

**STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)**

BEFORE THE CHIEF PROCUREMENT OFFICER

DECISION

In the Matter of Protests of:)

CASE Nos. 2011-114, 115 & 116

Carolinas Center for Medical Excellence)

Georgia Medical Care Foundation d/b/a Alliant ASO)

Arkansas Foundation for Medical Care)

Materials Management Office RFP No. 5400002492)

POSTING DATE: JUNE 21, 2011

Quality Improvement Organization for Department of Health & Human Services)

MAILING DATE: JUNE 21, 2011

This matter is before the Chief Procurement Officer (CPO) pursuant to letters of protest from Carolinas Center for Medical Excellence (CCME), Georgia Medical Care Foundation d/b/a Alliant ASO (Alliant) and Arkansas Foundation for Medical Care (Arkansas), collectively referred to as “the Protestants.” With this request for proposals (RFP), the Materials Management Office (MMO) attempts to acquire, through a resolicitation, a quality improvement organization (QIO) “to assist the Department of Health and Human Services (DHHS) in meeting the requirements for a statewide utilization control program for Medicaid services, in accordance with 42 CFR 456-Utilization Control. This includes providing utilization reviews for inpatient hospital services, mental hospitals, intermediate care facilities, and inpatient psychiatric care services for individuals under age 21, as outlined in the South Carolina State Plan for Medical Assistance. In addition, DHHS seeks additional pre-authorization reviews, pre-payment review and quality review functions.” [Ex. 1, p. 16, Overview] The Protestants have protested MMO’s notice of intent to award to Keystone Peer Review Organization, Inc. (KePro) dated March 25, 2011.

In order to resolve the matter, the CPO conducted a single hearing for all three cases on May 17 and 18, 2011. Appearing before the CPO were CCME, represented by Michael Montgomery, Esq.; Alliant, represented by Wade Mullins, Esq.; Arkansas, represented by Daniel Brailsford, Esq.; KePro, represented by John Schmidt and Melissa Copeland, Esquires; DHHS, represented by Deirdra Singleton and Vicki Johnson, Esquires; and MMO, represented by John Stevens, State Procurement Officer.

NATURE OF PROTESTS

All three original letters of protest are attached and incorporated by reference. In addition, the amended protest letters of Alliant and Arkansas are attached and incorporated by reference. The issues of protest were as follows: ¹

PROTEST ISSUES	CCME	Alliant	Arkansas
Responsiveness Allegations			
KePro did not propose a full time medical director	(1.r & 2.g.)	(I.A.)	(#3)
KePro failed to provide a proposed call center manager		(I.A.)	
KePro failed to provide the work plan as required or modified the RFP's requirements concerning it	(1.d. & e.)	(I.B.)	
KePro failed to propose psychologists to perform ICF/MR reviews	(1.g., 1.h., 1.o. & 2.d.)	(I.C.)	
KePro failed to agree to complete the prior authorization reviews required within 24 hours of receipt of the request	(1.b, 1.m., 2.b.)	(I.D.)	
KePro failed to complete prior authorization reviews that required a second level consultant's review within 48 hours	(1.b., 1.1. & 2.a.)	(I.D.)	(#1)
KePro failed to agree to use South Carolina licensed physicians to perform prior authorization reviews for double or multiple organ transplants	(1.k.)		

¹ For Alliant and Arkansas, the issue numbers used below are from their amended protest letters.

KePro failed to propose to implement prior authorization procedures for kidney and corneal transplants		(I.D.)	
KePro failed to offer on-site reviews for the Department of Disabilities and Special Needs at its Columbia location	(1.n. & 2.c.)	(I.E.)	
KePro did not offer to provide a biannual schedule of provider education/training or a quarterly report		(I.F.)	
KePro did not offer on-site support for appeals of pre-authorization denials, but rather offered only 1 hour telephone testimony		(I.G.)	
KePro did not offer to copy DHHS on all letters it mails	(1.a.)		
KePro failed to commit to using the DHHS Policy and Procedure Manual	(1.c.)		
KePro did not agree to provide only licensed physicians for physician reviews or identify a physician for each subspecialty	(1.f & 1.j.)		
KePro failed to identify who would be responsible for pre-authorization reviews for institutional and community based services for children under 21 as required by the RFP in Section 3.6.6	(1.i.)		
KePro did not agree to the operating hours as required by the solicitation but instead offered to be closed on State holidays	(1.p. & 2.e.)		
KePro failed to offered a performance bond as required	(1.q. & 2.f.)		
KePro failed to complete Schedule VIII	(1.t.)		
Misrepresentation Allegations			
KePro misrepresented the qualifications of its call center manager		(II.)	
KePro misrepresented the capabilities of its Atrezzo IT system		(II.)	
Allegation Regarding Evaluations			
The evaluators scores of KePro's qualifications were arbitrary and capricious due to the reference on the call center manager		(III.)	
Unreasonable Price Allegation			
KePro's proposal offered an unreasonably low price based upon its lack of adequate staffing	(4.a. & b.)	(IV)	(#2)

FINDINGS OF FACT

The following dates are relevant to the protest:

1. On September 4, 2009, MMO issued the first RFP.
2. MMO posted a notice of intent to award the first RFP to CCME on March 11, 2010.

3. On March 22, 2010, Alliant and Qualis submitted their protests to the CPO.
4. On May 25, 2010, the CPO posted a decision granting Alliant's the protest, cancelling the award to CCME, and remanding the matter to MMO.
5. CCME, Quallis Health, and Alliant appealed the matter to the Procurement Review Panel (Panel).
6. On August 30, 2010, the Panel upheld the CPO's decision on the first RFP granting Alliant's protest.
7. On December 7, 2010, MMO issued the resolicitation. [Ex. 1]
8. On December 8, 2010, MMO issued Amendment #1. [Ex. 2]
9. On January 14, 2011, MMO issued Amendment #2. [Ex. 3]
10. On January 28, 2011, MMO opened the proposals received.
11. On March 25, 2011, after evaluation of the proposals, MMO posted an intent to award to KePro. [Ex. 4] The pricing and composite scores are as follows [Ex. 6 & 9]:

<u>Offeror</u>	<u>Price Offered²</u>	<u>Total Score</u>
KePro	\$3,777,016	360.00
Arkansas	4,998,292	342.64
CCME	4,821,959	337.96
Alliant	4,956,316	336.44

12. On April 4, 2011, the Protestants filed their protests with the CPO. Arkansas filed an amended protest letter on April 7, 2011. On April 11, 2011, Alliant filed an amended protest.
13. MMO issued a Suspension Notice on March 25, 2011. [Ex. 5]

WITHDRAWAL/CLARIFICATION OF ISSUES OF PROTEST

CCME withdrew its protest issue 1.a, that KePro did not offer to copy DHHS on all letters it mails.

Further, CCME stipulated that the following issues of protest did not raise independent issues of protest:

- CCME Issue 1.u., that KePro is a non-responsive proposer and its proposal should be rejected;
- CCME Issue 2.h. that KePro is non-responsive to the solicitation in attempting to impose new requirements on the state or in attempt to modify the solicitation and, therefore, should be rejected as non-responsive; and
- CCME Issue 3.b., that KePro is non-responsive to the solicitation and its proposal should be rejected.

CONCLUSIONS OF LAW

A. RESPONSIVENESS ALLEGATIONS

The Protestants alleged in numerous protest issues that KePro's proposal was nonresponsive. The South Carolina Consolidated Procurement Code (Code) requires "[u]nless there is a compelling reason to reject bids as prescribed by regulation of the board, notice of an award or an intended award of a contract to the lowest responsive and responsible bidders whose bid meets the requirements set forth in the invitation for bids." Section 11-35-1520(10) This solicitation was processed as a request for proposals under SC Code section 11-35-1530, which incorporates the general requirements of 11-35-1520. The Code defines a responsive offeror as one "who has submitted a[n]...offer which conforms in all material aspects to the...request for proposals." Section 11-35-1410(7). According to the South Carolina Procurement Review Panel (Panel), an offer does not need to conform to all of the solicitations requirements in order to be responsive; rather it must conform only to the essential requirements in order to be responsive. See Protest of National Computer Systems, Inc., Case No. 1989-13. The Code permits a waiver of a deficiency where it is merely a matter of form or an immaterial variation from the exact requirements having no effect or merely a trivial or negligible

² As provided in the RFP, price offers were evaluated on the amount for the first two years, which is represented here. The

effect on total bid price, quality, quantity, or performance of the contract and does not prejudice the rights of other offerors. S.C. Code Ann. § 11-35-1520(13). Further, the Panel has held that the CPO can satisfy the writing requirement of the waiver determination. Protest of Value Options, Case No. 2001-7.

1. Allegation that KePro did not propose a full time medical director and was therefore non-responsive (CCME 1.r & 2.g., Alliant I.A, Arkansas #3)

The Protestants argue that KePro was non-responsive because it failed to offer a full time medical director as the solicitation required. Section 3.3 of the RFP reads:

3.3.1 Offeror Responsibilities

The Offeror will provide sufficient staff to perform the required tasks and meet the performance standards. At a minimum, the Offeror must:

3.3.1.2 Employ the following Key Personnel (SCDHHS expects the Offeror to have its Key Personnel dedicated to the project as indicated in this Section so that all requirements of the solicitation are met.):

Program Manager

Call Center Manager

Medical Director

(Ex. 1, p. 20 Emphasis added)

Part IV of the RFP reads:

Additionally, the Offeror must submit the following information:

1. Transmittal Letter

The Transmittal Letter shall be included as part of the Technical Proposal. The Transmittal Letter must be on the Offeror's official business letterhead and must summarize the Offeror's ability to supply the required products and services that meet the requirements defined in this RFP. The transmittal letter should include the following:

actual total potential award to KePro for the complete contract term was \$10,258,360.

- A statement indicating that the key staff and management staff proposed for the project will be those actually assigned. The key employees will remain affiliated with this project full time throughout the term of the Contract as long as the Offeror employs them. The Offeror agrees to replace the key employees that leave the Offeror's employment with persons of equal or better qualifications.

(Ex. 1, p. 51 Emphasis added)

In its proposal, KePro offered a “.6 FTE”³ medical director on an organizational chart reflecting the staff it proposed. (Ex. 10, p. 47). KePro reiterated its offer of a .6 FTE medical director later in its proposal as well. (Ex. 10, p. 53) Further, KePro's transmittal letter stated, in relevant part:

KePro meets each of the requirements outlined in the RFP:...

- Selected staff based on their specific sets of experience and skills relative to the tasks and requirements of the RFP. These individuals are assigned to and will remain affiliated with this contract throughout its duration should it be awarded to KePro. If replacement personnel are necessary, the qualifications for any replacement personnel will meet or exceed the qualifications of the personnel originally proposed to fill these key positions. (Ex. 10, p. 4, Emphasis added)

At the CPO hearing, Meghan Harris, KePro's Chief Operations Officer, contended that KePro's proposal was responsive to the RFP because it had complied with the requirement in Section 3.3.1.2 that the medical director be “dedicated” to the project. She argued that the language in Section IV of the RFP reading “[t]he key employees will remain affiliated with the project full time throughout the term of the Contract as long as the Offeror employs them” was not a mandatory requirement (Ex. 1, p. 51).

The parties provided lengthy testimony regarding what the term “dedicated” meant to each of them. However, it is unnecessary for the CPO to determine a common, or even a reasonable, meaning of “dedicated” since the protest allegation is not that KePro failed to comply with the requirement that the medical director be “dedicated” but instead that KePro is non-responsive for failing to comply with

³ “FTE” stands for full time equivalent.

the requirement that the medical director be “full time.” Since KePro does not dispute that its proposal did not offer a full-time medical director, it is also unnecessary for the CPO to determine a common or reasonable interpretation of “full time.”⁴ Instead the CPO must determine whether the solicitation required offerors propose a full time medical director, and if so, whether KePro complied with this requirement. If KePro failed to comply with a solicitation requirement, then the CPO must decide whether the requirement is essential.

