 Consensus Score Sheet.

⁶ *Id.*

⁷ *Id.*

⁸ MCNA Notice of Appeal.

⁹ Exhibit B (RFP 3290 Cancellation Notice) at 1.

the using agency with different ideas—i.e., different from those reflected in RFP 3290—about how to go about identifying a dental benefits administrator.

After Purchasing canceled the RFP 3290 NOA, MCNA motioned to the hearing officer assigned to its appeal to voluntarily dismiss its appeal and the hearing officer granted the motion and dismissed the MCNA protest with prejudice.¹⁰

b. Purchasing releases RFP 3425 and Liberty hires a lobbyist.

On March 8, 2017, less than a month after the RFP 3290 NOA was cancelled, Purchasing released RFP 3425. Like RFP 3290, RFP 3425 sought proposals from potential dental benefits administrators. However, despite Purchasing's claim that material changes would be reflected in RFP 3425, RFP 3425 was nearly identical to RFP 3290 in all respects. The minimal differences between RFP 3290 and RFP 3425 were detailed in Attachment Y to RFP 3425. Out of the 191 page RFP, only seven subsections were modified.¹¹

After RFP 3425 was issued, Liberty, the bidder that finished fifth with respect to RFP 3290, was determined to perform better on RFP 3290. More specifically, as detailed in its May 19, 2017 letter attached here for your reference, “[w]hen RFP 3425 was issued, LIBERTY was determined to compose a proposal that was more representative of LIBERTY’s qualifications as a dental benefits administrator.”¹² As such “LIBERTY hired new consultants to assist in drafting the proposal, Nevada counsel to review prior to submission, *and a lobbying firm*. LIBERTY executives also traveled to Carson City for *in-person communications* and established connections with the UNLV School of Dental Medicine.”¹³ According to testimony at the hearing in this matter from Liberty executives, the Liberty’s lobbying firm set up meetings with government officials before RFP 3425 was issued but after RFP 3290 was cancelled.

c. Purchasing awards RFP 3425 to Liberty only forty-three days after it was issued.

Delta, MCNA, Scion, Liberty and DentaQuest all submitted responses to RFP 3425.¹⁴ These responses were required to be submitted on March 29, 2017, just twenty-one days after RFP 3425 was posted. This time, however, Liberty, which finished behind Delta, MCNA, Scion and United in RFP 3290, was selected as the winning vendor.¹⁵ And the RFP 3425 Notice of Award (“RFP 3425 NOA”) was issued on April 27, 2017, only forty-three days after it was issued. Whereas Delta had the highest score in all six specifically designated scoring categories

¹⁰ Order approving dismissal at 1.

¹¹ RFP 3425 at Attachment Y.

¹² Liberty Response to Delta Notice of Appeal (Attached as Exhibit A) at 15.

¹³ *Id.*

¹⁴ Responses to RFP 3425.

¹⁵ RFP 3425 Consensus Score Sheet.

in RFP 3290, with respect to RFP 3425 it had the highest score in only one category (conformance with RFP).¹⁶ Liberty, on the other hand, saw a significant swing in its scoring. In RFP 3290, Liberty did not receive the highest score in any category and instead received the lowest score in three categories (experience and availability of key personnel, quality assurance and cost).¹⁷ But in RFP 3425, Liberty received the highest score in five categories, including two categories in which it received the lowest scores on RFP 3290 (experience and availability of key personnel and cost).¹⁸ In other words, in a very short frame of time on a nine figure state contract two almost identical RFPs were issued and came back with wildly inconsistent scoring results.

d. In awarding RFP 3425 to Liberty, Purchasing failed to follow the legal solicitations in Nevada.

At the hearing, testimony revealed that Purchasing committed legal errors in administering RFP 3425, separate and apart from erroneously publishing Delta's response to RFP 3290. The testimony at the hearing revealed that the scoring committee was made up of four individuals, all employees of the Department of Health and Human Services ("HHS"). The make-up of the evaluation committee consequently failed to satisfy the requirements of NAC 333.162(5), which states that [e]ach committee to evaluation proposals must contain members that represent at least two using agencies."¹⁹

It was also revealed that the individual members of the evaluation committee did not independently evaluate the cost criteria. Instead, Purchasing presented the evaluators with a ranking of the vendors as it related to cost, assigning a value to each of the vendors based on an objective formula developed by Purchasing. The evaluators were asked if they agreed or disagreed with the ranking, and each agreed. Consequently, none of the evaluators independently scored the cost criteria, all in violation of NAC 333.160(2). NAC 160(2) provides that "[i]n addition to the factors set forth in NRS 333.335, before making an award, the chief of the using agency, the Administrator or *each member of the committee to evaluate proposals must review, consider and consistently score each responsive proposal in accordance with the evaluation criteria determined pursuant to subsection 1.*"²⁰

Finally, the testimony at the hearing further revealed that one of the individuals on the evaluation committee was dispatched from the Director's Office, and the other three came from subordinate divisions. The appointment of director's office personnel draws into question whether the requirements of NAC 333.162(6) were satisfied. NAC 333.162(6) requires that

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ NAC 333.162(6).

²⁰ *Id.* at NAC 333.160(2) (emphasis added).

“[t]he Administrator will not appoint a member to a committee to evaluate proposals who possesses direct supervisory authority over a majority of the other members of the committee.”

e. Delta appeals the RFP 3425 NOA.

On May 8, 2017, Delta filed a notice of appeal of the RFP 3425 with the Hearings Division.²¹ There, Delta raised a number of issues relating to the lawfulness of the RFP 3425 NOA. The issues raised in the notice of appeal included the following:

- Purchasing unlawfully reissued RFP 3290 in the form of RFP 3425 after issuing the RFP 3290 NOA and publicly releasing the details of the winning proposal, creating an unfair advantage for Delta’s competitors in RFP 3425.²²
- The evaluators misapplied the scoring criteria resulting in arbitrary and capricious scoring and creating an unlawful de facto bidder’s preference for Liberty.²³
- The evaluators failed to score the responses consistently as required by Purchasing’s own regulations resulting in an arbitrary and capricious award.²⁴

As to the first point, Delta pointed out in its notice of appeal that NAC 333.170(5) and NAC 333.185(1) provide for the publication of a respondent’s response to an RFP only *after* a contract is executed. And Delta also pointed out that such a process reflected improper bid shopping, in violation of well-established case law, among other indicia of bid shopping present in the case. *Gulf Oil Corp v. Clark County*, 575 P.2d 1332, 94 Nev. 116 (1978) (Nevada Supreme Court holding that “[t]he purpose of bidding is to secure competition, save public funds, and to guard against favoritism, improvidence and corruption. Such statutes are deemed to be for the benefit of the taxpayers and not the bidders, and are to be construed for the public good.”).

In this case, Purchasing released Delta’s bid despite the fact that Delta and DHCFP did not fully execute a contract relating to RFP 3290, in violation of these provisions. This flaw resulted in an unfair advantage to Delta’s competitors in the re-solicitation—they all saw what a winning bid looks like.²⁵ What’s more, the re-bidding of the solicitation for a dental benefits administrator without material changes indicates improper bid shopping.

