

September 29, 2022

Via Email

Don Harris
Nolan Harris
Department of Administration
State of Montana
125 N. Roberts St.
Room 165 Mitchell Building
Helena, MT 59601
don.harris@mt.gov
nolan.harris@mt.gov

Re: Allegiance Benefit Plan Management, Inc., Bid Protest - DOA-HCBD-RFP-2022-016 1NH

Dear Mr. Harris and Mr. Harris:

Following the Request for Proposal, DOA-HCBD-RFP-2022-016 1NH (“RFP”), the State of Montana, Department of Administration (the “State”), awarded the Medical Third-Party Administrator Services contract to Blue Cross Blue Shield of Montana (“BCBSMT”) on September 15, 2022 (the “TPA Contract”). Pursuant to Montana Code Annotated § 18-4-242(2), Allegiance Benefit Plan Management, Inc. (“Allegiance”) submits this letter of protest within 14 days of the execution of the TPA Contract.

Based on the information available to Allegiance, there are several issues with the solicitation process and subsequent award that require the termination of the TPA Contract with BCBSMT pursuant to § 18-4-242(6), MCA.

1. Reservation of right to amend.

As early as August 3, 2022, Allegiance submitted requests for all public information related to the RFP. As you know, the undersigned received a substantial number of documents on September 21st, 23rd, 26th and 27th and Allegiance has not had adequate time to fully review and evaluate the information contained therein. Therefore, Allegiance reserves its right to amend or supplement its bid protest based on the late produced documents or documents which have not yet been produced, which it could not review before the statutory deadline for this protest.

Further details related to Allegiance’s requests for information and the State’s responses are included herein.

2. The State’s consultant, Alliant, incorrectly scored the offerors’ Cost Proposals.

Alliant Services, Inc. (“Alliant”), who the State employed to evaluate the offerors’ cost proposal, incorrectly scored the proposal resulting in an award of the TPA Contract to BCBSMT. The State’s scoring methodology, developed and employed by its consultant Alliant, is flawed because it does not use the same “Medicare Reference Price” for both offerors. The “Medicare Reference Price” is used as a denominator in determining the Multiple of Medicare (“MoM”) expected percentage. As shown by the below figure, the “Medicare Reference Price” used for Allegiance and that used for BCBSMT are approximately \$5.5 million different.

Alliant should have used a common denominator to determine the MoM and the “claim spend.” The “Medicare Reference Price” is based on a single reference – 100% of Medicare – as provided in the RFP. Allegiance, in compliance with the requirements for the RFP, used the Medicare Allowed Amount for all services provided by the State. This is a single data point and does not change based on which third party administrator is processing the claim. It was an error to use \$84,212,728 as BCBSMT’s “Medicare Reference Price (100%).” This error should have been apparent to Alliant and the State, because it makes no sense that both Allegiance’s and BCBSMT’s Medicare Reference Price could be 100% of Medicare and also different numbers.

Thus, in the below figure, it was simply incorrect for Alliant to evaluate BCBSMT based on a \$84,212,728 Medicare Reference Price denominator when determining MoM, but evaluate Allegiance based on a \$78,708,339 Medicare Reference Price as the denominator for determining MoM.

Claim Data: Incurred 1/1/2021-12/31/2021, Paid 1/1/2021 - 2/28/2022	Proposed	Proposed
RESPONDING VENDOR	Alliance	BCBS of MT
PROVIDER NETWORK		
Medicare Coord. Claim Included (Y/N)	N	N
Covered Billed Charge Distribution		
Total claims analyzed/repriced	100.0%	99.7%
Claims Excluded from Analysis	0.0%	0.3%
Total	\$234,871,162	\$234,871,162
Repriced Claim Dollars Based on Network Discounts		
Total	148,823,242	156,425,693
Medicare Reference Price (100%)		
Total	78,708,339	84,212,728
MoM - Low Range	181.1%	179.3%
MoM - Expected	189.1%	187.4%
MoM - High Range	197.1%	195.4%
Claim Spend - Low Range	\$142,526,575	\$141,111,359
Claim Spend - Expected	\$148,823,242	\$147,492,852
Claim Spend - High Range	\$155,119,909	\$153,789,519

This \$5.5 million difference between Allegiance's and BCBSMT's Medicare Reference Price denominator is significant. The error is also consistent across Alliant's July and August Cost Proposal analysis slide decks. Alliant's application of the wrong denominator for BCBSMT produces incorrect and misleading MoM percentages and Claim Spend for BCBSMT.¹ Had the offerors' Repriced Claim Dollars total been divided by the same Medicare Reference Price base (i.e., \$156,425,693 / \$78,708,339), the repriced expected MoM Guarantee should be 198.7% for BCBSMT. Applying this percentage to the Medicare Reference Price would yield an expected claim spend for BCBSMT of \$156,425,693. BCBSMT's methodology would require BCBSMT to reduce its contracts by 18.7 percentage points in order to hit the target 180%, which would require significant savings (approximately \$8.9 million) to the current BCBSMT contracts.

When comparing BCBSMT and Allegiance's repriced claims based on network discounts, it shows a difference of \$7.6 million (\$148,823.242 for Allegiance versus \$156,425,693 for BCBSMT). This difference cannot be ignored when developing the expected claim spend or the comparison of the value of each company's methodology, yet Alliant and the State have ignored that fact in their evaluation. It makes no sense that there is a \$7.6 million difference between the offerors' "Repriced Claim Dollars Based on Network Discounts" in favor of Allegiance, and then the "claim spend" shows a \$1.3 million difference in favor of BCBSMT. BCBSMT's expected claim spend is only reached by incorrectly applying the Medicare Reference Price of \$84,212,728.²

Further compounding Alliant's error, BCBSMT did not analyze and reprice all of the claims, as was required by the RFP, and Alliant miscalculated the percentage of claims that were not repriced. Alliant recognized in its analysis that BCBSMT did not reprice all claims in its evaluation of the Cost Proposals and reported that 0.3% of the claims provided were excluded from BCBSMT's analysis.³

BCBS of MT Results Overview

— All but a very small percentage of claims were analyzed and repriced. Results considered credible.

BCBSMT may have strategically not included claims that negatively impacted scoring in its analysis when it chose not to reprice 0.3% of claims. The blatant disregard for the RFP requirements should have disqualified BCBSMT's proposal as non-responsive and should now serve as a basis to terminate the contract for its failure to meet the requirement of § 18-4-304(5), MCA.

¹ It also is unclear what parameters were used to estimate the low and high ranges for the Multiple of Medicare Guarantee and the Claim Spend.

² The "Cost Tab" of the final scoring matrix shows that BCBSMT's total proposed cost is \$147,492,852, which is incorrect for the reasons stated herein.

³ Alliant did not state that BCBSMT analyzed all but a small percentage of claim *dollars*, only claims.

Further, the below figure pulled from Alliant’s cost proposal analysis must be inaccurate, because it cannot both be true that BCBSMT excluded 0.3% of claims and that its total claims analyzed and repriced equaled the same dollar figure as Allegiance’s total repriced claims at \$234,871,162. There should be approximately a \$704,613 difference in the two figures, and perhaps a higher difference if the claims were excluded based on claim count instead of claim dollars.⁴

Claim Data: Incurred 1/1/2021-12/31/2021, Paid 1/1/2021 - 2/28/2022	Proposed Allegiance	Proposed BCBS of MT
RESPONDING VENDOR		
PROVIDER NETWORK		
Medicare Coord. Claim Included (Y/N)	N	N
Covered Billed Charge Distribution		
Total claims analyzed/repriced	100.0%	99.7%
Claims Excluded from Analysis	0.0%	0.3%
Total	\$234,871,162	\$234,871,162

Had Alliant properly performed the Provider Network Discount Analysis, the results would be as shown below:

	100% of Claims	99.7% of Claims	
	Allegiance Results	BCBS Results	
Billed Charges	\$234,871,162	\$234,871,162	Should be less, BCBS did not reprice all claims
Repriced Allowed	\$148,823,242	\$156,425,693	Greater than Allegiance and does not include all claims
Medicare Allowed (per RFP File from SoM)	\$78,708,339	\$78,708,339	Common denominator "Reference" for all analysis (BCBS should reduce by claims not repriced)
Medicare Allowed (Per BCBS)	\$84,212,728	\$84,212,728	
Repriced Allowed MoM (per RFP File from SoM)	189.1%	198.7%	\$5,504,389
Repriced Allowed MoM (Per BCBS)	176.7%	185.8%	
	Allegiance Results	BCBS Results	
Billed Charges	\$234,871,162	\$234,871,162	
Repriced Allowed	\$148,823,242	\$156,425,693	\$7,602,451
Target Guarantee	190%	180%	198.7% to 180% would require \$8,932,841 in additional savings from BCBS current contracts
Medicare Allowed (per RFP File from SoM)	\$78,708,339	\$78,472,214	\$8,932,841
Medicare Allowed (per BCBS)	\$84,466,126	\$84,212,728	5.7%
Target Allowed (per RFP File from SoM)	\$149,545,841	N/A (BCBS used \$84M for Medicare)	
Target Allowed (per BCBS)	N/A (Allegiance used SoM)	\$151,582,310	180% of BCBS Medicare - not the SoM Medicare provided
The red figures below represent how slide 11 should have been presented			
MoM - Low Range	181.1%	190.2%	
MoM - Expected	189.1%	198.7%	BCBS repricing results using the same denominator as the SoM and Allegiance
MoM - High Range	197.1%	207.2%	
BCBS Cost in excess of Allegiance offer & current contracts			
Claim Spend - Low Range	\$142,526,575	\$149,664,497	\$ 7,137,922
Claim Spend - Express	\$148,823,242	\$156,425,693	\$ 7,602,451
Claim Spend - High Range	\$155,119,909	\$163,103,417	\$ 7,983,508

This error resulted in incorrect scoring totals for the offeror’s cost proposals. As a result, the TPA Contract should be terminated.⁵

⁴ Initially, BCBSMT had failed to analyze \$6.7 million of claims and the State required that BCBSMT clarify its repricing analysis to include all of the claims.

⁵ During the short period of time that Allegiance has been in possession of public scoring information and communications, it has found multiple scoring errors. This should undermine

3. The criteria and requirements that were used in scoring the offerors' cost proposals were not included as criteria in the RFP.

Further tainting the cost proposal solicitation and evaluation process, Alliant's scoring methodology for its evaluation of the MoM Guarantee submissions was not disclosed as part of the RFP criteria.

TPA Bid Response Analysis

MoM Guarantee: Scoring Methodology Description

There are four variables considered in the development of a value score for the MoM Guarantee:

1. The offer of a guarantee. No guarantee triggers an automatic score of zero.
2. The credibility of the guarantee when compared to the MoM Re-Price results. The factor developed here uses an exponential formula with results ranging from approximately 0.5 to 1.5
 - Bidders with guarantees that start triggering at the same MoM value from the Re-Price analysis receive a score of 1.0.
 - Bidders with guarantees that trigger at a MoM value less than their Re-Price analysis can receive a score between 1.0 and 1.5
 - Bidders with guarantees that trigger at a MoM value above their Re-Price analysis can receive a score between 0.5 and 1.0.
 - If no Re-Price analysis was provided, the score for this component defaults to 0.25
3. The maximum bidder fees at risk if the MoM target is not achieved. The factor developed here is the maximum fees at risk for missing the MoM divided by the bidders total fees from their Administration Fee offer.
4. Any conditions or caveats attached to the guarantee that may erode its value. Each bidder starts with a default value of 1.0 and depending on the severity of any caveats or conditions can receive a factor < 1.0.

If a score is offered (condition #1), then the factors resulting from variables 2, 3 and 4 are multiplied together to reach a total score for the guarantee.

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CORRECTIONS TO ERRORS, Slide Deck (August 2022), p. 14.

Pursuant to the Montana Procurement Act, the request for proposals must state the evaluation criteria and their relative importance. § 18-4-304, MCA. No other criteria may be used in the evaluation. *Id.* The RFP failed to do this with respect to the evaluation criteria for the MoM Guarantee. As such, the RFP and the solicitation process did not comply with the Montana Procurement Act. As a result, the TPA Contract awarded to BCBSMT should be terminated.

4. The State's attempt to seek clarification from offerors was, in fact, a solicitation on new terms, which required issuance of a new RFP.

The State issued the RFP on March 28, 2022. Allegiance submitted a timely proposal on May 19, 2022, and other vendors, including BCBSMT, submitted proposals in May 2022. Subsequent to the submissions, the State redid the RFP through what the State improperly

confidence that the scores in the final scoring matrix are accurate, particularly when offerors were unlawfully excluded from this scoring process in real time.

characterized as a request for “clarification”. On June 10, 2022, the State sent an email to offerors requiring offerors to substantially amend their RFP proposals by June 24, 2022, a mere two weeks later. By doing so, the State unlawfully required offerors to submit proposals to a reformulated RFP without adequate notice. Novation as executed here by the State violates the statutory requirements governing procurement.

The State appears to have sent all offerors a “clarification” request in a word document which revised the RFP by setting different or additional criteria or requirements. The need for a clarification was the direct result of the State’s failure to understand the criteria it included in its initial RFP. In addition to the “clarification” request word document, in the body of each clarification email, the State requested different information from individual offerors that was specific to each offeror.

The requirements of the “clarified” RFP were not merely clarifications but were rather complete revisions to what the State initially sought from offerors in the original RFP. The State made the following changes to the RFP:

- It added a requirement that the offerors be able to create, deploy and maintain a system by which average total in-state and out-of-state facility payments are reimbursed at approximately 195%-200% of the Medicare reimbursement rate, when the original RFP did not specify this target be applied to both in-state and out-of-state facility payments;
- It added a requirement that the offeror be able to create, deploy and maintain a system by which average total in-state and out-of-state professional provider payments are reimbursed at approximately 145-150% of the Medicare reimbursement rate;
- It modified the requirements for the maximum aggregate reimbursement level, by setting the target at 230%, instead of the original target of 245%;
- It added a requirement that the offeror could realistically achieve an overall approximate in-state and out-of-state facility reimbursement rate as close to 195% of Medicare as possible over the initial 3-year contract period, when the original RFP did not specify this target be applied to both in-state and out-of-state facilities;
- It added a requirement that the offeror provide a reimbursement strategy for professional providers that does not surpass the current aggregate reimbursement level of 154% and can realistically achieve an overall approximate in-state and out-of-state professional provider reimbursement rate as close to 145% of Medicare as possible over the initial 3-year contract period with comprehensive access to professional providers inside and outside of the Montana; and

- It modified the scope of the response to preclude balance billing for services once payment is made by the State.

With respect to Allegiance, the State also sought an updated response to the following sections: (a) COBRA Administration; (b) Compliance Support; and (c) Multiple of Medicare Guarantee. With respect to BCBSMT, the State sought an updated response to the following sections: (a) Benefit Plan Design and Administration; (b) COBRA administration; (c) Compliance Support; and (d) Re-Pricing Results.

The clarification substantially reformed the RFP such that it could not be classified as a clarification. The RFP should have been cancelled and reissued with adequate notice, pursuant to the Montana Procurement Act. *See* § 18-4-307, MCA (addressing the procedure for cancelling an RFP solicitation). When the State chooses to solicit services through a competitive sealed proposal, the proposals must be solicited through a request for proposal. § 18-4-304(2), MCA. The request for proposals must state the evaluation criteria and their relative importance. § 18-4-304, MCA. The State must provide adequate notice of the request for proposal. § 18-4-304(3), MCA. To provide adequate public notice, the State must provide notice of the proposals within a “reasonable time” before the date the proposals are due and in accordance with the rules adopted by your Department. § 18-4-303(2), MCA.

The State’s initial RFP did not include the evaluation criteria ultimately relied upon by the State, because the State substantially altered the RFP on June 10, 2022. The June 10th “clarification” included new and different criteria. Despite the State’s characterization of the new requests as a “clarification,” the State issued a new RFP on June 10th. Therefore, the State was required by the Montana Procurement Act to provide adequate notice of the new RFP. The State’s only option was to cancel the RFP and reissue it with its new requirements, providing adequate public notice under § 18-4-304(3), MCA. Instead, the State merely emailed the offerors who had already responded with its reformed request and provided offerors a mere 14 days to overhaul their initial proposals.

The State knew that it was not simply *clarifying* its RFP, but rather “fix[ing] or alter[ing]” it. On June 8, 2022, two days before issuing the “clarification”, Amy Jenks wrote to Belinda Adams and the State’s consultants at Alliant in an email titled “Medical Plan TPA RFP Fix” which stated:

To *fix* the RFP, do you think we could just *alter* it to state we desire to have a facility spend goal of 195% (not to include the professional spend)? We could put some sort of limit on the professional side, but I don’t think we would have to be too aggressive there, maybe 155%. I’m guessing based upon the data we get we could evaluate to see if that target is accurate and what savings projections may be. I may be over simplifying, but this seems like an easy solution and easy clarification on the RFP scope side.

Exhibit 1 (emphasis added). Later, on June 8, 2022, Amy Jenks wrote to State employees, including Director Misty Ann Giles, that:

To *fix* the RFP, I think we could just *alter* it to state we desire to have a facility spend goal of 195% (not to include the professional spend) and have a professional spend goal separate at 140%. I've attached a red-lined scope that shows what I'm thinking. I'm thinking we may need to do something about the MoM guarantee and repricing documents, we will work with Alliant on these.