The CPO finds that the solicitation did require that the medical director be full time. Section IV of the RFP expressly requires that “[t]he key employees will remain affiliated with this project full time throughout the term of the Contract as long as the Offeror employs them.” (Ex. 1, p. 51) The RFP defined the medical director as one of the key employees. (Ex. 1, p. 20) KePro’s proposal clearly did not offer a full time medical director and instead offered only a “.6 FTE” medical director. (Ex. 10, pp. 47 & 53) In fact, KePro appears to have chosen to ignore this requirement by carefully omitting the words “full time” from its transmittal letter. To allow KePro to not agree to the same ground rules as all other offerors would violate one of the fundamental purposes of the Code, which is to ensure the fair and equitable treatment of all offerors. See S.C. Code Ann. § 11-35-20.

The CPO further finds that a full time medical director was an essential requirement. According to the Panel, a requirement is “essential” if a variation from it has more than a trivial or negligible effect on total bid price, quality, quantity, or performance of the contract and allowing the waiver of the requirement would prejudice other offers. Protest of Gregory Electric Company, Inc., Case 1989-17; See also, S.C. Code Ann. § 11-35-1520(13). In a contract of this nature, it is logical that having a .6 FTE medical director rather than a full time one would have more than a trivial effect on

⁴ The CPO also disagrees with the parties’ arguments that the Question and Answer from Amendment 4 of the prior procurement sheds any light on this issue. (Ex. 15) Although not relevant to the protest issue, the CPO takes this opportunity to remind all procurement staff that every solicitation, even a resolicitation, is independent of the other. The

the quality and performance of the contract. Never-the-less, the Protestants provided the CPO with testimony regarding the essential nature of this requirement. For example, Kathleen Tapp, Chief Financial Officer of CCME, testified that their medical director was their “most expensive labor.” According to her, CCME would have saved almost \$1 million over the potential five-year life of the contract if it had been able to offer a .6 FTE medical director as KePro did, which would have enabled it to offer a lower price to the State.

Therefore, the CPO finds that KePro’s proposal was non-responsive to an essential requirement of the solicitation. Accordingly, this protest issue is granted.

2. Allegation that KePro failed to provide a proposed call center manager and was therefore non-responsive (Alliant I.A.)

Alliant argued that KePro was non-responsive because it failed to provide a proposed call center manager as the solicitation required. Section IV of the RFP required offerors to submit the names of its proposed key employees, if known, along with their resumes and references. (Ex. 1, pp. 48-49) The RFP designated a call center manager as a key employee. (Ex. 1, p. 20, Section 3.3.1.2) In its proposal, KePro offered Tiffany Brooks as its call center manager and attached her resume and the required number of references. (Ex. 10, pp. 48-49 & Appendix Tab 8)

Alliant failed to prove that KePro was not responsive in this regard. Accordingly, the allegation that KePro was non-responsive for failing to provide a proposed call center manager is without merit and is denied.⁵

CPO discourages any reference to a prior solicitation in a current solicitation, even if it is for mere guidance purposes as was suggested here. (Ex. 1, p. 7).

⁵ See also the misrepresentation and evaluator allegations.

3. Allegation that KePro failed to provide the work plan as required or modified the RFP's requirements concerning it. (CCME 1.d. & e., Alliant I.B.)

CCME and Alliant claim that KePro was non-responsive because it either failed to provide the work plan as required or modified the RFP's requirements concerning it. CCME also specifically argued that KePro was non-responsive because its work plan was inadequate for failing to agree to allow 10 days for DHHS approval of each submission or re-submission of each deliverable and failing to provide a discussion of how the work plan provides for handling of potential and actual problems.

The RFP reads:

3.1.1 Offeror Responsibilities

3.1.1.1 Create a comprehensive work plan prior to undertaking all facets of the development and implementation of the contract. The work plan must be logical in its sequence of events, including appropriate review time by SCDHHS and sufficient detail for review, and must be submitted to SCDHHS for approval within fifteen (15) business days of the contract award date. The plan must include a narrative that provides an overview of the approach that will result in an orderly transition of responsibilities and files, to include any work in progress (outstanding reviews, reconsiderations, etc) from the incumbent Contractor. The plan must detail the specific timeframes, tasks, responsibilities, and mutually developed key milestones necessary to ensure a successful transition and implementation process. The plan must also encompass all activities necessary to assume the responsibilities as the Medicaid utilization management Contractor. (Ex. 1, p. 19 Emphasis added)

Section IV of the RFP reads:

Critical Elements of the Technical Proposal

The Offeror must cross reference its Technical Proposal with each requirement listed in Section III of this RFP. In addition, the Offeror must provide a point-by-point response to each of the requirements in Section III. Offerors must state they understand each requirement and agree to provide the requirement.

IMPLEMENTATION

Submit a detailed description of the manner in which the Offeror proposes to perform the responsibilities detailed in Section 3.1.

The Work Plan and Schedule must include a detailed work plan broken down by tasks and subtasks and a schedule for the performance of each task included in each phase of the contract. The phases of the contract are Implementation and Operations. The schedule should allow ten (10) business days for SCDHHS approval of each submission or re-submission of each deliverable. The work plan should include all responsibilities, milestones, and deliverables outlined in this RFP.

This section shall cover:...

- A network diagram, showing the planned start and end dates for all the tasks and subtasks, indicating the interrelationships of all tasks and subtasks, and identifying the critical path.
- A Gantt chart, showing the planned start and end dates of all tasks and subtasks.
- A discussion of how the work plan provides for handling of potential and actual problems.
- A schedule for all deliverables providing a minimum of ten (10) days review time by SCDHHS.
- A detailed disaster recovery, turnover and business continuity plan. (Ex. 1, p. 48, Emphasis added)

KePro's proposal responded:

KePro understands and agrees to abide by all requirements of this section.

A sample work plan is provided in Appendix 6 for your review. We will submit to SCDHHS within 15 business days of contract award for approval and review.

(Ex. 10, p. 37)

Moreover, KePro's proposal went on over several pages to explain its agreement to the requirements, including the deliverables. (Ex. 10, p. 37 – 43). KePro also attached a sample work plan and a disaster recovery plan in the Appendix. (Ex. 10 Appendix)

The CPO finds that the RFP, read as a whole, only required the actual work plan to be submitted to DHHS for approval within fifteen (15) business days after the contract award date. KePro

clearly agreed to comply with this requirement. Further, KePro's submittal of a sample work plan with its proposal was adequate to meet the minimum requirements for responsiveness. Accordingly, KePro was responsive in this regard.

4. Allegation that KePro failed to propose psychologists to perform ICF/MR reviews (CCME 1.g., 1.h., 1.o., 2.d; Alliant I.C.)

Both CCME and Alliant contend that KePro failed to offer psychologists for all ICF/MR reviews as required and therefore was non-responsive. The RFP reads:

3.3.1.3. Employ Review Staff. Review staff must include medical personnel licensed and qualified to make medical necessity determinations based on professional standards/criteria provided by the Offeror to SCDHHS. Such medical personnel may include:

3.3.1.3.4 A psychologist is required to conduct all ICF/MR (Intermediate Care Facilities for the Mentally Retarded) level of care reviews.

(Ex. 1, pp. 20-21, Emphasis added)

In its proposal, KePro responded as follows:

KePro understands and agrees to abide by all requirements in this section.

KePro's medical director will recruit several psychologists who are South Carolina licensed and Board certified to perform all ICF-MR level of care reviews.

(Ex. 1, p. 51)⁶

In support of their allegation that KePro was non-responsive to this requirement, CCME and Alliant point to the KePro proposal at p. 153 where KePro wrote, "The nurse reviewer initiates the quality review by confirming the applicant's name, DOB, and Medicaid ID number" and argue it is evidence of KePro taking exception with the RFP. (Ex. 10)

The CPO disagrees that KePro failed to agree to the RFP's requirement that ICF/MR reviews be conducted by psychologists. KePro clearly agreed to provide psychologists for ICR/MR reviews. (Ex. 10, 51). KePro's later statement regarding "nurse reviewer" merely advised the state who would initiate those reviews by compiling administrative information, not who would complete them. Accordingly, CCME and Alliant failed to prove that KePro's proposal was non-responsive in this regard.

5. **Allegation that KePro failed to agree to complete the prior authorization reviews required within 24 hours of receipt of the request (CCME 1.b., 1.m. & 2.b, Alliant I.D)**

CCME and Alliant alleged that KePro took exception with the solicitation's requirement that certain prior authorizations reviews be conducted within 24 hours of receipt of the request. Accordingly, they contend that KePro was non-responsive in this regard.

The RFP reads in relevant part:

3.5 PRIOR AUTHORIZATION SERVICES

Unless otherwise provided in the RFP, all prior authorization reviews must be conducted within twenty-four (24) hours of receipt of the request. If a second level consultant's review is required, a determination must be made within forty-eight (48) hours of the initial request. (Ex. 1, p. 25, Emphasis added)

In addition, a subsection reads:

3.5.6 Mental Health Counseling Services

3.5.6.3 The Offeror must make a determination within twenty-four (24) hours of receipt of the request. (Ex. 1, p. 27, Emphasis added)

⁶ KePro's proposal merely contains a typographical error by referencing this section as "3.3.1.3.3" rather than 3.3.1.3.4; however, the text detailing the requirement as stated in the RFP is correct. (Ex. 10, p. 51)

KePro's proposal reads in part as follows:

3.5 Prior Authorization Services

Proven Approach for Prior Authorization Service Delivery

KePRO's proven approach in the prior authorization services has earned us a reputation for integrity within the industry. We customize processes and procedures to meet our client's requirements for the initial screening of prior authorization requests to determine if all necessary information has been submitted by the requesting provider.

For example, if a provider submits an incomplete request, we make a good faith effort to obtain the missing information by fax, telephone or system notification. We provide a precise description of what information is needed to complete the review, along with instructions for submitting the missing material. (Ex. 10, p. 122, Emphasis added)

Under its response to 3.5.6.3, KePro's proposal reads:

KePRO understands and agrees to abide by all the requirements in this section; we will complete the review within 24 hours of receipt of the necessary information.

(Ex. 10, p. 140, Emphasis added)

CCME and Alliant urge the CPO to interpret the above language to mean that KePro refused to provide these reviews within 24 hours of receipt of the any portion of a request. The CPO declines to do so. Clearly the RFP's requirement did not mandate the contractor will be responsible for completing a review when the State only provides it with part of the needed information. Reading KePro's response as a whole, KePro agreed to conduct these reviews within 24 hours of receiving a complete request, which is all the RFP requires. Therefore, this allegation is denied.

6. **Allegation that KePro failed to complete prior authorization reviews that required a second level consultant's review within 48 hours (CCME 1.b., 1.l. & 2.a., Alliant I.D., Arkansas #1)**

The Protestants all allege that KePro was non-responsive because it proposed conducting second level consultant reviews for outpatient therapies within 72 hours (3 days) rather than within 48 hours (2 days) as the RFP required. The CPO agrees.

As quoted in the previous issue, the RFP reads in relevant part:

3.5 PRIOR AUTHORIZATION SERVICES

Unless otherwise provided in the RFP, all prior authorization reviews must be conducted within twenty-four (24) hours of receipt of the request. If a second level consultant's review is required, a determination must be made within forty-eight (48) hours of the initial request.
(Ex. 1, p. 25, Emphasis added)

By way of background, the RFP applied the above time requirements generally to all the types of services, unless the service's subsection contained a different and more specific requirement. The types of services for which prior authorization reviews are conducted include inpatient admissions, organ transplants, surgery, outpatient physical/occupational and speech therapy, durable medical equipment, and mental health counseling requiring specific medical specialties. (Ex. 1, pp. 25-27)

At issue here is Subsection 3.5.4 of the RFP, which is entitled Outpatient Physical/Occupational and Speech Therapy. In that Subsection, the RFP has not "otherwise provided" any requirement different than the 48 hours requirement contained in 3.5 quoted above. (Ex. 10, p. 26)

In its proposal, KePro did not address or specifically respond to the general requirements contained in 3.5. (Ex. 10, pp. 122-124) However, in its response to Section 3.5.4, KePro's proposal stated both:

KePRO understands and agrees to abide by all requirements in this section. (Ex. 10, p. 133)

Physician consultants complete their determinations within three days of receipt.
(Ex. 10, p. 136, Emphasis added).