As to the second point, Delta pointed out that the evaluators impermissibly credited Liberty with points related to its Nevada presence in categories in connection with which a

²¹ Notice of Appeal at 1.

²² *Id.* at 4.

²³ *Id.* at 5.

²⁴ *Id.* at 8.

²⁵ *Id.* at 4-6.

Nevada presence was irrelevant.²⁶ As to the third point, Delta noted the fact that the scoring of the scoring categories that remained the same as between RFP 3290 and 3425 was inconsistent, in violation of NAC 333.160(2) (“[B]efore making an award, the chief of the using agency, the Administrator or each member of the committee to evaluate proposals must review, consider and consistently score each responsive proposal in accordance with the evaluation criteria . . .”).²⁷

f. The hearing officer unreasonably and unlawfully restricted Delta’s ability to present its case.

The hearing in the matter was set for May 25, 2017.²⁸ Delta filed a motion for continuance, requesting that the hearing be continued for sixty days.²⁹ Delta’s request was predicated on the need to conduct discovery, including the issuance of interrogatories and noticing of depositions.³⁰ It was Delta’s position that the dramatic scoring differences on two substantially similar requests for proposal (RFP 3290 and RFP 3425) yielded the inference of arbitrary and capricious scoring, in violation of Nevada law, and that discovery was necessary to determine the full extent of the discrepancies.³¹ The Hearing Officer continued the hearing, setting the hearings dates for June 20, June 22, June 27 and June 29, but prohibited Delta from conducting any discovery.³² What’s more, the Hearing Officer issued an evidentiary ruling precluding Delta from making any reference to RFP 3290 as it relates to the lawfulness of RFP 3425.³³ As such, the hearing officer deprived Delta of the ability to show that the RFP 3425 NOA constituted bid shopping and was the product of arbitrary and capricious scoring. Delta sought reconsideration of the hearing officer’s decision to prohibit discovery and reference to RFP 3290, but Delta’s request was denied.³⁴

Having been denied the opportunity to conduct formal discovery, Delta issued public records requests of Purchasing, DHCFP and the UNLV School of Dental Medicine. In doing so, Delta followed the direction of the deputy attorney general assigned to the matter who asserted to the hearing officer that we could effectively conduct discovery through the issuance of public records requests. The public records requests were issued on June 9, 2017. To date, with the exception of six email chains provided by Purchasing, Delta has received no substantive response to its requests.

²⁶ *Id.* at 6-8.

²⁷ *Id.* at 9-10.

²⁸ *Id.* at 1.

²⁹ Motion for Continuance at 3.

³⁰ *Id.* at 2.

³¹ *Id.*

³² Order at 1; The Hearing Officer’s order regarding discovery was made orally on the record.

³³ Oral Order.

³⁴ Order on Reconsideration at 2-3.

On June 16, 2017, Delta requested that the hearing officer compel the attendance of certain Liberty witnesses, including the lobbyist hired by Liberty as identified by Liberty in its May 19, 2017 letter.³⁵ In its request, Delta stressed that the testimony of Liberty's lobbyist would be necessary to determine whether any improper contacts were made, in violation of Nevada law, which prohibits contacts with anyone other than the contact person specified by the using agency once an RFP is issued as well as the solicitation of "proprietary information regarding the contract" from the Purchasing administrator, a purchasing officer or an employee of the using agency, among other prohibitions.³⁶ The hearing officer denied this request as well.

g. Delta presents its case under significant and unlawful restrictions.

With the hearing officer having limited Delta's ability to conduct discovery, compel the appearance of witnesses and reference RFP 3290, Delta was at a severe disadvantage. Indeed, Delta had no meaningful opportunity to present its case; Delta could not point to the results of RFP 3290 as evidence proving the arbitrariness of the result of RFP 3425. More importantly, it was prohibited from showing that RFP 3425 was the result of improper bid shopping. What's more, it was prohibited from examining Liberty's lobbyist, which Liberty itself indicated was retained after RFP 3425 was issued. As such, there is an incomplete record with regard to potentially improper contacts.

Although Delta had almost no ability to present its case, it was able to glean certain pieces of information that revealed legal defects in how RFP 3425 itself was managed. These include the fact that all the members of the evaluation committee came from the same using agency, one member of the evaluation committee had supervisory authority over the majority of other members, and the fact that Purchasing evaluated the cost proposals, all in violation of various provisions of the Nevada Administrative Code, including NAC 333.160(2) ("[E]ach member of the committee to evaluate proposals must review, consider and consistently score each responsive proposal in accordance with the evaluation criteria determined pursuant to subsection 1."), NAC 333.162(5) ("Each committee to evaluate proposals must contain members that represent at least two using agencies."), and NAC 333.162(6) (prohibiting "[t]he Administrator will not appoint a member to a committee to evaluate proposals who possesses direct supervisory authority over a majority of the other members of the committee.").

h. Hearing officer takes Delta's appeal under submission.

On June 28, 2017, the hearing took Delta's appeal under submission. As of the date of this letter, the Hearings Officer has not issued a decision on Delta's Appeal. Therefore, Delta's Appeal is still pending. Pursuant to NRS 333.370(6), "[a] notice of appeal filed in accordance with the provisions of this section *operates as a stay of action in relation to any contract until a*

³⁵ Request for Subpoenas to Issue at 4-5.

³⁶ NAC 333.155(2) and NRS 333.800(1) and (2).

*determination is made by the hearing officer on the appeal.*³⁷(emphasis added). Assuming that the hearing officer rules against Delta, Delta plans to appeal the matter to the district court.

II. Request

Delta respectfully requests the Board refuse to approve the Contract. DHCFP and Purchasing mishandled the solicitation for a dental benefits administrator. In issuing RFP 3290 and awarding it to Delta then inexplicably cancelling the award in order to re-solicit the contract, Purchasing and DHCFP raised serious questions about bid shopping. Those questions are underscored by the fact that RFP 3290 and RFP 3425 were nearly identical. Indeed, it is even more troubling that when RFP 3425 was scored, Delta, which had finished first on RFP 3290, finished second on RFP 3425, and Liberty, which finished fifth on RFP 3290, finished first on RFP 3425. The specter of bid shopping is compounded by Liberty's own statement that *after* RFP 3425 was issued it hired a lobbyist. That fact raises major red flags regarding whether there were unlawful contacts between Liberty and any relevant member of state government while the RFP was pending. Unfortunately, given the hearing officer's decisions limiting the scope of the proceedings, refusing to allow discovery and failing to require the appearance of specific witnesses, Delta was unable to fully vet these issues.

Purchasing's approach to the procedures employed in RFP 3425 are also problematic. In appointing an evaluation committee comprised of officials all of whom were employed with HHS, Purchasing violated the requirements of the NAC and ensured a myopic view of the RFP responses; instead of an interdisciplinary approach to awarding the contract, Purchasing chose to have only individuals from the health sector evaluate the proposals. And in appointing a single representative from the Director's Office, Purchasing allowed that individual to have outside influence over the process resulting from the supervisory nature of her position. Perhaps more problematic was the fact that Purchasing, not the individuals comprising the evaluation committee, evaluated the cost component of the responses and sought only a rubber stamp from the evaluation committee. This is simply not contemplated by the NAC, which clearly provides that the evaluation committee independently evaluate proposals. Moreover, it appears that this new scoring formula developed by Purchasing was used for the first time on RFP 3425. That Purchasing would use a \$400,000,000 contract, which had only recently been cancelled and rebid, as a guinea pig for a wholly new scoring approach is highly questionable.

