

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
19 DOA 05891

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| <p>Corvel Enterprise Comp Inc Petitioner,</p> <p>v.</p> <p>North Carolina Department of Administration Division of Purchase and Contract and the North Carolina Office of State Human Resources Respondent,</p> <p>and</p> <p>Cannon Cochran Management Services Inc., Respondent-Intervenor.</p> | <p>FINAL DECISION</p> |
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On August 6, 7, 10, 11, 2020, Administrative Law Judge Melissa Owens Lassiter heard this contested case in the Office of Administrative Hearings in Raleigh, North Carolina pursuant to N.C. Gen. Stat. § 150B-23 and Petitioner's contested case petition appealing Respondent's award of contracts under Request for Proposal ("RFP") #13-MS21798615 for the Workers' Compensation Services for Self-Insured Workers' Compensation Fund.

APPEARANCES

For Petitioner: Douglas W. Hanna
Graebe Hanna & Sullivan, PLLC
Raleigh, North Carolina

For Respondent: Lewis W. Lamar, Jr.
Assistant Attorney General
North Carolina Department of Justice
Property Control Section
Raleigh, North Carolina

For Respondent-Intervenor: J. Mitchell Armbruster
Grace A. Gregson
Smith Anderson Blount *et al.*
Raleigh, North Carolina

ISSUES

Whether Respondent substantially prejudiced Petitioner's rights or deprived Petitioner of property AND exceeded its authority, acted erroneously, failed to use proper procedure, acted arbitrarily, and failed to act as required by law or rule by:

- (1) Failing to consider and evaluate properly the statutory criteria of "prices offered" set forth in N.C. Gen. Stat. § 143-52 during the RFP evaluation process by making "prices offered" the least important factor,
- (2) Failing to disqualify CCMSI from the TPA Evaluation process for failing to submit complete pricing that did not conform to the terms of the RFP and by determining that the CCMSI bid was a qualified proposal subject to evaluation,
- (3) Failing to consider the lowest prices bid by CorVel during the Third Party Administrator (TPA) review process,
- (4) Selecting Vendor for the TPA program that could not meet the technical requirements of the RFP,
- (5) Selecting CCMSI for the TPA program after it failed to disclose that the State of Kentucky had assessed a monetary penalty and publicly remanded CCMSI for ethics violation in July of 2018,
- (6) Failing to consider the monetary penalty and public reprimand of CCMSI by the State of Kentucky for ethics violation in evaluating CCMSI's background, and failing to reconvene the Evaluation Committee for a proper review,
- (7) Failing to consider the protest issues CorVel raised and failing to send the matter back to the Evaluation Committee for a full consideration,
- (8) Conducting an unlawful, unfair and prejudicial evaluation process.

APPLICABLE STATUTES AND RULES

N.C. Gen. Stat. § 143-135.9
N.C. Gen. Stat. § 143-49
N.C. Gen. Stat. § 143-50.1
N.C. Gen. Stat. § 143-52 & -53
N.C. Gen. Stat. § 150B-23
N.C. Gen. Stat. § 150B-34
01 NCAC 05B .0101 PROCEDURE
01 NCAC 05B .0203 DEVELOPMENT OF SPECIFICATIONS
01 NCAC 05B .0301 CONTRACTING REQUIREMENTS

01 NCAC 05B .0306 LATE OFFERS, MODIFICATIONS, OR WITHDRAWALS
01 NCAC 05B .0307 ERROR/CLARIFICATION
01 NCAC 05B .0309 EVALUATION
01 NCAC 05B .0503 NEGOTIATION

EXHIBITS ADMITTED INTO EVIDENCE

For Petitioner: 1, 2, 6-33, 35-50, 54-56, 62-64
Rule 30(b)(6) Deposition Intervenor CCMSI (Rod Golden)
EXCEPT FOR: (1) p. 26, line 8 through p. 28, line 5
(2) p. 29, line 6 through p. 30, line 24

For Respondent: 1-6, 8

WITNESSES

1. Vanessa Davison, Contract Specialist, OSHR
2. Thelma Speight-Farrar, Evaluation Committee member
3. Scarlette Gardner; Division Director of the Safety, Health and Workers' Compensation Division
4. R.J. Tompkins, Area Vice President, CorVel
5. Gordon Clemmons, Chairman, CorVel
6. Meredith Swartz, Purchasing Officer, Department of Administration
7. Robert Smith, Attorney, Contract Management, Department of Administration
8. Rule 30(b)(6) deposition testimony of Intervenor CCMSI (Rod Golden) (Excluding above Excerpts noted in above Exhibits Admitted)
9. Rule 30(b)(6) deposition testimony of Respondent DOA (Meredith Schwartz)
10. Rule 30(b)(6) deposition testimony of Respondent OSHR (Scarlette Gardner)

FINDINGS OF FACT

After considering the sworn testimony of the witnesses, analyzing the exhibits admitted into evidence, considering the applicable cases, statutes, and regulations, considering the applicable burden of proof by the preponderance of the evidence, and hearing the arguments of counsel of the parties, the undersigned finds as follows:

Parties

1. Petitioner CorVel is a Delaware corporation with headquarters in Irvine, California.

2. Respondent, North Carolina Department of Administration ("DOA") is an administrative agency of the State of North Carolina responsible for government operations such as purchasing and contracting for goods and services.

3. Respondent, North Carolina Office of State Human Resources ("OSHR"), is the agency responsible for managing human resources for the State of North Carolina's government and for administering the self-insured State Workers' Compensation Program ("State Workers' Compensation Program" or "program"). The State Workers' Compensation Program covers approximately 170,000 state employees in Cabinet agencies, Council of State agencies, the University of North Carolina campuses and community colleges.

4. Fifty-eight (58) state agencies administer their own workers' compensation claims, which includes making decisions regarding claim compensability, major claim handling decisions, what a claim is worth, and when and whether to settle. Each agency pays their workers' compensation claims cost every month. The objectives of the State Workers' Compensation Program are to assist employees in recovering from injuries and returning to work as quickly as possible, while managing the costs of the program.

Procedural Background

5. From 2009 to December 31, 2019, Petitioner CorVel provided contractual services to Respondent for the self-insured State Workers' Compensation Program including Third Party Administrator ("TPA") services. Petitioner's contract expired on December 31, 2019.

6. On February 28, 2019, Respondent issued Request for Proposal ("RFP") #13-MS21798615 for Workers' Compensation Services for the State Self-Insured Workers' Compensation Fund pursuant to N.C. Gen. Stat. § 143-52. (Petitioner's Exhibit 1) The proposed services to be awarded were:

- a. One Vendor for Third Party Administrator ("TPA") to provide claims reporting and management, medical compensation, pharmacy benefit management, and medical bill review services.
- b. Two Vendors for Nurse and Vocational Case Management services. 50% of new referrals to each Vendor. Each Vendor may defer any referral to other Vendor.
- c. One Vendor for Physical Therapy and Functional Capacity Evaluation services.
- d. One Vendor for Diagnostic Radiology services.
- e. One Vendor for Home Health and Durable Medical Equipment services.
- f. One Vendor for Transportation and Translation services.
- g. Two Vendors for Surveillance services. 50% of new referrals to each Vendor. Each Vendor may defer any referral to other Vendor.

7. On August 29, 2019, Respondent awarded contracts under the RFP.

8. On September 18, 2019, and October 11, 2019, CorVel submitted a protest and amended protest, respectively, to Respondent's contract awards under the subject RFP.

9. On October 17, 2019, Respondent's State Purchasing Officer issued a Final Agency Decision affirming Respondent's August 30, 2019 award of contracts for the Workers' Compensation Services for Self-Insured Workers' Compensation Fund and denying the relief sought by Petitioner in its written protest.

10. On October 25, 2019, Petitioner timely filed this contested case action challenging Respondent Department of Administration's October 17, 2019 Final Decision and contracts awarded under the RFP. (Petition) Petitioner is a "person aggrieved" by the Final Decision under N.C. Gen. Stat. § 150B-2(6).

Request for Proposals

11. N.C. Gen. Stat. § 143-52 describes the mandatory components of the statutory competitive bidding process as follows:

The acceptance of bid(s) most advantageous to the State shall be determined upon consideration of the following criteria: prices offered; best value, as the term is defined in G.S. 143-135.9(a)(1); the quality of the articles offered; the general reputation and performance capabilities of the bidders; the substantial conformity with the specifications and other conditions set forth in the request for bids; the suitability of the articles for the intended use; the personal or related services needed; the transportation charges; the date or dates of delivery and performance; and such other factor(s) deemed pertinent or peculiar to the purchase in question, which if controlling shall be made a matter of record.

12. Vanessa Davison, Contract Specialist for OSHR, and Scarlett Gardner, State Workers' Compensation Manager and later Division Director, Safety Health & Workers' Compensation, were the primary drafters of RFP#13-MS21798615 on behalf of OSHR. T. p. 41.

13. Attachment B, titled INSTRUCTIONS TO VENDORS, of the RFP informed Vendors that:

It shall be the Vendor's responsibility to read the Instructions, the State's terms and conditions, all relevant exhibits and attachments, and any other components made a part of this RFP and comply with all requirements and specifications herein.

Attachment B also advised Vendors that "[f]ailure to comply with these requirements shall constitute sufficient cause to reject a proposal without further consideration." (Petitioner's Exhibit 1).

14. Section 2.7 of the RFP required Vendors to submit a “[c]ompleted version of ATTACHMENT A: PRICING” for each category of services the Vendor was seeking a contract with Respondents. Full and complete pricing in the Vendor proposal was a requirement under the RFP. Section 2.7 of the RFP also required each Vendor to “populate all attachments of this RFP that require the Vendor to provide information.”

15. Regarding the TPA pricing, the RFP required Vendors to submit a completed version of PRICING for the following Parts:

- (A) Claim administration fees: newly reported claims
- (B) Claim administration fees: transfer of existing claims
- (C) Medical compensation
- (D) Pharmacy benefit management, and
- (E) Bill review.

16. Section 3.1 (Method of Award) of the RFP stated:

Contracts will be awarded in accordance with G.S. 143-52 and the evaluation criteria set out in this solicitation . . .

All proposals will be reviewed first for responsiveness (qualified proposals), and then qualified proposals will be evaluated by consensus of the review committee, and awards will be made to the Vendor(s) meeting the RFP requirements, specifications and consistent with State preferences and achieving the highest and best final evaluation, based on the criteria described below in Section 3.4.

BEST VALUE: "Best Value" procurement methods are authorized by N.C.G.S. §§ 143-135.9 and 143B-1350(h). The award decision is made based on multiple factors, including: total cost of ownership, meaning the cost of acquiring, operating, maintaining, and supporting a product or service over its projected lifetime; the evaluated technical merit of the Vendor's offer; the Vendor's past performance; and the evaluated probability of performing the specifications stated in the solicitation on time, with high quality, and in a manner that accomplishes the stated business objectives and maintains industry standards compliance. The intent of "Best Value" procurement is to enable Vendors to offer and the Agency to select the most appropriate solution to meet the business objectives defined in the solicitation and to keep all parties focused on the desired outcome of a procurement.