KePro argues that the sentence regarding three days was merely a typographical error that the CPO can disregard. The CPO disagrees. The Panel has held that a “broad statement by a bidder that it will meet the specifications does not necessarily cover any specific deficiencies in its response.” Protest of Blue Bird Corp., Case No. 1994-15. The RFP clearly required that a determination must be made within 48 hours of the initial request for second level consultant reviews involving Outpatient Physical/Occupational and Speech Therapy. KePro did not agree to the solicitation’s 48 hours requirement but rather stated that it would make these determinations within 72 hours. Under the circumstances of this case, KePro’s upfront broad statement agreeing to all requirements is insufficient to overcome the more specific exception it took to the requirement.

The CPO also finds that the requirement of 48 hours was essential. Allowing KePro to alter this requirement would clearly have more than a trivial or negligible effect on total bid price, quality, quantity or performance of a contract of this nature. Bill Battles, Alliant’s Director of Business Development, testified that longer review times cost less and can impact the services being delivered. Specifically, this contract involves pre-approving individuals before they can obtain medical care. To accept KePro’s offer and make Medicaid clients wait an additional day for prior approvals of treatments diminishes the importance of Medicaid participants’ needs for healthcare. Accordingly, KePro is non-responsive for altering an essential requirement of solicitation.

7. **Allegation that KePro failed to agree to use South Carolina licensed physicians to perform prior authorization reviews for double or multiple organ transplants (CCME 1.k.)**

CCME alleged that KePro was non-responsive because it failed to commit to utilizing physicians for the prior authorization reviews on double or multiple organ transplants. CCME also alleged that KePro had taken exception to this mandatory requirement.

The RFP reads:

3.5.2. Organ Transplant Services

The Offeror must implement procedures to prior authorize the following organ transplant requests: heart, lung, liver, pancreas, multi-organ, bone marrow/stem cell, kidney, corneal and small bowel. These transplant requests must be reviewed by appropriate medical professionals. RNs can conduct the first level of screening and provide authorization for single organ transplants. However, a physician must authorize double or multiple organ transplants or transplants that are new or emerging. The Offeror must utilize evidence-based and nationally recognized criteria for evaluating and determining an organ transplant's medical necessity...

3.5.2.1 The Offeror must utilize evidence-based and nationally recognized criteria for evaluating and determining the medical necessity of an organ transplant.

(Ex. 1, p. 25, Emphasis added)

KePro's proposal does not reflect any specific response to 3.5.2. (Ex. 10, p. 129) However, under 3.5.2.1, KePro responded as follows:

KePRO understands and agrees to abide by all requirements in this section...

The nurse reviewers can approve the transplants if they meet criteria, but any potential denial is sent to a specialty-matched physician.
(Ex. 10, p. 129)

CCME claims that KePro took exception to the requirement based on the nurse reviewers sentence. KePro argued that its response indicated it agreed to abide by all requirements in this section.

The CPO does not agree with either party. KePro did issue the general statement agreeing to the requirements, but only to the requirements of 3.5.2.1, not all of 3.5.2. The sentence regarding nurse reviewers is merely under 3.5.2.1.; however, even if it could be construed to respond to 3.5.2, it properly addresses the reviews for single organ transplants, not multiple transplants. Therefore, it did not affirm KePro's agreement with the requirement that a physician authorize double or multiple organ transplants. However, the fact that KePro's proposal failed to affirmatively address this requirement in this section does not rise to the level of making its proposal non-responsive. Accordingly, this allegation is denied.

8. Allegation that KePro failed to propose to implement prior authorization procedures for kidney and corneal transplants (Alliant I.D.)

Alliant alleged that KePro failed to propose to implement prior authorization procedures for kidney and corneal transplants as the RFP required in Sections 3.5.2 and 3.5.2.2.

The RFP reads:

3.5.2. Organ Transplant Services

The Offeror must implement procedures to prior authorize the following organ transplant requests: heart, lung, liver, pancreas, multi-organ, bone marrow/stem cell, kidney, corneal and small bowel....

3.5.2.2 The Offeror must provide procedures for receipt of the request and notification to the provider of the decision. For approved procedures, the Offeror must develop a method for notifying the provider of Centers for Medicare and Medicaid Services (CMS) approved transplant facilities for each type of transplant request.

(Ex. 1, p. 25)

KePro's proposal does not reflect any specific response to 3.5.2. (Ex. 10, p. 129) However, KePro did provide the following response to 3.5.2.2: "We work with our clients to establish criteria based on their specific needs. Please see below for our proposed criteria." (Ex. 10, p. 130). KePro's

proposal contains a chart in Figure 20 entitled Transplant Prior Approval Rules in which it indicates that no prior approval review is required for cornea and kidney transplants. (Ex. 10, p. 130) Further, KePro's proposal contained the following statement: "All solid organs with the exception of kidney and cornea transplants require prior authorization regardless of the age of beneficiary or the diagnosis..." (Ex. 10, p. 131, Emphasis added.)

The CPO finds that the RFP required prior authorization reviews for all transplant requests. Based on KePro's response, KePro failed to comply with this mandatory requirement. Moreover, reviewing kidney and cornea transplant requests is material; in fact, in a contract for prior authorization services, the failure to agree to pre-authorize any type of procedure is material. Therefore, KePro was nonresponsive to this requirement of the RFP.

9. Allegation that KePro failed to offer on-site reviews for DDSN at its Columbia location (CCME 1.n. & 2.c, Alliant I.E.)

CCME and Alliant allege that KePro failed to offer on-site reviews of determinations made by the South Carolina Department of Disabilities and Special Needs (DDSN) involving the Intermediate Care Facility for the Mentally Retarded services at DDSN's Columbia location. Accordingly, both claim that KePro was non-responsive to this requirement.

The RFP reads:

3.6.5 Intermediate Care Facility for the Mentally Retarded

The Offeror must implement an SCDHHS approved Level of Care Quality Management Process for Intermediate Care Facilities for the Mentally Retarded (ICF/MR) as required by CMS Quality Framework, which will provide quality reviews of ICF/MR level of care (LOC) determinations made by the South Carolina Department of Disabilities and Special Needs (DDSN) for SCDHHS. To be clear this is not is (sic) an on-site review of ICF/MRs, rather it is a review of the LOC

determinations of a sample of cases of individuals accessing long term care services.

The Offeror will be required, at a minimum and on a continuous basis, to:

3.6.5.1. Provide quality management for SCDHHS oversight of the ICF/MR LOC determinations completed by DDSN through a comprehensive process, which includes monitoring, tracking and trending ICF/MR LOC data (The hard-copy documentation will be located at DDSN. The Offeror is required to conduct these reviews on-site at the DDSN Consumer Assessment Team (CAT) location in Columbia, SC.)...

3.6.5.4 Review, at a minimum, a sample of not less than ten percent (10%) of the approved and/or denied initial certifications and annual re-certifications of ICF/MR LOC determinations for the following Medicaid Home and Community-Based (HCB) waivers and/or programs per state fiscal year (The Contractor will not have to travel to the facilities but will conduct these reviews on-site at the DDSN Consumer Assessment Team (CAT) location in Columbia, SC.)
(Ex. 1, p. 29, Emphasis added)

In response to 3.6.5, KePro wrote, “KePro understands and agrees to abide by all requirements of this section.” (Ex. 10, p. 147) In response to 3.6.5.1, KePro affirmed its agreement with the requirements that it conduct ICF/MR LOC reviews on site at DDSN in Columbia writing, “We recognize that any re-reviews will be conducted onsite at the DDSN CAT location in Columbia.” (Ex. 10, p. 149) KePro’s response to 3.6.5.4 is as follows:

KePro understands and agrees to abide by all requirements of this section. . .

The records may be sent to KePro or KePro staff may conduct the review at the office location of the CAT.
(Ex. 10, pp. 152-153, Emphasis added)

CCME and Alliant allege that the language in KePro’s response to 3.6.5.4 takes exception to the requirement that these services be conducted on-site. KePro argues that it had agreed to comply with the requirement but also suggested an alternative process.

The CPO finds that conducting these reviews on-site is a mandatory requirement. However, KePro's offer is responsive to the requirements of 3.6.5 for on-site reviews at the DDSN in that it offers on-site reviews. Reading KePro's response as a whole, KePro clearly agreed to abide by this requirement but also offered an alternative option. Accordingly, KePro was responsive in this regard.

10. Allegation that KePro did not offer to provide a biannual schedule of education/training or a quarterly report. (Alliant I.F)

Alliant alleges that KePro failed to offer a biannual schedule of training or a quarterly report as the solicitation required and was therefore non-responsive.

The RFP reads, in relevant parts:

3.9 PROVIDER EDUCATION/TRAINING

The Offeror must present a variety of educational opportunities to Medicaid providers to ensure providers understand all utilization management and prior authorization programs and responsibilities. The Offeror must participate, as requested by SCDHHS in training environments...

3.9.2 Deliverables

3.9.2.1 The Offeror must provide a biannual schedule of proposed provider education activities due the fifteenth (15th) of the month following the report period.

3.9.2.2 The Offeror must provide a quarterly report of provider education activities that took place during the quarter...

(Ex. 10, p. 37, Emphasis added)

KePro did not respond specifically to 3.9.2.1 or 3.9.2.2. However, in its response to 3.9, KePro wrote, "KePro understands and agrees to abide by all requirements in this section." (Ex. 10, p. 214) KePro later wrote, under Schedule Seminars, "[w]e will submit the proposed topic(s) and schedule within 30 calendar days of the start of the calendar year or at a schedule provided by SCDHHS." (Ex. 10, p. 226, Emphasis added)

The CPO finds no evidence in support of Alliant's allegation that KePro takes exception to these requirements. With regards to providing the biannual schedule, KePro's response taken as a whole agreed to abide by this requirement but also offered an alternative option. With regards to the quarterly report, Alliant did not provide evidence in support of its allegation. Therefore, this protest issue is denied.

11. Allegation that KePro did not offer on-site staff support for reconsideration and appeals of pre-authorization denials, but rather offered only 1 hour telephone testimony. (Alliant I.G.)

Alliant argues that KePro did not agree to the requirement concerning appeals as set forth in the RFP. Instead, it alleges KePro modified this requirement and was non-responsive. KePro argues that it agreed to the solicitation requirement and had merely offered an alternative solution, which the RFP permitted.

The RFP reads, in part:

3.10. RECONSIDERATIONS AND SUPPORT FOR ADMINISTRATIVE APPEALS AND HEARINGS

Any provider, physician or recipient who is dissatisfied with the Offeror's decision shall be entitled to a reconsideration or administrative appeal of the determination. Requests for reconsideration must be submitted in writing within sixty (60) calendar days of receiving notice of the initial decision. The Offeror must complete the reconsideration within thirty (30) business days of request receipt. The requirements of the Offeror will vary depending on the subject of the hearing. The method of participation will vary depending on the subject of the hearing and the Hearing Officer's requirements.

All reconsideration reviews shall examine all relevant evidence in the record regarding services requested and any new documentation submitted by the provider. The Offeror shall make a determination upholding, modifying, or reversing the denial of payment for requested

services, taking into consideration any additional information that may be presented at the reconsideration...

3.10.1.2.6...The State expects the Offeror to provide documentation and witness testimony for the hearings. The method for conducting the hearing will be at the discretion of the SCDHHS Hearing Officer. The subject matter of the hearing will determine whose presence at the hearing will be needed. (Ex. 1, p. 39, Emphasis added)

In response to 3.10.1.2.6, KePro responded generally, “KePro understands and agrees to abide by all requirements in this section.” (Ex. 10, p. 235) However, KePro then added the following:

If requested by SCDHHS, authorization staff in each specialty of the case, our medical director or peer reviewer will be made available for a one-hour period, by phone conferencing, to testify at hearings and legal proceedings.
(Ex. 10, p. 235, Emphasis added)

The CPO finds that the RFP required KePro to provide witness testimony for the hearings. Further, the RFP expressly mandated that the DHHS hearing officer would decide how, where, and in what capacity the witnesses would testify, not the offerors. (Ex. 10, pp. 38-39) KePro did not agree to this mandatory requirement. Although it included a general statement that it agreed with all the requirements, the Panel has held that is insufficient to override any specific exception a vendor chooses to take. See Protest of Blue Bird Corp., Case No. 1994-15 (finding that a “broad statement by a bidder that it will meet the specifications does not necessarily cover any specific deficiencies in its response.”) KePro qualified its response by only agreeing that it “will” make its witnesses available for a “one-hour period, by phone conferencing” and there is no indication that this qualification was somehow merely an alternative that KePro proposed. (Ex. 10, 235) Moreover, the CPO is not persuaded by KePro’s argument that it only offered the one hour telephone testimony as an alternative. KePro’s proposal only offered availability for one hour via telephone; no where does its proposal clearly indicate this is an

alternative option. If the CPO were to accept KePro's argument in this regard, it would mean that there are no mandatory requirements for this solicitation at all, which is clearly not the case.

