

1 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

2
3 Mercy Care, BCBS of Arizona Health
4 Choice, Banner-University Family Care,

5 Complainants,

6 v.

7 AHCCCS Administration,

8 Respondent,

9 Health Net Access, Inc. DBA
10 Arizona Complete Health Complete
11 Care Plan,

12 And

13 Arizona Physicians IPA DBA
14 UnitedHealthcare Community Plan

15 Intervenors.
16

No. 24F-OTR-317925-AHC

**ADMINISTRATIVE LAW JUDGE
DECISION**

17 **HEARING:** March 25, 2024, with further hearing on March 29, and April 1, 2, 3, 5, 8, 10,
18 11, 12, 15, 17, 19, 22, 23, and May 6¹

19 **APPEARANCES:** Roy Herrera, Daniel A. Arellano, Jillian L. Andrews, and Austin T.
20 Marshall of Herrera Arellano LLP and Kiersten A. Murphy of Henze Cook Murphy PLLC,
21 represented Appellant Mercy Care; Kevin E. O'Malley and Hannah H. Porter of Gallagher
22 & Kennedy, P.A. represented Appellant Blue Cross Blue Shield of Arizona Health Choice;
23 David B. Rosenbaum and Theresa C. Rassas of Osborn Maledon and Matthew P. Gordon
24 of Perkins Coie LLP represented Appellant Banner-University Family Care; William A.
25 Richards and Michael Narlock of Richards & Moskowitz, PLC represented Respondent
26 Arizona Health Care Cost Containment System Administration; Brett W. Johnson, Colin
27 Ahler, and Vanessa Pomeroy of Snell & Wilmer LLP and Karen Walker, Tiffany A.
28 Roddenberry, and D. Ty Jackson of Holland & Knight LLP represented Intervenor Health
29 Net Access, Inc. dba Arizona Complete Health-Complete Care Plan; Christopher A.

30 _____
¹ Citations to the transcript in this Recommended Decision will reference the day, page(s), and line(s), *i.e.*,
Day 1 Tr. 14:21-15:25.

1 DeLong, Gabriel M. Hartsell, Alex P. Hontos, and Isaac M. Gabriel of Dorsey & Whitney
2 LLP represented Intervenor Arizona Physicians IPA dba UnitedHealthcare Community
3 Plan.

4 **ADMINISTRATIVE LAW JUDGE:** Sondra J. Vanella

5 **EXHIBITS ADMITTED INTO EVIDENCE:** 1-274, 276, 277, 290, 292, 296, 297, 300, 303,
6 304, 306-308, 311, 320, 324, 326, 329, 331, 334, 335, 338, 339, 348, 350, 351, 355, 363,
7 372, 378, 389, 413, 421, 473, 496, 498, 500, 506-508, 510, 522-526, 528-530, 532, 533,
8 535, 537, 540-543, 552, 554-559, 569, 571- 583.²

9 **FINDINGS OF FACT**

10 *Factual and Procedural Background*

11 1. Pursuant to the Notice of Hearing issued by the Arizona Health Care Cost
12 Containment System (“AHCCCS”) Administration on February 13, 2024, this hearing was
13 commenced to address

14 [t]he protests filed by Mercy Care, BCBS of Arizona Health Choice, and
15 Banner-University Family Care, which challenge the EPD Contract Awards
16 issued December 1, 2023 per: ALTCS EPD RFP NO. YH24-0001, ARS §
17 36-2906, ARS § 36-2944, AAC R9-22-601 et seq., AAC R9-28-601 et seq.

18 2. Mercy Care, BCBS of Arizona Health Choice (“Health Choice”), and Banner
19 University Family Care (“Banner”) appealed the decision of AHCCCS’s Chief
20 Procurement Officer (“CPO”) denying their protests of AHCCCS’s contract awards arising
21 from Request for Proposal Solicitation # YH24-0001, Long Term Care for Individuals Who
22 are Elderly and/or Have a Physical Disability (the “RFP”).

23 *The ALTCS Program*

24 3. AHCCCS is charged with the administration of the Arizona Long Term Care
25 System (“ALTCS”).³

26 4. The ALTCS Elderly and Physically Disabled (“E/PD”) program was
27 established to provide “management and delivery of hospitalization, medical care,
28 institutional services and home and community based services to members through the

29 ² Citations to exhibits in this Recommended Decision will reference the exhibit number and page(s), but will
30 omit leading signifiers and zeros, *i.e.* Ex. 8 at 318-20.

³ Ex. 4 at 54.

1 administration.”⁴ AHCCCS has full operational responsibility for the ALTCS E/PD
2 program, including contracting with Medicaid managed care organizations (“MCOs”) to
3 provide the comprehensive delivery of services under the program.⁵

4 5. To qualify for ALTCS, members must require an institutional level of care,
5 meaning that, but for the ALTCS program and related services, these members would
6 reside in a skilled nursing facility or nursing home.⁶

7 6. The goal of the ALTCS program is to maintain members in the least
8 restrictive setting possible so members can receive services at home or within their
9 community.⁷

10 7. The ALTCS E/PD program currently serves approximately 26,000 members
11 in three Geographic Service Areas (“GSAs”): North, Central, and South.⁸

12 8. AHCCCS contracts with MCOs to implement and operate ALTCS. MCOs
13 serving the ALTCS program are charged with providing integrated care addressing
14 physical and behavioral health needs and Long Term Services and Supports (“LTSS”) to
15 the E/PD population.⁹

16 9. Appellants Mercy Care and Banner are incumbent ALTCS MCOs. Appellant
17 Health Choice is a current AHCCCS MCO serving the general Medicaid population.