A ranking method of source selection will be utilized in this procurement using evaluation criteria listed in order of importance in Section 3.4 to allow the State to award this RFP to the Vendor(s) providing the Best Value and recognizing that Best Value may result in award other than the lowest price or highest technically qualified offer. By using this method, the overall

ranking may be adjusted up or down when considered with or traded-off against other non-price factors.

(Petitioner's Exhibit 1)

17. Section 3.3 of the RFP described the evaluation process and informed prospective offerors that requests for clarification and invitations for oral presentations were both in the discretion of evaluators. Section 3.3 stated:

Award of a contract to one Vendor does not mean that the other proposals lacked merit, but that, all factors considered, the selected proposal was deemed **most advantageous** and represented the **best value** to the State. (Emphasis added).

In Section 3.3, Respondents reserved the right to reject any and all offers “in the best interest of the State” and to request one or more offerors the opportunity for negotiations if evaluations deemed the initial offers unsatisfactory.

18. Section 3.4 of the RFP identified seven evaluation criteria, in order of importance, highest to lowest. “All qualified proposals will be evaluated, and awards made based on the following criteria, listed in order of importance, highest to lowest, to result in awards **most advantageous** to the State.” (Emphasis added). These criteria were:

1. Vendor shall demonstrate in its response how it will use technology to meet or exceed specifications for Services and data reporting that promote consistent claims handling and cost containment (See Exhibits 1 – 8); and
2. Vendor shall demonstrate in its response how it will meet or exceed specifications to implement and/or transition Services from the prior Vendor(s), including a detailed proposed Project Organization and proposed staffing plan (See Exhibits 1-8); and
3. Vendor shall demonstrate in its response how it will meet or exceed specifications to engage in internal quality assurance including ongoing staff training and performance assessment to achieve continuous performance improvement (See Exhibits 1-8); and
4. Vendor shall demonstrate in its response how it will provide added value beyond the RFP’s specifications at no additional cost (See Exhibits 1-8); and
5. Vendor shall demonstrate in its response how it will provide preferred Services described in Exhibits 2B, 3B, 4B, 5B, and 6B; and

6. Vendor shall demonstrate in its response to Attachment I: Vendor Experience how its prior experience providing workers' compensation services to customers prepares them to maintain continued adherence to the RFP's specifications and provide preferred Services (See Exhibits 1-8); and

7. Attachment A: Pricing.

19. The first six items under Section 3.4 were limited to technical performance abilities relating to the provision of service for the Workers' Compensation program.

20. Price was the least important criteria among the seven listed factors in the RFP. Price is always a consideration, but in a best value procurement, the State weighs price against other criteria – typically having to do with elements and quality of services. Price was the least important criteria for this procurement because of the nature of the State's Self-Insured Workers' Compensation Program and the services it provides to injured State employees and employing agencies. The most important factors were: (a) providing timely and appropriate services to injured State employees; and (b) managing claim costs paid monthly by every state agency. Testimony of Scarlette Gardner, T pp. 418-19.

21. Awards would be made "to the Vendors meeting the RFP requirements, specifications and consistent with State preferences and achieving the highest and best final evaluation, based on the criteria identified in Section 3.4."

22. The estimated TPA services contract award amount, which exceeds \$150,000,000 over the five-year contract period, includes costs of claim administration, medical treatment and related services, prescription drugs, and medical bill review for all newly filed and transferred claims. Of this amount, the awarded TPA Vendor will retain only approximately \$30,000,000 or twenty percent (20%) for claim administration and bill review services while the remaining \$120,000,000 (estimated) will be paid to medical and related services providers and pharmacies who provide services directly to injured employees. (Respondents' Exhibit 4).

23. The preponderance of the evidence established that OSHR valued the ability to meet the requirements, specifications, and preferences of the RFP more than price. OSHR understood that even though it might cost more up front to transition to a new TPA services Vendor (due to transfer fees for existing claims), the way another Vendor would manage those claims may potentially save the State money on total claim costs over the term of the contract. Testimony of Thelma Speight-Farrar, T pp. 262-63; Testimony of Sharon Patrick Wilson, T pp. 835-36 ("price isn't always what's going to give you the best value for something").

24. In other words, more important than determining the lowest cost Vendors was identifying which Vendors would provide the best customer service to injured State employees and agencies and cost containment opportunities. Quality claim services, and

especially TPA services, promote better claim outcomes for injured employees and reduce the hassle factor for state agencies, medical providers, and others involved in the claim handling process. Testimony of Scarlett Gardner T. pp. 336-338. Separate contracts for claim services with transparent pricing and accountability measures ensure the State is obtaining the best value for every tax dollar spent on claim costs. Testimony of Scarlett Gardner T p. 419.

25. Section 3.6 of the RFP informed Vendors that “no one requirement shall automatically disqualify a Vendor from consideration,” while “failure to comply with any single requirement” could result in rejection of a proposal in its entirety in the discretion of OSHR.

26. Under Section 4.6 (Background Checks), “Vendor and its personnel are required to provide or undergo background checks at Vendor’s expense prior to beginning work with the State.” This section did not require Vendors to provide background information with their proposal. Instead, each Vendor awarded a contract may be required to provide background checks at their own expense before beginning work with the State, if the State, at its sole discretion, elected to enforce Section 4.6.

27. Attachment I: Vendor Experiences of the RFP required Vendors to respond to questions regarding the Vendor's structure, history, and operations providing the services for which the Vendor was bidding.

28. The RFP proposed to award separate contracts for each of the above-identified services (T pp. 46-47). Vendors were eligible to bid on one or more of the services and were eligible for award in more than one category of services, but other claims services could not be contingent upon receiving the award for TPA services.

29. Contracting for these services separately would enable OSHR to have direct supervisory authority over the service provider for each category of claims services. It would enable OSHR to better hold Vendors accountable, control costs and add transparency to the costs incurred by the State. It would also enable OSHR to terminate other claims services vendors in the middle of a contract term for poor performance without disrupting TPA services.

30. At hearing, Vanessa Davison explained that the rationale for having separate, or “unbundled” contracts, was to provide greater transparency, better understanding of costs and more control over Vendor performance. T. pp. 47-48. Nothing in the RFP prohibited a Vendor from submitting proposals for any combination of services. T p. 61. The contract for TPA services would be a stand-alone contract, but the RFP did not state that a Vendor that bid on TPA services would be excluded from consideration for other services. T p. 62.

31. When a Vendor submitted their response to the RFP, the execution page required them to sign their proposal acknowledging the contents of the RFP and agreeing to its terms.

32. The RFP stated that all Vendor “proposals will be reviewed first for responsiveness (qualified proposal),” and then qualified proposals will be evaluated” by the State.

33. The RFP required Vendors to submit sealed bids by 2:00 p.m., April 30, 2019. Sealed bids were required to guard against one Vendor having an unfair advantage. T. pp. 310, 745.

Evaluation of Proposals

34. Thirty-three (33) Vendors submitted proposals in response to the RFP, resulting in more than 90 total offers for various service components, including seven (7) for TPA services.

35. On April 30, 2019, Respondent's Office of Fiscal Management – Purchasing opened the sealed proposals and tabulated the bids. T p. 42. Petitioner's Exhibit 9 is a handwritten bid tabulation chart showing each bid received and the amount of the bid.

36. By memo dated May 3, 2019, Meredith Swartz, Purchasing Officer for the Department of Administration, sent the Evaluation Committee copies of each Vendor's proposals.

37. On May 20, 2019, the Evaluation Committee began meeting to evaluate proposals (T. p. 111). (Petitioner's Exhibit 11). Ms. Davison's handwritten notes of this meeting confirmed that Ms. Gardner speculated on the profits made by CorVel and reported to the Evaluation Committee that “we don't know how much CorVel kept” or “how much they pay their providers/revenue sharing.” (Petitioner's Exhibit 12, p. 4). Gardner had prepared a three-year summary chart to discuss the costs of the TPA program and the profit margins of CorVel. She used the three-year summary chart “to show them how much revenue CorVel was making” off the contract as a result of so-called “revenue sharing.” Ms. Gardner opined to the Evaluation Committee that revenue sharing was “distasteful, that CorVel engaged in this practice of revenue sharing, but CCMSI did not.” T. pp. 113, 320, (Petitioner's Exhibit 12).

38. CorVel submitted a full and complete PRICING proposal for TPA services. CorVel was the low price bidder for TPA services. CorVel's bid for claim administration fees (Parts A and B) was \$20 million dollars lower than the bid submitted by CCMSI. CorVel's strategy was to bid the lowest price possible even though the RFP listed pricing as the least important factor. Testimony of R. J. Tompkins, T. p. 639.

39. The desire for a stand-alone TPA model hurt Petitioner during the evaluation process for TPA because it was not “the business model that we wanted.” T. pp. 364-365 (Gardner).

40. CCMSI's proposal, Respondents' Exhibit 2, contained a completed Attachment A: Pricing (Petitioner's Exhibit 7). CCMSI provided no pricing in Part D

(Pharmacy Benefit Management), and only supplied partial pricing information in Part C (Medical Compensation) and Part E (Bill Review Services).

41. On May 21, 2019, CCMSI sales representative, Wendy Lanphere, sent an email to Vanessa Davison that included a revised Attachment A: Pricing proposal. In this revised pricing proposal, CCMSI had completed Parts C, D and E. (Petitioner's Exhibit 18).

42. OSHR did not solicit the revised pricing proposal from CCMSI. Vanessa Davison never shared the revised pricing proposal with the Evaluation Committee and it was not considered during evaluations. T. p. 108.

43. On May 22, 2019, OSHR issued a Request for Clarification to CCMSI, to address pricing arising from the incomplete information provided by CCMSI in the Attachment A: Pricing submitted with their original response. The May 22, 2019 Request for Clarification contained a single question:

Attachment A: Pricing, Third Party Administrator, Part D. Pharmacy Benefit Management. CCMSI has left this information blank, not offered any pricing. Does this mean there is no cost for pharmacy for all new claims and for all transferred claims for the life of the contract?

CCMSI responded "No" to the question posed by the Request for Clarification. (Petitioner's Exhibit 22).

44. On May 29, 2019, the Evaluation Committee met again and evaluated seven offers for Transportation and Translation Services and evaluated five offers for Home Health and DME. T. pp. 125-126. CorVel bid on every service category except surveillance. The Committee did not evaluate CorVel's bid proposals because its bids were interpreted by the Committee as "all or nothing" bids contingent upon receiving the TPA award. T. pp. 110, 125, 127. In its cover letter submitted with their proposal, CorVel stated:

Our proposal includes claims, bill review and pharmacy services, telephonic and field case management, physical therapy/FCE, diagnostic radiology, home health/DME and transportation/translation services as integrated components.