Second, the CPO concludes that providing witnesses to testify at hearings in the manner proscribed by the DHHS hearing officer was an essential or material requirement. According to the Panel, a requirement is "essential" if a variation from it has more than a trivial or negligible effect on total bid price, quality, quantity, or performance of the contract and allowing the waiver of the requirement would prejudice other offers. Protest of Gregory Electric Company, Inc., Case 1989-17; See also, S.C. Code Ann. § 11-35-1520(13). Obviously providing medical professional witnesses in person for an unknown length of time could cost the contractor, and ultimately the State, significantly more than if these witnesses' testimony was limited to just one hour via phone.

Therefore, the CPO finds that KePro's proposal was non-responsive to an essential requirement of the solicitation. Accordingly, this protest issue is granted.

12. Allegation that KePro failed to commit to using DHHS's durable medical equipment (DME) Policy and Procedure Manual (CCME 1.c)

CCME claims that offerors were required to use DHHS's DME manual, that KePro failed to commit to doing so, and that it was therefore non-responsive.

The RFP reads:

3.5.5 Durable Medical Equipment

The Offeror must implement and maintain procedures for, but not limited to, the evaluation and pre-certification of the medical necessity for Cranial Molding Orthotic Devices and the Power (motorized) Wheel Chair package. The Offeror will use criteria that are nationally recognized or, where none are available, follow medical best practices designated by SCDHHS' Medical Director for approval. The current criteria are published in the SCDHHS Durable Medical Equipment Policy and Procedure Manual. However, the Offeror should submit

criteria recommendations for SCDHHS review.
(Ex. 1, p. 26, Emphasis added)

KePro responded, “KePro uses InterQual Durable Medical Equipment (DME) criteria”, a nationally recognized criteria. KePro added, “When we receive the medical best practice guidelines, developed by the SCDHHS medical director, we review and incorporate these guidelines.” (Ex. 10, p. 137, Subsection 3.5.5)

The CPO concludes that this allegation is without merit. Testimony was provided to the CPO that InterQual was in fact nationally recognized criteria. No evidence to the contrary was offered. Since KePro agreed to use InterQual, its offer fully complies with the requirements of the RFP and is responsive. Accordingly, this protest issue is denied.

13. Allegation that KePro did not agree to provide only licensed physicians for physician reviews or KePro did not identify one physician for each medical specialty (CCME 1.f. & 1.j.)

CCME alleges that KePro was non-responsive in these two regards. The CPO disagrees.

Section 3.3.1.3.2 of the RFP reads:

Physician Reviewers: All physician level reviews must be performed by a physician licensed in the State of South Carolina and of the same specialty as the treating physician. The Offeror must have available to it, by arrangement or otherwise, the services of a sufficient number of licensed doctors of medicine and/or osteopathy, practicing medicine and surgery in the review area, to assure adequate peer review of the services provided by the various medical specialties and subspecialties. The Offeror must demonstrate arrangements with at least one available physician in each generally recognized subspecialty.

(Ex. 1, p. 21, Emphasis added)

This Section was partly amended. Amendment 2 to the RFP read:

4. Section 3.3.1.3.2 (Page 21) Physician Reviewers: The offeror must demonstrate arrangements with at least one available physician in each

generally recognized subspecialty. Must the offeror have these arrangements in place and submitted with the proposal?

A. The Offeror's proposal should describe procedures for meeting this requirement. Where possible, these arrangements should be submitted with the proposal.

(Ex. 3, p. 9, Emphasis added)

KePro responded,

We understand/acknowledge the importance of this requirement and agree to have only South Carolina licensed, Board certified physicians of medicine or osteopathy and practicing medicine or surgery to perform reviews for this Medicaid QIO contract. Since we are an experienced utilization management vendor, we already have four physicians who meet SCDHHS criteria on our panel (see Figure 6), as well as two chiropractors. In addition, we have access to our 3,200 licensed physicians throughout the nation through our arrangement with a nationally recognized university medical center. While we do not know the exact number of South Carolina licensed physicians accessible through this relationship, we know there are many. All of these physicians have medical necessity review experience and are highly qualified to meet SCDHHS utilization management needs.

(Ex. 10, p. 50)

KePro then listed by name the physicians already on their panel. (Ex. 10, p. 50. Figure 6)

KePro added,

Additionally, upon contract award, KePro's medical director will undertake an aggressive physician recruitment effort, which will continue throughout the life of the contract. All reviewers...will have an ample number of licensed doctors of medicine and/or osteopathy, practicing medicine and surgery in the review area ...We will have at least one relationship with a physician in each generally recognized subspecialty by contract start date.

(Ex. 10, p. 50, Emphasis added)

First, the CPO finds that KePro expressly agreed that it would use South Carolina licensed physicians for these physician reviews. Second, the RFP did not require KePro to "identify" the physicians but rather to merely describe its procedures for meeting the performance requirement of

having a relationship with at least one available physician in each generally recognized subspecialty, which it did. KePro's proposal was sufficient to comply with this requirement of the RFP.⁷ Therefore, it was responsive in these regards.

14. KePro failed to identify who would be responsible for pre-authorization reviews for institutional and community based services for children under 21 as required by the RFP in Section 3.6.6 (CCME 1.i.)

CCME claims to KePro was also non-responsive based upon its response to Section 3.6.6.

Section 3.6 of the RFP reads,

RETROSPECTIVE AND PRE-PAYMENT REVIEW SERVICES

Unless otherwise specified below, all retrospective and pre-payment reviews must be conducted within thirty (30) calendar days of receipt of the request.

(Ex. 1, p. 28)

Subsection 3.6.6 of the RFP reads,

Institutional and Community Based Services for Children Under 21

The licensed professionals with psychiatric experience described in Section 3.3.1.3.4 may conduct the reviews listed in the Section 3.6.6.

(Ex. 1, p. 30)

Subsection 3.3.1.3.4 reads in relevant part: "A psychologist is required to conduct all ICF/MR level of care reviews." (Ex. 1, p. 21)

KePro responded to 3.6.6 as follows:

KePro understands and agrees to abide by all requirements in this section.

⁷ Regardless, Section 11-35-1520(13)(b) of the Code indicates that the failure to furnish required information concerning employees can be waived as a minor informality. To the extent that KePro's response was deficient in this regard, the CPO hereby waives it as a minor informality.

KePro will utilize our skilled, licensed health care professionals to conduct the onsite reviews. Please refer to Section 3.3 for details related to our professional credentials.
(Ex. 10, p. 155)

KePro responded to 3.3.1.3.4 as follows:⁸

KePro understands and agrees to abide by all the requirements in this section.

KePro's medical director will recruit several psychologists who are South Carolina licensed and Board certified to perform all ICR-MR level of care reviews.
(Ex. 10, p. 51).

Clearly KePro's response complied with this requirement of the RFP. CCME's attempt to argue otherwise is wholly without merit. Accordingly, the allegation that KePro is non-responsive in this regard is denied.

15. Allegation that KePro did not agree to the operating hours as required by the solicitation but instead offered to be closed on State holidays (CCME 1.p., 2.e)

The RFP required offerors to propose that the call center/prior authorization processing center “[b]e available from at least 8:00AM to 7:00PM Eastern Time, Monday through Friday.” (Ex. 1, p. 35, 3.8.1.4)

KePro responded generally, “KePro fully understands and readily agrees to provide all requirements in **Section 3.8 Call Center**” (Emphasis KePro's) KePro added “KePro service representatives will answer provider requests during normal business hours of 8:00AM to 7:00PM EST, Monday through Friday.” (Ex. 10, p. 195, 3.8 and p. 196, 3.8.1.4). These responses by KePro were compliant with the RFP.

However, KePro wrote further, “Our call/processing center will be available to respond to inquiries and requests. It will be staffed from 8:00 a.m.-7:00 p.m. EST Monday through Friday, excluding State Holidays; messaging systems will be in place after hours or on recognized holidays.” (Ex. 10, p. 198, Call/Prior Authorization Processing Center, bullet #1) (Emphasis added)

The CPO finds that staffing the call center from 8:00 AM to 7:00 PM Eastern Time, Monday through Friday, was a mandatory requirement of the RFP. KePro agreed initially to comply, but then qualified its answer stating that its call center would close on state holidays. This variation was not compliant to this requirement of the RFP. Moreover, it is a material alteration because providing staff on fewer days, particularly holidays, obviously effects the price offered. Therefore, KePro is non-responsive to a material requirement of the solicitation because it excluded staffing its call center on holidays.

16. Allegation that KePro failed to offer a performance bond as required. (CCME 1.q, 2.f)

CCME alleges that KePro was non-responsive not because it did not agree to offer a performance bond because it agreed to offer it five days later than was required by the solicitation. For the reasons set forth below, this allegation is denied.

The RFP reads,

Within ten (10) calendar days after written notice of award, the Contractor shall furnish a performance bond. The Contractor shall provide and pay the cost of the performance bond and shall use the form entitled “Performance Bond for Other Than Construction Contracts” provided with the RFP
(Ex. 1, p. 68, Emphasis added)

⁸ KePro’s proposal inadvertently lists this section as “3.3.1.3.3”; however, it clearly is merely a typographical error since the text is identical to 3.3.1.3.4.

KePro included the required bond form with its proposal, but typed at the top, “KePro agrees to provide this attestation and the performance bond within 15 business days of contract award.” (KePro’s proposal exhibits, Tab #2)

Agreeing to provide a performance bond was a mandatory requirement of the solicitation. Clearly, KePro agreed to provide and pay for the performance bond on the form specified in the RFP. However, KePro altered the number of days allowed for submittal.

Never the less, the Code provides authority to correct minor deficiencies in a bid, such as this.

Section 11-35-1520(13) reads:

Minor Informalities and Irregularities in Bids. A minor informality or irregularity is one which is merely a matter of form or is some immaterial variation from the exact requirements of the invitation for bids having no effect or merely a trivial or negligible effect on total bid price, quality, quantity, or delivery of the supplies or performance of the contract, and the correction or waiver of which would not be prejudicial to bidders. The procurement officer shall either give the bidder an opportunity to cure any deficiency resulting from a minor informality or irregularity in a bid or waive any such deficiency when it is to the advantage of the State. Such communication or determination shall be in writing.

The procurement manager could have determined this technical violation to be a minor informality and waived it but did not. However, the CPO finds KePro’s submittal regarding the performance bond to be an immaterial variation from the exact requirements of the invitation having no effect or merely a trivial effect on total price, quality, quantity, or delivery. Therefore, the CPO deems this to be a minor informality and waives it. Accordingly, the protest issue is denied.

17. Allegation that KePro failed to complete Schedule VIII (CCME 1.t)

CCME argues that KePro's Bidding Schedule / Price-Business Proposal required by Section VIII of the RFP was incomplete. Accordingly, CCME contends this renders KePro's proposal non-responsive.

According to the Section VI. AWARD CRITERIA, Evaluation Factors – Proposals, as amended, the evaluation of price would be based upon “[t]he total cost of ownership to the State including annual maintenance and license fees for the initial two (2) year contract period.” (Ex. 2, p. 8, Emphasis added) It went on to restate and clarify that “[p]ricing will be evaluated on the initial term (2 years), however, each offeror must provide pricing for the additional renewal terms as well.” (Ex. 2, p. 8, Emphasis added) The RFP required offerors to submit their price proposal as formatted in Part VIII. (Ex. 1, p. 69 and as amended at Ex. 2, p. 9, Bidding Schedule/Price-Business Proposal) The format of the bidding schedule provided columns for offerors to insert their price year by year for all the various services required. Since the price evaluation was based upon pricing for the initial term, or the first two years, the bidding schedule also provided a column for summation of line item pricing for years one and two, which was entitled “Total Initial Contract Period”. (Ex. 2, p. 9)

In its Bidding Schedule / Price-Business Proposal, KePro did not extend its line item prices for each category for the initial two-year term. (Ex. 14) Therefore, CCME protests KePro's failure to complete the bidding schedule as instructed. The CPO disagrees that this renders KePro's proposal non-responsive. While KePro did not extend each line item for the initial term of two years as the Bidding Schedule had provided for, KePro did provide its total initial contract price for two years, which was \$3,777,016. (Ex. 14)

The CPO finds that this omission is merely a matter of form and had utterly no effect on the total bid price, quality, quantity, or performance of the contract and in no way prejudices the rights of other offerors. Accordingly, it is waived as a minor informality, and this protest issue is denied.