18 10. Pursuant to statute, AHCCCS is required to issue a request for proposal
19 every five years for MCOs to bid to administer the ALTCS program services to
20 members.¹⁰

21 11. Notwithstanding the language in A.R.S. § 36-2944(A) requiring the issuance
22 of a request for proposal every five years, AHCCCS granted itself an exemption allowing
23 the proposed contract to extend up to seven years. Meggan LaPorte, AHCCCS’s CPO,
24 testified at hearing regarding the extension to seven years, in pertinent part, as follows:

25 Q. . . . And explain to the judge your understanding of how this
26 requirement that you recompute the ALTCS EPD contracts every five years,
at least by statute, works.

27 ⁴ See A.R.S. § 36-2932(A).

28 ⁵ See A.R.S. § 36-2932(B)(1).

29 ⁶ Day 3 Tr. 639:24-640:13; see *also* Day 1 Tr. 35:22-36:3.

30 ⁷ Day 3 Tr. 640:14-22.

⁸ Day 1 Tr. 36:24-37:9; Ex. 8 at 316, 322.

⁹ Ex. 4 at 54; Day 1 Tr. 35:17-36:3; Day 3 Tr. 639:19-640:4.

¹⁰ See A.R.S. § 36-2944(A).

1 A. So essentially we put on an RFP every five years to recompete, as
2 you said, the program contract. The requirement to recompete is kind of
3 fundamental to, you know, public procurement to allow for competition. This
4 requirement that we put out the RFP every five years has been in place
5 since I believe inception of our agency. In the past couple cycles of RFPs
6 for health plan contracts, we have -- we have issued longer terms, because
7 we felt that it was more advantageous to the State, so we have issued
8 contracts for seven years, as opposed to five.

9 Q. How have you done that?

10 A. Well, the agency comes together to decide how long we feel is
11 necessary or is appropriate for one of these contracts. They take very long
12 to put together. The plans work very hard to, you know, carry out the
13 services. And we came to a decision many years ago with the ACC contract,
14 I believe, or maybe the one prior to that, that it was advantageous to keep
15 contractors on for a little bit longer than five years. So we chose the seven-
16 year cycle simply because getting a plan up and running, should they be a
17 new contractor, or even resoliciting is just a mass amount of work -- right?
18 -- to the State. We want to make sure that the plans have enough time to
19 get comfortable in the state and carry out the services.

20 Q. Okay. And what's the process for exceeding the five-year limit under
21 the statute?

22 A. So in the past, we have essentially sent not necessarily a request for
23 approval, but a request for a notification, really, to the State procurement
24 administrator to allow for any questions that they might have if, you know -
25 - and make sure that the State procurement administrator, along with the
26 Arizona Department of Administrative -- Administration director kind of sees
27 our vision and are in line with our vision for the seven-year term.

28 Q. Okay. And there was a document that's been used. I'm not going to
29 show it to you --

30 A. Yeah.

Q. -- but that's been used as an exhibit here that was a letter from you
to Andy Tobin. Is that the notice that you're referring to?

A. Yeah. It's a multi-year determination, essentially, yeah.

...
Q. Sure. What is your understanding of whether AHCCCS has the
authority to simply indefinitely extend the ALTCS EPD contracts?

A. My understanding is, we don't have the authority to indefinitely
extend contracts. We, perhaps, would have the ability to extend for small
periods of time, given limited circumstances, if there were, you know, a
reason to, but no, we don't have authority to extend in perpetuity any
contract.¹¹

¹¹ Day 14 Tr. 3317:25-3318:20; Ex. 311.

1 12. AHCCCS estimated the costs of administering the ALTCS E/PD program
2 for the next seven years to exceed \$15 billion.¹²

3 Development of the RFP

4 13. AHCCCS issued the RFP that is the subject of this appeal on August 1,
5 2023, after more than a year of development.¹³

6 14. AHCCCS utilized three groups comprised of its own employees and an
7 outside consultant firm, Pacific Health Policy Group (“PHPG”), to develop the RFP. PHPG
8 has assisted AHCCCS with numerous prior procurements and has vast national
9 procurement experience, particularly in Medicaid managed care procurements.¹⁴ Two
10 principals of PHPG, Andy Cohen and Scott Wittman, participated in all aspects of the
11 RFP, including its development and drafting.¹⁵

12 15. This work was performed by workgroups as follows:

13 (1) The Sub-Work Groups:

14 •Responsible for reviewing stakeholder feedback, and current processes
15 and deliverables and recommending efficiencies/improvements to
16 incorporate into the RFP •Evaluates costs and payment methodology to
17 recommend changes/improvements •Makes recommendations
18 •Implements approved recommendations •Contributes new content based
19 on approved decisions •Edit RFP documents including contract language,
20 instructions to offerors, and submission requirements for evaluation of all
21 bidders •May serve on scoring team •Present recommendations/findings to
22 the Scope Team;

23 (2) The Scope Team:

24 •Responsible for ensuring that RFP content is accurate and reflects major
25 decisions and improvements identified throughout the process •Decision-
26 makers •Provides status updates, and brings escalated items, to Executive
27 Team •Provides approval of recommendations from Proposal WG; and

28 (3) The Executive Team:

29 •Ensures agency initiatives and issue items that would impact the awarded
30 vendor, and the impacted populations and/or services, are considered and

¹² Ex. 151 at 31.