(Respondents' Exhibit 8). In the third sentence of their cover letter: "It is our recommendation that OSHR maintain an integrated program as specified in our proposal." In the last sentence of the second paragraph: "Our proposal includes claims, bill review and pharmacy services, telephonic and field case management, physical therapy/FCE, diagnostic radiology, home health/DME and transportation/translation services as integrated components." In the first sentence of the third paragraph: "CorVel provides superior outcomes, which are created by our integrated platform." On the second

page of the cover letter: “the synergies among services offered allows CorVel to provide OSHR with the lowest cost proposal.” (Respondents’ Exhibit 8).

45. CorVel also made many references to integration elsewhere in their proposal. See (Petitioner's Exhibit 7; Respondents’ Exhibit 8). In CorVel's response to Question 4 for TPA Vendors, they stated: “CareMC collects hundreds of data elements from initial claim reporting, Adjuster entry, bill review, case management, pharmacy, physical therapy management and other integrated services.” In response to TPA Question 5, CorVel stated:

CorVel’s integrated model offers real time predictive modeling, allowing identification of risk factors and providing adjusters the ability to reach better outcomes. When claims are managed on a single platform, meaning CorVel is providing all contracted services other than surveillance, all notes, information, documents and reports are accessible in real time. This integration also allows for immediate and seamless referrals for medical services. The utilization of other vendors for nurse/vocational case management, PT/FCE, diagnostic radiology, home health/DME, transportation/translation would require EDI processes in order to exchange information, which could result in delays in treatment. The EDI process does not typically allow for real time data sharing between vendors. Upon receipt of treating physician’s order, referrals for services are placed within one business day. The workflow of referrals and data sharing would be dependent upon other vendors’ capabilities.

Within our integrated model, the Adjuster works with the CorVel medical management team to coordinate services that would be beneficial to the claim such as telephonic or field case management, vocational rehabilitation, physical therapy, etc.

Our system provides alerts if it identifies any issues that may impact return to work, create a barrier to return to work or result in less than optimal outcomes. The Adjuster and medical management team work together to address the issue and set the claim back on track for a successful resolution.

46. In response to TPA Question 11, CorVel stated:

Integrated, Proprietary PPO Network: CorVel delivers additional discounts below workers' compensation fee schedules and reasonable and customary rates through the integration of our proprietary PPO network and bill review service.

In response to TPA Question 12, CorVel stated: “CareMC: CorVel’s online fully interactive claims system provides all data from all integrated services to Adjusters, OSHR and WCA

in real time.” In response to TPA Question 18, CorVel said: “The integration of all services in CareMC allows us to collect data from many sources.”

47. In response to Attachment I: Vendor Experience, CorVel represented that:

CorVel provides OSHR superior results through our fully integrated claims management and managed care solution. All services are provided in-house allowing our employees to proactively manage and collaborate on claims in real time so we can achieve the best possible outcomes for you and your injured workers.

Also, in Attachment I: Vendor Experience, CorVel referenced their:

Vendor Management: Carrier/Vendor Relationship Integration-Connectivity with Carriers/Customers ancillary providers for the automation and assurance of payment integrity. Integrated processes managed within the CorVel applications.

48. CorVel also emphasized that “[t]his integrated ecosystem is the foundation for our service offering” and “[w]e are the only partner that offers integrated claims management and managed care services under via one platform. (Respondents’ Exhibit 8. Petitioner’s Exhibit 2).

49. Based on these multiple statements in its cover letter and in its proposal (Petitioner’s Exhibit 7) which promoted an “integrated” solution as the best option for the State, OSHR and the Evaluation Committee interpreted CorVel’s proposal to be for an integrated contract for TPA and other services.

50. On May 31, 2019, the Committee evaluated four offers for Radiology, four offers for Physical Therapy and five offers for Nurse Case Management. CorVel’s offers for Radiology, Physical Therapy and Nurse Case Management were not evaluated on this day because Petitioner had noted in its proposal and cover letter that its bids were part of an integrated contract for TPA and other services.

51. On June 13, 2019, the Committee evaluated CorVel’s bid proposal for TPA services as well as a group of other Vendors who had proposed integrated programs.

52. On June 20, 2019, the Committee made recommendations as to which vendors should be issued best and final offers. The Evaluation Committee recommended CCMSI as the TPA vendor and evaluated the CCMSI proposal based on performance. The Committee came to a consensus on performance criteria but not price. The Evaluation Committee was not able to evaluate all of the TPA pricing because CCMSI had not submitted full and complete pricing for Parts D and E.

53. On June 25, 2019, Vanessa Davison sent a written memo to Meredith Swartz, pursuant to 01 NCAC 05B .0503, requesting authority on behalf of OSHR to reject all bids and negotiate with the following Vendors:

- a. CCMSI for TPA, to address pricing and minor issues with claims handling procedures;
- b. Carolina Case Management and Southern Rehabilitation Network for Nurse/Vocational Case Management services, to address pricing only;
- c. OneCall for Physical Therapy/Functional Capacity Evaluation and Diagnostic Radiology services, to address pricing and minor issues with referral handling procedures;
- d. Home Care Connect, for Home Health and Durable Medical Equipment, to address pricing only;
- e. Global Trans Services, for transportation and translation services, to address pricing only; and
- f. Advantage Surveillance and DJG Investigative Services, Inc., to address pricing only.

(Petitioner's Exhibit 31). Davison also advised Schwartz that after conducting its administrative review of the submitted bids for responsiveness, the Evaluation Committee had determined bids submitted by two Vendors were not responsive. (Petitioner's Exhibit 31).

54. By memo on July 1, 2019, Sandy Anderson, a State Procurement Specialist III with the Department of Administration, authorized OSHR to reject all bids and negotiate with the requested Vendors. (Petitioner's Exhibit 32).

55. The negotiation phase is a powerful tool and allows the State to start the process over. T. p. 762.

56. Between July 1, 2019 and July 15, 2019, Vanessa Davison negotiated with CCMSI through a series of telephone calls and emails. T p. 149-157; (Petitioner's Exhibits 35-38).

57. On July 15, 2019, Vanessa Davison issued a Request for Best and Final Offer ("BAFO") to CCMSI to address pricing and minor issues with claims handling. CCMSI responded on July 16, 2019. (Petitioner's Exhibit 43). A BAFO process allows OSHR to negotiate with the Vendor in an effort to achieve a satisfactory contract.

58. The practice of engaging in a BAFO process with one or more Vendors after evaluations is a common practice, expressly permitted by the Administrative Code provisions governing state purchasing. Under 01 NCAC 05A .0112(2), a Best and Final Offer is "a document that memorializes the details of Negotiations between the State and a Vendor and mutually modifies the Vendor's Offer." 01 NCAC 05B .0503 provides that "[n]egotiations may also be conducted under conditions that merit a waiver of Competition

pursuant to Rule .1401 of this Section.” Under 01 NCAC 05B .1401, one of the conditions that merits a waiver of competition is “where competition has been solicited but no satisfactory offers received.”

59. On August 28, 2019, Vanessa Davison sent a memo to Meredith Swartz requesting authority to award contracts pursuant to the recommendations of the Evaluation committee. (Petitioner's Exhibit 47). The August 28, 2019 memo contained a summary of the evaluations for each Vendor and each service category, and an explanation of the reasons the Evaluation Committee recommended each Vendor for award.

60. Although CorVel's initial bid pricing was lower for claim administration services compared to other vendors due in part to lack of existing claim transfer fees, the Evaluation Committee determined that another TPA Vendor's proposal was the most advantageous and represented the best value to the State and therefore recommended award to that Vendor. In its August 28, 2019 Memo, Respondent OSHR recommended:

The Evaluation Committee recommends CCMSI for the TPA component as their response demonstrated they are the most capable of all responding Vendors to provide the best value in meeting the requirements, specifications and preferences included in the RFP as described in the Evaluation Charts.

(Petitioner's Exhibit 47). Among the reasons supporting the recommendation of the Evaluation Committee were the following:

- 1) CCMSI is the only Vendor who responded to TPA component that does not engage in revenue sharing with any workers' compensation claims services providers. CCMSI's pricing for claims administration, medical network, pharmacy and bill review services are fully transparent and include no hidden revenue sources. This practice ensures that CCMSI does not have a conflict of interest with the State as a TPA as they are not incentivized to keep claims open longer than necessary to generation [sic] additional revenue . . .
- 2) CCMSI's business model incentivizes them to close claims as quickly as possible.
- 3) CCMSI's response indicates they are fully willing to work with all claims services Vendors selected by the State to provide medical treatment and other services with no restrictions. Other TPA Vendor responses required the State to work with specific medical providers and other claims services Vendors for their quoted pricing to apply.

- 4) CCMSI's response includes the commitment to implementing specialized client claim handling instructions, exceeding that of other responding Vendors.
- 5) CCMSI's response demonstrates a strong commitment to quality assurance via internal auditing guidelines and worksheets used for the claims office and individual employees . . .
- 6) Most importantly, CCMSI's service model does not include utilization of a call center to handle customer service and other inquiries. Instead, CCMSI's service model directs injured employees, medical service providers, other contracted Vendors, State agency staff, etc. . . . to directly contact the assigned claims staff member handling an individual claim for questions and assistance.
- 7) CCMSI's pricing for retail delivery of prescription drugs of 22% of average wholesale price is a substantial discount over other Vendor responses.
- 8) CCMSI also provides a [lower] bill review fee (15% instead of 25%) for pharmacy bills.
- 9) CCMSI's use of artificial intelligence enhanced predictive modelling technologies most closely fulfills the State's preference for such services to assist in overall claims management by State agencies and Vendor claims staff.
- 10) The State's primary goals for the overall direction of the OSHR program align with CCMSI's stated goals of providing technical and strategic claims insight, supervisory claim management technology and systems, seamless administrative support and reducing overall claim cost as demonstrated throughout their response.

(Petitioner's Exhibit 47, pages 31-33). OSHR based its decision to award the TPA services component of the contract to CCMSI on the Evaluation Committee's assessment that CCMSI's proposal demonstrated that CCMSI would best meet the contract specifications and provide the best value to the State.

61. On August 29, 2019, Sandy Anderson, State Procurement Specialist, Department of Administration, P&C (Purchase and Contract), issued an approval memo to Meredith Swartz, Purchasing Officer, Department of Administration, copied to Vanessa Davison, Contract Specialist, OSHR. (Petitioner's Exhibit 48).

62. On August 30, 2019, OSHR Director Barbara Gibson executed the contract for TPA services with CCMSI along with the contracts for other services with other Vendors. (Petitioner's Exhibit 50).