B. MISREPRESENTATION ALLEGATIONS

According to the Panel, an allegation of misrepresentation is not a matter of responsiveness or responsibility and is not a matter that makes the evaluators' determinations arbitrary or capricious. Protest of PS Energy, Case No. 2002-9. Instead, it is a matter of good faith, and a bid or proposal should be rejected when the misrepresentation is made in bad faith or materially influences an evaluation. Id.

1. Allegation that KePro misrepresented the qualifications of its call center manager (Alliant II.)

Alliant contends that KePro misrepresented the qualifications of Tiffany Brooks, its proposed call center manager. Its argument is based upon the result of one reference check where the reference indicated that Ms. Brooks was only 17 year old. However, this issue is wholly without merit.

By way of background, KePro offered Tiffany Brooks as its call center manager indicating that Ms. Brooks "brings almost ten years of experience in call center and customer relationship management expertise to DHHS." (Ex. 10, pp. 48-49) KePro's proposal included Ms. Brooks' resume', which reflected she had worked at KePro since May 2006 and had served as a call center for the past year and a half. Her resume also reflected several more years of experience with two other companies as a customer service representative and an account manager. KePro also included three references for Ms. Brooks, as required by the RFP. (Ex. 10, Appendix) DHHS was assigned the duty of calling the references provided. For Ms. Brooks, DHHS only called one reference, a Ms. Telicia

Chambliss-Brooks, who responded that she was “Tiffany’s step mom and that Tiffany is only 17 years old.” (Ex. 12, unnumbered page)

Regardless, Joseph Dougher, KePro’s President and CEO, testified before the CPO that the Tiffany Brooks that KePro had proposed has worked for KePro for the past 4-5 years. Ms. Harris of KePro verified that their Ms. Brooks is 29 years old, not 17. She explained that the confusion occurred because there are two known Tiffany Brooks. According to Ms. Harris, KePro’s Ms. Brooks had listed Ms. Chambliss as a reference and Ms. Chambliss had since married a man with the last name of Brooks who has a 17 year old daughter also named Tiffany Brooks.

Obviously an error or miscommunication was made during the reference check that should have been clarified by the State. However, there is no evidence that KePro had in fact misrepresented the qualifications of Ms. Brooks. Therefore, this allegation is denied.

2. Allegation that KePro misrepresented the capabilities of its Atrezzo IT system (Alliant II)

Alliant claimed that, upon information and belief, KePro had intentionally misrepresented the utilization, implementation and abilities of its Atrezzo IT system. The CPO disagrees.

Section 3.4.1.3 of the RFP required offerors to “[p]rovide procedures for providers to submit prior authorization (PA) request related information to the Offeror via secure website, telephone, fax, and/or mail.” (Ex. 1, p. 22)

KePro responded with almost three pages of information. Specifically, KePro wrote, “Our system is the external provider access point to Atrezzo as the internal review system”. . . “The system combination reduces errors, improves turnaround time, and increases efficiency for providers”. . . KePro is currently using the system to support over 1.2 million 400,000 annual reviews within state contracts.” (Ex. 10, pp. 72-73, Emphasis added)

The Protestants contend that KePro misrepresented the capabilities of the Atrezzo system arguing that KePro only recently acquired the system and that it is not being used to support over 1.2 million 400,000 reviews, as KePro contended in its proposal. In other words, Alliant contends that the reference to “the system” meant the Atrezzo internal review system. However, Meghan Harris, KePro’s Chief Operations Officer, explained that “the system” language in its proposal references all of KePro’s systems, including personnel, policies, etc., not the Atrezzo internal review system alone.

The CPO finds no evidence that KePro misrepresented the utilization, implementation and capabilities of the Atrezzo internal review system. Therefore, this protest issue is denied.

C. ALLEGATION INVOLVING EVALUATIONS

Allegation that the evaluators scores of KePro’s qualifications were arbitrary, and capricious due to the reference on the call center manager (Alliant III)

Alliant alleges that the evaluators’ scores of KePro’s qualifications were arbitrary and capricious. Alliant points to the reference for Tiffany Brooks indicating she was only 17 as evidence that the evaluations were arbitrary and capricious.

Evaluators’ determinations as to which proposal is most advantageous to the State, as required by Section 11-35-1530(7) and (9) of the Code, are “final and conclusive, unless clearly erroneous, arbitrary, capricious, or contrary to law.” S.C. Code Ann. § 11-35-2410. According to the Panel, the protestant has the burden to prove, by a preponderance of the evidence, that its allegation concerning the evaluator or evaluators renders the determination clearly erroneous, arbitrary, capricious, or contrary to law. Protest of Volume Services, Case No. 1998-4. Moreover, the Panel has repeatedly stated that it will not re-evaluate proposals and will not substitute its judgment for that of the evaluators. Id.; Protest of Coastal Rapid Public Transit Authority, Case No. 1992-2; Protest of NBS Imaging Systems, Inc., Case No. 1993-16; Protest of First Sun EAP Alliance, Inc., Case No. 1994-11;

Protest of Travelsigns, Case No., 1995-8; Protest of Santee Wateree Regional Transportation Authority, 2000-5. In Protest of Coastal Rapid Public Transit Authority, the Panel explained that it will not disturb the evaluators' findings "so long as the evaluators follow the requirements of the Procurement Code and the RFP, fairly consider all proposals, and are not actually biased." Stated differently, the Panel has found the "evaluation process does not need to be perfect so long as it is fair."
Protest of Santee Wateree Regional Transportation Authority.

As stated previously, this reference was obviously the result of miscommunication. Alliant did not present any of the evaluators at the hearing to testify about the effects, if any, of this reference. Therefore, this single issue does not prove the evaluations were arbitrary or capricious, and this allegation is denied.

D. UNREASONABLE PRICE ALLEGATION

Allegation that KePro's inadequate staffing led to an unreasonably low price (CCME 4.a, Alliant I.V., Arkansas # 2)

The Protestants all allege that due to its inadequate staffing plan KePro's offer was unreasonably low.

Regulation 19-445.2095(J)(c) provides that individual proposals may be rejected where "the proposed price is clearly unreasonable." Here protestants claim that the price offered by the intended awarded vendor was unreasonably low.

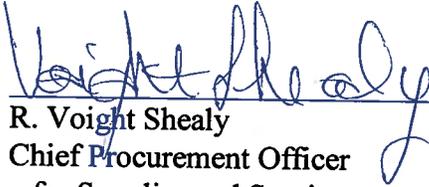
An allegation of an unreasonably low price is not usually a valid ground for protest. See Matter of: Advanced Technology Systems, Inc., Comp. Gen. B-296493.6 (Oct. 2006) (holding that "price reasonableness concerns whether a price is unreasonably high, as opposed to unreasonably low."); Matter of: WorldTravelService, Comp. Gen. B-284155.3 (Mar. 2001) (noting that there is no basis to

challenge a price as unreasonable where the allegation is the price offered was too low, not too high); Matter of: Evans Security Solutions, Inc., Comp. Gen. B-311035 (Mar. 2008) (noting that a protestor's claim that another vendor submitted an unreasonably low price or that the price is below the cost of performance is not a valid basis for protest). This is particularly true when the price results from a competitive process involving multiple offers and the offeror is deemed responsible, which is not challenged here.

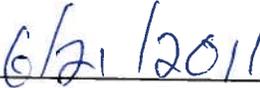
However, the decision above that KePro's proposal was nonresponsive to a material requirement of the solicitation renders moot this issue that KePro offered an unreasonably low price in this regard. Therefore, the CPO does not address it.

DETERMINATION

For the reasons stated above, the protests are granted. Based upon the Protest of Carter Goble Associates, Inc., Case No. 1989-25, the CPO directs the State to cancel the intent to award to KePro and resolicit in accordance with the Code and Regulations.



R. Voight Shealy
Chief Procurement Officer
for Supplies and Services



Date

Columbia, S.C.

STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW
Protest Appeal Notice (Revised October 2010)

The South Carolina Procurement Code, in Section 11-35-4210, subsection 6, states:

(6) Finality of Decision. A decision pursuant to subsection (4) is final and conclusive, unless fraudulent or unless a person adversely affected by the decision requests a further administrative review by the Procurement Review Panel pursuant to Section 11-35-4410(1) within ten days of posting of the decision in accordance with subsection (5). The request for review must be directed to the appropriate chief procurement officer, who shall forward the request to the panel or to the Procurement Review Panel, and must be in writing, setting forth the reasons for disagreement with the decision of the appropriate chief procurement officer. The person also may request a hearing before the Procurement Review Panel. The appropriate chief procurement officer and an affected governmental body shall have the opportunity to participate fully in a later review or appeal, administrative or judicial.

Copies of the Panel's decisions and other additional information regarding the protest process is available on the internet at the following web site: www.procurementlaw.sc.gov

FILE BY CLOSE OF BUSINESS: Appeals must be filed by 5:00 PM, the close of business. *Protest of Palmetto Unilect, LLC*, Case No. 2004-6 (dismissing as untimely an appeal emailed prior to 5:00 PM but not received until after 5:00 PM); *Appeal of Pee Dee Regional Transportation Services, et al.*, Case No. 2007-1 (dismissing as untimely an appeal faxed to the CPO at 6:59 PM).

FILING FEE: Pursuant to Proviso 83.1 of the 2010 General Appropriations Act, "[r]equests for administrative review before the South Carolina Procurement Review Panel shall be accompanied by a filing fee of two hundred and fifty dollars (\$250.00), payable to the SC Procurement Review Panel. The panel is authorized to charge the party requesting an administrative review under the South Carolina Code Sections 11-35-4210(6), 11-35-4220(5), 11-35-4230(6) and/or 11-35-4410...Withdrawal of an appeal will result in the filing fee being forfeited to the panel. If a party desiring to file an appeal is unable to pay the filing fee because of hardship, the party shall submit a notarized affidavit to such effect. If after reviewing the affidavit the panel determines that such hardship exists, the filing fee shall be waived." 2010 S.C. Act No. 291, Part IB, § 83.1. PLEASE MAKE YOUR CHECK PAYABLE TO THE "SC PROCUREMENT REVIEW PANEL."

LEGAL REPRESENTATION: In order to prosecute an appeal before the Panel, a business must retain a lawyer. Failure to obtain counsel will result in dismissal of your appeal. *Protest of Lighting Services*, Case No. 2002-10 (Proc. Rev. Panel Nov. 6, 2002) and *Protest of The Kardon Corporation*, Case No. 2002-13 (Proc. Rev. Panel Jan. 31, 2003).

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April 4, 2011

VIA E-MAIL AND HAND DELIVERY

Mr. Voight Shealy
Chief Procurement Officer
Materials Management Office
Suite 600
1201 Gervais Street
Columbia, South Carolina 29201

APR 4 11 AM 3:05PM

MMO OFFICE

RE: Protest of Award under RFP No. 5400002492 to KePRO
Provide a Quality Improvement Organization ("QIO") to the South
Carolina Department of Health and Human Services, ("SCDHHS")

Dear Mr. Shealy:

Pursuant to S.C. Code Ann. §11-35-4210 (2010), please allow this letter to constitute the protest of Carolinas Center for Medical Excellence ("CCME") to the Notice of Intent to Award the contract for the services described in RFP No. 5400002492 to KePRO to provide QIO services for the South Carolina Department of Health and Human Services ("SCDHHS"). The Intent to Award ("Award") was posted March 25, 2011.

The Grounds for CCME's protest are as follows:

1. **KePRO's Proposal is Non-Responsive to the Essential Requirements of the RFP and should be REJECTED pursuant to Reg. 19-445.2070(A).**
 - a. KePRO fails to commit to copy SCDHHS on all letters as they are mailed out, unless otherwise determined by SCDHHS as required by Section 3.4.1.5 of the RFP.
 - b. KePRO fails to commit to conduct all prior authorization reviews within twenty-four (24) hours of the receipt of the request. If a second level consultant's review is required, a determination must be made within forty-

eight (48) hours of the initial request. The Offeror is responsible for generating the PA number. The provider of the service and/or the primary physician is responsible for obtaining the PA. Physician consultation is required as specified in the RFP and when deemed necessary by a reviewer based on his/her best judgment and Offeror's protocol. All pursuant to Section 3.5 of the RFP. KePRO's response at pages 121-123 makes no commitment to these as required by the RFP.