The defects identified here draw into question not only the legality of the RFP 3425 NOA, but also yields the appearance of impropriety. At worst, there are serious legal flaws in the solicitation; at best, the solicitation was handled in an unsteady manner that reflects poorly on the state of Nevada. And what's worse, Delta was hamstrung in its ability to litigate these issues before the hearing officer. All this is underscored by the fact that the Contract was sizable,

³⁷ NRS 333.370(6).

constituting a \$400 million solicitation. As such, Delta respectfully request the Board refuse to approve the Contract and order the re-solicitation of the dental benefits administrator RFP. In the alternative, Delta requests the Board stay action on the Contract until the litigation related to this matter, including any court litigation following the hearing officer's decision, is complete.

Very truly yours,



Paul Georgeson, Esq.
McDonald Carano
Attorneys for Delta

PJG/mln

cc: Governor, Brian Sandoval
Attorney General, Adam Laxalt
Secretary of State, Barbara Cegavske



Maria Nutile, Esq.*

Email: Maria@nutilelaw.com

Direct: 702-307-4870

*licensed in NV, AZ and CO

May 19, 2017

Hearings Division
Sheila Moore, Appeals Officer
Nevada Department of Administration
1050 E. William St. Ste 450
Carson City, Nevada 89074

Re: Response to Notice of Appeal filed by Delta Dental with respect to Notice of Award ("NOA") Proposal No. 3425 to LIBERTY Dental Plan of Nevada, Inc.

Dear Ms. Moore:

Pursuant to NRS 333.170(4), we respectfully submit this letter brief on behalf of LIBERTY Dental Plan of Nevada, Inc. ("LIBERTY") through its counsel, Maria Nutile, Esq. of Nutile Law and Matthew Dushoff, Esq. of Kolesar & Leatham.

INTRODUCTION

LIBERTY was the successful bidder in connection with the responses to Request for Proposal ("RFP") 3425 issued by the Department of Administration, Purchasing Division ("Purchasing Division" or "Division") on behalf of the Division of Health Care Financing and Policy ("DHCFP"), a division of the State of Nevada, Department of Health and Human Services ("DHHS") for the selection of a Medicaid Dental Benefit Administrator. Delta Dental (the "Appellant" or "Delta"), an unsuccessful bidder of RFP 3425, filed a Notice of Appeal on May 8, 2017.

On November 7, 2016, the Purchasing Division issued RFP 3290 for a Dental Benefits Administrator to service the State of Nevada Medicaid and SCHIP programs. A Notice of Award ("NOA") was issued to Delta on January 13, 2017 with respect to RFP 3290.¹ On January 23, 2017, MCNA Insurance Company ("MCNA"), the runner-up for RFP 3290, timely filed an appeal ("MCNA Appeal").² MCNA alleged that Delta fraudulently concealed information related to Delta's contract failures and/or breaches. On February 7, 2017, the Purchasing Division withdrew

¹ See Exhibit 2, Notice of Award for RFP 3290.

² See Exhibit 3, Appeal of RFP 3290 by MCNA.

the NOA to Delta stating that its “decision was based on review of the scoring criteria and the need to be more specific in the expectations of the selected vendor”.³ On February 22, 2017 the Appeals Officer in the matter of RFP 3290 filed an order of dismissal of the appeal with prejudice, noting that relief from the decision lies in the judiciary. On March 8, 2017, the Purchasing Division issued a new RFP 3425 for a Dental Benefits Administrator. RFP 3425 is not merely a “reissuance” of RFP 3290. RFP 3425 is separate and apart from RFP 3290, with numerous material changes requiring significant modifications of the proposals that had been submitted for RFP 3290. Delta’s own RFP 3425 proposal is materially revised compared with its RFP 3290 proposal.⁴ If RFP 3290 had merely been “reissued” for rebidding, such changes would not have been necessary.

Delta alleges that the Purchasing Division violated NAC § 333.180 when it released Delta’s RFP 3290 to the public, allegedly prematurely, and allegedly resulting in all other bidders having an unfair advantage for the bidding on RFP 3425. However, Delta’s assertion is fatally flawed. First, pursuant to NRS § 233B.130(2)(d), Delta failed to file a petition for judicial review regarding the Purchasing Division’s alleged violation of NAC § 333.180. Therefore, Delta is jurisdictionally barred from its assertion. Second, pursuant to NAC § 333.180, Delta’s bid would have been made public before any bidder could file an appeal pursuant to NRS § 333.370(1). Pursuant to NRS § 333.170(5), if an appeal is granted, a new RFP is required. Accepting Delta’s flawed argument, anytime an appeal is granted, Delta, or any other bidder, could claim that they are prejudiced by the public release of its RFP. Delta’s affirmative defense would then always be grounds to appeal subsequent RFP’s and would effectively eliminate any appeal pursuant NRS § 333.370(1).

Delta then curiously alleges that the evaluators were arbitrary and capricious in their scoring of RFP 3425 by inflating LIBERTY’s scores because of LIBERTY’s affiliation with Nevada. However, pursuant to NRS § 333.335(3)(d) the evaluators can take into account “**any other factor disclosed in the request for proposals.**” Presumably, “any other factor” would necessarily include any bidder’s affiliation with Nevada.

Delta also points out the short amount of time that passed between RFP 3290 and RFP 3425, implying that LIBERTY’s qualifications and presentation could not have changed as dramatically as the scores indicate. However, LIBERTY’s RFP 3290 proposal was made rather hastily. When RFP 3425 was issued, LIBERTY was determined to compose a proposal that was more representative of LIBERTY’s qualifications as a dental benefits administrator. LIBERTY therefore spent substantial time and energy in preparing for RFP 3425. A total of over five hundred sixty (560) work hours by LIBERTY staff and newly engaged outside consultants were spent on reviewing, drafting and highlighting LIBERTY’s strengths. This resulted in LIBERTY’s response to RFP 3425 being substantially different, though none the less accurate, than its response to RFP 3290. Substantial changes were made to highlight LIBERTY’s Medicaid experience in several states, its mission driven culture, and member centric focus.

Delta’s final allegation amounts to “sour grapes.” Delta claims that since LIBERTY received lower scores in its RFP 3290 than in its RFP 3425, the evaluators were arbitrary and

³ See Exhibit 4, Cancellation of Award of RFP 3290, February 7, 2017.

⁴ See Exhibit 14, Delta’s proposal for RFP 3290.

capricious in granting LIBERTY the award. However, RFP 3425 was a new RFP. Every bidder started from zero and was entitled to submit a brand-new bid. As stated above, LIBERTY invested much more time and effort in its RFP 3425 proposal. As a result, LIBERTY's bid on RFP 3425 was vastly improved from its RFP 3290 proposal. Even setting those facts aside, the scoring criteria and weights of RFP 3425 are significantly different from those used in RFP 3290, and even with no other substantive changes on the vendors' parts would have resulted in a change in scores. In any event, Delta's RFP 3425 bid was simply not as good as LIBERTY's bid.