Exhibit 1 (emphasis added).

In response to proposal from Ms. Jenks to “fix” the RFP by “alter[ing]” it, John Thomas informed her as follows:

I have taken your document and formatted the changes as clarification questions. Since the RFP has closed and we already have responses, our only avenue short of canceling is asking Offerors for clarification.

Exhibit 1.

To avoid the burden of canceling the RFP due to the State's error in issuing it with incorrect criteria, the State quickly changed course, and required offerors to submit new proposals without adequate notice in violation of the Montana Procurement Act, and also the State's own guidance. The State Procurement Bureau's Procurement Manual, which serves as a guide for state internal contract officers and provides the public with an overview of the procurement process, prohibits the use of a clarification to revise an RFP. It provides:

6.3.7 Clarification of Proposals.

9.6.3.7.1 Overview. As part of initial proposal evaluations, evaluation committees may decide that clarification is necessary. Accordingly, committees pose questions to a Vendor to resolve conflicting *resolving conflicting information, apparent ambiguities, or minor clerical errors within the proposal*. If a clarification to the proposal is necessary, the CO or Legal Counsel contacts the Vendor, requests the clarifications, and distributes the response to the committee. Acceptable Vendor's clarifications are in writing and signed/issued by an authorized representative.

9.6.3.7.2 Clarifications are Not Opportunities to Change Solicitation Responses. Vendor clarifications *are not used to “cure” deficiencies in proposals, nor to revise them*. Clarifications are used to understand the information provided in

proposals. A request for a Vendor to clarify its proposal is not negotiating the specifications or terms and conditions; a request to clarify does not provide one Vendor an advantage over another.

State of Montana Procurement Manual, p. 50, https://spb.mt.gov/_docs/A-PROCUREMENT-FORMS-GUIDE/SPBM_A_Chapters_8_22_Update.pdf.

The State understood it was using the clarification to cure deficiencies in its original RFP. It ignored its own guidance and the law in issuing a revised RFP without adequate notice. As a result, the solicitation and award of the TPA Contract was unlawful and the TPA Contract with BCBSMT should be terminated.

5. The State violated Montana’s Open Meeting law guaranteed in the Constitution by precluding Allegiance from attending public meetings.

The State unlawfully excluded Allegiance from public meetings. Pursuant to Montana’s Constitution, the “public has the right to expect governmental agencies to afford such reasonable opportunity for citizen participation in the operation of the agencies prior to the final decision as may be provided by the law.” Art. II, Section 8, Montana Constitution. The actions and deliberations of all public agencies shall be conducted openly. § 2-3-210, MCA. Because the “people of the state do not wish to abdicate their sovereignty to the agencies which serve them,” the Montana Legislature has enacted open meeting laws. *Id.* A public meeting can be closed for portions of the meeting that include “discussion relate[d] to a matter of individual privacy and then if and only if the presiding officer determines that the demands of individual privacy clearly exceed the merits of public disclosure.” § 2-3-203(3), MCA.

The State unlawfully precluded Allegiance from the administrative fee / cost proposal scoring meeting. Upon information and belief, the State conducted a meeting, which included their consultant Alliant Services, but did not open the meeting to the public. The State, working with its consultant, awarded scores for the “Cost Proposal” portion of the RFP evaluation. This section included three separate sub-scores: (1) Administrative Fees; (2) Claims Re-pricing Analysis; and (3) Multiple of Medicare guarantees.

There was no basis to preclude the public from this scoring meeting. Non-human entities do not enjoy privacy rights under Article II, section 9. *Great Falls Tribune v. Mont. PSC*, 2003 MT 359, ¶ 39, 319 Mont. 38, 50, 82 P.3d 876, 883. And, at the time the meeting was held, neither BCBSMT nor Allegiance had designated their administrative fees as containing confidential information. Indeed, the RFP requirements prohibited them from doing so.⁶ BCBSMT had designated its Multiple of Medicare Guarantees information as a trade secret, but has since admitted, by not objecting to the information’s disclosure, that the material was never a

⁶ When BCBSMT later designated its administrative fees as confidential, the State should have rejected that designation, consistent with the requirements of its RFP.

trade secret. Thus, with respect to that information, the State did not correctly weigh the individual privacy rights versus the merits of public disclosure.

The State unlawfully precluded Allegiance (and other offerors) from the meeting when it met, discussed and made decisions on the Administrative Fees and Multiple of Medicare Guarantees portions of the RFP evaluation. The State worked with its consultant behind closed doors on these scores. As a result, Allegiance was deprived of its right to participate in that meeting, understand how scores were awarded for those categories, and whether the scores were awarded fairly and not arbitrarily. As discussed above, Alliant's cost proposal analysis is substantially flawed, and such flaws could have been brought to light before the State awarded the TPA Contract had Allegiance been allowed to participate in the cost scoring meeting. By excluding Allegiance from the cost scoring meeting, the State has thwarted the purpose of the Montana Constitution's Right of Participation provision.⁷

This is not the first time a state agency has attempted to preclude access to information provided by an offeror. In *Great Falls Tribune v. Day*, 289 Mont. 155, ¶ 1, 959 P.2d 508 (1998), the Supreme Court reversed a district court order excluding the newspaper and the public from the deliberations of the Private Prison Screening and Evaluation Committee of the Department of Corrections (DOC). The Supreme Court held that the public's constitutional right to review documents and observe deliberations of a public body were violated. *Great Falls Tribune*, 289 Mont. 155, ¶ 19. As the Supreme Court stated, "a public agency's desire for privacy does not provide an exception to the public's constitutional right to observe its government at work." *Id.* at ¶ 32. In support, the Court looked to the comments of the delegates to the Constitutional Convention and concluded they favored facilitation of public scrutiny at the expense of private government operations. *Id.* at ¶ 35.

The State's solicitation process for the TPA Contract violated the Montana Constitution thereby undermining the State's analysis. Therefore, the award to BCBSMT should be terminated.

⁷ The documents produced in response to Allegiance's request for public information reveal that during the scoring process multiple errors were identified and corrected which leads Allegiance to believe that upon further review of the public information, additional errors may be discovered. For example, it was not until August 9, 2022, that Alliant discovered it had used an outdated version of BCBMT's Multiple of Medicare Guarantee to score the offeror's cost proposal. Thus, the scores it submitted a month earlier to the committee were incorrect. Similarly, on August 4, 2022, Belinda Adams communicated that scores needed to be adjusted to account for fiduciary first vs. second level appeals, which apparently had previously been missed.

6. The State impermissibly withheld from Allegiance information submitted by BCBSMT based upon BCBSMT's designation of it as trade secret protected even though the State did not weigh whether it was entitled to protection.

The Montana Constitution also contains a robust “right to know” provision. Art. II, Section 9, Montana Constitution. It provides that “[n]o person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions. . . .” The only exception in the Montana Constitution to the disclosure requirement occurs if a governmental unit determines that “the demand of individual privacy clearly exceeds the merits of public disclosure.” *Id.* Non-human entities do not enjoy privacy rights under Article II, section 9. *Great Falls Tribune v. Mont. PSC*, 2003 MT 359, ¶ 39, 319 Mont. 38, 50, 82 P.3d 876, 883. In addition to the provision in the Constitution, the Legislature has codified the public’s right to information provided to the State as part of a procurement. § 18-4-126(1), MCA. In the litigation initiated by the Great Falls Tribune against DOC, the Supreme Court noted that the proposals submitted to DOC were documents covered by § 18-4-126(1), MCA, and, therefore, available for inspection by the public. *Great Falls Tribune*, 289 Mont. 155, ¶ 32. No privacy interest protected the information from disclosure. *Id.*

The General Information document that was released by the State with the RFP explains the process the State was to engage in upon receiving a proposal in response to the RFP. *See Exhibit 2.* It explains how an offeror may seek to designate material as confidential if the offeror claims that the material qualifies as a bona fide trade secret. The General Information document that was released by the State with the RFP explains the process the State was to engage in upon receiving a proposal in response to the RFP. *See Exhibit 2.* It explains how an offeror may seek to designate material as confidential if the offeror claims the material qualifies as a bona fide trade secret. Pursuant to the RFP process, to request that material be kept confidential, an offeror was required to submit an affidavit from offeror’s legal counsel attesting to and explaining the validity of the trade secret claim. The State required that the affidavit be submitted on the State’s form.

Pursuant to the process set forth in the General Information document, after the Event Close and Date Time for the RFP, the procurement officer must review proposals submitted by the offerors and make a determination about whether the material meets the narrow exceptions to the public’s right to inspection. The General Information Document explains that upon receipt of proposals for the RFP, the procurement officer must ensure each proposal contained no confidential material in the cost or price information submitted. Thus, it was a requirement of the RFP that the cost and price information be available for public inspection.