- c. KePRO fails to commit to using the current SCDHHS DME Policy and Procedure Manual as required by Section 3.5.5 of the RFP.
- d. KePRO fails to respond to material requirements of Section 3.1 of the RFP such as failing to confirm a 10 day period for SCHDDS to approve submission or resubmission of deliverables; the "Person-weeks chart includes no provision for RFP required SCDHHS personnel efforts; there is no mention of a network diagram identifying critical paths for contract tasks in the proposal; there is no evidence that KePRO has qualified staff, or has made arrangements for outside staff qualified to do this.; The Gantt chart submitted as KePRO's fails to demonstrate that KePRO knows how to structure a document that has practical value for a complex, shore duration implementation process.
- e. There is no response in the KePRO proposal or Work Plan that describes how KePRO would handle "potential or actual problems" as required by RFP Section IV.a.
- f. KePRO failed to identify at least one available physician in each generally recognized subspecialty as required by Section 3.3.1.3.2 of the RFP.
- g. KePRO failed to commit to use a South Carolina licensed psychologist to conduct all ICF/MR reviews as required by the RFP.
- h. KePRO failed to indicate that or agree that a licensed professional with psychiatric experience would perform quality reviews.
- i. KePRO failed to identify who would be responsible for reviews pursuant to Section 3.6.6 of the RFP.
- j. KePRO failed to commit to utilize only South Carolina licensed physicians to perform physician level reviews as required by Section 3.3.1.3.2 of the RFP.
- k. KePRO failed to commit to utilize only South Carolina Licensed Physicians to approve double or multiple organ transplants as required by Section 3.5.2 of the RFP.
- l. KePRO attempts to modify the essential requirements of the contract in violation of the RFP where it indicates in response to Section 3.5.4 that the physician consultant will complete their review within "three days of receipt"; the standard imposed by the RFP is **within 48 hours of receipt**.
- m. KePRO attempts to modify the essential requirements of the contract pursuant to its response to Section 3.5.6.6 of the RFP. The RFP provides that

Offeror MUST make a determination within 24 hours of the “receipt of the request”. KePRO attempts to modify this by stating in its Proposal that it will complete the review within “24 hours of receipt of the request **and necessary information**” KePRO affirms this position when it states “KePRO understands and agrees to abide by all requirements in this section; we will complete the review within 24 hours of receipt of **necessary information.**”

- n. KePRO attempts to modify the Contract requirements of Section 3.63.5.4 which provides that “The Contractor will not have to travel to the facilities but will conduct these reviews onsite at the DDSN Consumer Assessment Team (CAT) location in Columbia, SC.” KePRO has proposed that the records be sent to their office for review.
 - o. KePRO fails to agree to provide a South Carolina licensed psychologist to conduct the ICF/MR reviews pursuant to Section 3.3.1.3.4 of the RFP.
 - p. KePRO fails to meet the essential operating hours enumerated in the RFP under Section 3.8.1.4 in that it proposes to be closed on State Holidays. The RFP requires the call center to be open every Monday through Friday.
 - q. KePRO fails to agree to furnish a Performance Bond as required by the RFP
 - r. KePRO fails to provide key employees full time throughout the Contract as long as the Offeror employs them pursuant to the RFP. For example the Medical Director is listed as Key Personnel in Section 3.3.1.2 of the RFP; KePRO proposes only .6 FTE – which is only 60% of a full time Medical Director.
 - s. KePRO fails to provide other key employees full time throughout the Contract Period.
 - t. KePRO failed to Complete SCHEDULE VIII as required by the RFP.
 - u. KePRO is a non-responsive proposer and its Proposal should be rejected.
2. **KePRO’s proposal attempts to Modify the RFP and impose conditions upon DHHS in violation of S.C. Code Ann. Reg. §19-445-2070(D) (2010)**
- a. KePRO attempts to modify the essential requirements of the contract in violation of the RFP where it indicates in response to Section 3.5.4 that the physician consultant will complete their review within “three days of receipt”; the standard imposed by the RFP is **within 48 hours of receipt.**
 - b. KePRO attempts to modify the essential requirements of the contract pursuant to its response to Section 3.5.6.6 of the RFP. The RFP provides that Offeror MUST make a determination within 24 hours of the “receipt of the request”. KePRO attempts to modify this by stating in its Proposal that it will complete the review within “24 hours of receipt of the request **and necessary information**” KePRO affirms this position when it states “KePRO

understands and agrees to abide by all requirements in this section; we will complete the review within 24 hours of receipt of **necessary information.**"

- c. KePRO attempts to modify the Contract requirements of Section 3.6.3.5.4 which provides that "The Contractor will not have to travel to the facilities but will conduct these reviews onsite at the DDSN Consumer Assessment Team (CAT) location in Columbia, SC." KePRO has proposed that the records be sent to their office for review.
 - d. KePRO attempts to modify the Contract requirements of Section 3.3.1.3.4 by using nurses rather than a South Carolina licensed psychologist to conduct the ICF/MR reviews.
 - e. KePRO attempts to modify the Contract requirements of Section 3.8.1.4 in that it proposes to be closed on State Holidays. The RFP requires the call center to be open every Monday through Friday.
 - f. KePRO attempts to modify the Contract requirements by removing the requirement that it furnish a Performance Bond as required by the RFP
 - g. KePRO attempts to modify the Contract requirements by exempting itself from the requirement that key employees be provided full time throughout the Contract. For example the Medical Director is listed as Key Personnel in Section 3.3.1.2 of the RFP; KePRO proposes only .6 FTE – which is only 60% of a full time Medical Director.
 - h. KePRO is non-responsive to the solicitation in attempting to impose new requirements on the state or in attempting to modify the solicitation. Its proposal should be rejected as nonresponsive.
- 3. KePRO's proposal does not include or provide adequate staffing to perform the essential requirements of the contract.**
- a. KePRO failed to provide all staffing within the proposal and references panels which are not included in its cost proposal as resources which were considered in evaluating the proposal. This results in a misrepresentation of staffing and a probable error in costs.
 - b. KePRO is non-responsive to the solicitation and its proposal should be rejected.
- 4. KePRO's proposal should be rejected because its price is Unreasonable.**
- a. The narrow band of pricing among the other proposers and the drastically lower price from KePRO evinces the fact that an unreasonable price has been presented based upon a lack of staffing necessary to perform the essential functions of the contract.
 - b. KePRO's price is unreasonable and should be rejected pursuant to Reg. 19-445.2095.J(c) (2010)

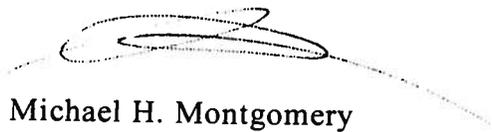
Mr. Voight Shealy
April 4, 2011
Page 5

For the above enumerated reasons, CCME requests that the Chief Procurement Officer determine that KePRO's proposal is non-responsive to the essential requirements of the RFP, that its proposal attempts to modify the RFP and impose additional conditions upon DHHS; that the proposal staffing is misrepresented and unreasonable and that the proposal pricing is unreasonable and skewed the overall scoring to the detriment of CCME. The award to KePRO should be overturned, the price scoring should be recalculated based upon the remaining proposers and the contract should be awarded to the highest scoring responsive and responsible proposer after that rescoring, CCME.

Thank you in advance for scheduling a prompt hearing and for your favorable consideration of CCME's protest.

Very Truly Yours,

MONTGOMERY WILLARD, LLC



Michael H. Montgomery

MHM/msp

BRUNER, POWELL, WALL & MULLINS, LLC

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April 11, 2011

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VIA EMAIL AND HAND DELIVERY

Mr. Voight Shealy
Chief Procurement Officer for Goods and Services
Materials Management Office
1201 Main Street, Suite 600
Columbia, South Carolina 29201

301390 0000
APR 13 11 51 AM '11

Re: Protest of Award of Contract for Solicitation No. 5400002492
Description: Provide a Quality Improvement Organization for the SC
Department of Health and Human Services
Our File No.: 7-2231.100

Dear Mr. Shealy:

As you know, this firm has been retained to represent Georgia Medical Care Foundation, Inc. d/b/a Alliant ASO ("Alliant") in connection with the proposed intent to award the Contract for Quality Improvement Organization ("QIO") for the South Carolina Department of Health and Human Services to Keystone Peer Review Organization, Inc. ("KePro"). Pursuant to S.C. Code Ann. § 11-35-4210, Alliant hereby supplements its protest filed on April 4, 2011. Alliant reiterates and incorporates by reference its protest grounds set forth in the protest letter of April 11, 2011. Alliant would assert the following factual and legal basis for protest:

On December 7, 2010, the Materials Management Office ("MMO") issued specifications for Solicitation No. 5400002492. The solicitation sought proposals on behalf of the South Carolina Department of Health and Human Services ("DHHS") for the services of a QIO or QIO-like entity to assist DHHS in meeting the requirements for a statewide utilization control program for Medicaid Services, in accordance with 42 CFR Part 456 – Utilization Control. This would include providing utilization reviews for inpatient hospital services, mental hospitals, intermediate care facilities and inpatient psychiatric care services for individuals under age 21. The solicitation also sought services for pre-authorization reviews, pre-payment review and quality review functions.

The solicitation required prospective vendors to submit an initial technical proposal and a separate price proposal. The technical proposals were to be judged for responsiveness and scored and evaluated by an evaluation panel pursuant to the published criteria in the RFP. Likewise, the price proposals were to be judged for responsiveness and scored by MMO according to published criteria in the RFP. The deadline for the submission of proposals was January 28, 2011. The Notice of Intent to Award was issued on March 25, 2011.

The RFP provided specific instruction to Offerors as to the significant elements that were to be included in any proposal. The RFP required specific detail regarding staffing that was required as part of the solicitation. The RFP required each Offeror to provide sufficient staff to perform the required tasks and meet the performance standards. Specifically, the RFP required a detailed description of the manner in which the Offeror proposed to perform the responsibilities, including but not limited to project team organization, staffing charts, estimates of the staff hours by task to be performed by position and detailed information of the Key Personnel as required by the RFP. The Key Personnel included the (1) Program Manager; (2) Call Center Manager and (3) Medical Director. The RFP required that each Offeror submit a statement that the Key Personnel will remain affiliated with this project full time throughout the term of the Contract. The RFP also required each Offeror to provide detailed description as to how the Offeror proposed to perform the general management responsibilities set forth in the RFP.

Alliant contends the proposed award to KePro is improper and contrary to the Procurement Code. First, Alliant contends that KePro presented a non-responsive technical proposal which materially deviated from the requirements of the RFP. KePro's proposal should have therefore been rejected. Secondly, Alliant contends that KePro's proposal should have been rejected based on misrepresentations of fact regarding its software system and its Key Personnel. Third, Alliant contends that the proposed award to KePro is improper based on the arbitrary and capricious nature of the scoring by the evaluation panel. Lastly, the procurement officer erred in failing to reject KePro's proposal based on the fact that it was unreasonable as to price in accordance with SC Reg. 19-445.2070(E) and 19-445.2095(J)(c).

I. KePro's Proposal was Not Responsive and Should Have Been Rejected.

A. Staffing.

The RFP required that the Proposal to include detailed information as to the manner in which sufficient staff would be provided to perform the required tasks and meet the performance standards. Alliant contends that the staffing plan submitted by KePro is woefully inadequate and materially deviates from the essential requirements of the RFP. Simply put, it is impossible for KePro to perform the required tasks and meet the performance standards with the staffing as proposed. These material deviations from the RFP reflect a non-responsive bid and therefore should be rejected.