The Nevada Supreme Court has ruled that state agencies and departments, such as the Purchasing Division, should be given great deference in their findings. Delta's mere desire for a different outcome is insufficient for Delta's appeal to prevail. For the reasons set forth below, Delta's appeal must be denied and the Purchasing Division's award of the dental benefits administrator contract to LIBERTY be upheld.

RFP BACKGROUND

On November 7, 2016, the Purchasing Division issued RFP 3290 for a Dental Benefits Administrator to service the State of Nevada Medicaid and SCHIP programs. This RFP was amended on November 28, 2016 and again on December 1, 2016. The original 3290 RFP, collectively with the two amendments is referred to as "RFP 3290".⁵ A Notice of Award ("NOA") was issued to Delta on January 13, 2017 with respect to RFP 3290.⁶ On January 23, 2017, MCNA Insurance Company ("MCNA"), the runner-up for RFP 3290, timely filed an appeal ("MCNA Appeal").⁷ MCNA alleged that Delta fraudulently concealed information related to Delta's contract failures and/or breaches. On February 7, 2017, the Purchasing Division withdrew the NOA to Delta stating that its "decision was based on review of the scoring criteria and the need to be more specific in the expectations of the selected vendor".⁸ On February 20, 2017 MCNA, through its counsel, withdrew its appeal of the NOA for RFP 3290 in reliance on the fact that the Purchasing Division was rescinding the award to Delta.⁹ Delta, through its counsel, received notice of this withdrawal.¹⁰ On February 22, 2017 the Appeals Officer in the matter of RFP 3290 filed an order of dismissal of the appeal with prejudice, noting that relief from the decision lies in the judiciary.¹¹ Delta did not contest the withdrawal of the award or the dismissal of the appeal. Filing a petition to object to the withdrawal of the award would have provided Delta the opportunity to address the allegations it committed fraud; it failed to do so. The rescission of RFP 3290 is a *fait accompli*.

⁵ See Exhibit 1, RFP 3290 with amendments.

⁶ See Exhibit 2, Notice of Rescission of Award for RFP 3290.

⁷ See Exhibit 3, Appeal of RFP 3290 by MCNA.

⁸ See Exhibit 4, Cancellation of Award of RFP 3290, February 7, 2017.

⁹ See Exhibit 5, Withdrawal of Appeal by MCNA.

¹⁰ *Id.* at page 2.

¹¹ See Exhibit 6, Dismissal of Appeal by MCNA with Prejudice.

On March 8, 2017, the Purchasing Division issued a new RFP 3425 for a Dental Benefits Administrator. On March 21, 2017, an amendment to RFP 3425 was issued prior to the bid opening date of March 29, 2017. The original RFP 3425, collectively with its amendment, is referred to as "RFP 3425."¹² The requirements of RFP 3425 were materially different from those of RFP 3290. The term of the contract resulting from RFP 3425 is two (2) years, with the possibility of a single one (1) year extension, in place of RFP 3290's four (4) year term with two (2) potential one (1) year extensions. RFP 3425 also added three new sections: Section 10.1.5, value added benefits; Section 10.1.6, collaboration with UNLV School of Dental Medicine; and Section 10.1.7, demonstration of success with electronic provider enrollment which were not in the previous RFP. The amendment also noted that the weighting of the new sections in the scoring process would be confidential.

LIBERTY submitted its response to RFP 3425 on March 28, 2017.¹³ On April 13, 2017, LIBERTY received notice of the Purchasing Division's intent to award it the contract.¹⁴ On April 19, 2017, LIBERTY executed and returned the contract it negotiated with the State of Nevada.¹⁵ On April 27, 2017, the Division issued Notice of the Award of the Dental Benefits Administrator contract from RFP 3425 to LIBERTY.¹⁶ On May 8, 2017, Delta timely filed Notice of Appeal for RFP 3425.

LIBERTY BACKGROUND

As described in its response to RFP 3425, LIBERTY is a full service dental benefits company that has been providing dental services to Medicaid beneficiaries across the country since 2005. Dental care coordination for Medicaid populations is the core focus of LIBERTY and its affiliates. In fact, more than half of the members which the LIBERTY companies serve nationwide are Medicaid recipients.

LIBERTY's response to RFP 3290¹⁷ had not been as robust as it would have liked due to time constraints. Therefore, in preparing its proposal for RFP 3425, LIBERTY assembled a highly competent and experienced team of individuals. LIBERTY even contracted with several former Medicaid state and health plan officials who now serve as consultants to assist in assembling comprehensive responses. The team wanted to ensure that the depth of LIBERTY's experience and innovation was highlighted in its response to RFP 3425.

¹² See Exhibit 7, RFP 3425 with amendment.

¹³ See Exhibit 8, LIBERTY's proposal for RFP 3425.

¹⁴ See Exhibit 9, Notice of Intent to Award RFP 3425 to LIBERTY.

¹⁵ See Exhibit 10, DBA Contract by and between State of Nevada and LIBERTY

¹⁶ See Exhibit 11, Notice of Award of RFP 3425 to LIBERTY.

¹⁷ See Exhibit 12, LIBERTY's proposal for RFP 3290.

JUDICIAL REVIEW

Delta's claims amount to nothing more than a sour grapes attitude in not being awarded the contract for RFP 3425. As noted below, Delta had the opportunity to clear its reputation and appeal the dismissal of MCNA's previous appeal and rescission of the award to it by the Purchasing Division, and failed to do so. Additionally, Delta consented to participate in the bidding under RFP 3425¹⁸, which was issued before Delta's right to judicial appeal of RFP 3290 had expired. Therefore, Delta has waived its right to raise any objection or claim with respect to RFP 3290. No comparison should be made between RFP 3290 and RFP 3425 as they are two distinct RFPs, with RFP 3290 fully rescinded by the Division. Any claims Delta may have had with regards to RFP 3290, and any comparisons it attempts to make between RFP 3290 and RFP 3425, are entirely moot.

CLAIMS

Purchasing unlawfully reissued RFP 3290 in the form of RFP 3425 after issuing the RFP NOA and publicly releasing the details of the winning proposal, creating an unfair advantage for Delta's competitors in RFP 3425.

Delta's claim is comprised of several separate issues, none of which survives legal analysis. First, Delta alleges that RFP 3290 was "unlawfully reissued." Second, they claim that RFP 3425 is a reissuance of RFP 3290. Finally, Delta asserts that the publication of its successful proposal wrongfully put them at a disadvantage in the RFP 3425 competition. We will review each issue in turn.