Petitioner's Protest

63. CorVel filed a protest letter with the State Purchasing Officer dated September 18, 2019. In its protest letter, CorVel informed Respondents that the Kentucky Executive Branch Ethics Commission (“Commission”) filed an Initiating Order in March 2019 beginning an administrative proceeding and formal complaint against CCMSI for possible violations of the Executive Branch Code of Ethics. See Petition, attached exhibits. The exhibits showed that the Commission resolved its investigation into CCMSI by Settlement Agreement with CCMSI, to which:

- (a) CCMSI admitted no wrongdoing but agreed not to contest certain charges contained in the Initiating Order;
- (b) CCMSI agreed to pay a civil penalty of \$50,000.00; and
- (c) The Settlement Agreement constituted a public reprimand under Kentucky law (“Kentucky settlement”).

64. The parties do not dispute that Respondent-Intervenor CCMSI did not disclose information pertaining to the Kentucky settlement in its bid proposal submitted to Respondents.

65. Neither the Respondents nor the Evaluation Committee had any information about the Kentucky settlement and thus, did not consider the Kentucky settlement before the contracts at issue, including the contract for TPA services, were awarded. Testimony of Scarlett Gardner, T pp. 409-11.

66. The Kentucky settlement was not related to CCMSI’s provision of workers’ compensation claims services in the State of Kentucky and did not involve any persons who will be providing services to the State of North Carolina.

67. The State Procurement Officer (“SPO”), Odessa McGlown, timely scheduled a protest meeting with CorVel on October 2, 2019. CorVel consented in writing to allow the SPO more time to issue her written decision beyond the ten-day deadline under 01 NCAC 05B .1519. Petition, Protest Decision attachment. Ms. McGlown issued a written decision on October 17, 2019, denying CorVel’s protest.

68. OSHR was unable to enter into a contract with the Vendor recommended for award of the Transportation and Translation Services contract by the Evaluation Committee because the North Carolina Department of Information Technology (“NCDIT”) deemed Vendor Global Trans Services a high-data security risk.

69. After conferring with the Division of Purchase and Contract, OSHR determined that, because it had rejected all offers (Petitioner's Exhibits 31, 32), the Administrative Code allowed them to negotiate for those services with all known sources

of supply. OSHR negotiated with One Call and CCMSI because both had already been vetted and deemed low-data security risk by NCDIT. Eventually, with input from the Evaluation Committee, OSHR elected to amend the contract with CCMSI to add Transportation and Translation Services.

70. On November 21, 2019, the Department of Administration issued a memo approving OSHR's request to amend the contract with CCMSI to add Transportation and Translation Services. (Petitioner's Exhibit 54). T pp. 164-168.

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has personal and subject matter jurisdiction over this contested case, and the parties received proper notice of the hearing in this matter. To the extent that the Findings of Fact contain Conclusions of Law, or that the Conclusions of Law are Findings of Fact, they should be so considered without regard to the given labels. Charlotte v. Heath, 226 N.C. 750, 755, 40 S.E.2d 600, 604 (1946); Peters v. Pennington, 210 N.C. App. 1, 15, 707 S.E.2d 724, 735 (2011).

2. A judge is not required to find all the facts shown by the evidence, but only sufficient material facts to support the decision. Green v. Green, 284 S.E.2d 171,174, 54 N.C. App. 571, 575 (1981); In re Custody of Stancil, 179 S.E.2d 844,847, 10 N.C. App. 545, 549 (1971).

3. Petitioner is an aggrieved person under Chapter 150B and is entitled to commence a contested case under Chapter 150B of the North Carolina General Statutes.

4. The procurement that is the subject of this contested case proceeding involved the acquisition of services by a state agency and was therefore subject to the requirements of Title 01, Chapter 05 of the North Carolina Administrative Code, and to Article 3 of Chapter 143 of the North Carolina General Statutes.

5. Based on the date of issuance of the RFP that is the subject of this contested case proceeding, the applicable Administrative Code provisions are those in effect prior to October 1, 2019. (Petitioner's Exhibit 64).

Standard of Review

6. Pursuant to N.C. Gen. Stat. § 150B-23(a), the burden of proof is on the Petitioner to show, by a preponderance of the evidence, that Respondents exceeded their authority or jurisdiction; acted erroneously; failed to use proper procedure; acted arbitrarily or capriciously or failed to act as required by rule or law; and that Petitioner was substantially prejudiced thereby.

7. Due regard is given to the demonstrated knowledge and expertise of the agency with respect to facts and inferences within the specialized knowledge of the agency. N.C. Gen. Stat. § 150B-34(a). The reviewing body does not have authority to

override decisions within general agency discretion when that discretion is exercised in good faith and in accordance with the law. Lewis v. N.C. Dept. of Human Resources, 92 N.C. App. 737, 740, 375 S.E.2d 712, 714 (1989).

8. In determining whether the department has acted arbitrarily or capriciously, the tribunal should not replace the agency's judgment as between two reasonably conflicting views even though the Court would justifiably have reached a different result. Town of Leland, 17 EHR 03759, 2017 WL 7052568, quoting Thompson v. Wake County Bd. Of Educ., 292 NC 406, 410, 233 S.E.2d 538, 541 (1977). A decision or action is arbitrary and capricious when it is whimsical, made in bad faith, indicates a lack of fair and careful consideration, or fails to indicate any course of reasoning and the exercise of judgment. Adams v. N.C. State Bd. Of Registration for Professional Engineers and Land Surveyors, 129 N.C. App. 292, 297, 501 S.E.2d 660, 663 (1998). There is a presumption that the agency acted in good faith. Pamlico-Tar River Foundation v. N.C. Dept. of Environment and Natural Resources, Div'n of Water Resources, 13 EHR 17938, 2015 WL 3813960 (NCOAH 2015).

9. In its Verified Petition, Petitioner asserted eight (8) issues for determination. In its Prehearing Statement, Petitioner asserted twenty (20) issues for determination. As there was overlap among these issues, the Undersigned has combined these issues for a more succinct determination of the issues.

Price Offered as Least Important Factor in RFP Evaluation Process

10. Petitioner's argument that Respondents erred in making "prices offered" the least important factor in the RFP evaluation process was without merit. While Respondents are required to follow N.C. Gen. Stat. § 143-52, N.C. Gen. Stat. § 143-52 does not require the State to use pricing as the most important criteria in evaluating bids or proposals. N.C. Gen. Stat. § 143-52 does not list evaluation criteria in order of importance; pricing is merely one of several factors the State is required to consider. In addition, not all criteria listed are applicable to every procurement.

11. N.C. Gen. Stat. § 143-53 provides:

The acceptance of bid(s) most advantageous to the State shall be determined upon consideration of the following criteria: . . . *and such other factor(s) deemed pertinent or peculiar to the purchase in question, which if controlling shall be made a matter of record.*" (Emphasis added.)

This statute is clear that the State is permitted to determine, in its discretion, which factors it deems pertinent to the purchase in questions as long as the criteria is identified as a matter or record. Additionally, 01 NCAC 05B .0309(a) requires only that the evaluation criteria be identified in the solicitation document.

12. In RFP#13-MS21798615, Respondents identified seven evaluation criteria for this procurement process, including price as the least important criteria. Respondents

did not exceed their authority or jurisdiction, act erroneously, fail to use proper procedure, act arbitrarily or capriciously, or otherwise fail to act as required by rule or law, by their consideration of price as the least important evaluation criteria in this procurement.

13. OSHR was required by 01 NCAC 05B .0301(3) to solicit sealed offers, which it did. (Petitioner's Exhibit 1). Additionally, pursuant to 01 NCAC 05B .0301(4), the solicitation document is required to contain task descriptions of the following: dates of service; detailed specifications; what the State shall furnish; what the contractor shall furnish; the method, schedule and procedures for billing and payments; and other subject matters bearing on the conduct of the work. The solicitation document issued by Respondents contained sufficient task descriptions to satisfy this requirement. (Petitioner's Exhibit 1).

14. The Evaluation Committee thoroughly considered pricing during its deliberations as evidenced by the various cost analysis charts introduced into evidence by Petitioner. (Petitioner's Exhibits, 15, 40, 41, and 45, and Respondents' Exhibit 3). See also testimony of Thelma Speight-Farrar (T p. 253); Sharon Patrick Wilson (T pp. 835 - 36). According to the testimony of Scarlette Gardner, the Evaluation Committee was not as focused on the "market basket" provided by each vendor's Attachment A: Pricing sheets, but instead on a per-unit cost analysis as represented in Respondents' Exhibit 3. T p. 345.

15. Although CorVel's initial bid pricing was lower for claim administration services compared to other vendors due in part to lack of existing claim transfer fees, the Evaluation Committee determined that another TPA Vendor's proposal was the most advantageous and represented the best value to the State and therefore recommended award to that Vendor.

16. CorVel elicited a great deal of testimony at the hearing about its pricing proposal and CCMSI's pricing proposal, trying to emphasize the differential in their proposals. This testimony was all premised on CorVel's argument that cost or price must be the most important factor in the procurement. CorVel's witness testified that CorVel's strategy was to bid the lowest price possible even though the RFP listed pricing as the least important factor. Testimony of R.J. Tompkins, T p. 639. Bidding the lowest price possible may have been CorVel's strategic decision, but Respondents did not err in following the evaluation criteria listed in the RFP.

Consideration of CCMSI's Pricing Proposal

17. Respondents did not exceed their authority or jurisdiction, act erroneously, fail to use proper procedure, act arbitrarily or capriciously, or otherwise fail to act as required by rule or law, by deeming CCMSI's bid to be responsive. Although CCMSI's Attachment A: Parts C, D, or E pricing was not fully completed, CCMSI met the minimum technical requirements of Section 2.7 of the RFP by submitting Attachment A: Pricing for TPA services completing Parts A, B and part of Part E, and otherwise substantially complied with the requirements of the RFP. (Petitioner's Exhibit 8).

18. Although technically incomplete, CCMSI's pricing attachment did not subject them to disqualification at initial bid opening because initial, administrative review at bid opening is merely to confirm that a Vendor's response contains everything that is required. Testimony of Meredith Swartz, T pp. 748-49. Even though there were blanks in some portions of CCMSI's Attachment A: Pricing response, Parts A, B, and E were partially or fully completed thus substantially conforming to the RFP requirements. (Petitioner's 8).

19. Vanessa Davison consulted with Ms. Swartz regarding what action should be taken concerning CCMSI's submitted pricing. T pp. 101-02. Ms. Swartz told her to give CCMSI's proposal to the Evaluation Committee for review and, if CCMSI was a contender after evaluations for the contract award, OSHR could address their pricing through a BAFO request. T p. 102.