Section 3.3 of the RFP requires specific information regarding Key Personnel. The Key Personnel are defined as the Program Manager, the Call Center Manager and the Medical Director. The RFP requires that these personnel will be affiliated with this project **full time** throughout the term of the Contract. Indeed, the RFP required the Offeror to include, in its Transmittal Letter, a statement acknowledging compliance with this requirement. See Section IV. Information for Offerors to Submit, RFP. p. 51. Despite this requirement, KePro did not propose a full time Medical Director. Rather, KePro's staffing plan only proposes .6 FTEs devoted to a Medical Director. The Medical Director performs an essential function in the

performance of the Contract. KePro's failure to account for a Medical Director full time in its proposal amounts to a material violation of the RFP. As such, its proposal should have been rejected.

Furthermore, the RFP requires the Offeror to provide resumes and detail experience information regarding its Key Personnel. KePro provided specific information, details and qualifications regarding its Call Center Manager, who would be performing a critical component of the Contract. Despite its representations, KePro failed to provide a proposed Call Center Manager as required. Indeed, upon information and belief, reference checks performed on the proposed Call Center Manager revealed that the person did not have the qualifications as represented and was seventeen years old. The Key Personnel were critical components to the scope of services required and were specifically identified were to be specifically evaluated by the panel. KePro's failure to provide the required information and misrepresentation of the qualifications for the Call Center Manager is a material deviation from the RFP. As such, the proposal should have been rejected.

B. Section 3.1.1.1 – Work Plan for Development and Implementation of Project

Section 3.1 required the creation of a comprehensive work plan for the development and implementation of the Project. Section IV of the RFP, Information for Offeror to Submit, required KePro to submit a Work Plan and schedule that contained certain information including but not limited to the following:

- (1) A network diagram, showing the planned start and end dates for all tasks and subtasks, indicating the interrelationships of all tasks and subtasks, and indentifying critical path;
- (2) A Gantt chart showing the planned start and end dates of all tasks and subtasks;
- (3) A discussion of how the work plan provides for handling of potential and actual problems;
- (4) A schedule for all deliverables providing a minimum of ten (10) days review time by DHHS.

Upon information and belief, KePro, in its proposal, either failed to provide the required information in Section 3.1 and Section IV of the RFP relating to the Work Plan or attempted to modify the requirements of the RFP. KePro's proposal reflects a material deviation from the RFP, imposes improper conditions upon the State, and should be rejected as non-responsive.

C. Section 3.3.1.3.4 – Psychologist LOC Review of ICF/MR.

As set forth above, Section 3.3 of the RFP sets forth the staffing requirements of the RFP. Section 3.3.1.3.4 provides that a psychologist is required to conduct all ICF/MR level of care reviews. Despite this specific requirement, KePro's proposal indicates that the LOC reviews for

ICF/MR will be conducted by nurse reviewers rather than psychologists. As such, KePro's proposal reflects a material deviation from the RFP and should be rejected as non-responsive.

D. Section 3.5 – Pre-Authorization Services

Section 3.5 of the RFP provides that all prior authorization reviews must be conducted within twenty-four (24) hours of receipt of the request. If a second level review is required, a determination must be made within forty-eight (48) hours of the initial request. KePro in its proposal agrees to complete review within 24 hours of receipt of necessary information. It further provides that a second level determination will be completed by a physician within three days of receipt. KePro's proposal reflects a material deviation from the RFP and attempts to impose conditions upon the State in violation of the Code. KePro's proposal is nonresponsive and should be rejected.

Section 3.5.2 of the RFP requires that the Offeror must implement procedures for to prior authorize the following organ transplant requests: heart, lung, liver, pancreas, multi-organ, bone marrow/stem cell, kidney, corneal and small bowel. KePro takes exception to this requirement in that it does not propose to implement prior authorization procedures for kidney and corneal transplants. KePro's proposal reflects a material deviation from the RFP and attempts to impose conditions upon the State in violation of the Code.

E. Section 3.6.5 - Intermediate Care Facility for the Mentally Retarded.

Section 3.6.5 of the RFP requires the Offeror to implement a level of care management process for Intermediate Care Facilities for the Mentally Retarded. Section 3.6.5.1, relating to Intermediate Care Facility for the Mentally Retarded, requires the following:

Provide quality management for SCDHHS oversight of the ICF/MR LOC determinations completed by DDSN through a comprehensive process, which includes monitoring, tracking and trending ICF/MR LOC data (The hard-copy documentation will be located at DDSN. The Offeror is required to conduct these reviews on-site at the DDSN Consumer Assessment Team (CAT) location in Columbia, SC.)

KePro, in its proposal, takes exception to this requirement in that it attempts to retain the ability to simply request that the LOC records be forwarded to their office for review and that if the records are not forwarded to the KePro offices the case would be closed. KePro's proposal reflects a material deviation from the RFP, imposes improper conditions upon the State, and should be rejected as non-responsive.

F. Section 3.9.2 – Provider Education/Training: Deliverables.

The RFP requires the Offeror to present a variety of educational opportunities to Medicaid providers to ensure that providers understand all utilization management and programs

and responsibilities. The RFP required KePro to provide a biannual schedule of proposed provider education activities as well as provide a quarterly report to DHHS. KePro's proposal takes exception to this requirement by offering only to provide annual scheduling and reporting activities. KePro's proposal reflects a material deviation from the RFP and attempts to impose conditions upon the State in violation of the Code.

G. Section 3.10 – Reconsiderations and Support for Administrative Appeals.

Section 3.10.2.6 provides that administrative appeal hearings are conducted by DHHS. The State expects the Offeror to provide documentation and witness testimony for the hearings. The RFP provides that DHHS will determine the method for conducting the hearing and that the subject matter of the hearing will determine whose presence at the hearing will be required. KePro's proposal takes exception to this requirement in that it provides it will make a medical director or peer reviewer available only for a one-hour telephone conference to testify at the hearings. KePro's proposal reflects a material deviation from the RFP and attempts to impose conditions upon the State in violation of the Code.

II. KePro should be Determined to be a Non-Responsive and/or Non-Responsible bidder based on its misrepresentations of fact.

In its proposal, KePro touts the successes of its proprietary IT system, Atrezzo. Indeed, KePro represents that its system is being used "to support over 1.2 million 400,000 annual [sic] reviews with our state contracts." Upon information and belief, this IT system was only recently acquired by KePro and is currently not being utilized in other State Medicaid Contracts as represented. Upon information and belief, the IT system has never been utilized on State Medicaid contracts by KePro or the company that developed it. Thus, in responding to the solicitation, KePro intentionally misrepresented the utilization, implementation and abilities of its Atrezzo IT system.

Furthermore, as set forth above, KePro provided specific information relative to its Key Personnel. This information included representations regarding the qualifications and experience of its Call Center Manager. The records from the procurement file suggest that the Call Center Manager was seventeen years old and could not have possessed the qualifications and experience represented in the KePro proposal.

Misrepresentation is a matter of good faith. Where a misrepresentation is made in bad faith or materially influences a determination or evaluation, the proposal should be rejected. *In Re: Protest of PS Energy*, Case No. 2002-9. As such, KePro's proposal should be rejected.

III. The Evaluation Panel's scoring of the Proposals was arbitrary and capricious and failed to properly consider the established award criteria.

The Qualification award criteria, which accounted for 25 points, required consideration of references, resumes, staffing, experience, financial statements and evidence of ability to conduct business. The proposal submitted by KeyPro was woefully inadequate in this regard.

Mr. Voight Shealy
April 11, 2011
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The information submitted was either wholly lacking or contained misrepresentations of fact. For example, the reference checks suggest that it did not have the personnel and experience relative to the Call Center as represented. There simply was not sufficient information provided to support the scoring provided by the panel. The scoring of the technical proposals was arbitrary and capricious in that it reflected a failure to properly apply the award criteria for the Qualification portion of the evaluation.

IV. KePro's Proposal should be rejected based on the Fact that it was Unreasonable as to Price.

KePro's Price proposal was significantly lower than all other Offerors. The bids from the remaining Offerors were tight. As set forth above, Alliant contends that KePro proposes a woefully inadequate staffing plan. KePro will be unable to perform the necessary and essential components of the Contract with the staff as proposed. Alliant contends that this has resulted in a significantly lower and unreasonable price proposal submitted by KePro. As such, KePro's proposal should have been rejected, pursuant to SC Regs. 19-445.2070(E) and 19-445.2095(J)(c), based on the unreasonable Price Proposal submitted.

For the foregoing reasons, the notice of award to KePro should be cancelled. Alliant contends that the Chief Procurement Officer should determine that KePro's Proposal should be rejected as non-responsive. Alliant further requests that the KePro Proposal be rejected based on its misrepresentation of facts set forth in its proposal and based on the fact that its Proposal is unreasonable as to price. Because the errors in the award have irreparably tainted that scoring and because of the otherwise arbitrary and capricious nature of the scoring, Alliant maintains that the solicitation should be cancelled and the project should be re-bid.

Alliant will rely on these arguments and such additional information as may become available through the course of our Freedom of Information Act request and further investigation. We are requesting an administrative review and hearing of this protest and look forward to addressing the issues with you in person and presenting our proof.

Sincerely,



E. Wade Mullins, III

BRUNER, POWELL, WALL & MULLINS, LLC

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April 4, 2011

AUTHOR'S E-MAIL:
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VIA EMAIL AND HAND DELIVERY

Mr. Voight Shealy
Chief Procurement Officer for Goods and Services
Materials Management Office
1201 Main Street, Suite 600
Columbia, South Carolina 29201

20110404 09:41

4/4/11 10:11:33 AM

Re: Protest of Award of Contract for Solicitation No. 5400002492
Description: Provide a Quality Improvement Organization for the SC
Department of Health and Human Services
Our File No.: 7-2231.100

Dear Mr. Shealy:

This firm has been retained to represent Georgia Medical Care Foundation, Inc. d/b/a Alliant ASO ("Alliant") in connection with the above referenced solicitation. On behalf of Alliant, we hereby protest the intent to award the Contract for Quality Improvement Organization ("QIO") for the South Carolina Department of Health and Human Services to Keystone Peer Review Organization, Inc. ("KePro") and request a hearing and/or administrative review. Alliant was an Offeror in the above referenced procurement and, pursuant to S.C. Code Ann. § 11-35-4210(1), Alliant has standing to pursue a protest. The grounds for this protest are set forth below.

On December 7, 2010, the Materials Management Office ("MMO") issued specifications for Solicitation No. 5400002492. The solicitation sought proposals on behalf of the South Carolina Department of Health and Human Services ("DHHS") for the services of a QIO or QIO-like entity to assist DHHS in meeting the requirements for a statewide utilization control program for Medicaid Services, in accordance with 42 CFR Part 456 – Utilization Control. This would include providing utilization reviews for inpatient hospital services, mental hospitals, intermediate care facilities and inpatient psychiatric care services for individuals under age 21. The solicitation also sought services for pre-authorization reviews, pre-payment review and quality review functions.

The solicitation required prospective vendors to submit an initial technical proposal and a separate price proposal. The technical proposals were to be judged for responsiveness and scored and evaluated by an evaluation panel pursuant to the published criteria in the RFP. Likewise, the price proposals were to be judged for responsiveness and scored by MMO according to published criteria in the RFP. The deadline for the submission of proposals was January 28, 2011. The Notice of Intent to Award was issued on March 25, 2011.

The RFP provided specific instruction to Offerors as to the significant elements that were to be included in any proposal. The RFP required specific detail regarding staffing that was required as part of the solicitation. The RFP required each Offeror to provide sufficient staff to perform the required tasks and meet the performance standards. Specifically, the RFP required a detailed description of the manner in which the Offeror proposed to perform the responsibilities, including but not limited to project team organization, staffing charts, estimates of the staff hours by task to be performed by position and detailed information of the Key Personnel as required by the RFP. The Key Personnel included the (1) Program Manager; (2) Call Center Manager and (3) Medical Director. The RFP required that each Offeror submit a statement that the Key Personnel will remain affiliated with this project full time throughout the term of the Contract. The RFP also required each Offeror to provide detailed description as to how the Offeror proposed to perform the general management responsibilities set forth in the RFP.

Alliant contends the proposed award to KePro is improper and contrary to the Procurement Code. First, Alliant contends that KePro presented a non-responsive technical proposal which materially deviated from the requirements of the RFP. KePro's proposal should have therefore been rejected. Secondly, Alliant contends that KePro's proposal should have been rejected based on misrepresentations of fact regarding its software system. Lastly, the procurement officer erred in failing to reject KePro's proposal based on the fact that it was unreasonable as to price in accordance with SC Reg. 19-445.2070(E) and 19-445.2095(J)(c).