¹³ Day 4 Tr. 689:13-21; *see also*, e.g., Ex. 172.

¹⁴ Day 12 Tr. 2669:25-2671:12.

¹⁵ Day 1 Tr. 131:1-17; Day 12 Tr. 2728:24-2730:6; *see* Ex. 98.

1 developed into the RFP •Decision-makers •Receives status updates from
2 Scope Team •Provides approval of escalated recommendations.¹⁶

3 16. Some of the work groups' investigation of issues developed into major
4 decisions which would impact the RFP and provision of services under ALTCS; these
5 major decisions were communicated to potential offerors in advance of the issuance of
6 the RFP.¹⁷

7 17. The Scope Team was the guiding team for the RFP.¹⁸ The Scope Team
8 considered recommendations by the workgroups on items to include in the RFP and then
9 shared that information with the Executive Team.¹⁹

10 18. The Scope Team was ultimately responsible for bringing together the
11 materials to create and implement the RFP, including by taking the lead in drafting the
12 RFP.²⁰ The Scope Team included several experienced AHCCCS employees, including:
13 Jakenna Lebsock, the Assistant Director of Health Care Services; Meggan LaPorte, the
14 CPO; Cynthia Layne, the Deputy Assistant Director of Healthcare Finance; Dr. Megan
15 Woods; Dara Johnson; Danielle Ashlock; and Melissa Arzabal, among others.²¹

16 19. The Executive Team provided overarching support in the procurement and
17 had final approval over the language and for all decisions sent to the Executive Team by
18 the Scope Team for review in the RFP.²² The Executive Team included Christina Quast,
19 Ewaryst Jedrasik, Gina Relkin, Jakenna Lebsock, Kari Price, Kristen Challecomb, Jeff
20 Tegen, and Sarah Salek.²³

21 20. Other items were within the Scope Team's purview to approve.²⁴

22 21. There was overlap between members of Scope Team and Executive Team.

23 The RFP

24 22. The RFP stated:

25 _____
26 ¹⁶ Ex. 172 at 458.

¹⁷ Day 4 Tr. 693:22-697:14; see, e.g., Ex. 2.

¹⁸ Day 2 Tr. 289:2-17; Day 6 Tr. 1143:19-1144:3.

¹⁹ Day 2 Tr. 289:2-17; see also Day 1 Tr. 55:3-6, 123:3-16.

²⁰ Day 2 Tr. 289:2-17.

²¹ Day 1 Tr. 57:7-13, Day 2 Tr. 272:11-14, 274:11-13; Day 7 Tr. 1535:6-10; Day 9 Tr. 2031:14-17, 2035:6-7; Ex. 214 at 434.

²² Day 1 Tr. 125:5-24.

²³ Ex. 214 at 434.

²⁴ Day 1 Tr. 124:5-23.

1 AHCCCS intends to make a total of three awards for this RFP, awarding
2 GSAs based upon the winning bids in each GSA and may also consider
3 Order of Preference indicated on Section I, Exhibit B: Offeror's Bid Choice
4 Form. Awards may result in zero, one, or two statewide Contractors.²⁵

4 23. The RFP noted that "awards shall be made to the responsible Offeror(s)
5 whose Proposal is determined in writing to be the most advantageous to the state based
6 upon the evaluation criteria. Proposals will be evaluated based upon the ability of the
7 offeror to satisfy the requirements of the RFP in a cost-effective manner."²⁶ The RFP
8 further noted AHCCCS's decision would be "guided, but not bound, by the scores
9 awarded by the evaluators. AHCCCS will make its decision based on a determination of
10 which Proposals are deemed to be most advantageous to the State and in accordance
11 with Paragraph 11, Award of Contract, in this Section."²⁷

12 24. Paragraph 11, Award of Contract, set forth:

13 AHCCCS shall award a Contract or Contracts to the responsible and
14 responsive Offeror(s) whose Proposal is determined most advantageous to
15 the State. . . . A Proposal submitted in response to this RFP is an offer to
16 contract with AHCCCS based upon the terms, conditions, scope of work
17 (Program Requirements), and specifications of the RFP. The Proposal
18 submitted by the Offeror will become part of the Contract with AHCCCS. . .
19 AHCCCS will award Contracts in each GSA to Successful Offerors in the
20 best interest of the State. . . . Each Offeror shall elect to bid on all three
21 GSAs and indicate the order of preference for GSAs to be awarded. . . .
22 AHCCCS anticipates awarding a maximum of two Contractors in the North
23 GSA, a maximum of two Contractors in the South GSA, and a maximum of
24 three Contractors in the Central GSA. . . . AHCCCS intends to make a total
25 of three awards for this RFP, awarding GSAs based upon the winning bids
26 in each GSA and may also consider Order of Preference indicated on
27 Section I, Exhibit B: Offeror's Bid Choice Form. Awards may result in zero,
28 one, or two statewide Contractors. . . . In the event a protest or unforeseen
29 circumstance delays the October 1, 2024, implementation in one or more
30 GSAs, the current ALTCS E/PD Contractors shall be required to continue
provision of services according to the terms of their existing Contract, until
such time as determined by AHCCCS and in the best interest of the State."²⁸

²⁵ Ex. 8 at 322 (emphasis added).