In connection with its proposal, BCBSMT submitted an Affidavit for Trade Secret Confidentiality dated May 18, 2022. BCBSMT’s May 18th Affidavit designated the following information as subject to the protections of the Montana Uniform Trade Secrets Act (“MUTSA”): “Claims Repricing Analysis / Results File” and “Multiple of Medicare Guarantees File.” *See Exhibit 3.* Later, about one month after it submitted its proposal, BCBSMT submitted an Affidavit for Trade Secret Confidentiality on June 23, 2022. BCBSMT’s June 23rd Affidavit designated the following information as subject to the protections of the MUTSA:

“Claims Repricing Analysis / Results File”, “Provider Facility Reimbursement Strategy”, and “Multiple of Medicare Guarantee File.” See **Exhibit 4**. Thus, in this affidavit, BCBSMT added “Provider Facility Reimbursement Strategy” to the items it sought to protect as a trade secret.⁸ Later still, BCBSMT submitted an Affidavit for Trade Secret Confidentiality on August 30, 2022. BCBSMT’s August 30th Affidavit designated the following information as subject to the protections of MUTSA: “Claims Repricing Analysis/Results File”, “Provider Facility Reimbursement Strategy”, “Multiple of Medicare Guarantees File”, “Performance Guarantees”, and “Administrative Fee Pricing Sheet.” See **Exhibit 5**. Thus, in this affidavit, BCBSMT added “Performance Guarantees” and “Administrative Fee Pricing Sheet” to the items it sought to protect as a trade secret.

Each of the Affidavits for Trade Secret Confidentiality were submitted on the DOA form, which states, in pertinent part as follows: “I am aware that the Vendor is submitting a proposal to the State of Montana (State) for RFP # DOA-HCBD-2022-0161NH. Public agencies in Montana are required by Montana law to permit the public to examine documents that are kept or maintained by the public agencies, other than those legitimately meeting the provisions of MUTSA, and that the State is required to review claims of trade secret confidentiality.” In fact, the State must evaluate an invocation of the MUTSA exception to public inspection under the test established in *Great Falls Tribune*, 2003 MT 359, 319 Mont. 38, 82 P.3d 376. The State form Affidavit for Trade Secret Confidentiality also states: “I and the Vendor accept that, should the State determine that the explanation is incomplete, inadequate or invalid, the submitted materials will be treated as any other document in the agency’s possession, insofar as its examination as a public record is concerned. I and the Vendor are solely responsible for the adequacy and sufficiency of the explanation. Once a proposal is opened, its contents cannot be returned to the Vendor if the Vendor disagrees with the State’s determination of the issue of trade secret confidentiality.” Thus, the State’s form, consistent with *Great Falls Tribune*, makes clear that the State must engage in its own analysis of the trade secret and not merely rely upon the offeror’s designation.

Despite the State’s understanding, as evidenced by its own form affidavit, that it was to perform an analysis of whether the material an offeror designates as a trade secret is in fact a bona fide trade secret under Montana law, we have been provided no evidence that the State analyzed whether BCBSMT’s designation of its Provider Reimbursement Strategy meets the requirements to qualify as a trade secret. In addition, BCBSMT designated its Provider Reimbursement Strategy as confidential on June 23, 2022, over a month after it submitted its original proposal to the RFP. BCBSMT should not be permitted to retroactively designate material that became public information upon its initial submission as a trade secret. The State also was required to evaluate whether BCBSMT’s invocation of the MUTSA exception to public inspection was appropriate. To the extent it did not, and then precluded the public from BCBSMT’s presentation of its Provider Reimbursement Strategy during the solicitation process, the State has violated the Montana Procurement Act.

⁸ Allegiance did not designate its Provider Reimbursement Strategy as a trade secret.

7. The State has not fully responded to Allegiance’s request for public information.

Despite numerous and timely demands for certain documents from the State, Allegiance has been deprived of its right to inspect public records and public information related to the State’s award of the TPA Contract to BCBSMT. The State’s violation of the laws governing Allegiance’s right to inspect public information substantially prejudices Allegiance when exercising its right to file a bid protest. Allegiance was required to file this bid protest by September 29, 2022, stating its objections and allegations of violations of the Montana Procurement Act. Despite the late and seemingly incomplete production, Allegiance has complied with this statutory deadline. Upon submission of this bid protest, DOA will have 30 days to respond to the protest. Thus, the timely receipt of information is vital to Allegiance’s ability to exercise its right to file a bid protest and to participate in the administrative protest process.

Montana’s laws governing public records were enacted to “ensure the efficient and effective management of public records and public information, in accordance with Article II, sections 8 through 10, of the Montana Constitution, for the state of Montana and its political subdivisions.” § 2-6-1001, MCA. “Public information” is defined by Montana law to mean “information that is prepared, owned, used, or retained by any public agency relating to the transaction of official business, regardless of form, except for confidential information that must be protected against public disclosure under applicable law.” § 2-6-1002(11), MCA. “Public record” is defined to mean “public information that is: (a) fixed in any medium and is retrievable in usable form for future reference; and (b) designated for retention by the state records committee, judicial branch, legislative branch or local government records committee.” § 2-6-1002(13), MCA.

Every person has a right to examine and obtain a copy of any public information of the State of Montana. § 2-6-1003(1), MCA. A person may request public information from a public agency. § 2-6-1006(1), MCA. Upon receiving a request for public information, a public agency shall respond in a timely manner to the requesting person by: (a) making the public information maintained by the public agency available for inspection and copying by the requesting person; or (b) providing the requesting person with an estimate of the time it will take to fulfill the request if the public information cannot be readily identified and gathered and any fees that may be charged. § 2-6-1006(2), MCA.

DOA’s failure to perform its clear duty under the Montana Constitution and Montana law deprives Allegiance of information necessary for it to file a timely bid protest that complies with DOA’s regulations and the Montana Procurement Act

The Montana Procurement Act sets forth the exclusive remedies for an unlawful solicitation or award. An offeror aggrieved in connection with the solicitation or award of a contract may protest DOA. § 18-4-242(1), MCA. The protest must be submitted to DOA in writing no later than 14 days after execution of the contract. § 18-4-242(2), MCA. All protests must be in writing and state in detail all of the protestor’s objections and allegations of violations

of the Montana Procurement Act. Admin. R. Mont. 2.5.406. If the protest is not resolved by mutual agreement, the department shall issue in writing a decision on the protest within 30 days after receipt of the protest. § 18-4-242(3), MCA. The protestant then has 14 days after the date of DOA's written decision to request a contested case hearing if it is not satisfied with the department's written decision. § 18-4-242(3)(b), MCA.

Because of the deadlines described above, the State's late production of documents and its failure to produce other documents has harmed Allegiance's ability to submit a bid protest and participate in the administrative process. Allegiance has not received requested phone records and it has not received meeting minutes for all meetings that took place between committee members and between the State and Alliant. Appropriate minutes must be kept and available for inspection by the public. § 2-3-212(1), MCA. Indeed, Allegiance only has received one set of meeting minutes. The State produced only one incomplete record of individual committee member scores and did not produce any individual committee member scoring notes or records of individual committee members' own analysis of the evaluation criteria. Additionally, the emails produced by the State appear to be incomplete. For example, there are limited emails produced from Director Brereton (as the sender), which suggests that his emails were not searched for responsive materials. There also are almost no emails where Misty Ann Giles is a sender, although the produced emails indicate she was involved in strategic and high-level decisions related to the RFP and solicitation process.

8. The oral presentation scores were arbitrary and not grounded in the materials presented as demonstrated by the significant variation between the technical scoring and the oral presentation scoring.

BCBSMT was awarded 217 more points than Allegiance for the "Oral Presentation / Interview" category of the evaluation. During the scoring process for this category, the committee scored Allegiance's product demonstration far lower than the committee members had scored Allegiance during the technical scoring portion of the evaluation, despite the same materials being presented. Individual committee members encouraged particularly low scores for Allegiance's oral presentation. An underlying purpose of the Montana Procurement Act is to "ensure the fair and equitable treatment of all persons who deal with the procurement system of the state." § 18-4-122(5), MCA. Based on the scoring presentation for the oral demonstration and the discussion during those meetings, the scores awarded to BCBSMT and Allegiance for their Oral Presentations were arbitrary and not based on the materials presented.

9. Multiple committee members or individuals participating in the evaluation of the RFP proposals have connections to BCBSMT.