"Unlawful" Withdrawal of RFP 3290

The Purchasing Division withdrew the Notice of Award to Delta on February 7, 2017, citing a need to revise the RFP "to include specific requirements and additional points in the evaluation process."¹⁹ As the bidding process is "deemed to be for the benefit of the taxpayers and not the bidders,"²⁰ the Division was within its rights to withdraw the Notice of Award for RFP 3290 if, in its discretion, the RFP needed revisions to ensure "the success of this [multimillion dollar] endeavor."²¹

Delta's remedy, if it indeed believed the withdrawal of RFP 3290 was unlawful, would have been to petition for judicial review of the Division's action. MCNA's appeal of the RFP 3290 award was dismissed on February 22, 2017, constituting final agency action. Delta, as a party of record to that appeal, then had thirty (30) days to file its petition for judicial review, the scope of

¹⁸ See Exhibit 13, Delta's proposal for RFP 3425.

¹⁹ See Exhibit 4, Cancellation of Award of RFP 3290, February 7, 2017.

²⁰ *Gulf Oil Corp. v. Clark County*, 94 Nev. 116, 118-19, 575 P. 2d 1332, 1333 (1978). See also *Associated Builders and Contractors, Inc. v. Southern Nevada Water Authority*, 115 Nev. 151, 979 P. 2d 224 (1999).

²¹ See Exhibit 4, Cancellation of Award of RFP 3290, February 7, 2017.

which could have included the Purchasing Division's decision to cancel RFP 3290.²² Delta therefore had until March 24, 2017 to claim the Purchasing Division's decision to cancel RFP 3290 was unlawful, and failed to do so. As this time limit is jurisdictional, "a district court is divested of jurisdiction if the petition is not timely filed."²³

Moreover, Delta waived any claims, including any property rights, it may have had related to RFP 3290 when it consented to participate in RFP 3425. Delta's angst over the withdrawal process of RFP 3290 is misplaced and utterly irrelevant to RFP 3425. RFP 3425 was released on March 8, 2017, well within Delta's thirty (30) day window to petition for judicial review.²⁴ If Delta believed that RFP 3425 was not materially different from RFP 3290, Delta had the ability to seek judicial relief. As it chose not to do so, Delta has waived any claims it may have had with any procedural defects of RFP 3290.

As noted throughout this letter brief, what transpired with respect to RFP 3290 by any proposer is moot as that RFP was rescinded. However, had Delta requested judicial review of MCNA's appeal dismissal solely based upon the Purchasing Division's rescission of the award in RFP 3290, Delta would have had to defend itself with respect to the allegations of fraud alleged by MCNA. Specifically, MCNA alleged that Delta failed to disclose material information responsive to RFP 3290, Section 4.1.7, thereby fraudulently concealing information relating to RFP 3290.²⁵ Most likely Delta did not want a hearing on the merits of the MCNA appeal as it could not overcome the allegations presented by MCNA. Procedurally, if in fact a final contract with Delta was never executed, RFP 3290 would have been awarded to MCNA as the next in line if the RFP were not withdrawn entirely.²⁶ No doubt Delta felt it was in its best interests to risk rebidding the contract rather than see it awarded to MCNA.

"Reissuance" of RFP 3290 as RFP 3425

As stated above, RFP 3290 was withdrawn by the Purchasing Division, and such withdrawal was not timely contested by Delta. RFP 3290 was therefore fully rescinded and is of no legal or functional effect. RFP 3425 is not merely a "reissuance" of RFP 3290. RFP 3425 is separate and apart from RFP 3290, with numerous material changes requiring significant modifications of the proposals that had been submitted for RFP 3290. Delta's own RFP 3425 proposal is materially revised compared with its RFP 3290 proposal.²⁷ If RFP 3290 had merely been "reissued" for rebidding, such changes would not have been necessary.

The Purchasing Division listed several of the planned material changes in its notice of cancellation of Delta's award, such as covered value based services; willingness and intent to

²² NRS §§ 233B.130(1), (2)(d).

²³ *Mikohn Gaming v. Espinosa*, 122 Nev. 593, 598, 137 P.3d 1150, 1154 (2006).

²⁴ NRS 233B.130(2)(d) provides that Petitions for Judicial Review "must be filed within 30 days after service of the final decision of the agency."

²⁵ See Exhibit 3, Appeal of RFP 3290 by MCNA.

²⁶ NAC § 333.170(3).

²⁷ See Exhibit 14, Delta's proposal for RFP 3290.

collaborate with University of Nevada, Las Vegas School of Dentistry; and demonstration of success with electronic provider enrollment. These changes were intended to “[s]trengthen[] the RFP” and “advance...goals of prevention, early detection, and quality services; collaboration; and administrative simplification.” Ultimately, even the term of the proposed contract changed from four (4) years to two (2) years. RFP 3290 and RFP 3425 are materially different; there is no legal or logistical basis to claim the rescinded RFP 3290 is some criterion which was merely varied or extended by RFP 3425.

Delta’s premise that RFP 3425 was issued and scored in an arbitrary and capricious manner is fatally flawed, as it is dependent on all material aspects of RFP 3290 and RFP 3425 being equal. As will be discussed in further detail below, the scoring results of RFP 3290 and RFP 3425 cannot be compared against each other because each RFP’s terms and proposals were materially different. Delta has no grounds for crying foul when it is comparing apples and oranges.

Publication of Delta’s Proposal

Delta claims that the Purchasing Division’s allegedly premature publication of its winning proposal for RFP 3290, in alleged violation of NAC § 333.185, wrongfully placed Delta at a disadvantage in the bidding for RFP 3425, in that its competitors had access to the “winning bid” from which to model their own proposals. If Delta truly believed this was the case, Delta, pursuant to NRS § 233B.130(2)(d), had thirty (30) days from February 22, 2017²⁸, to file a Petition for Judicial Review for the Purchasing Division’s alleged misconduct. However, Delta failed to file its Petition for Judicial Review, and, therefore, waived this claim.

Moreover, the Purchasing Division was following appropriate procedure in publishing the proposal, and the effect on Delta and the bidding process was the same as if MCNA had pursued and won its appeal of RFP 3290. Further, all parties to this bidding process are sophisticated, with ample experience writing similar proposals and with equal access to public records of similar proposals in multiple states across the country.

Under Nevada law, proposals are confidential and “may not be disclosed until the contract is awarded.”²⁹ Proposals become public record as of the later of the date of award as entered on the bid record, or the date the notice of award is posted in at least three public buildings.³⁰ The notice of award is made after a negotiated contract has been executed by all parties, and it is the notice of award that triggers the ten (10) day appeal window.³¹ There is no mechanism for preventing public disclosure of proposals once an award is made. Even if the Division made public Delta’s proposal prior to Delta signing a contract, there is “no harm no foul”: had the award not been withdrawn, MCNA’s appeal would have placed the proposals in the public domain and available to competitors in the event of a post-appeal rebid. The Purchasing Division did not

²⁸ The date of the hearing officer’s dismissal and final action.

²⁹ NRS § 333.335(6).

³⁰ NAC § 333.185 (1).

³¹ NAC § 333.170(5).

wrongfully release the details of Delta's winning proposal, nor was Delta materially harmed by such release.