²⁶ *Id.* at 319.

²⁷ *Id.*

²⁸ *Id.* at 321.

1 25. The RFP further specified that, in the event AHCCCS “deem[ed]” that a
2 “negligible difference in scores” existed between two or more competing proposals “for a
3 particular Geographic Service Area (GSA), in the best interest of the State, AHCCCS may
4 consider additional factors in awarding the Contract, including, but not limited to . . .
5 [p]otential disruption to members” and/or “[a]dministrative burden to the Agency.”²⁹ The
6 RFP did not require AHCCCS to consider any of these additional factors if there was not
7 a negligible difference in scores, nor did the RFP prevent AHCCCS from considering one
8 or more of these factors in making its contract award determination even where there was
9 not a negligible difference in scores.

10 26. The RFP informed prospective offerors that if they had concerns about what
11 was or was not in the RFP, they were required to file a protest at least 14 days prior to
12 the deadline for proposal submission, or if an amendment was issued within that 14 day
13 period, prior to the deadline for proposal submission.³⁰

14 27. The RFP also gave prospective offerors two opportunities to submit
15 questions about the RFP, which AHCCCS would answer through amendments to the
16 RFP.³¹ In total, AHCCCS issued three amendments to the RFP.³²

17 28. Both Mercy Care and Heath Choice asked several questions regarding
18 scoring and weighting of scores and AHCCCS’s response to all such questions was the
19 same: “AHCCCS will not be providing scoring or weighting details.”³³

20 29. The deadline for the submission of proposals was October 2, 2023.

21 The Evaluation Factors

22 30. Section 8 of the Instructions to Offerors, entitled “Evaluation Factors and
23 Selection Process,” listed two “scored portions of the evaluation” “in their relative order of
24 importance” as “1. Programmatic Submission Requirements” and “2. Financial
25 Submission Requirements.”³⁴

26 ²⁹ Ex. 8 at 319-20.

27 ³⁰ See Ex. 8 at 323, 324 (“Protests shall comply with the requirements set forth in A.A.C. R9-28-601 et seq.
28 and in particular A.A.C. R9-28-604.”); A.A.C. R9-22-604(D)(1) (Any protest alleging improprieties in an RFP
or an amendment to an RFP must be filed at least 14 days prior to the due date for receipt of proposals.);
see also Day 14 Tr. 3350:10-3351:7.

29 ³¹ Ex. 8 at 318, 326.

30 ³² Day 1 Tr. 257:25-258:2; see also Exs. 18, 19, 20.

³³ Ex. 18 at 371-72, 375.

³⁴ Ex. 8 at 319.

1 31. The phrase “Programmatic Submission Requirements” is not defined in the
2 RFP.³⁵

3 32. The RFP instructed offerors to submit written responses to a series of
4 “Narrative Submission Requirements” and to participate in oral presentations, which “may
5 be audio-taped by AHCCCS for the Agency’s use in the evaluation process.”³⁶ Narrative
6 Submission Requirements were identified as B1-B11.³⁷ Narrative Submission
7 Requirements did *not* include oral presentations (B12). The Instructions to Offerors
8 contained in Section H of the RFP provided detailed instructions of what offerors should
9 expect in the procurement process.³⁸

10 33. The RFP explained that “[t]he items *which are designated for scoring in this*
11 *RFP shall be evaluated and scored.*”³⁹

12 34. The RFP was specific as to what portions would be scored:

13 Programmatic and Finance Requirements will be evaluated and weighted.
14 The Capitation Agreement/Administrative Cost Bid *will be scored* for each
15 Offeror and the score for that Offeror will be applied to all GSAs bid by that
16 Offeror. The Case Management Cost Bid *will be scored by GSA* for each
17 Offeror. With the exception of Narrative Submission Requirements noted as
18 a non-scored item and Narratives that are noted as GSA-specific, Narrative
19 Submission Requirements *will be scored* for each Offeror and the score for
20 that Offeror will be applied to all GSAs bid.⁴⁰

21 35. In addition to the Narrative Submission Requirements, the RFP required
22 each offeror to participate in a scheduled oral presentation “pertaining to key areas of the
23 ALTCS E/PD Program.”⁴¹ The RFP did not disclose the prompts that would be used in
24 the oral presentations, but did indicate that the offerors should bring no more than six
25 individuals to the meeting, all of whom should be employees of the offeror and not
26 consultants, and that among the six, they should have expertise in medical management,
27 case management, and quality management.⁴² The RFP also specifically stated that

28 ³⁵ Ex. 8.

29 ³⁶ *Id.* at 332.

30 ³⁷ See Ex. 16.

³⁸ See Ex. 8.

³⁹ *Id.* at 319 (emphasis added).

⁴⁰ *Id.* at 320 (emphasis added).

⁴¹ Ex. 8 at 332.

⁴² *Id.*

1 “[p]resentations may be audio-taped by AHCCCS for the Agency’s use in the evaluation
2 process.”⁴³

3 36. AHCCCS did not specify in the RFP that oral presentations would be
4 scored.