Committee members or others involved in the solicitation process submitted Declarations of Non-Conflict of Interest and Confidential Information. Each committee member or person involved in the RFP process declared that it certified no relationship with or bias toward any offeror that would prevent the individual from evaluating any proposal solely on its merits. Upon information and belief, multiple committee members or individuals involved in the solicitation and award have worked for Blue Cross Blue Shield. As emphasized in the State's

Procurement Manual, “any erosion of public trust, and any perception of impropriety, is detrimental to the integrity of the procurement process.” State of Montana Procurement Manual, p. 7, https://spb.mt.gov/_docs/A-PROCUREMENT-FORMS-GUIDE/SPBM_A_Chapters_8_22_Update.pdf.

10. Conclusion.

In sum, the solicitation and award of the TPA Contract violated the law and therefore the TPA Contract should be terminated by the State pursuant to § 18-4-242(6), MCA. Affirming the TPA Contract, and therefore the flawed process the State used to award it, is not in the best interest of the State of Montana.

Sincerely,



Brianne C. McClafferty
Associate
for Holland & Hart LLP

BCM/lfs

Enclosure

19862160_v8

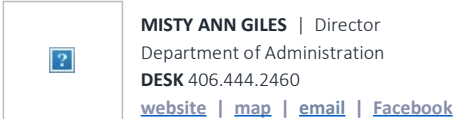
EXHIBIT 1

From: [Giles, Misty Ann](#)
To: [Thomas, John](#); [Jenks, Amy](#); [Harris, Nolan](#)
Cc: [Harris, Don](#); [Holmlund, Meghan](#); [Adams, Belinda](#)
Subject: RE: Medical Plan TPA RFP Fix - LEGAL REVIEW
Date: Monday, June 13, 2022 10:20:06 AM
Attachments: [image003.jpg](#)
[image004.png](#)
[image005.png](#)

All,

Did this go out formally?

MAG



From: Thomas, John <jthomas@mt.gov>
Sent: Wednesday, June 8, 2022 1:50 PM
To: Jenks, Amy <AJenks@mt.gov>; Harris, Nolan <Nolan.Harris@mt.gov>
Cc: Harris, Don <Don.Harris@mt.gov>; Giles, Misty Ann <MistyAnn.giles@mt.gov>; Holmlund, Meghan <mholmlund@mt.gov>; Adams, Belinda <Belinda.Adams@mt.gov>
Subject: RE: Medical Plan TPA RFP Fix - LEGAL REVIEW

Amy:

I have taken your document and formatted the changes as clarification questions. Since the RFP has closed and we already have responses, our only avenue short of cancelling is asking Offerors for clarification.

I have attached the updated document and I ask that you review it to ensure we are getting the clarified information we need from Offerors.

Thanks, and we look forward to speaking with you at 3:00.

JT

From: Jenks, Amy <AJenks@mt.gov>
Sent: Wednesday, June 8, 2022 12:28 PM
To: Harris, Nolan <Nolan.Harris@mt.gov>; Thomas, John <jthomas@mt.gov>
Cc: Harris, Don <Don.Harris@mt.gov>; Giles, Misty Ann <MistyAnn.giles@mt.gov>; Holmlund, Meghan <mholmlund@mt.gov>; Adams, Belinda <Belinda.Adams@mt.gov>
Subject: FW: Medical Plan TPA RFP Fix

John and Nolan,

We received the data back from our multiple of Medicare study today and have a plan of attack on how to address the Medical Plan TPA RFP.

To fix the RFP, I think we could just alter it to state we desire to have a facility spend goal of 195% (not to include the professional spend) and have a professional spend goal separate at 140%. I've attached a red-lined scope that shows what I'm thinking. I'm thinking we may need to do something about the MoM guarantee and repricing documents, we will work with Alliant on these.

I've asked Belinda to schedule some time for us to discuss today so we are prepared for the call with Misty tomorrow and able to move forward fairly quickly with the RFP.

AMY JENKS | Administrator
Health Care & Benefits Division



Department of Administration
DESK 406.444.2528 **FAX** 406.444.0080
[website](#) | [map](#) | [email](#) | [Facebook](#)

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From: Scott McClave <smcclave@alliant.com>
Sent: Wednesday, June 8, 2022 11:18 AM
To: kelly.actuariesnw.com <kelly@actuariesnw.com>; Jenks, Amy <AJenks@mt.gov>; Tom Quirk <tom.quirk@alliant.com>; Mary Kay Puckett <MaryKay.Puckett@alliant.com>
Cc: Adams, Belinda <Belinda.Adams@mt.gov>
Subject: [EXTERNAL] RE: Medical Plan TPA RFP Fix

Amy and team,

I've gotten the results back from our independent Medicare reprice analysis and it looks like they're in line with what Allegiance is showing as the result. I've got some questions to discuss with the vendor for clarification purposes but they weren't available for that discussion till tomorrow afternoon. As soon as I have things clarified from the vendor I will forward along their report, but I think for purposes of our discussion tomorrow morning we'll need to assume Allegiance results are reasonably accurate.

I took the info from a couple weeks ago and below is the result broken out by Facility vs. Prof, separated by MT and all other for 2021. (I thought it was interesting that after the St Peter's update for 2021 the MoM for MT vs All Other is basically now the same)

If you were to revise the bid to ask that facility be reduced to 200% of Medicare, this would change your overall MoM to about 178.2% yielding about 8.1% savings to the plan. If that meets the overall objective for the state, then your suggestion is probably the easiest way forward.

		Allowed Amt	Med Est	Multiple	New Target Multiple	New Allowed Amt	Savings vs. Current Allowed
MT	IP & OP	\$84,849,774	\$36,859,976	230.2%	200.0%	\$73,719,952	-13.1%
MT	PROF	\$54,551,371	\$35,268,441	154.7%	154.7%	\$54,551,371	0.0%
ALL OTHER	IP & OP	\$12,825,417	\$5,536,411	231.7%	200.0%	\$11,072,822	-13.7%
ALL OTHER	PROF	\$6,214,663	\$4,023,998	154.4%	154.4%	\$6,214,663	0.0%
		\$158,441,225	\$81,688,826	194.0%	178.2%	\$145,558,808	-8.1%

Scott McClave
 Underwriting Consultant, Vice President
 Employee Benefits

D (949) 660-8159
 E smcclave@alliant.com
alliantbenefits.com [alliantbenefits.com]



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advice, and recipients are advised to consult with their appropriate advisors regarding any legal, financial, or tax implications.

From: kelly [actuariesnw.com \[actuariesnw.com\]](mailto:kelly@actuariesnw.com) <kelly@actuariesnw.com>
Sent: Wednesday, June 8, 2022 8:49 AM
To: Jenks, Amy <AJenks@mt.gov>; Tom Quirk <tom.quirk@alliant.com>; Scott McClave <smcclave@alliant.com>; Mary Kay Puckett <MaryKay.Puckett@alliant.com>
Cc: Adams, Belinda <Belinda.Adams@mt.gov>
Subject: RE: Medical Plan TPA RFP Fix

This message has originated outside the organization.

Hi Amy,

To get the average % of Medicare, you can divide the Allowed amounts by the Medicare amounts. So cell G50 in your worksheet is B50 / I50 = 229.8%, and G55 calculates at 150.3%.

I like your idea of separating facility and professional, but would ask for some reduction on the professional side (maybe 140%?).

Thanks,
Kelly

Kelly Grebinsky, FSA, MAAA, FCA | Principal, Senior Consulting Actuary
Actuaries Northwest, LLC | [www.actuariesnw.com \[actuariesnw.com\]](http://www.actuariesnw.com)
425.643.8050 (o) | 425.466.0361 (m) | 425.341.9104 (f)

From: Jenks, Amy <AJenks@mt.gov>
Sent: Wednesday, June 8, 2022 8:06 AM
To: Tom Quirk <tom.quirk@alliant.com>; Scott McClave <smcclave@alliant.com>; Mary Kay Puckett <MaryKay.Puckett@alliant.com>; kelly [actuariesnw.com \[actuariesnw.com\]](mailto:kelly@actuariesnw.com) <kelly@actuariesnw.com>
Cc: Adams, Belinda <Belinda.Adams@mt.gov>
Subject: Medical Plan TPA RFP Fix

All,

I know we are expected to get our data back later today possibly and we have a follow-up meeting scheduled for tomorrow a.m. with Misty. I've been thinking about what to do with the RFP to accomplish our goal of reducing spend and I'd like to get your thoughts about something.

If you look at the reporting Allegiance provided, what appears to be driving down the Medicare % is the professional spend being included. I've attached the report from Allegiance, as well as a document with the charts moved into excel. I've separated out facility vs. professional for 2021. I'm not 100% how to get at the average % of Medicare if we only look at facility spend, Scott/Kelly may need to help with that, but I'm guessing we are around 230%.

To fix the RFP, do you think we could just alter it to state we desire to have a facility spend goal of 195% (not to include the professional spend)? We could put some sort of limit on the professional side, but I don't think we would have to be too aggressive there, maybe 155%. I'm guessing based upon the data we get we could evaluate to see if that target is accurate and what savings projections may be. I may be over simplifying, but this seems like an easy solution and easy clarification on the RFP scope side.