20. During proposal evaluations, the Evaluation Committee was able to determine CCMSI's pricing for Part C (Medical Compensation) because the fee for use of managed care/medical provider networks was supplied in Part E (Bill Review) of CCMSI's original bid submission. (Petitioner's Exhibit 8). However, the Evaluation Committee was unable to determine whether CCMSI had intentionally or unintentionally omitted pricing information from Part D (pharmacy benefit management) of Attachment A: Pricing. To resolve the issue, the Evaluation Committee issued a Request for Clarification to CCMSI dated May 22, 2019 in which it asked CCMSI to respond "Yes" or "No" to the following question: "Does this mean there is no cost for pharmacy for all new claims and for all transferred claims for the life of the contract?" CCMSI responded "No." (Petitioner's Exhibit 19 (CCMSI's Response to Request for Clarification)).

21. Furthermore, Respondents did not exceed their authority or jurisdiction, act erroneously, fail to use proper procedure, act arbitrarily or capriciously, or otherwise fail to act as required by rule or law, by continuing to evaluate CCMSI's proposal. CCMSI submitted full pricing information for Part A, Claims Administration Fees: Newly Reported Claims and for Part B: Claims Administration Fees: Transfer of Existing Claims. CCMSI submitted a partial response to Part E: Bill Review, which enabled the Evaluation Committee to determine their pricing for that service. (Petitioner's Exhibit 8). Testimony of Scarlett Gardner, T p. 340.

22. CCMSI's proposal substantially conformed to the requirements of the RFP. Furthermore, the data absent from their Attachment A: Pricing response was subject to more than one interpretation. For example, CCMSI was at risk of having to perform certain services at no cost if Respondents had not elected to conduct negotiations at a later stage as the blanks in their proposal could be interpreted to mean CCMSI was going to perform those services at no charge. For those reasons, at initial bid opening, their proposal was not subject to disqualification. The appropriate course of action in accordance with state law was to issue a Request for Clarification, which was the course of action chosen by Respondents.

23. The Evaluation Committee was able to clarify that CCMSI intended to charge a fee for Part D: Pharmacy Benefit Management through their response to a Request for Clarification. (Petitioner's Exhibit 19). Based on the pricing submitted by other Vendors, the Evaluation Committee did not believe that CCMSI's fees for those services would substantially affect the committee's assessment of the rest of CCMSI's proposal. Testimony of Thelma Speight-Farrar, T p. 252; Testimony of Vanessa Davison, T p. 180.

24. The Evaluation Committee was able to ascertain pricing for Part E. Medical Bill Review due to the information provided by CCMSI in Attachment A: Pricing. Testimony of Vanessa Davison, T p. 179; Testimony of Scarlett Gardner, T p. 340. In any case, the Evaluation Committee determined during evaluations that CCMSI was the TPA services Vendor that would best meet the needs of the Workers' Compensation Program, provided OSHR was able to negotiate acceptable pricing terms with them. T p. 180.

25. After completing evaluations and determining that CCMSI was the Vendor with the strongest proposal for TPA services, the Evaluation Committee rejected all other TPA bids and issued a Request for Best and Final Offer (BAFO) to CCMSI. In their BAFO response, when price was subject to negotiation, CCMSI provided a revised Attachment A: Pricing response. The Evaluation Committee reviewed CCMSI's BAFO response, determined it to be satisfactory, and recommended CCMSI for award. (Petitioner's Exhibit 47).

Best Value Evaluation

26. CorVel argues that the Request to Reject Bids and Negotiate and the Recommendation of Award do not sufficiently describe the Best Value evaluation done by the Evaluation Committee. In other words, CorVel argues that Respondents did not sufficiently explain their methodology.

27. N.C. Gen. Stat. § 143-135.9(b) provides that:

The intent of Best Value procurement is to enable contractors to offer and the agency to select the most appropriate solution to meet the business objectives defined in the solicitation and to keep all parties focused on the desired outcome of a procurement.

28. For purposes of this procurement, the evaluation criteria listed in Section 3.4 of the RFP were intended to, and were drafted to, assist the Evaluation Committee in determining the Vendor proposals that most met the business objectives and procurement intent of the State Workers' Compensation Program as defined in the RFP.

29. The Evaluation Committee properly considered Best Value evaluating both price and performance related evaluation criteria in reviewing the proposals of CorVel, CCMSI and all other Vendors that responded to the RFP. (Petitioner's Exhibits 11, 31

(pp. 1-2), 47 (pp. 1-2); Respondents' Exhibit 1, Parts 1-8, Respondent's Exhibit 3). Testimony of Vanessa Davison, T p. 89 (price considered throughout the process); T p. 171 (the Evaluation Committee applied the evaluation criteria and awards were made based on a consideration of that criteria). Specifically, the Evaluation Committee used the Section 3.4 evaluation criteria to determine which proposal would provide "the best trade-off between price and performance, where quality is considered an integral performance factor." The Evaluation Committee concluded that CCMSI's response for TPA services demonstrated "the best value in meeting requirements, specifications and preferences included in the RFP." (Petitioner's Exhibit 47, p. 31). The best value analysis is one of the key reasons why CorVel's lowest price bid did not require them to be awarded the contract.

30. The Evaluation Committee also considered total cost of ownership. Testimony of Thelma Speight-Farrar, T pp. 262-63. As previously discussed, there are factors other than the initial bid price that affect the total cost of operating the State Workers' Compensation Program, including control of medical and pharmacy costs. Testimony of Thelma Speight-Farrar, T pp. 262-63. Because price was the least important criteria, having a lower initial bid for TPA services was not enough to affect the procurement outcome in CorVel's favor.

31. Respondents did not exceed their authority or jurisdiction, act erroneously, fail to use proper procedure, act arbitrarily or capriciously, or otherwise fail to act as required by rule or law, by their conduct of "Best Value" analysis in this procurement.

32. Pursuant to 01 NCAC 05B .0307, an agency may seek clarification of offers to ascertain intent or some other particular fact, or to resolve an ambiguity, as long as no change in price is permitted. The two Requests for Clarification issued by OSHR to CCMSI were appropriate in scope and followed proper procedure in seeking pre-approval from the Division of Purchase and Contract. Respondents did not exceed their authority or jurisdiction, act erroneously, fail to use proper procedure, act arbitrarily or capriciously, or otherwise fail to act as required by rule or law, by issuing the two Requests for Clarification to CCMSI.

33. In addition, a request for clarification is a procedural tool that may be used in the agency's discretion to clarify an ambiguity or for other purposes identified in 01 NCAC 05B .0307. Respondents did not exceed their authority or jurisdiction, act erroneously, fail to use proper procedure, act arbitrarily or capriciously, or otherwise fail to act as required by rule or law, by not issuing any clarification requests to CorVel.

34. Pursuant to 01 NCAC 05B .0501 (prior to October 1, 2019), any and all offers received may be rejected, in whole or in part. The basis for rejection shall include, but not be limited to, the offer being deemed unsatisfactory as to quantity, quality, delivery, price or service offered; and any determination that rejection would be in the best interest of the state.

35. Respondents did not exceed their authority or jurisdiction, act erroneously, fail to use proper procedure, act arbitrarily or capriciously, or otherwise fail to act as required by rule or law, by rejecting bids after evaluations. (See Petitioner's Exhibit 31)

36. Petitioner also asserted that Respondents were unfairly biased against CorVel in making its award decision and asserted that the outcome of this procurement was "predetermined" from the outset. T p. 6. However, the evidence at the hearing showed the contrary. The evidence showed that CorVel believed that making an integrated proposal with the lowest overall cost would be a winning strategy. The Evaluation Committee, in its discretion, did not agree. The RFP disclosed that Vendors' bid cost or price would be considered as least important among the evaluation factors. The Evaluation Committee created over 800 pages of evaluation materials considering over 90 proposals from 33 Vendors based on the requirements of the RFP.

Evaluation and Consideration of CorVel's Lowest Prices Bid

37. CorVel argues that Respondents failed to consider CorVel's low-cost bid. The evidence showed that at initial bid opening, without further evaluation, and disregarding BAFO pricing submitted by other Vendors, CorVel was the low-price bidder for only two of the seven components: TPA services and nurse/vocational case management services. (Petitioner's Exhibit 9). CorVel's filings inaccurately state that CorVel's initial price was the lowest offered for diagnostic radiology services. No Vendor submitting a proposal for TPA services offered pricing substantially lower than the other Vendors, with the exception of CorVel. CorVel's proposal for TPA services enjoyed a pricing advantage largely because CorVel, as the incumbent Vendor, would not charge an existing claim transfer fee. See (Petitioner's Exhibit 7).

38. A preponderance of the evidence demonstrated that the Evaluation Committee evaluated all of CorVel's proposals for TPA and other services. Testimony of Scarlett Gardner, T pp. 498-99; Testimony of Sharon Patrick Wilson, T p. 845.

39. In a trade-off between quality of services and pricing, with price being the least important factor, CorVel's lower claim administration pricing was not enough of an advantage to overcome the Evaluation Committee's assessment of the merits of CCMSI's proposal for TPA services. (Petitioner's Exhibit 47).

40. CorVel argues that OSHR should have allowed CorVel to clarify or supplement its proposal to provide a better response. However, OSHR was not required to allow Vendors an opportunity to supplement, clarify or reform their proposals. Section 3.4 of the RFP stated:

Vendor's proposal must contain Vendor's best effort to describe how it will provide Services in accordance with the RFP's specifications and preferences.

Section 3.3 of the RFP stated:

Vendors are cautioned, however, that the evaluators are not required to request presentations or other clarification – and often do not. Therefore, all proposals should be complete and reflect the most favorable terms available from the Vendor.

41. CorVel contended that Respondents did not fairly evaluate their proposals because Respondents incorrectly assumed that CorVel's proposal was exclusively for integrated services.

42. A preponderance of the evidence demonstrated that CorVel decided their strategy for this RFP was to submit an integrated proposal even though the RFP contemplated multiple vendor awards.

a. CorVel referenced the term "integrated" more than once in their cover letter. In the third sentence of their cover letter: "It is our recommendation that OSHR maintain an integrated program as specified in our proposal." In the last sentence of the second paragraph: "Our proposal includes claims, bill review and pharmacy services, telephonic and field case management, physical therapy/FCE, diagnostic radiology, home health/DME and transportation/translation services as integrated components." In the first sentence of the third paragraph: "CorVel provides superior outcomes, which are created by our integrated platform." On the second page of the cover letter: "the synergies among services offered allows CorVel to provide OSHR with the lowest cost proposal." (Respondents' Exhibit 8).

b. CorVel also made many references to integration elsewhere in their proposal. See (Petitioner's Exhibit 7; Respondents' Exhibit 8). In CorVel's response to Question 4 for TPA Vendors, they stated: "CareMC collects hundreds of data elements from initial claim reporting, Adjuster entry, bill review, case management, pharmacy, physical therapy management and other integrated services."