5 The Offerors

6 37. Five MCOs responded to the RFP: APIPA, Banner, Health Choice, Health
7 Net, and Mercy Care.⁴⁴

8 38. APIPA, Mercy Care, and Banner currently contract with AHCCCS for
9 ALTCS E/PD services.⁴⁵

10 39. Although Health Net and Health Choice do not currently contract with
11 AHCCCS for ALTCS E/PD services, they hold other contracts with AHCCCS and are
12 affiliates of large national entities with significant experience in providing services
13 pursuant to Medicaid contracts.⁴⁶

14 The Evaluation Process

15 40. On October 3, 2023, AHCCCS held its only scoring training for its
16 evaluators.⁴⁷

17 41. All of the evaluators received this single training related to their duties,
18 provided by Ms. Sandy Borys, who informed evaluators of the individual and consensus
19 ranking portions of the evaluation process.⁴⁸

20 42. AHCCCS directed its evaluators as follows: “It is strongly suggested that
21 you do not print any documents related to the offerors or the scoring documents
22 themselves. If you do **YOU** must ensure that the documents are shredded. Do Not put
23 them into the shredding can in your office. You must physically put them into the locked
24 shredding bin yourself.”⁴⁹

25 43. During the training, AHCCCS reiterated to evaluators that:
26 AHCCCS will be awarding a total of three contracts:

27 ⁴³ *Id.*

28 ⁴⁴ Ex. 95.

29 ⁴⁵ Day 1 Tr. 253:22-24; Ex. 105.

30 ⁴⁶ See Day 5 Tr. 887:9-13; Day 12 Tr. 2727:13-2728:2; Ex. 105.

⁴⁷ See Ex.151.

⁴⁸ *Id.*

⁴⁹ *Id.* at 62 (emphasis in original).

- Two in the North GSA consisting of Mohave, Coconino, Apache, Navajo, and Yavapai Counties.
- Three in the Central GSA including Maricopa, Gila, and Pinal Counties.
- Two in the South GSA consisting of Cochise, Graham, Greenlee, La Paz, Pima, Santa Cruz, and Yuma Counties.

There is a potential for 0, 1, or 2 statewide contracts being awarded.⁵⁰

44. AHCCCS instructed evaluators to complete their own individual reviews for their assigned sections and rank each of the offerors 1 through 5, with 1 being the best. After individual scoring, the evaluation team members for each section would then meet to discuss their individual rankings and notes and decide upon a consensus ranking.

45. Ms. Borys testified that she discouraged the use of ties.⁵¹ The training materials further directed evaluators that “ties are ok but try to rank 1-5.”⁵²

46. Witnesses offered conflicting testimony regarding training on this topic and whether ties were discouraged.⁵³

47. AHCCCS decided to use a consensus and ranking scoring methodology prior to the issuance of the RFP, consistent with a methodology it had used in numerous prior procurements, including a prior procurement for the ALTCS E/PD program.⁵⁴

48. Within each scoring category, the first-ranked proposal received 100 percent of the available points no matter how poorly it met the scoring criteria, and the last-ranked proposal received only 20 percent of the available points no matter how well it met those criteria. AHCCCS distributed points in 20 percent increments among the five bidders, no matter how close their proposals were to each other and regardless of how well each met the scored criteria.⁵⁵

49. Evaluators were not told that closely matched submissions would be separated by as much as 80 percent of the points awardable. Thus, some, but not all, of

⁵⁰ *Id.* at 32.

⁵¹ See Day 1 Tr. 89:9-18.

⁵² Ex. 151 at 60.

⁵³ Day 7 Tr. 1435:17-22 (testifying “ties were okay”); Day 1 Tr. 89:9-18 (replying “correct” to questioning if ties were discouraged). Another witness testified “we didn’t really discuss it” when asked about training on the use of ties. Day 8 Tr. 1793:8-14. One witness also testified that evaluators were instructed “to do our best to try to rank them from [] 1-5.” Day 6 Tr. 1169:20-25, 1170:1-3. See also Day 6 Tr. 1325:7-11 (testifying, “I think ties could make it more difficult to figure out our ranking in [the] final run”).

⁵⁴ Day 1 Tr. 180:22-24, 242:8-243:7; Day 2 Tr. 310:12-19; Day 14 Tr. 3328:15-3329:20.

⁵⁵ Ex. 97.

1 the evaluators were kept in the dark as to the ultimate weighting or scoring formula.⁵⁶
2 Scope Team members (who knew the weighting and scoring formulas) served on almost
3 every evaluation team.⁵⁷

4 50. Under a consensus method, a group of evaluators are assigned a specific
5 portion of each proposal to review individually before meeting as a group to arrive at a
6 consensus rank of the proposals.⁵⁸ AHCCCS asserted that each of the evaluators brought
7 to bear his or her own subject matter expertise and perspectives to decide on a consensus
8 rank of the proposals against the particular submission requirement being evaluated, with
9 the assistance of an experienced facilitator.⁵⁹

10 51. AHCCCS's Scoring Training Manual specifically stated to the evaluators
11 "**You** have been chosen because of **your** subject matter expertise and **your**
12 knowledge."⁶⁰ Despite such statement and testimony from AHCCCS leadership that
13 evaluators were all subject matter experts on their assigned evaluation criteria and were
14 specifically chosen to be evaluators for this precise reason⁶¹, several evaluators testified
15 they were *not* subject matter experts in the criteria they scored.