Delta's argument that competitors received an unlawful advantage by having access to Delta's winning proposal would lead to absurdity. Adopting Delta's argument would mean that Delta could use that affirmative defense for the entire life of the RFP's subject matter, because all participants would always already have its initial bid. Delta would be able to appeal and repeat this defense for every rebid on the project, unless and until Delta won the award. Conversely, an appeal of an award to Delta could never be granted. This would create an absurd result contrary to a basic tenet of statutory construction: "A statute should be construed in light of the policy and spirit of the law, and the interpretation should avoid absurd results."³²

Further, each bidder is unique with its experiences, strengths, and weaknesses. LIBERTY strives to distinguish itself from others with its focus on members and its mission to provide quality dental care. LIBERTY has no need or inclination to play copycat with any other vendor's bids, least of all Delta's.

The evaluators misapplied the scoring criteria resulting in arbitrary and capricious scoring and creating an unlawful de facto bidder's preference for LIBERTY.

"Arbitrary and Capricious" Scoring

Delta alleges that the Division's scoring of RFP 3425³³ was "arbitrary and capricious," relying on a comparison with the scoring of now defunct RFP 3290³⁴ as proof. However, a determination that an agency acted arbitrarily and capriciously, and thereby abused its discretion, requires a finding that an administrative agency's conclusions were not supported by substantial evidence, "which a reasonable mind might accept as adequate to support a conclusion."³⁵ The Division's scoring of LIBERTY would have had to be based on inadequate supporting evidence rendering the scoring essentially irrational for the Division to have acted in an arbitrary and capricious manner. However, as detailed below, the Division had substantial evidence supporting its scoring decisions and consequent award to LIBERTY. Delta's argument itself is arbitrary and capricious, as it is rooted in an irrational comparison with a legally and procedurally impotent document.

Delta alleges that "the evaluators arbitrarily inflated LIBERTY's scores [in demonstrated competence and experience performing comparable engagements] on account of LIBERTY's connection to Nevada," citing excerpts from evaluators' comments in an attempt to prove its point. While the scoring data for RFP 3425 did not include any issues for consideration in scoring, the

³² *Hunt v. Warden*, 111 Nev. 1284, 1285, 903 P.2d 826, 827 (1985), internal citations omitted.

³³ See Exhibit 15, Scoring for RFP 3425.

³⁴ See Exhibit 16, Scoring for RFP 3290.

³⁵ *Nev. Pub. Emps. Ret. Bd. v. Smith*, 129 Nev. Adv. Op. 65, 310 P.3d 560, 564 (2013), internal citation omitted. See also NRS § 233B.135.

scoring sheets for RFP 3290 included issues for each evaluation criterion. While LIBERTY claims RFP 3290 is substantively irrelevant to RFP 3425, we note that the following evaluation factors were known to Delta through RFP 3290's scoring sheets, and therefore consideration of each vendor's ties with Nevada was reasonably foreseeable and far from arbitrary:

"1) Demonstrated Competence:

- a. Did the vendor provide sufficient data to convince you that they will do a good job for the State?...
- d. Will the vendor's resources be adequate to serve the State's needs?...
- f. Does the vendor have the flexible capacity to handle all the needs of the State as they continue to change?
- g. Does the vendor present sufficient performance history to convince you of their ability?...

2) Experience in Performance of Comparable Engagements:

- a. Does the vendor have prior experience that will ensure all the skills necessary to perform tasks well?
- c. Does the vendor's previous work convince you of its successful completion of these duties?..."

Each of the factors listed above would be enhanced through a vendor's previous experience in and familiarity with Nevada. There is no "arbitrary inflation" for consideration of a vendor's track record in Nevada when the successful bidder will be providing services to the State of Nevada, and no better way for the Division to ascertain a vendor's contributions to the best interests of the people of Nevada. Moreover, Delta was fully aware that such factors would be taken into consideration prior to bidding on RFP 3425.

As its only (and meager) support for its claim that the evaluators incorrectly scored LIBERTY's response to RFP 3425 by considering LIBERTY's ties to Nevada, Delta attempts to aggrandize the import of LIBERTY's ties to Nevada in the scoring of RFP 3425 by selectively quoting the evaluators' comments. However, when taken in context with the full comments, the Nevada affiliations are merely one factor of many. Specifically, Delta utilizes the following to support its claim:

With respect to demonstrated competence:

Delta's Excerpt	Full Evaluator Comment
<p>Evaluator 03425-03 commented: "They are already licensed and operating in Nevada."</p>	<p>"The response appeared comprehensive. They demonstrated experience with the Medicaid population and current experience in Nevada. <u>They are already licensed and operating in Nevada.</u> They already have contracts with existing FQHC's. The business seems stable and under the original leadership. They are very data driven and use reports to manage care.</p> <p>They have multilingual support and 91% of their network is bilingual. They have an after-hours partner to provide 24-hour coverage.</p> <p>They have a special needs coordinator to help manage services for individuals with disabilities or mental health concerns.</p> <p>They provide mobile dental services and demonstrated experience working with schools and other health providers to ensure outreach to target communities."</p>
<p>Evaluator 03425-03 also commented "local company"</p>	<p>"<u>Local company</u> with clearly demonstrated work outcomes."</p>
<p>Evaluator 03425-06 commented: "LIBERTY founded in 2001 by a dentist; 3 dentists on executive team; staff with a range of experience including those who will be located in NV; familiar with Clark and Washoe Counties."</p>	<p>"<u>LIBERTY</u> founded in 2001 by a dentist; 3 dentists on executive team; staff with a range of experience including those who will be located in NV; familiar with Clark and Washoe Counties; have proactively met with provider focus groups to identify challenges; use data analytics to identify and develop member outreach programs specific to community needs; no ownership changes; no censure or litigation history."</p>

With respect to experience performing comparable engagements:

Delta's Excerpt	Full Evaluator Comment
<p>Evaluator 03425-05 commented "LIBERTY's staffing plan was clear and staff is already located in Nevada."</p>	<p>"LIBERTY has experience providing Medicaid services to over two million Medicaid numbers. <u>LIBERTY's staffing plan was clear and staff is already located in Nevada.</u>"</p>
<p>Evaluator 03425-06 commented: "LIBERTY currently provides care to nearly 100,000 Nevada's with a network of over 1,400 credentialed providers."</p>	<p>"<u>LIBERTY currently provides care to nearly 100,000 Nevada's with a network of over 1,400 credentialed providers</u>; also administers a full array of dental benefits and services to close to 2 million Medicaid members in CA, FL, IL, NJ, NY, TX; successes documented in proposal include 17% increase in proportion of members using dental services with FL Medicaid, in IL assumed responsibility for providing Medicaid child dental benefits in a 2 week period for approximately 300,000 Medicaid members; included member welcome packet-very thorough."</p>

Delta's selective quotations of the evaluators' comments absurdly misrepresent the evaluators' scope of review. When read in full, the comments clearly show that the evaluators noted LIBERTY's depth in managing Medicaid programs, its use of analytics, and, unlike Delta, LIBERTY's lack of alleged breaches or litigation history. While it is true being licensed and operating in Nevada does not in and of itself demonstrate competence to serve as dental benefits administrator, the complete comments of the evaluators encompass valid, thorough criteria to be used in evaluating the competence of LIBERTY to provide the services. That said, the fact that LIBERTY has a current provider network, license, and members in Nevada provides State authorities a degree of assurance that LIBERTY will pass the Centers for Medicare and Medicaid Services (CMS) mandatory readiness review³⁶ and be on top of new program implementation.