I. KePro's Proposal was Not Responsive and Should Have Been Rejected.

A. Staffing.

The RFP required that the Proposal to include detailed information as to the manner in which sufficient staff would be provided to perform the required tasks and meet the performance standards. Alliant contends that the staffing plan submitted by KePro is woefully inadequate and materially deviates from the essential requirements of the RFP. Simply put, it is impossible for KePro to perform the required tasks and meet the performance standards with the staffing as proposed. These material deviations from the RFP reflect a non-responsive bid and therefore should be rejected.

Section 3.3 of the RFP requires specific information regarding Key Personnel. The Key Personnel are defined as the Program Manager, the Call Center Manager and the Medical Director. The RFP requires that these personnel will be affiliated with this project **full time** throughout the term of the Contract. Indeed, the RFP required the Offeror to include, in its Transmittal Letter, a statement acknowledging compliance with this requirement. See Section IV. Information for Offerors to Submit, RFP. p. 51. Despite this requirement, KePro did not propose a full time Medical Director. Rather, KePro's staffing plan only proposes .6 FTEs devoted to a Medical Director. The Medical Director performs an essential function in the performance of the Contract. KePro's failure to account for a Medical Director full time in its proposal amounts to a material violation of the RFP. As such, its proposal should have been rejected.

B. Section 3.6.5 - Intermediate Care Facility for the Mentally Retarded.

Section 3.6.5 of the RFP requires the Offeror to implement a level of care management process for Intermediate Care Facilities for the Mentally Retarded. Section 3.6.5.1, relating to Intermediate Care Facility for the Mentally Retarded, requires the following:

Provide quality management for SCDHHS oversight of the ICF/MR LOC determinations completed by DDSN through a comprehensive process, which includes monitoring, tracking and trending ICF/MR LOC data (The hard-copy documentation will be located at DDSN. The Offeror is required to conduct these reviews on-site at the DDSN Consumer Assessment Team (CAT) location in Columbia, SC.)

KePro, in its proposal, takes exception to this requirement in that it attempts to retain the ability to simply request that the LOC records be forwarded to their office for review and that if the records are not forwarded to the KePro offices the case would be closed. KePro's proposal reflects a material deviation from the RFP, imposes improper conditions upon the State, and should be rejected as non-responsive.

C. Section 3.3.1.3.4 – Psychologist LOC Review of ICF/MR.

As set forth above, Section 3.3 of the RFP sets forth the staffing requirements of the RFP. Section 3.3.1.3.4 provides that a psychologist is required to conduct all ICF/MR level of care reviews. Despite this specific requirement, KePro's proposal indicates that the LOC reviews for ICF/MR will be conducted by nurse reviewers rather than psychologists. As such, KePro's proposal reflects a material deviation from the RFP and should be rejected as non-responsive.

D. Section 3.5 – Pre-Authorization Services

Section 3.5 of the RFP provides that all prior authorization reviews must be conducted within twenty-four (24) hours of receipt of the request. If a second level review is required, a determination must be made within forty-eight (48) hours of the initial request. KePro in its proposal agrees to complete review within 24 hours of receipt of necessary information. It further provides that a second level determination will be completed by a physician within three days of receipt. KePro's proposal reflects a material deviation from the RFP and attempts to impose conditions upon the State in violation of the Code. KePro's proposal is nonresponsive and should be rejected.

II. KePro should be Determined to be a Non-Responsive and/or Non-Responsible bidder based on its misrepresentations of fact.

In its proposal, KePro touts the successes of its proprietary IT system, Atrezzo. Indeed, KePro represents that its system is being used "to support over 1.2 million 400,000 annual [sic] reviews with our state contracts." Upon information and belief, this IT system was only recently acquired by KePro and is currently not being utilized in other State Medicaid Contracts as represented. Upon information and belief, the IT system has never been utilized on State Medicaid contracts by KePro or the company that developed it. Thus, in responding to the solicitation, KePro intentionally misrepresented the utilization, implementation and abilities of its Atrezzo IT system. Misrepresentation is a matter of good faith. Where a misrepresentation is made in bad faith or materially influences a determination or evaluation, the proposal should be rejected. *In Re: Protest of PS Energy*, Case No. 2002-9.

III. KePro's Proposal should be rejected based on the Fact that it was Unreasonable as to Price.

KePro's Price proposal was significantly lower than all other Offerors. The bids from the remaining Offerors were tight. As set forth above, Alliant contends that KePro proposes a woefully inadequate staffing plan. KePro will be unable to perform the necessary and essential components of the Contract with the staff as proposed. Alliant contends that this has resulted in a significantly lower and unreasonable price proposal submitted by KePro. As such, KePro's proposal should have been rejected, pursuant to SC Regs. 19-445.2070(E) and 19-445.2095(J)(c), based on the unreasonable Price Proposal submitted.

For the foregoing reasons, the notice of award to KePro should be cancelled. Alliant contends that the Chief Procurement Officer should determine that KePro's Proposal should be rejected as non-responsive. Alliant further requests that the KePro Proposal be rejected based on its misrepresentation of facts set forth in its proposal and based on the fact that its Proposal is unreasonable as to price. Because the errors in the award have irreparably tainted that scoring, Alliant maintains that the solicitation should be cancelled and the project should be re-bid.

Alliant will rely on these arguments and such additional information as may become available through the course of our Freedom of Information Act request and further investigation. We are requesting an administrative review and hearing of this protest and look forward to addressing the issues with you in person and presenting our proof.

Sincerely,



E. Wade Mullins, III



Arkansas Foundation
for Medical Care™
www.afmc.org

April 7, 2011

**President and
Chief Executive Officer**
Ray Hanley

R. Voight Shealy
Chief Procurement Officer
Materials Management Office
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Chief Operating Officer
Jonathan M. Fuchs, FACHE

*E-mail: protest-mmo@mmo.sc.gov
Fax: 803-737-0639*

Chief Medical Officer
Michael Moody, MD

Re: Amendment To Protest of Intent to Award To
Keystone Peer Review Organization, Inc.
Solicitation # 5400002492
Contract # 4400003535

Board of Directors

Executive Committee

John Henderson, MD

Joann B. Mays, MD

Sherrill Wise, CPA

Jim Teeter

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Susan Greenwood, RN, BSN, CDE

Sharon Moore-Jochums

Darrell Ragland, MD

Robert Sanders, DO

Gene Snelby, MD

Portia Short

Alvin Simmons

Corporate Secretary

Patricia J. Williams

Dear Mr. Shealy:

The Arkansas Foundation for Medical Care respectfully submits the following amendment to its April 4, 2011 protest challenging the intent to award the Quality Improvement Organization (QIO) contract to Keystone Peer Review Organization

This amendment is filed within the five (5) days of the initial protest filed by the Arkansas Foundation for Medical Care. This amendment provides an additional ground in support of the protest filed on April 4, 2011.

The Arkansas Foundation for Medical Care believes it is an aggrieved party with a right to protest as the second ranked most advantageous proposal to the state for QIO services.

Amended Grounds for Protest

1. Section 3.5 of the Request for Proposal stipulates the following:

“Unless otherwise provided in the RFP, all prior authorization reviews must be conducted within twenty-four (24) hours of receipt of the request. If a second level consultant’s review is required, a determination must be made within forty-eight (48) hours of the initial request. The Offeror is responsible for generating the PA number. The provider of the service and/or the primary physician is responsible for obtaining the PA. Physician consultation is required as specified in this RFP and when deemed necessary by a reviewer based on his/her best judgment and Offeror’s protocol. Unless otherwise specified in this RFP, authorizations are valid for six (6) months.”

The response submitted by Keystone Peer Review Organization indicates that physician consultants will complete their review within three days of receipt, which should be considered non-responsive to the stipulated requirement.

2. The reasonableness of price proposed by Keystone was not adequately evaluated to ensure that they could perform the requirements of the RFP

The proposed pricing for the majority of vendors was fairly competitive, within a three percent variance from one another. However, Keystone's pricing was a significant outlier, as much as twenty-five percent lower. This indicates that Keystone is likely not going to be able to meet the requirements of the contract under their proposed pricing schedule.

3. The RFP at Section 3.3 regarding "Staffing" stipulates that the Offeror must "Employ the following Key Personnel (SCDHHS expects the Offeror to have its Key Personnel dedicated to the project as indicated in this Section so that all requirement of the solicitation are met.):

- 3.3.1.2.1 Program Manager
- 3.3.1.2.2 Call Center Manager
- 3.3.1.2.3 Medical Director"

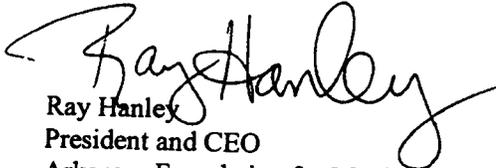
Keystone Peer Review Organization proposed using .6FTE for the Medical Director, which is non-responsive to the requirement that the Medical Director's position be "dedicated" to this project. Generally, "dedicated" positions have been interpreted to be positions exclusively allocated for a particular project. Therefore, 1.0 FTE would be needed to be responsive to this requirement.

Request for Relief

As outlined in the initial protest, the Arkansas Foundation for Medical Care respectfully requests that the intent to award a contract to Keystone Peer Review Organization be rescinded and that the QIO contract be awarded to the Arkansas Foundation for Medical Care, the second ranked most advantageous proposal to the state.

If you have any questions or need additional information, please contact me at (501) 212-8610. Thank you for your time and consideration of this matter.

Respectfully submitted,



Ray Hanley
President and CEO
Arkansas Foundation for Medical Care
1020 West Fourth Street
Little Rock, Arkansas 72201



Arkansas Foundation
for Medical Care™
www.afmc.org

April 4, 2011

**President and
Chief Executive Officer**

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Chief Operating Officer

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Chief Medical Officer

Michael Moody, MD

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R. Voight Shealy
Chief Procurement Officer
Materials Management Office
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Columbia, South Carolina 29201
(E-mail: protest-mmo@mmo.sc.gov)

Re: Protest of Intent to Award to Keystone Peer Review Organization, Inc.
Solicitation # 5400002492
Contract # 4400003535

Dear Mr. Shealy:

The Arkansas Foundation for Medical Care respectfully submits this protest against the intent to award the Quality Improvement Organization (QIO) contract to Keystone Peer Review Organization as posted on March 25, 2011.

The Arkansas Foundation for Medical Care believes it is an aggrieved party with a right to protest as the second ranked most advantageous proposal to the state for QIO services.

Grounds for Protest

1. Section 3.5 of the Request for Proposal stipulates the following:

“Unless otherwise provided in the RFP, all prior authorization reviews must be conducted within twenty-four (24) hours of receipt of the request. If a second level consultant’s review is required, a determination must be made within forty-eight (48) hours of the initial request. The Offeror is responsible for generating the PA number. The provider of the service and/or the primary physician is responsible for obtaining the PA. Physician consultation is required as specified in this RFP and when deemed necessary by a reviewer based on his/her best judgment and Offeror’s protocol. Unless otherwise specified in this RFP, authorizations are valid for six (6) months.”

The response submitted by Keystone Peer Review Organization indicates that physician consultants will complete their review within three days of receipt, which should be considered non-responsive to the stipulated requirement.

2. The reasonableness of price proposed by Keystone was not adequately evaluated to ensure that they could perform the requirements of the RFP.

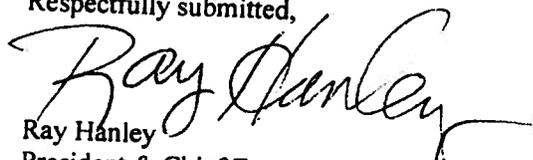
The proposed pricing for the majority of vendors was fairly competitive, within a three percent variance from one another. However, Keystone’s pricing was a significant outlier, as much as twenty-five percent lower. This indicates that Keystone is likely not going to be able to meet the requirements of the contract under their proposed pricing schedule.

Request for Relief

The Arkansas Foundation for Medical Care respectfully requests that the intent to award a contract to Keystone Peer Review Organization be rescinded and that the QIO contract be awarded to the Arkansas Foundation for Medical Care, the second ranked most advantageous proposal to the state.

If you have any questions or need additional information, please contact me at (501) 212-8610. Thank you for your time and consideration of this matter.

Respectfully submitted,


Ray Hanley
President & Chief Executive Officer