43. In response to TPA Question 5, CorVel stated:

CorVel's integrated model offers real time predictive modeling, allowing identification of risk factors and providing adjusters the ability to reach better outcomes. When claims are managed on a single platform, meaning CorVel is providing all contracted services other than surveillance, all notes, information, documents and reports are accessible in real time. This integration also allows for immediate and seamless referrals for medical services. The utilization of other vendors for nurse/vocational case management, PT/FCE, diagnostic radiology, home health/DME, transportation/translation would require EDI processes in order to exchange information, which could result in delays in treatment. The EDI process does

not typically allow for real time data sharing between vendors. Upon receipt of treating physician's order, referrals for services are placed within one business day. The workflow of referrals and data sharing would be dependent upon other vendors' capabilities.

Within our integrated model, the Adjuster works with the CorVel medical management team to coordinate services that would be beneficial to the claim such as telephonic or field case management, vocational rehabilitation, physical therapy, etc.

Our system provides alerts if it identifies any issues that may impact return to work, create a barrier to return to work or result in less than optimal outcomes. The Adjuster and medical management team work together to address the issue and set the claim back on track for a successful resolution.

44. In response to TPA Question 11, CorVel stated:

Integrated, Proprietary PPO Network: CorVel delivers additional discounts below workers' compensation fee schedules and reasonable and customary rates through the integration of our proprietary PPO network and bill review service.

In response to TPA Question 12, CorVel stated: "CareMC: CorVel's online fully interactive claims system provides all data from all integrated services to Adjusters, OSHR and WCA in real time." In response to TPA Question 18, CorVel said: "The integration of all services in CareMC allows us to collect data from many sources."

45. In response to Attachment I: Vendor Experience, CorVel represented that:

CorVel provides OSHR superior results through our fully integrated claims management and managed care solution. All services are provided in-house allowing our employees to proactively manage and collaborate on claims in real time so we can achieve the best possible outcomes for you and your injured workers.

Also, in Attachment I: Vendor Experience, CorVel referenced their:

Vendor Management: Carrier/Vendor Relationship Integration-Connectivity with Carriers/Customers ancillary providers for the automation and assurance of payment integrity. Integrated processes managed within the CorVel applications.

CorVel emphasized that "[t]his integrated ecosystem is the foundation for our service offering" and "[w]e are the only partner that offers integrated claims management and

managed care services under via one platform.” (Respondents’ Exhibit 8; Petitioner’s Exhibit 2).

46. CorVel contends that the Evaluation Committee should have considered CorVel’s past performance as incumbent TPA vendor but failed to do so. This is, in part, because their RFP response assumed that evaluators would take into consideration how CorVel was rendering services under the former contract. CorVel’s witnesses at the hearing suggested that CorVel had an excellent performance record, though they also admitted to failings such as a significant data security incident.

47. The evidence showed that CorVel’s past performance was reviewed and considered to the extent CorVel documented its past performance in its RFP response. Attachment I: Vendor Experience required Vendors respond to questions regarding what experience each Vendor had providing similar services to clients of similar size to the State Workers’ Compensation Program. (Petitioner’s Exhibit 1). Testimony of Scarlett Gardner, T pp. 439-440, 605.

48. Furthermore, there is enough difference between the specifications and requirements of the former contract and the RFP that simply relying on knowledge of CorVel’s performance under the old contract would have been insufficient and inappropriate. Since the new contract included the RFP (and addenda), Vendor’s Response, and any BAFOs issued, responded to and accepted, OSHR may only hold Vendors accountable for the performance they detailed in response to the RFP, not whatever that Vendor did in the past.

49. Section 3.3 of the RFP (pg. 14) stated, in part, that evaluators are not required to request presentations or other clarification and often do not. Clarifications are only used when there is an ambiguity or where a Vendor’s intent is unclear.

50. In this case, the Evaluation Committee did not detect an ambiguity or anything unclear about CorVel’s proposal. Testimony of Vanessa Davison, T p. 111. It was each Vendor’s responsibility to make their proposal clear and unambiguous. Based on CorVel’s multiple statements in its proposal (Petitioner’s Exhibit 7) which promoted an “integrated” solution as the best option for the State, it was reasonable for OSHR and the Evaluation Committee to interpret CorVel’s proposal to be for an integrated contract for TPA and other services. See Testimony of Scarlett Gardner, T pp. 524-26.

51. CorVel asserted that Respondents improperly identified deficiencies in their proposal. These deficiencies are noted in the summary evaluation charts attached to the June 25, 2019 memo (Petitioner’s Exhibit 31) and the August 28, 2019 memo (Petitioner’s Exhibit 47) and represent the Evaluation Committee’s comments regarding the weaknesses it identified in CorVel’s proposal for TPA services, specifically CorVel’s responses to the questions addressed to offerors in Attachment 2B of the RFP (Petitioner’s Exhibit 1).

52. The Evaluation Committee deemed CorVel's response to TPA Question 6, having to do with individual Agency return to work needs, to be inadequate. Individual State agencies have different return to work needs due to the large range of occupations of injured employees, which range from corrections officers, healthcare workers at all levels, transportation workers, facilities maintenance staff, landscaping, housekeeping, food service, administrative/clerical, and many others. As such, consideration of individual agency needs is essential to the success of returning employees to work. The Evaluation Committee concluded that CorVel's response to Question 6 provided only general information addressing their return to work efforts in all claims but did not address specifically how it would address the return to work needs of different employee populations in different agencies. (Petitioner Exhibit 31-June 25, 2019 Memo, p. 4).

53. CorVel's prior actions are no guarantee of what they would do under a new contract; thus, it would have been unreasonable for OSHR to rely upon prior performance. To protect the State, all Vendor services are required to be in writing in their response per the terms of the RFP. CorVel's lack of detail in their response did not invoke confidence in the Evaluation Committee that they would do more than what was in their proposal, nor could CorVel be bound to do more than they offered.

54. Regarding TPA Question 17, the Evaluation Committee deemed CorVel's response, concerning staffing as a weakness because their response did not indicate how many of the 100 staff members, they state are assigned to this account are working on it on a full-time basis. CorVel's response to Question 17 states, "As the incumbent, CorVel has approximately 100 staff members assigned to this project . . ." As the words "approximately" and "assigned" were included in this sentence, the Evaluation Committee questioned how many persons were working exclusively on the State's account. (Respondents' Exhibit 1 - evaluation of CorVel's TPA proposal). The Evaluation Committee recognized that some persons listed as key executive, managerial and professional personnel staff assigned to the program may or may not dedicate one hundred percent (100%) of their work hours to OSHR; thus, there was a question as to the element of rounding represented by the words, "approximately 100 staff members assigned to this project . . ." Testimony of Scarlett Gardner, T p. 496.

55. CorVel contended that as the incumbent provider, their staffing plan is known to, understood by, and agreed to by OSHR. Here, CorVel relied upon facts it believed the evaluators should know, instead of providing a response to the RFP that completely described its staffing plan and showed that CorVel would be the best, most advantageous TPA services provider for the State. Since CorVel's current staffing plan was not fully detailed in the RFP response, the Evaluation Committee could not assume that the current staffing plan would remain in place for the new contract term beginning January 1, 2020. (Respondents' Exhibit 1).

56. In contrast, CCMSI's response to Question 17 included a detailed staffing plan with the number of projected employees in each category (Office Manager/Account Manager, Account Manager, Adjuster IND, Senior MO, Adjuster MO, Claim Clerical and Supervisors) and a column entitled "% Dedicated" that states each of these employees'

work hours will be one-hundred percent (100%) dedicated to this account. If awarded OSHR's contract, CCMSI stated they would comply with the RFP requirement and quickly establish an office in North Carolina and hire staff as described. (Respondents' Exhibit 2 p. 282).

57. As for whether the Evaluation Committee should have issued one or more Requests for Clarification to CorVel, such clarifications are not required by 01 NCAC 05B .0307. Clarifications are not used to supplement proposals, but instead to clarify matters that the evaluators cannot understand or interpret based on the information received. The Evaluation Committee did not feel that CorVel's proposal was unclear or ambiguous and, as a result, did not regard it as necessary to issue a Request for Clarification to CorVel. CorVel failed to demonstrate how the outcome of the procurement would have changed but for the fact that it did not have the opportunity to provide clarifications to address the weaknesses of its proposal. The Requests for Clarification issued to CCMSI, on the other hand, were issued to resolve matters the Evaluation Committee could not determine from CCMSI's proposal.

Conduct of the Evaluation Process

58. Petitioner argued that Respondent's evaluation process was unfair, biased, prejudicial and predetermined. Vanessa Davison's notes from first Evaluation Committee meeting on May 20, 2019 (Petitioner's Exhibit 12) and testimony of the witnesses (Vanessa Davison, Thelma Speight-Farrar and Sharon Patrick Wilson) indicated that Scarlette Gardner made some introductory comments regarding the proposals of the Vendors that submitted proposals for TPA services. She described revenue sharing as "distasteful" and introduced a chart showing the last 3 years of expenditures for TPA services, including a set of estimates of the amounts that CorVel may have retained through revenue sharing arrangements with its subcontractors. (Petitioner's Exhibit 15).

59. Additionally, Vanessa Davison's notes show that Scarlette Gardner made some introductory remarks about CCMSI's proposal, including that they were a "boutique" company and that they did not engage in revenue sharing. Scarlette Gardner claimed that these comments were based on statements directly from CCMSI's proposal. T p. 325. See also CCMSI's Proposal, Attachment I, which is Respondents' Exhibit 2.

60. CorVel contended these remarks and the three-year cost analysis chart indicated unfair bias prejudicial to CorVel. However, it was not unfair or prejudicial for Evaluation Committee members to discuss the relative strengths and weaknesses of each Vendor's proposal, which was the nature of Scarlette Gardner's comments at the May 20, 2019 Evaluation Committee meeting. Scarlette Gardner used the three-year cost chart to explain the reason for unbundling the contract for TPA services from the contracts for other services. T pp. 326-27; 536.

61. Most importantly, CorVel contended that Scarlette Gardner's comments regarding revenue sharing at that first meeting were unfair, biased or prejudicial. However, none of Respondents' Committee members who testified at the hearing testified

that Gardner's comments during the May 20, 2019 meeting negatively affected their view of CorVel's proposal. See Testimony of Sharon Patrick Wilson, T p. 838-39. Ms. Speight-Farrar did not even recall Gardner's negative comments.

62. In planning for and drafting the RFP that OSHR released on February 28, 2019, OSHR decided that it would be in the best interest of the State to award separate contracts for separate services but drafted the RFP to allow flexibility to award all service components to a single vendor. T pp. 419-420. Scarlette Gardner explained that accountability, transparency and the ability to terminate a vendor for poor performance without affecting the entire workers' compensation program were the reasons for that decision. T pp. 418-19. These are the types of decisions about a procurement that are firmly in the discretion of the agency issuing the solicitation.

63. In addition, 01 NCAC 05B .1201 allows for multiple awards where more than one supplier is needed to provide the contemplated requirements as to services, as long as awards are limited to the number of suppliers deemed necessary to reasonably satisfy the intended requirements and care is exercised to protect the character and principles of competition.