Let me know your thoughts so we can be a bit prepared to present some sort of solution to Misty tomorrow.



AMY JENKS | Administrator
Health Care & Benefits Division
Department of Administration
DESK 406.444.2528 **FAX** 406.444.0080
[website](#) | [map \[goo.gl\]](#) | [email](#) | [Facebook \[facebook.com\]](#)

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EXHIBIT 2

RFP GENERAL INFORMATION

ACKNOWLEDGEMENT / ACCEPTANCE OF RFP SPECIFICATIONS, REQUIREMENTS, AND CONTRACT.

By submitting a response to this RFP, offeror acknowledges it understands and shall comply with the RFP specifications, requirements, and contract. Much of the language included in the contract reflects the requirements of Montana law.

Offerors requesting additions or exceptions to the contract terms, shall use the Q & A Board to submit them by the Question Submission Close Date and Time deadline stated for questions submission. Requests must be accompanied by an explanation why the exception is being sought and what specific effect it will have on the offeror's ability to respond to the RFP or perform the contract. The State reserves the right to address nonmaterial requests for exceptions to the contract language with the highest scoring offeror during contract negotiation.

The State shall identify any revisions to the contract language either in the Q & A Board or in an addendum to this RFP. The addendum will apply to all offerors submitting a response to this RFP. The State will determine any changes to the contract.

ACCEPTANCE/REJECTION OF PROPOSALS. The State reserves the right to accept or reject any or all proposals, wholly or in part, and to make awards in any manner deemed in the best interest of the State.

ALTERATION OF SOLICITATION DOCUMENT. In the event of inconsistencies or contradictions between language contained in the State's solicitation document and an offeror's response, the language contained in the State's original solicitation document will prevail. Intentional manipulation and/or alteration of solicitation document language will result in the offeror's disqualification and possible debarment.

AUTHORITY. This RFP is issued under 18-4-304, Montana Code Annotated (MCA) and ARM 2.5.602. The RFP process is a procurement option allowing the award to be based on stated evaluation criteria. The RFP states the relative importance of all evaluation criteria. The State shall use only the evaluation criteria outlined in this RFP.

CLASSIFICATION AND EVALUATION OF PROPOSALS:

- **Initial Classification of Proposals as Responsive or Nonresponsive.** The State shall initially classify all proposals as either "responsive" or "nonresponsive" (ARM 2.5.602). The State may deem a proposal nonresponsive if: (1) any of the required information is not provided; (2) the submitted price is found to be excessive or inadequate as measured by the RFP criteria; or (3) the proposal does not meet RFP requirements and specifications. The State may find any proposal to be nonresponsive at any time during the procurement process. If the State deems a proposal nonresponsive, it will not be considered further.
- **Determination of Responsibility.** The procurement officer shall determine whether an offeror has met the standards of responsibility consistent with ARM 2.5.407. An offeror may be determined nonresponsible at any time during the procurement process if information surfaces that supports a nonresponsible determination. If an offeror is found nonresponsible, the procurement officer will notify the offeror by mail. The determination will be included within the procurement file.
- **Evaluation of Proposals.** An evaluator/evaluation committee shall evaluate all responsive proposals based on stated criteria and recommend an award to the highest scoring offeror. After receipt of proposals and prior to the recommendation of award, the procurement officer may initiate discussions with one or more offerors should clarification be necessary. In scoring against stated criteria, the evaluator/evaluation committee may consider such factors as accepted industry standards and a comparative evaluation of other proposals in terms of differing price and quality. These scores will be used to determine the most advantageous offering to the State. If an evaluation committee meets to deliberate and evaluate the proposals, the public may attend and observe the evaluation committee deliberations.
- **Completeness of Proposals.** Selection and award will be based on the offeror's proposal and other items outlined in this RFP. Proposals may not include references to information such as Internet websites, unless specifically requested. Information or materials presented by offerors outside the formal response or subsequent discussion, negotiation, or best and final offer, if requested, will not be considered, will have no bearing on any award, and may result in the offeror being disqualified from further consideration.

- **Best and Final Offer.** Under Montana law, the procurement officer may request a best and final offer if additional information is required to make a final decision. The State reserves the right to request a best and final offer based on price/cost alone. Please note that the State rarely requests a best and final offer on cost alone.
- **Evaluator/Evaluation Committee Recommendation for Contract Award.** The evaluator/evaluation committee shall provide a written recommendation for contract award to the procurement officer that contains the scores, justification, and rationale for the decision. The procurement officer shall review the recommendation to ensure its compliance with the RFP process and criteria before concurring with the evaluator's/evaluation committee's recommendation.
- **Request for Documents Notice.** Upon concurrence with the evaluator's/evaluation committee's recommendation, the procurement officer shall request from the highest scoring offeror the required documents and information, such as insurance documents, contract performance security, an electronic copy of any requested material (e.g., proposal, response to clarification questions, and/or best and final offer), and any other necessary documents. Receipt of this request does not constitute a contract and **no work may begin until a contract signed by all parties is in place.** The procurement officer shall notify all other offerors of the State's selection.
- **Contract Execution.** Upon receipt of all required materials, a contract incorporating the highest scoring offeror's proposal will be provided to the highest scoring offeror for signature. The highest scoring offeror shall accept and agree to all material requirements contained in contract included with this RFP. If the highest scoring offeror does not accept all material requirements, the State may move to the next highest scoring offeror or cancel the RFP. Work under the contract may begin when the contract is signed by all parties.

CONTRACT PERIOD. The contract period is stated in the contract included with this RFP. The parties may mutually agree to a renewal of this contract in any interval that is advantageous to the State. Renewal is solely the State's option.

DEBARMENT. Offeror certifies, by submitting this proposal, that neither it nor its principals are presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from participation in this transaction (contract) by any governmental department or agency. Offeror must contact the procurement officer listed in this RFP prior to submitting a response if this statement cannot be certified.

FAILURE TO COMPLY WITH INSTRUCTIONS. Offerors failing to comply with the instructions provided in the prerequisite, Submitting a Proposal, may be subject to point deductions. Further, the State may deem a proposal nonresponsive or disqualify it from further consideration if it does not follow the response format, is difficult to read or understand, or is missing requested information.

FAILURE TO HONOR PROPOSAL. If an offeror to whom a contract is awarded refuses to accept the award (contract) or fails to deliver in accordance with the contract terms and conditions, the department may, in its discretion, suspend the offeror for a period of time from entering into any contracts with the State of Montana.

OFFER IN EFFECT FOR 120 CALENDAR DAYS. Offeror agrees that it may not modify, withdraw, or cancel its proposal for a 120-day period following the RFP Close date or receipt of best and final offer, if required.

OFFEROR COMPETITION. The State encourages free and open competition to obtain quality, cost-effective services and supplies. The State designs specifications, proposal requests, and conditions to accomplish this objective.

OFFEROR'S REPRESENTATIONS – SIGNATORY AUTHORITY AND NO COLLUSION.

Offeror represents that the person submitting the response to this RFP is authorized to legally bind the offeror to the RFP. Offeror may not withdraw the response for lack of authority. Offeror further represents response to this RFP has been made without collusion.

OWNERSHIP OF TIMELY SUBMITTED MATERIALS. The State owns all materials submitted in response to this RFP.

PERSONAL PROPERTY TAX. All personal property taxes will be paid by the offeror.

Q & A BOARD.

Offerors having questions or requiring clarification or interpretation of information presented in this RFP shall use the Q & A Board to submit them by the Question Submission Close Date and Time deadline stated. Issues or questions received after the Question Submission Close Date deadline may not be considered.

Offerors are responsible for viewing Q & A Board information to become informed as to conditions that might in any way affect the RFP or their response. Failure to do so will be at the sole risk of the offeror.

RECEIPT OF PROPOSALS AND PUBLIC INSPECTION:

- **Public Information.** Subject to exceptions provided by Montana law, all information received in response to this RFP, including copyrighted material, is public information. Proposals will be made available for public viewing shortly after the RFP Event Close Date and Time.
- **Exceptions.** The exceptions to this requirement are: (1) bona fide trade secrets meeting the requirements of the Uniform Trade Secrets Act, Title 30, chapter 14, part 4, MCA, that have been properly marked, separated, and documented; (2) matters involving individual safety as determined by the State; and (3) other constitutional protections. See 18-4-304, MCA.
- **Procurement Officer Review of Proposals.**

Shortly after the Event Close Date and Time, the procurement officer will review submitted proposals for information meeting the exceptions referenced above, providing the following conditions are met:

- Confidential information files are clearly labeled and submitted in the Supplier Attachments section.
- The proposal does not contain confidential material in the cost or price.
- An affidavit from offeror's legal counsel attesting to and explaining the validity of the trade secret claim as set out in Title 30, chapter 14, part 4, MCA, is uploaded in the Supplier Attachment section. Counsel must use the State's "Affidavit for Trade Secret Confidentiality" form to request the trade secret claim. This affidavit is available on the [State Procurement](#) website at or by calling 406-444-2575.