16 a. Samantha O'Neal, a B4 evaluator, testified as follows:

17 Q. Well, let me ask you this: Are you a subject matter expert in
18 case management training or ongoing training for case
19 management?

20 A. No.

21 Q. Did you ever suggest to anybody that you might not have the
22 requisite subject matter expertise to be an evaluator for a category
23 that was about case management training and ongoing training?

24 A. No, not that I can recall.

25 Q. Were the other evaluators for B4, in your opinion, subject
26 matter experts in case management training, ongoing training?

27 A. I don't know. I can't answer that.⁶²

28 b. Gini Britton, a B7 evaluator, testified:

29 ⁵⁶ See Ex. 144 at 2411 ("The weighting and points were not communicated as part of the scoring training,
30 so the other 14 evaluators conducted evaluations without knowledge of the scoring values being impacted
by their consensus evaluations and rankings of the Offerors on individual proposal elements."); Day 8 Tr.
1678:16-24; Day 8 Tr. 1902:2-14; Day 8 Tr. 1763:23-1764:10.

⁵⁷ See Ex. 214 at 434; Ex. 152.

⁵⁸ Day 4 Tr. 728:7-18; Day 6 Tr. 1153:1-12; see also Ex. 97 at 1227.

⁵⁹ Day 4 Tr. 728:19-729:3; Day 12 Tr. 2682:7-2683:21, 2687:5-2688:5, 2689:1-2692:6, 2694:9-2701:7.

⁶⁰ Ex. 151 at 62 (emphasis in original).

⁶¹ Day 1 Tr. 89:1-8; Day 3 Tr. 503:18-21.

⁶² Day 8 Tr. 1773:5-17.

1 Q. But first, I wanted to ask you, Ms. Britton, are you a subject
2 matter expert when it comes to networks?

3 A. I don't know that I would call myself a subject matter expert at
4 it. I do have knowledge of it.⁶³

5
6 A. . . . I am not a subject matter expert, and so listening to the
7 conversation, I was able to ask questions and -- of Jay and Christina,
8 and they were able to ask questions of me.⁶⁴

9
10 Q. Sure. But at the meeting itself, did you have any disagreement
11 that you voiced or that he voiced?

12 A. I wouldn't say disagreements. I will say we had -- we read
13 things differently.

14 Q. Okay. Can you describe that a little bit more?

15 A. I don't have a lot of network knowledge, so I relied on Jay to
16 fill me in with bits and pieces that I wasn't aware of. So I won't call
17 them disagreements. I will call them I may have listened to what he
18 said as an added education to what the question may be alluring [sic]
19 to.⁶⁵

20 c. Brandi Howard, a B4 evaluator, testified:

21 Q. Are you a subject matter expert in any particular area at
22 AHCCCS?

23 A. I'm not sure.

24 Q. Are you a case management -- a subject matter expert in case
25 management?

26 A. No.⁶⁶

27 d. Jay Dunkleberger, a B8 evaluator, testified:

28 Q. So, Mr. Dunkleberger, right before the break, I think we were
29 switching to B8. Can you please explain what B8 concerned?

30 A. B8 concerns workforce development.

Q. Do you consider yourself a subject matter expert in workforce
development?

A. So the workforce development paragraph is in a subsection
of the network development paragraph. There are some overlaps. I
do not consider myself an expert in line of our workforce
development team, but I'm familiar with the issues.

⁶³ Day 8 Tr. 1809:16-19.

⁶⁴ Day 8 Tr. 1824:11-14.

⁶⁵ Day 8 Tr. 1801:16-25; 1802:1.

⁶⁶ Day 8 Tr. 1838:1-6

1 Q. And the other evaluators on B8, are they also -- are they
2 subject matter experts in workforce development?

3 A. I probably should let them speak for themselves.

4 Q. In your mind, do you consider them to be subject matter
5 experts?

6 A. In my mind, one of them is our workforce development team
7 lead, and the other is a compliance officer.⁶⁷

8 e. Cynthia Layne, a cost bid evaluator, testified that she is not a subject
9 matter expert in capitation.⁶⁸

10 52. After the evaluators reached a consensus rank of the proposals for each
11 evaluation factor, each of the ranked evaluation factors were weighted, with the rank
12 given to each proposal for each evaluation factor converted into a number of points.⁶⁹

13 53. There were a total of points (1,000) to be awarded based on the weights
14 afforded to the evaluation factors.⁷⁰ The most weight and thus the majority of the points—
15 610 or 61 percent—were allotted to the Narrative Submission Requirements, while 290
16 points or 29 percent were allotted to the two oral presentations.⁷¹

17 54. AHCCCS did not include information on how the evaluation factors would
18 be scored or their weighting in the RFP.⁷²

19 55. Twenty-two AHCCCS employees, all of whom AHCCCS purported were
20 subject matter experts in various specialties, were tasked with evaluating the proposals.⁷³
21 The evaluators were divided into teams of two, three, or four each to review and score
22 each of the Programmatic and Financial Submission Requirements, aligned with their
23 purported subject matter expertise.⁷⁴

24 56. Of these twenty-two employees, at least five were on the Scope and/or
25 Executive Teams, and therefore were privy to the impact of the ranking system and the

26 ⁶⁷ Day 8 Tr. 1725:4-23

27 ⁶⁸ Day 9 Tr. 2036:15-17

28 ⁶⁹ Ex. 97.