64. The preponderance of the evidence proved that the Evaluation Committee evaluated each Vendor's proposal in accordance with the criteria set forth in the RFP and the Evaluation Committee decided to award separate contracts. (Respondents' Exhibit 1). T. pp. 420-421. Respondents did not exceed their authority or jurisdiction, act erroneously, fail to use proper procedure, act arbitrarily or capriciously, or otherwise fail to act as required by rule or law, by determining that the best way to procure necessary services on behalf of the State Workers' Compensation Program was to seek and award separate contracts for each service.

CCMSI's Nondisclosure of Kentucky Settlement in its Proposal

65. In its protest, CorVel presented information that CCMSI was reprimanded by the Kentucky Executive Branch Ethics Commission for failure to register a lobbyist who was not employed by CCMSO. The lobbyist that CCMSI failed to register allegedly bribed public officials in Kentucky. He was convicted in federal court of one count of bribery. The alleged bribery was not associated with or connected to a CCMSI contract. The ethics investigation led to CCMSI entering into a Settlement Agreement based on the failure to register a lobbyist. In the Settlement Agreement, CCMSI did not admit any wrongdoing but agreed to pay a \$50,000 civil penalty.

66. In its protest letter and a subsequent supplement to its protest letter, CorVel argued that Section 4.6 of the RFP, Background Checks, required CCMSI to disclose this information in its bid to Respondent.

67. None of this information was known to OSHR or the Evaluation Committee during the procurement process. Testimony of Scarlette Gardner T. p. 410. The

information only became known after awards were made, through CorVel's protest. Testimony of Scarlett Gardner T. p. 409.

68. Respondents did not contest that there was an investigation which led to a Settlement Agreement, payment of a civil penalty, and public reprimand. The only issue is, since it was not known until after the contract awards, is it a basis upon which OAH can grant them relief.

69. State Purchasing Officer (Odessa McGlown) found in her protest decision (attached to the petition) that the information about the Kentucky Settlement and failure to register a lobbyist was not related to the provision of workers' compensation services in the State of North Carolina. The protest decision stated:

Section 4.6 of the RFP (Background Checks) states: 'Vendor and its personnel are required to provide or undergo background checks at Vendor's expense prior to beginning work with the State.' The information you supplied pertaining to CCMSI is not information that CCMSI was required to submit in response to the RFP and therefore CCMSI's failure to disclose this information is not grounds for disqualification. Whatever effect this information may have had on the final award, it is not clear from the record that its disclosure prior to the evaluation period would have resulted in an award to CorVel.

70. CorVel later claimed that CCMSI was required to respond affirmatively to a question in Attachment I to the RFP having to do with Vendor Experience and that, since CCMSI responded negatively, CCMSI should have been disqualified from award. However, CorVel did not present Attachment I: Vendor Experience of CCMSI's response as a reason to uphold CorVel's protest. Respondents dispute whether CCMSI was required to respond in the affirmative to a question posed in Attachment I: Vendor Experience in the RFP.

71. Attachment I does not specifically identify a matter such as the Kentucky Settlement as requiring disclosure. CCMSI submitted an affidavit in this case in which it explained that it did not believe a positive response was required under the circumstances. (Petitioner's Exhibit 56, Affidavit of Rod Golden).

72. The evidence established that there was no legal requirement to disqualify CCMSI from consideration for the contract award. The Kentucky Settlement is something that, had it been known prior to award, the Evaluation Committee could have taken into consideration and it would have been in the discretion of the Evaluation Committee and OSHR to decide how to address this information. Section 3.6 of the RFP stated:

In determining whether proposals should be evaluated or rejected, the Department will take into consideration the degree to which Vendors have proposed or failed to propose solutions that will satisfy the Department's needs as described in the Request for Proposal. Except as specifically

stated in the Request for Proposal, no one requirement shall automatically disqualify a Vendor from consideration. However, failure to comply with any single requirement may result in the Department exercising its discretion to reject a proposal in its entirety.

73. Petitioner failed to prove that the underlying information pertaining to the Kentucky Settlement required disqualification of CCMSI or rescission of its award.

74. Even if CCMSI erred in failing to disclose the information under Attachment I: Vendor Experience by failing to disclose the facts relating to the Kentucky settlement in response to Attachment I: Vendor Experience, disqualification of CCMSI from consideration for award was not required by any rule, law, or the requirements of the RFP because the decision of whether to disqualify a Vendor lies in the discretion of the agency.

75. Pursuant to Section 3.1 of the RFP, "The State reserves the right to waive any minor informality or technicality in proposals received." Section 3.6 of the RFP states that:

In determining whether to proposals should be evaluated or rejected, the Department will take into consideration the degree to which Vendors have proposed or failed to propose solutions that will satisfy the Department's needs as described in the Request for Proposal. Except as specifically stated in the Request for Proposal, no one requirement shall automatically disqualify a Vendor from consideration. However, failure to comply with any single requirement may result in the Department exercising its discretion to reject a proposal in its entirety.

76. The State Purchasing Officer was not required to uphold the protest of CorVel on the basis of this information. The State Purchasing Officer considered the Kentucky settlement from the information provided by CorVel in their protest letter and took that information into consideration in rendering her response to the protest. According to the written decision, she determined that:

- a. "it is not clear from the record that its disclosure prior to the evaluation period would have resulted in an award to CorVel."
- b. "In terms of past performance and general reputation, the agency checked CCMSI's references and reported that the results were satisfactory."

The SPO reasonably and correctly found that CorVel failed to show substantial prejudice based on the information relating to the Kentucky settlement.

77. Under the facts presented in this case, Respondents did not exceed their authority or jurisdiction, act erroneously, fail to use proper procedure, act arbitrarily or capriciously, or otherwise fail to act as required by rule or law, by failing to either disqualify

CCMSI from consideration for contract award or by failing to uphold CorVel's protest on the basis of information relating to the Kentucky settlement.

Real Time Data in RFP

78. Page 21 of the RFP includes the following specification:

Vendor's electronic information management system shall record and provide data in real-time for use by authorized users in State agencies, OSHR, other Vendors, medical providers, or other necessary entities to perform requirements of this RFP.

79. Evidence at hearing showed that some TPA system platforms are incapable of providing end users with such access to view the most current claim data or utilize the most current claim data in reports in this manner. Instead, those TPA system platforms operate on a time delay of what end users can view via their online web portal that may vary from hours to days as data is only uploaded periodically in batches for end user access.

80. OSHR intended that Vendors with systems wherein end users are unable to view all saved data as soon as it is saved at all times would not meet this RFP specification.

81. Page 33 of the RFP Bid Addendum Question 189 includes the following text:

Question 189. Is there flexibility as to certain data being updated for viewing purposes daily versus real-time? . . .

No. There is no flexibility. ALL claim related data must be updated in real time and available to generate any reports in the entire TPA Vendor claims management/database system.

82. CorVel, in their proposal: (a) continued to push for an integrated services model, and (b) failed to understand the meaning of "real time data." In addition, CorVel contended in their protest letter that:

This technical requirement of "real time data" is not possible to deliver while utilizing multiple system platforms. It is CorVel's contention that it is the only Vendor bidding on this RFP who can deliver "real time data" since all services are provided via the same proprietary system platform. Other Vendors have the ability to share data via Electronic Data Interchange (EDI), however, this process cannot meet the requirement of "real time." Ultimately, the decision by OSHR to unbundle the services under the RFP makes it impossible to the meet the requirement of delivering "real time data" between Vendors. We believe that this requirement can only be met

with the selection of one Vendor on all the services bid by CorVel under the RFP.

83. The interpretation of “real time data” offered by CorVel would, in their own testimony, require an integrated contract even though the RFP plainly contemplated awards to multiple vendors. Testimony of R.J. Tompkins T. p. 623-624. However, CorVel did not submit a vendor question to resolve any confusion regarding what Respondent meant by “real time data.”

84. OSHR’s decision to unbundle services did not make it impossible to meet the requirement of delivering “real time data” between Vendors. This RFP requirement referring to “real time data” intended to mean that the data available to TPA claim adjusters that has been saved in a claim file is available at the same time to all end users, *i.e.*, state agency employees accessing the claim file via the TPA’s online internet web portal. In other words, whatever the adjuster sees, the end user sees and all claims data in the TPA’s system is available, as soon as it is saved to a claims file, to all end users. Testimony of Scarlett Gardner, T p. 563.

Rejection of All Offers

85. CorVel contended that the Respondents unlawfully rejected all vendors in violation of 01 NCAC 05B .0501 despite the existence of competitive bidders and in conflict with the recommendations made by the Evaluation Committee.

86. However, the Committee's decision to reject bids and negotiate was not “in conflict with the recommendations made by the RFP evaluation committee;” it was specifically the recommendation of the Evaluation Committee, as evidenced by the June 25, 2019 memo. The request to reject bids and negotiate was made in accordance with the requirements of 01 NCAC 05B .0501 and was approved by the Division of Purchase and Contract. No specific language is required by the Administrative Code. It was reasonable to infer from the request for approval that one or more of the reasons for rejecting bids existed, such as no satisfactory offers were received; and/or it was in the best interest of the State. Furthermore, the summary evaluation charts provided additional reasons in support of rejecting all bids and negotiating with the selected vendors.

Rejection of All Bids and Negotiation with CCMSI

87. CorVel contended that it was error for Respondents to reject all bids and negotiate with CCMSI without first having CCMSI’s complete pricing response. CorVel also argued it was error to negotiate with CCMSI after evaluations when the Evaluation Committee did not, at that time, have complete pricing from CCMSI and that allowing a Vendor to revise or amend their bid during negotiations is unfair because it violates the principle of sealed bids.

88. After completing evaluations, the Evaluation Committee requested permission to reject all offers and negotiate with the Vendors the evaluators deemed to

have submitted the strongest proposal for those services. (Petitioners Exhibit 31 -June 25, 2019 memo). The Evaluation Committee understood that CorVel's proposal relating to non-TPA claims services was dependent and contingent upon receiving the TPA services award. Testimony of Sharon Patrick Wilson, T p. 842; Testimony of Scarlett Gardner, T pp. 524-26; (Respondents' Exhibit 8). Other Vendors that submitted proposals for TPA services took the same approach as CorVel and OSHR also did not select any of those other Vendors for award. (Petitioner's Exhibit 47 -August 28, 2019 Memo p. 31 last paragraph).

89. Pursuant to 01 NCAC 05B .0503 (prior to October 1, 2019), negotiation is permitted where an agency determines it does not receive a satisfactory offer in response to a solicitation and all offers are rejected. Negotiations shall be conducted in writing and shall include standard language and terms and conditions issued by the Division of Purchase and Contract. If negotiations are conducted with only one source or if only one source responds to the negotiations, the reason for lack of competition shall be documented in writing for public record.

90. Negotiation takes place after evaluations and after rejection of all bids and allows the State to conduct negotiations with one (or sometimes more than one Vendor) to obtain the best possible outcome for the State.