Information separated out under this process will be available for review only by the procurement officer, evaluator/evaluation committee members, and limited designees. Offerors shall pay all of its legal costs and related fees and expenses associated with defending a claim for confidentiality should another party submit a "right to know" (open records) request.

RESULTING CONTRACT. This RFP and any addenda, the offeror's RFP response, including any amendments, a best and final offer (if any), and any clarification question responses shall be incorporated by reference in any resulting contract.

REVIEW RFP. Offerors shall carefully review the entire RFP terms and conditions. Offerors shall promptly notify the procurement officer of any ambiguity, inconsistency, unduly restrictive specifications, or error that they discover. In this notice, the offeror shall include any terms or requirements within the RFP that preclude the offeror from responding or add unnecessary cost. Offerors shall provide an explanation with suggested modifications. The notice must be received by the deadline for questions set forth in the RFP. The State will determine any changes to the RFP.

STATE NOT RESPONSIBLE FOR PREPARATION COSTS. Offeror is solely responsible for all costs it incurs prior to contract execution.

STATE'S RIGHT TO INVESTIGATE AND REJECT. The State may make such investigations as deemed necessary to determine the offeror's ability to provide the supplies and/or perform the services specified. The State reserves the right to reject a proposal if the information submitted by, or investigation of, the offeror fails to satisfy the State's determination that the offeror is properly qualified to perform the obligations of the contract. *This includes the State's ability to reject the proposal based on negative references.*

STATE'S RIGHTS RESERVED. While the State has every intention to award a contract resulting from this RFP, issuance of the RFP in no way constitutes a commitment by the State to award and execute a contract. Upon a determination such actions would be in its best interest, the State, in its sole discretion, reserves the right to:

- Cancel or terminate this RFP (18-4-307, MCA);
- Reject any or all proposals received in response to this RFP (ARM 2.5.602);
- Waive any undesirable, inconsequential, or inconsistent provisions of this RFP that would not have significant impact on any proposal (ARM 2.5.505);
- Not award a contract, if it is in the State's best interest not to proceed with contract execution (ARM 2.5.602); or
- If awarded, terminate any contract if the State determines adequate state funds are not available (18-4-313, MCA).

EXHIBIT 3



State Financial Services Division
Greg Gianforte, Governor
Misty Ann Giles, Director

AFFIDAVIT FOR TRADE SECRET CONFIDENTIALITY

STATE OF MONTANA)

)ss.

County of Lewis & Clark)

Christopher M. Herriges (Affiant), being first duly sworn under oath, and representing Blue Cross and Blue Shield of Montana (hereafter "Vendor"), hereby deposes and says that:

1. I am an attorney licensed to practice in the State of Montana, representing the Vendor referenced in this matter, and have full authority from the Vendor to submit this affidavit and accept the responsibilities stated herein.

2. I am aware that the Vendor is submitting a proposal to the State of Montana (State) for RFP # DOA-HCBD-2022-0161NH. Public agencies in Montana are required by Montana law to permit the public to examine documents that are kept or maintained by the public agencies, other than those legitimately meeting the provisions of Montana's Uniform Trade Secrets Act, Mont. Code Ann. §§ 30-14-401, *et seq.*, and that the State is required to review claims of trade secret confidentiality.

3. I have read and am familiar with the provisions of Montana's Uniform Trade Secrets Act, am familiar with the case law interpreting it, and understand that all information received in response to this RFP will be available for public examination except for:

- (a) trade secrets meeting the requirements of the Act; and
- (b) matters involving individual safety as determined by the State.

4. I am aware that in order for the Vendor to claim confidential material, this affidavit must be fully completed and submitted to the State, and the following conditions must be met by the Vendor:

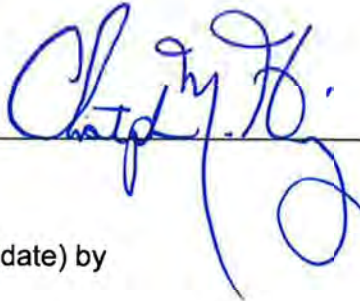
- (a) information to be withheld under a claim of confidentiality must be clearly marked and separated from the rest of the proposal;
- (b) the proposal may not contain trade secret matter in the cost or price; and
- (c) the Vendor's explanation of the validity of this trade secret claim is attached to this affidavit.

5. I and the Vendor accept that, should the State determine that the explanation is incomplete, inadequate or invalid, the submitted materials will be treated as any other document in the agency's possession, insofar as its examination as a public record is concerned. I and the Vendor are solely responsible for the adequacy and

sufficiency of the explanation. Once a proposal is opened, its contents cannot be returned to the Vendor if the Vendor disagrees with the State's determination of the issue of trade secret confidentiality.

6. I, on behalf of the Vendor, warrant that the Vendor will be solely responsible for all legal costs and fees associated with any defense by the State of the Vendor's claim for trade secret protection in the event of an open records request from another party which the Vendor chooses to oppose. The Vendor will either totally assume all responsibility for the opposition of the request, and all liability and costs of any such defense, thereby defending, protecting, indemnifying and saving harmless the State, or the Vendor will immediately withdraw its opposition to the open records request and permit the State to release the documents for examination. The State will inform the Vendor in writing of any open records request that is made, and the Vendor will have three working days from receipt of the notice to notify the State in writing whether the Vendor opposes the request or not. Failure to provide that notice in writing will waive the claim of trade secret confidentiality and allow the State to treat the documents as a public record.

Documents that, in the opinion of the State, do not meet all the requirements of the above will be available for public inspection, including any copyrighted materials.



Affiant's Signature

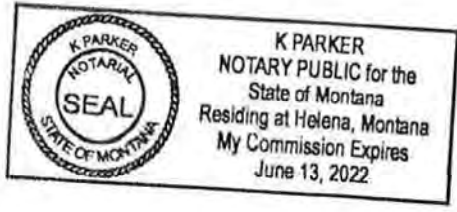
Signed and sworn to before me on May 18, 2022 (date) by

Christopher M. Heniges (Affiant's name).

U. W. Oakes

Notary Public for the State of Montana

My Commission Expires: June 13, 2022



**ATTACHMENT TO AFFIDAVIT FOR TRADE SECRET
CONFIDENTIALITY**

RFP# DOA-HCBD-2022-0161NH

Affidavit of Christopher M. Herriges

**Attorney for Blue Cross and Blue Shield of Montana, a
Division of Health Care Service Corporation, a Mutual Legal Reserve Company.**

Blue Cross and Blue Shield of Montana, a Division of Health Care Service Corporation, a Mutual Legal Reserve Company ("Vendor"), designates the following material responsive to RFP# DOA-HCBD-2022-0161NH as a trade secret/confidential, pursuant to the Receipt of Proposals and Public Inspection section of the RFP's General Information provisions, and subject to the protections of the Montana Uniform Trade Secrets Act, §30-14-401, et.seq., MCA, for the following reasons.

Claims Repricing Analysis/Results File: The provider re-pricing information being requested as a part of the Claims Repricing Analysis/Results file/summary, is based upon and is a matter of private contract between the Vendor and its participating network of providers. These contracted rates, discounts, allowable charges and related information form the basis for Vendor's market-leading discounts and give Vendor a competitive edge over ordinary third-party administrators in Montana.

This information is not generally known nor is it readily ascertainable by proper means (e.g., by public disclosure) insofar as the Vendor does not want competitors to obtain its provider pricing upon which it builds its participating provider networks. Public disclosure of Vendor's pricing would economically benefit competitors by allowing them to build their own provider networks in competition with the Vendor, using Vendor information as the target objective or comparison point; essentially using Vendor's pricing against it in crafting their own networks. Moreover, public disclosure of this information would allow competitors who have neither shared in the cost or effort to develop such networks, nor otherwise have a right to the networks' use, to nonetheless utilize Vendor's efforts against it.

Vendor has undertaken reasonable efforts to protect such information insofar as it conducts the negotiations of and rendering of the final terms between it and its network providers as a private matter, publicizing neither the negotiations nor the contractual terms arrived at by those parties. Moreover, the Vendor and its network providers contractually agree to mutually maintain the confidentiality of proprietary and trade secret information that either party may obtain from the other as a result of the contractual relationship between them.

Vendor has clearly marked this information as confidential and has separated it from the remainder of its response to the RFP, consistent with the above-referenced sections of the RFP's General Information provisions.