29 ⁷⁰ Day 4 Tr. 754:11-755:8, Day 5 Tr. 902:13-16, 1088:1-7; *see also* Day 2 Tr. 309:19-310:11; Ex. 170.

30 ⁷¹ Day 6 Tr. 1160:12-1162:7.

⁷² Day 2 Tr. 317:8-15.

⁷³ *See* Ex. 214 at 434.

⁷⁴ *See id.*; Day 2 Tr. 278:3-8; Day 4 Tr. 843:21-844:1; Day 6 Tr. 1309:7-19, 1309:24-1310:4; Day 7 Tr. 1429:10-1430:7; Day 7 Tr. 1464:11-1465:10, 1493:6-13; Day 8 Tr. 1725:4-15; Day 8 Tr. 1745:9-1746:6; Day 8 Tr. 1809:16-19, 1809:20-1810:5; Day 9 Tr. 2136:1-2138:11; Day 10 Tr. 2290:22-2291:5; Day 11 Tr. 2420:10-14; Day 11 Tr. 2586:18-2587:4; Day 13 Tr. 3145:4-7, 3162:16-20.

1 number of points that would be assigned to each submission based upon the ranks.
2 Moreover, all four of the oral submission evaluators were on the Scope Team.

3 57. AHCCCS prepared scoring tools for the evaluators to use in their evaluation
4 of the proposals.

5 58. Each scoring tool aligned with a particular evaluation factor and included
6 both "Broad Categories" and "Criteria Considerations."⁷⁵ The "Broad Categories" related
7 back to major components of the RFP and were aspects that would have been anticipated
8 in any response to that evaluation factor under the RFP.⁷⁶ The "Criteria Considerations"
9 that fell under the Broad Categories served as essentially "guideposts" or as items that
10 could be expected to be discussed given the evaluation factor and Broad Category at
11 hand.⁷⁷

12 59. The Broad Categories and Criteria Considerations did not correspond to
13 any point value or a scoring rubric.

14 60. The Scope Team created the initial layout of Broad Categories and Criteria
15 Considerations, but ultimately the evaluation team assigned to each evaluation factor
16 were tasked with reviewing and finalizing the scoring tool for that factor.⁷⁸

17 61. The scoring tools, including the Broad Categories, were determined prior to
18 the receipt of proposals but after the issuance of the RFP.⁷⁹ However, the evidence
19 presented at hearing established that some of the criteria considerations were added or
20 changed by the evaluators during the course of their evaluations.

21 62. Each scoring tool included an "Other" Criteria Consideration category,
22 which was a place for evaluators to make notes regarding something they wanted to
23 discuss during the consensus evaluation meeting that might not clearly fit within a preset
24 Broad Category or Criteria Consideration.⁸⁰

25 63. For Narrative Submission Requirements B4 through B11, the evaluators
26 would first individually review the portions of the proposals corresponding to the Narrative
27

28 ⁷⁵ Exs. 153-163.

⁷⁶ Day 1 Tr. 247:5-249:6, Day 4 Tr. 778:21-779:10.

⁷⁷ Day 1 Tr. 249:2-23; Day 2 Tr. 377:4-10; Day 4 Tr. 775:7-22, 777:19-778:5, 812:1-5.

⁷⁸ Day 1 Tr. 86:5-13; Day 3 Tr. 502:4-14, 502:18-25.

⁷⁹ Day 1 Tr. 86:10-18, 148:10-18; Day 5 Tr. 1088:22-24; Ex. 169.

⁸⁰ Day 1 Tr. 88:4-12; Day 4 Tr. 776:25-777:12, 800:16-801:3; Day 12 Tr. 2704:16-2705:4.

1 Submission Requirement they were evaluating and use their individual scoring tool to
2 record any initial thoughts and draft rankings.⁸¹

3 64. Evaluators were only to consider the relevant portion of the proposal in
4 evaluating the particular submission assigned to them.⁸² However, as previously noted,
5 there were multiple evaluators that served on multiple scoring teams, and therefore, they
6 were aware of the contents of the other submissions. For example, Melissa Arzabal was
7 on the scoring team for B5 worth 145 points, as well as for the oral presentations worth
8 145 points each. Jakenna Lebsock served on the scoring teams for B10, worth 35 points,
9 and the oral presentations, worth 145 points each. Christina Quast served on the scoring
10 team for B7, worth 75 points; B10, worth 35 points; and B11, worth 20 points. Danielle
11 Ashlock served on the scoring team for B5, worth 145 points; and both oral presentations
12 worth 145 points each. All of these individuals were also on the Scope Team, and Ms.
13 Quast and Ms. Lebsock were also on the Executive Team. Consequently, these
14 individuals were aware of the differential in the rankings, the points assigned to each
15 submission, and how the ranks would convert to points.

16 65. For the written portions of the RFP, the process required evaluators to
17 individually review the submissions, take notes, and prepare a draft ranking based on
18 their individual assessment.⁸³ This was known as the “individual evaluation process.”⁸⁴
19 After deciding their individual rankings, the evaluators gathered (typically virtually) to
20 discuss their individual rankings and come to a consensus on the final ranking.⁸⁵ This was
21 known as the “consensus meetings.”⁸⁶

22 66. The oral presentations were handled similarly with some distinctions.