91. A Request for Best and Final Offer is a document issued by the Division of Purchase and Contract including standard language and terms and conditions intended to meet the requirements of 01 NCAC 05B .0503.

92. In this case, Respondents only negotiated with CCMSI after: (1) the Evaluation Committee identified CCMSI as the strongest bidder for TPA services during evaluations, (2) the Committee rejected all offers, and (3) the Committee requested and received authority to negotiate. RFP Section 3.3 (Exhibit 1-D) informed Vendors that OSHR could reject all bids and negotiate. 01 NCAC 05B .0501 and .0503 allow for rejection of all bids and negotiation. Rejecting all bids and negotiating is not unusual. It is a procedure that Respondents use "all the time" in procurements. Swartz. T. p. 772.

93. A preponderance of the evidence showed the Evaluation Committee addressed the lack of complete pricing from CCMSI in that: (i) the omission of pharmacy pricing data did not change the Evaluation Committee's opinion that CCMSI submitted the strongest proposal for TPA; (ii) price was the least important factor in evaluations; (iii) pricing for pharmacy review was unlikely to make a significant difference in overall cost; and (iv) the pharmacy review pricing submitted by all other Vendors was similar, suggesting CCMSI's pricing for those services was unlikely to be substantially or significantly different. Testimony of Vanessa Davison, T pp. 179-180; Testimony of Thelma Speight-Farrar, T p. 252.

94. The Request for Best and Final Offer issued by Respondents to CCMSI on July 15, 2019 met the requirements of the Administrative Code.

95. Respondents did not exceed their authority or jurisdiction, act erroneously, fail to use proper procedure, act arbitrarily or capriciously, or otherwise fail to act as required by rule or law, by the manner in which OSHR conducted negotiations with CCMSI orally and in writing through email communications between July 1, 2019 and July 15, 2019.

96. Respondents did not exceed their authority or jurisdiction, act erroneously, fail to use proper procedure, act arbitrarily or capriciously, or otherwise fail to act as required by rule or law, by conducting negotiations with CCMSI and other Vendors in accordance with this provision.

Documenting the Reason for Lack of Competition in Writing Before Negotiations

97. CorVel contended that 01 NCAC 05B .0312 and .0501 required an agency document the reason for lack of competition if the agency decides to negotiate with only one vendor. However, Petitioner's contention is incorrect.

98. Under the circumstances of this RFP, such a requirement did not apply as the competitive part of the competitive bidding process had already taken place. Seven vendors bid on the TPA portion of the contract. All qualified TPA responses were thoroughly reviewed and evaluated. At the conclusion of evaluations, the Evaluation Committee decided that they only wanted to negotiate with CCMSI for TPA services, but also choose to negotiate with other vendors for other portions of the contract. Respondents documented the reasons they wanted to negotiate with CCMSI and other vendors in the June 25, 2019 memo requesting approval to reject all bids and negotiate, but they did not specifically mention anything that would specifically address "the reason for lack of competition." In so doing, the Committee followed the normal procedure required by the applicable Administrative Code.

Request for Best and Final Offer

99. Petitioner contended that issuing a Request for Best and Final Offer to CCMSI (and other Vendors) after initial bid opening is somehow outside OSHR's authority, contrary to law or rule, erroneous, arbitrary, capricious or in some other way improper. That is simply incorrect. The BAFO process is expressly contemplated and allowed under the North Carolina Administrative Code.

100. Under 01 NCAC 05A .0112(2), a Best and Final Offer is "a document that memorializes the details of Negotiations between the State and a Vendor and mutually modifies the Vendor's Offer." Under 01 NCAC 05B .0503, "[n]egotiations may also be conducted under conditions that merit a waiver of Competition pursuant to Rule .1401 of this Section." Under 01 NCAC 05B .1401, one of the conditions that merits a waiver of competition is "where competition has been solicited but no satisfactory offers received."

101. Additionally, Section 3.3 of the RFP stated:

The State reserves the right to reject all original offers and request one (1) or more of the Vendors submitting proposals within a competitive range to submit a best and final offer (BAFO), based on discussions and negotiations with the State, if the initial responses to the RFP have been evaluated and determined to be unsatisfactory.

In this case, Section 3.3 gave CorVel and other Vendors sufficient notice that OSHR could elect to use the BAFO process.

102. The Evaluation Committee regarded the proposal by CCMSI as the best proposal to meet the needs of the State Workers' Compensation Program. They requested, and received, permission to issue a BAFO to CCMSI, a common practice in State procurements. The BAFO, along with the RFP, and CCMSI's initial proposal, becomes a part of the contract between the State and CCMSI following award.

103. The BAFO process does not defeat the purpose of having sealed bids but allows the State to conduct negotiations with one (or sometimes more than one) Vendor to obtain the best possible terms for the State.

104. In this particular solicitation process, the RFP expressly provided the award would not necessarily go to the lowest bidder and expressly notified bidders what the evaluation criteria were. In this case, the Committee's engaging in a BAFO process did not violate the terms of the RFP or the laws or rules governing State procurement of services and was completely within the authority of OSHR. Accordingly, the State did not exceed its authority, act erroneously, fail to use proper procedure, act arbitrarily, or fail to act as required by law or rule in engaging in a BAFO process with CCMSI and accepting CCMSI's BAFO pricing.

Failure to Compare CCMSI's Revised Pricing with Other Vendors

105. CorVel claims that the Evaluation Committee did not compare CCMSI's revised pricing (submitted during negotiations) to the pricing of other TPA Vendors and did not conduct an analysis to determine that CCMSI's revised pricing provided "best value" in terms of trade-off between price and performance. However, the Evaluation Committee already had the pricing from other TPA Vendors and there are spreadsheets in evidence demonstrating a comparison between CCMSI's revised pricing and that of the other TPA Vendors. (Respondents' Exhibit 3 -Per Unit Cost Chart) and (Petitioner's Exhibit 41).

Assistance in Negotiations

106. CorVel argued that N.C. Gen. Stat. § 143-50.1 requires that the Division of Purchase and Contract, Contract Management Section ("CMS") assist in negotiations and

because CMS did not do so, this error requires the entire procurement award to be rescinded.

107. Petitioner's argument was without merit. There is no affirmative duty for CMS to assist in negotiations under the circumstances of this procurement process. The duty to negotiate, under N.C. Gen. Stat. § 143-49(3a), applies only when a competitive bidding process is not used. The only reference to negotiation in N.C. Gen. Stat. § 143-50.1 applicable to the circumstances in this case may have been a passive duty to act as a general resource as directed by the State Purchasing Officer.

108. There was demonstrably a competitive bidding process. More than 30 vendors responded to the RFP submitting over 90 separate proposals with multiple responding vendors in every service category. The Evaluation Committee conducted a thorough review of all proposals evidenced by Evaluation Charts in Respondents' Exhibit 1.

109. Lastly, CMS helped OSHR in obtaining the most favorable contract for the State by assisting with preparation of the RFP, advising OSHR throughout the procurement process, and by reviewing the recommendation of award before final contract award. At hearing, Bob Smith, an attorney (now head) of the CMS read from the memo he wrote before any protest was filed. Mr. Smith opined that "[i]n general, this is one of the most thorough and professional award processes I have seen recently." (T. pp. 805.) He continued:

Careful, extensive, narrative discussion of the deficiencies and strengths of the many relevant vendors and careful procurement processes as well as discussion of the reasons for declaring vendors nonresponsive make this effort stand out under the process and procedures of DOA P&C.

T. p. 805. (Respondent's Exhibit 6). Plainly, CMS not only performed its normal role, but also concluded that Respondents had conducted an exemplary procurement.

110. Assuming arguendo that Petitioner had established Respondents failed to meet the requirements of N.C. Gen. Stat. § 150B-23(a), Petitioner must also establish substantial prejudice. In other words, Petitioner must show that, but for the acts or omissions of Respondents, Petitioner would have been awarded one or more contracts to provide services for the State Workers' Compensation Program.

111. Petitioner failed to prove by a preponderance of the evidence that Respondents' decisions to award the RFP violated the Administrative Code or Chapter 150B and failed to prove that Petitioner was materially prejudiced by any alleged errors in the procurement process.

112. Petitioner failed to establish that OSHR acted arbitrarily or capriciously in awarding the contracts at issue. OSHR had a rational basis for its decisions as supported by the testimony of Respondents during the hearing and as reflected in (Petitioner's Exhibits 31, 47; Respondents' Exhibit 1). Petitioner has not demonstrated that OSHR

failed to act according to rule or law or exceeded its authority. Further, Petitioner has not established that, but for the acts or omissions of the Respondents, CorVel should have been awarded one or more of the contracts for services for the State Workers' Compensation Program. Therefore, the award at issue is not subject to reversal.

FINAL DECISION

WHEREFORE, based on the Findings of Fact and Conclusions of Law set forth herein, the undersigned finds that Petitioner has not met its burden of demonstrating, by a preponderance of the evidence, that the Respondents exceeded their authority or jurisdiction; acted erroneously; failed to use proper procedure; acted arbitrarily or capriciously, or failed to act as required by rule or law; and that Petitioner was substantially prejudiced thereby.

NOTICE OF APPEAL

This is a Final Decision issued under the authority of N.C. Gen. Stat. § 150B-34.

Under the provisions of North Carolina General Statute § 150B-45, any party wishing to appeal the final decision of the Administrative Law Judge must file a Petition for Judicial Review in the Superior Court of the county where the person aggrieved by the administrative decision resides, or in the case of a person residing outside the State, the county where the contested case which resulted in the final decision was filed. **The appealing party must file the petition within 30 days after being served with a written copy of the Administrative Law Judge's Final Decision.** In conformity with the Office of Administrative Hearings' rule, 26 N.C. Admin. Code 03.0102, and the Rules of Civil Procedure, N.C. General Statute 1A-1, Article 2, **this Final Decision was served on the parties as indicated by the Certificate of Service attached to this Final Decision.** N.C. Gen. Stat. § 150B-46 describes the contents of the Petition and requires service of the Petition on all parties. Under N.C. Gen. Stat. § 150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of Superior Court within 30 days of receipt of the Petition for Judicial Review. Consequently, a copy of the Petition for Judicial Review must be sent to the Office of Administrative Hearings at the time the appeal is initiated in order to ensure the timely filing of the record.

This the 14th day of January, 2021.



Melissa Owens Lassiter
Administrative Law Judge

CERTIFICATE OF SERVICE

The undersigned certifies that, on the date shown below, the Office of Administrative Hearings sent the foregoing document to the persons named below at the addresses shown below, by electronic service as defined in 26 NCAC 03 .0501(4), or by placing a copy thereof, enclosed in a wrapper addressed to the person to be served, into the custody of the North Carolina Mail Service Center who subsequently will place the foregoing document into an official depository of the United States Postal Service:

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This the 14th day of January, 2021.



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