Ironically, and admittedly so, Delta makes its own case for Nevada affiliation, touting its connections to the state and claiming they were "not highlighted in detail by the evaluators with respect to any scoring category." This claim is patently false. The evaluators did comment of Delta's Nevada connections, both positively and negatively:

- Evaluator 03425-02: "137,000 lives in NV. LV [Las Vegas] call center."
"Experience in NV."

³⁶ See <https://www.cms.gov/Medicare-Medicaid-Coordination/Medicare-and-Medicaid-Coordination/Medicare-Medicaid-Coordination-Office/FinancialAlignmentInitiative/ReadinessReviews.html>

- Evaluator 03425-03: “Have current certificate of authority to operate in NV....Would have to build Nevada network....Minimum [demonstrated competence] requirements met, but only minimum.” “Experience [in performance of comparable engagements] limited to few states.” “Most of Nevada staff would need to be hired.”
- Evaluator 03425-05: “Recent experience providing services similar to the Nevada DBA program in the California’s Medi-Cal Dental...” “...[D]ifficult to determine how many staff will actually be located in Nevada.”
- Evaluator 03425-06: “...42 years experience in administering programs similar to the Nevada DBA program...”

If indeed Delta believed that RFP 3290 and RFP 3425 were materially the same, it had the opportunity to petition for judicial review within thirty (30) days of the rescission of the appeal by the appeals officer. The timeline is very clear:

January 13, 2017	NOA to Delta
January 23 2017	MCNA filed Appeal of Award to Delta based upon allegation of its fraud or concealment
February 7, 2017	Purchasing Division withdraws its award to Delta citing it will expand the scope of services
February 20, 2017	Withdrawal of Appeal by MCNA only if rescission of award to Delta made
February 22, 2017	Appeals Officer files, with prejudice, dismissal of MCNA Appeal
March 9, 2017	Purchasing Division issues RFP 3425
March 22, 2017	Last date on which Delta had the ability to contest the dismissal and withdrawal of the award to it, if it believed RFP 3290 was not materially different than RFP 3425

It is unlikely such a petition would have been successful if filed, as the Nevada Supreme Court has held:

“Courts should not be zealous to interfere with letting contracts, unless they are satisfied that the public has been made to suffer, either through fraud or bad faith or careless attention to business. The presumption is that the acts of executive officers are done for public good. When their actions are challenged, the burden of showing to the contrary rests on those asserting it, and it is a heavy burden; courts can and will interfere only when it is made apparent that discretion has been abused.”³⁷

(Emphasis added). Delta did not want to risk petitioning the court regarding the rescission of its award as then the appeal of MCNA would be heard. Instead, it decided to take a chance in the

³⁷ *State, Nevada State Purchasing Div. v. George's Equip. Co., Inc.*, 105 Nev. 798, 806, 783 P.2d 949, 954 (1989), internal citation omitted.

rebidding process and in doing so, at the end of the day, Delta's proposal simply was not as strong as LIBERTY's.

"De Facto Bidder's Preference for LIBERTY"

Delta claims that the Division's publication of Delta's response to RFP 3290 put Delta at a disadvantage in bidding for FRP 3425, creating an unlawful "bidder's preference," allowing the state to vendor-shop contrary to the public interest. Delta cites Massachusetts case law rejecting an agency's authority to apply bidding laws (in this case, the power to reject all bids and rebid the contract) in a way that would create an " 'opportunity to exercise favoritism in awarding contracts.' " ³⁸ That case goes on to emphasize the importance of the "equal footing" principle, mandating that " 'bidders have the opportunity to bid in the same way' ...[and] bidders 'bear the same risk of rejection,' " to avoid any unfairness through favoritism. ³⁹ "Absent such a[n equal footing] restriction, an awarding authority would be free to rebid a contract until a preferred bidder submitted the lowest bid price...." ⁴⁰

Ironically, Delta appears to reject the "equal footing" principle, and instead relies on the disavowed "bidder's preference" in claiming mistreatment in the RFP 3425 process. Without any valid factual premise, Delta's logic must be that, because Delta was awarded the contract under RFP 3290 but was not the winning bidder for RFP 3425, the Division necessarily acted arbitrarily and capriciously by not giving Delta a bidder's preference when it awarded the RFP 3425 contract to LIBERTY.

Moreover, Delta's reliance on *Petricca* to assert the wrongfulness of exposing a secret bid price through the rebidding process is misguided. Delta fails to note that its quotation on that point ⁴¹ is drawn from the *Petricca* court's discussion of *Caruci v. Dulan*, 41 Misc.2d 859, 246 N.Y.S.2d 727 (1964), *rev'd on other grounds*, 24 A.D.2d 529, N.Y.S.2d 677 (1965). In *Caruci*, the court held that "awarding authorities may not reject bids simply to obtain a lower price." ⁴² (Emphasis added.) That case is distinguishable from the current appeal in that the Division made the decision to rebid for the dental benefits administrator "based on review of the scoring criteria and the need to be more specific in the expectations of the selected vendor," with "revis[i]ons" to include specific requirements and additional points in the evaluation process... ⁴³ Rebidding for RFP 3425 was done based on material changes to the RFP, not in order to obtain a lower price. *Petricca* identifies such "new specifications on rebid" as an "accepted rationale[] for rejecting bids" that is "not based on any abuse of the process." ⁴⁴

³⁸ *Petricca Const. Co. v. Com.*, 37 Mass. App. Ct. 392, 397 (1994), internal citation omitted.

³⁹ *Id.*, internal citation omitted.

⁴⁰ *Id.* at 396, internal citation omitted.

⁴¹ "[s]uch a procedure also exposes the secret bid price to other potential bidders and may provide the means whereby a future municipal government can use this power of rejection to award contracts to the persons of their choice."

⁴² *Petricca*, 37 Mass. App. Ct. at 396.

⁴³ See Exhibit 4, Cancellation of Award of RFP 3290, February 7, 2017.

⁴⁴ *Id.*

The evaluators failed to score the responses consistently as required by Purchasing's own regulations resulting in an arbitrary and capricious award.

Delta alleges the Division's scoring of RFP 3425 was inconsistent, and therefore arbitrary and capricious. Delta points to the "disparate nature of the scoring as between the responses to RFP 3290 and 3425" as the basis for its argument, and proceeds to itemize the differences in the scoring results between the two RFPs for LIBERTY and Delta. As previously discussed at length, any comparison at all between RFP 3290 and RFP 3425 is utterly invalid and inconsequential, as RFP 3290 was fully rescinded, Delta did not seek judicial relief, and there were material differences between the terms of the two RFPs. Differences in scores alone cannot support a claim of inconsistent or arbitrary scoring. Moreover, no comparison to RFP 3290 can be permitted as evidence of improper scoring, as doing so without hearing the merits of MCNA's appeal on allegations of fraud essentially extends the jurisdictional requirement that Delta petition the court within thirty (30) days.