Multiple of Medicare Guarantees File: The Multiple of Medicare Guarantees summary, upon which Vendor is putting certain of its PEPM fees at risk, is based upon its pricing strategy with and is a matter of private contract between the Vendor and its participating network of providers. The pricing strategy form the basis for Vendor's market-leading discounts and give Vendor a competitive edge over ordinary third-party administrators in Montana.

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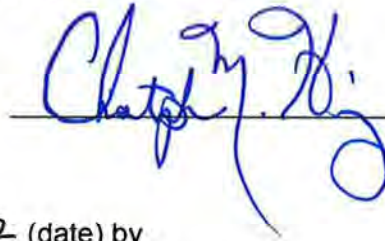
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EXHIBIT 4

responsible for the adequacy and sufficiency of the explanation. Once a proposal is opened, its contents cannot be returned to the Vendor if the Vendor disagrees with the State's determination of the issue of trade secret confidentiality.

6. I, on behalf of the Vendor, warrant that the Vendor will be solely responsible for all legal costs and fees associated with any defense by the State of the Vendor's claim for trade secret protection in the event of an open records request from another party which the Vendor chooses to oppose. The Vendor will either totally assume all responsibility for the opposition of the request, and all liability and costs of any such defense, thereby defending, protecting, indemnifying and saving harmless the State, or the Vendor will immediately withdraw its opposition to the open records request and permit the State to release the documents for examination. The State will inform the Vendor in writing of any open records request that is made, and the Vendor will have three working days from receipt of the notice to notify the State in writing whether the Vendor opposes the request or not. Failure to provide that notice in writing will waive the claim of trade secret confidentiality and allow the State to treat the documents as a public record.

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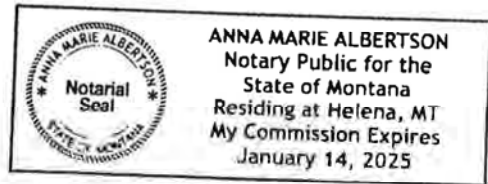
Affiant's Signature

Signed and sworn to before me on June 23, 2022 (date) by

Christopher M. Herriger (Affiant's name)
Amir Mulla

Notary Public for the State of Montana

My Commission Expires: January 14, 2025



**ATTACHMENT TO AFFIDAVIT FOR TRADE SECRET
CONFIDENTIALITY**

RFP# DOA-HCBD-2022-0161NH

Affidavit of Christopher M. Herriges

**Attorney for Blue Cross and Blue Shield of Montana, a
Division of Health Care Service Corporation, a Mutual Legal Reserve Company.**

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Vendor has undertaken reasonable efforts to protect such information insofar as it conducts the negotiations of and rendering of the final terms between it and its network providers as a private matter, publicizing neither the negotiations nor the contractual terms arrived at by those parties. Moreover, the Vendor and its network providers contractually agree to mutually maintain the confidentiality of proprietary and trade secret information that either party may obtain from the other as a result of the contractual relationship between them.

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Provider Facility Reimbursement Strategy: The provider re-pricing results, expressed as one or more percentages of Medicare, being provided in response to the Provider Facility Reimbursement Strategy section of the RFP (Section 1.9) is based upon and is a matter of private contract between the Vendor and its participating network of providers. These contracted rates, discounts, allowable charges, and related information form the basis for Vendor's market-leading discounts and gives Vendor a competitive edge over ordinary third-party administrators in Montana.

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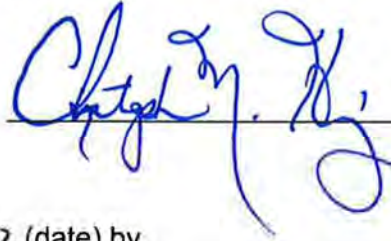
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EXHIBIT 5

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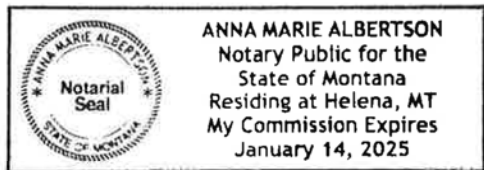
Affiant's Signature

Signed and sworn to before me on August 30, 2022 (date) by

Christopher M. Herriges (Affiant's name).

Notary Public for the State of Montana

My Commission Expires: January 14, 2025



**ATTACHMENT TO AFFIDAVIT FOR TRADE SECRET
CONFIDENTIALITY**

RFP# DOA-HCBD-2022-0161NH

Affidavit of Christopher M. Herriges

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Provider Facility Reimbursement Strategy: The provider re-pricing results, expressed as one or more percentages of Medicare, being provided in response to the Provider Facility Reimbursement Strategy section of the RFP (Section 1.9) is based upon and is a matter of private contract between the Vendor and its participating network of providers. These contracted rates, discounts, allowable charges, and related information form the basis for Vendor's market-leading discounts and gives Vendor a competitive edge over ordinary third-party administrators in Montana.

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Vendor has clearly marked this information as confidential and has separated it from the remainder of its response to the RFP, consistent with the above-referenced section of the RFP's General Information provisions.

Performance Guarantees: The performance guarantees information being requested from the Vendor at the State's request and in response to the above-referenced RFP, is based upon a detailed internal analysis of Vendor's costs to provide the services being requested by the State. The administrative fees which the Vendor is willing to put at risk as the State's third-party claims administrator, as developed by the Vendor's internal processes and business analysis gives the Vendor a competitive edge over ordinary third-party administrators in Montana.

This information is not generally known nor is it readily ascertainable by proper means (e.g., by public disclosure) insofar as the Vendor does not want competitors to obtain the results of its fees at risk processes and efforts. Public disclosure of Vendor's performance guarantees/fees at risk strategy would economically benefit competitors by allowing them to adjust their own performance guarantees in competition with the Vendor, using Vendor information as the target objective or comparison point; essentially using Vendor's performance guarantee strategy against it in crafting their own fees at risk schedules. Moreover, public disclosure of this information would allow competitors who have neither shared in the cost or effort to develop such a schedule, to nonetheless utilize Vendor's efforts against it. The State recognized the confidentiality of such information during its recent RFP scoring process, allowing neither the public or any of the Vendor's competitors to learn of the details of Vendor's performance

guarantee offer, at least prior to any contracting stage of the RFP process (and, reciprocally, Vendor was not made privy to the fees at risk schedules of any competing bidder).

Vendor has undertaken reasonable efforts to protect such information insofar as its performance guarantee strategy, and the conduct of and the analysis and development of the fees which it elects to put at risk, is a private, internal matter. Vendor's Code of Conduct, applicable to all employees, stresses the importance of and requirement to protect Vendor's business confidential information, which would include performance guarantees it offers to its prospective and existing clients. Vendor annually trains its employees on the necessity for protecting the company's confidential business information, the failure of which may lead to discipline up to and including termination of employment.

Vendor has clearly marked this information as confidential and has separated it from the remainder of its response to the RFP, consistent with the above-referenced section of the RFP's General Information provisions.

Administrative Fees Pricing Sheet: The administrative fees pricing information being requested from Vendor at the State's request and in response to the above-referenced RFP, is based upon a detailed internal analysis of Vendor's costs to provide the services being requested by the State. The administrative fees developed by the Vendor's internal processes give the Vendor a competitive edge over ordinary third-party administrators in Montana.

This information is not generally known nor is it readily ascertainable by proper means (e.g., by public disclosure) insofar as the Vendor does not want competitors to obtain the results of its pricing processes and efforts. Public disclosure of Vendor's pricing would economically benefit competitors by allowing them to adjust their own administrative fees in competition with the Vendor, using Vendor information as the target objective or comparison point; essentially using Vendor's pricing against it in crafting their own administrative fee schedules. Moreover, public disclosure of this information would allow competitors who have neither shared in the cost or effort to develop such a fee schedule, to nonetheless utilize Vendor's efforts against it. The State recognized the confidentiality of such information during its recent RFP scoring process, allowing neither the public or any of the Vendor's competitors to learn of the details of Vendor's administrative fees pricing, at least prior to any contracting stage of the RFP process (and, reciprocally, Vendor was not made privy to the administrative fees schedules of any competing bidder).

Vendor has undertaken reasonable efforts to protect such information insofar as it conducts the analysis and development of the schedule of administrative fees is a private, internal matter. Vendor's Code of Conduct, applicable to all employees, stresses the importance of and requirement to protect Vendor's business confidential information, which would include the schedule of administrative fees it offers its potential and existing clients. Vendor annually trains its employees on the necessity for protecting the company's confidential business information, the failure of which may lead to discipline up to and including termination of employment.

Vendor has clearly marked this information as confidential and has separated it from the remainder of its response to the RFP, consistent with the above-referenced section of the RFP's General Information provisions.

[End of Attachment to Trade Secret Affidavit]