Delta's starting point for its disparate scoring argument is the "six specified scoring categories in both RFP 3290 and RFP 3425," listed as "demonstrated competence, experience and availability of key personnel, quality assurance, and cost." (Emphases added.) However, RFP 3425 did not include a "quality assurance" ("QA") category. QA had a weight of 20⁴⁵ in RFP 3290, but was not present at all on RFP 3425.⁴⁶ Therefore, in addition to the material differences between requirements of RFP 3290 and RFP 3425 discussed previously, the scoring categories and relative weights were different as well:

Category	RFP 3290 Weight	RFP 3425 Weight	Difference RFP 3290 to RFP 3425
Demonstrated competence	30 (30%)	25 (29%)	-5 (-1%)
Experience in performance of comparable engagements	20 (20%)	10 (11.8%)	-10 (-8.2%)
Conformance with the terms of this RFP	10 (10%)	10 (11.8%)	0 (+1.8%)
Expertise and availability of key personnel	10 (10%)	10 (11.8%)	0 (+1.8%)
Quality assurance	20 (20%)	0 (0%)	-20 (-20%)
Cost	10 (10%)	15 (17.6%)	+5 (+7.6%)

⁴⁵ RFP 3290 had a total weight of 100.

⁴⁶ RFP 3425 included a divided "Other" category with a cumulative weight of 15 out of a total weight of 85.

Category	RFP 3290 Weight	RFP 3425 Weight	Difference RFP 3290 to RFP 3425
Financial stability	Pass/fail	0 (0%)	N/A
Other	0	5 (5.9%)	+5 (+5.9%)
Other	0	10 (11.8%)	+10 (+11.8%)
<i>TOTAL</i>	<i>100</i>	<i>85</i>	<i>-15</i>

Furthermore, Delta provides absolutely no support for its allegation that the Purchasing Division failed to score the responses consistently. Again, Delta's argument is based solely on invalid comparisons between the scores it and LIBERTY received in RFP 3290 and those they received in RFP 3425. Setting aside the fact that RFP 3290 and RFP3425 are completely separate and incomparable, Delta's award in RFP 3290 was never fully vetted as MCNA appealed the award due to the allegations of fraud committed by Delta.

Delta also points out the short amount of time that passed between RFP 3290 and RFP 3425, implying that LIBERTY's qualifications and presentation could not have changed as dramatically as the scores indicate in just one hundred (100) days. However, as mentioned above, LIBERTY's RFP 3290 proposal was made quickly. When RFP 3425 was issued, LIBERTY was determined to compose a proposal that was more representative of LIBERTY's qualifications as a dental benefits administrator. LIBERTY hired new consultants to assist in drafting the proposal, Nevada counsel to review prior to submission, and a lobbying firm. LIBERTY executives also traveled to Carson City for in-person communications and established connections with the UNLV School of Dental Medicine.

Delta is incorrect, however, that changes could not occur to LIBERTY in just one hundred days. In fact, LIBERTY completed its provider online enrollment project on January 5, 2017 and conducted Provider Focus Groups in Nevada on March 15, 2017. Also, in showing its innovation, on March 22, 2017 LIBERTY issued a Provider Report to provide feedback of healthcare quality measures to its providers on how they were performing and benchmarking against their peers. Suffice it to say, RFP 3425 is a new RFP to be reviewed and evaluated for each bidder independent of any other responses the Purchasing Division may have received for any other RFP.

CONCLUSION

The Appeals Officer must find in favor of the Purchasing Division and reject the appeal of Delta. Delta is jurisdictionally barred from asserting any claim of impropriety with respect to RFP 3290. Any comparison of the two RFPs with respect to substance or scoring is irrelevant. Further, Delta provides no support for its claims that the evaluators' scoring rose to the level of arbitrary and capricious, beyond the simple fact that Delta was not the winning bidder.

Accordingly, LIBERTY requests the Purchasing Division pursue all costs, fees and expenses incurred by the State of Nevada due to this appeal from Delta's bond.

WITNESSES Liberty may call some or all of the following witnesses:

- Dr. Amir Neshat Chief Executive Officer of LIBERTY Dental Plan. Can testify as to the qualifications of LIBERTY as DBA and efforts for RFP 3425 proposal.
- John Carvelli Executive Vice President, LIBERTY Dental Plan. Can testify as to the to LIBERTY's qualifications as DBA and can testify as to the efforts LIBERTY made in its RFP 3425 proposal.
- Nico Alvarez Vice President, Operations, LIBERTY Dental Plan. Can testify as to LIBERTY'S innovative products, projects and quality assurance and efforts for RFP responses.
- Dr. Richard Goren Chief Dental Officer, LIBERTY Dental Plan. Can testify as to LIBERTY generally, provider relations and quality assurance, as well as contacts established with UNLV School of Dental Medicine.
- Laurie Hargrave Senior Network Manager, Professional Relations, LIBERTY Dental Plan. Acted as Project Manager for RFP 3425. Can testify as to the efforts LIBERTY made in its RFP 3425 proposal.
- Dave Meadows Senior Vice President, Government Health Program, LIBERTY Dental Plan. Can discuss LIBERTY in general and LIBERTY's experience with Medicaid programs. Can testify as to the efforts LIBERTY made in its RFP 3425 proposal.

The following individuals can testify as to the efforts LIBERTY made in its RFP 3425 proposal:

- Pam Coleman Independent consultant for LIBERTY Dental Plan. 30-years' experience with Medicaid, including serving as the Deputy Medicaid Director for the Texas Health and Human Services Commission responsible for the Managed Care Operations Department. Formerly Senior Vice President at Optum. Assembled LIBERTY's RFP 3425 preparation team.
- Sheila Cooper Independent consultant for LIBERTY Dental Plan. 20-years' experience in state and federal government healthcare programs including Medicaid Managed Care.

Ms. Moore, Appeals Officer
Hearing Division
May 19, 2017
Page 17

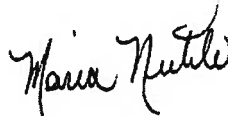
Ann L. Rasenberger, J.D. Independent consultant for LIBERTY Dental Plan. Provides regulatory and strategic guidance concerning Medicaid, Medicaid managed care, dual eligible programs. Former Assistant Attorney General with the Office of the Attorney General of Maryland.

Tania Colon Independent consultant for LIBERTY Dental Plan. Formerly served as a Director of the Office of Project Management within the Medicaid and State's Children Health Insurance Program (SCHIP) division which is responsible for the development and implementation of major large-scale initiatives impacting Medicaid and the SCHIP.

Plus any other witnesses on the witness list of the Purchasing Division or Delta.

Sincerely,

NUTILE LAW



Maria Nutile, Esq.

Kolesar Leatham

/s/ Matthew Dushoff, Esq.

Matthew Dushoff, Esq.

cc: Josh Hicks, Esq. counsel to Delta Dental
MacDonald Carano LLP
100 W. Liberty St. 10th Fl.
Reno, NV 89501

Jeffrey Menicucci, Esq., Deputy Attorney General
100 N. Carson St.
Carson City, NV 89701