23 67. AHCCCS provided the same instructions to each of the offerors ahead of
24 the oral presentations.⁸⁷ The representatives of the offerors, comprised of senior-level
25
26

27 ⁸¹ See, e.g., Day 6 Tr. 1177:9-1179:20; Day 8 Tr. 1681:17-23.

28 ⁸² See, e.g., Day 8 Tr. 1681:24-1682:7.

29 ⁸³ Ex. 151 at 59-61.

30 ⁸⁴ *Id.*

⁸⁵ Day 3 Tr. 503:18-25; Ex. 151 at 67-68.

⁸⁶ Ex. 151 at 68.

⁸⁷ Exs. 75, 76, 77, 78, 79.

1 MCO employees, had an hour to prepare for each of the two presentations.⁸⁸ They then
2 had a half hour to present their response to each question.⁸⁹

3 68. After each oral presentation, the evaluators would have a consensus
4 meeting to discuss their observations and impressions of the presentation that they had
5 just heard.⁹⁰ There was no “individual” evaluation for the oral presentations. The
6 evaluators, all of whom were on the Scope and/or Executive Teams, achieved consensus
7 on ranking all five offerors’ oral presentations after the last presentation, for 29 percent of
8 the available points.⁹¹

9 69. The oral presentations were recorded, although no evaluator appeared to
10 have reviewed those recordings.⁹² AHCCCS witnesses explained at hearing, that it was
11 unnecessary to review these recordings as the consensus evaluation meetings began
12 immediately after the oral presentations, while the presentations were still fresh in the
13 minds of the evaluators. However, the oral presentations took place on five different dates
14 between October 24, 2023, and November 2, 2023.

15 70. The oral presentations together weighed 29 percent of the available points.
16 As Ms. Lebsock explained, this was intentional so that AHCCCS could evaluate the
17 responses of the MCOs themselves, rather than through the filter of consultants who often
18 prepare the narrative submission portions of proposals.⁹³ However, Ms. LaPorte testified
19 that the oral presentations were intended to measure “how [the Offerors] did on their feet,
20 how their team works together, information like that.”⁹⁴ AHCCCS sought to use the
21 presentations to “give insight to team chemistry, experience and expertise, culture fit, and
22 commitment and passion.”⁹⁵ Ms. Lebsock testified that the oral presentations were “the
23 one opportunity for the health plans to stand on their own with the staff that they have
24 hired to share knowledge of how they do business.”⁹⁶

25 ⁸⁸ Day 3 Tr. 606:8-16.

26 ⁸⁹ Day 3 Tr. 606:23-25.

27 ⁹⁰ Day 2 Tr. 385:9-13, 402:13-21; Day 3 Tr. 622:15-623:6, Day 4 Tr. 739:17-742:24; Day 7 Tr. 1412:9-
1413:3, 1564:15-1565:11; Day 12 Tr. 2722:13-2723:7.

28 ⁹¹ Day 2 Tr. 391:4-11; Day 3 Tr. 624:6-16; Day 4 Tr. 743:13-744:18; Day 12 Tr. 2723:15-20.

29 ⁹² Day 7 Tr. 1412:9-1413:3; *see also* Day 7 Tr. 1563:20-1564:2, 1564:23-1565:11; Day 12 Tr. 2721:25-
2723:7.

30 ⁹³ Day 2 Tr. 358:6-15, 359:10-17.

⁹⁴ Day 14 Tr. 3430:16-24.

⁹⁵ Ex. 350 at 3364.

⁹⁶ Day 4 Tr. 703:25-704:3.

Cost Bid

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71. AHCCCS did not provide guidance to the scoring team for the Cost Bid, regarding how to weigh the four required elements of the Cost Bid. The sole witness on the scoring team for the Cost Bid, Pam McMillen, testified that the scoring team decided on the scoring “on their own between us;” that “we weren’t given guidance;” and “this is the first time I was ever on a Scoring Team or involved in anything additional besides bidders’ library reports.”⁹⁷ The scoring also included consideration of additional undisclosed factors, including one scorer’s subjective determination of “risk.”⁹⁸ One evaluator on the team referred to the second-lowest bid as “very low PMPM that is unsustainable,” but in contrast, did not consider the lowest bid unsustainable.⁹⁹

72. AHCCCS has not provided the basis for the Cost Bid scoring. The Cost Bid team ranked each offeror’s respective administrative and case management bids, and those rankings correlated directly with the overall rankings for the cost bid submissions, indicating that they were the primary basis for the final rankings.¹⁰⁰

73. The rankings for the administrative and case management bid components were determined using formulas in a “tool”—an Excel file. The only version of that tool produced by AHCCCS included error messages instead of data.¹⁰¹ As a result, the tool did not show the basis for the ranking of the administrative and case management bids, and Ms. McMillen was unable to explain how the rankings were derived.¹⁰²

74. Despite being formula-driven and the members of the scoring team all utilizing the same tool for ranking the bids, they arrived at different rankings. Ms. McMillen ranked APIPA second for fixed costs, Health Choice third for variable costs, and Health Net tied for first for variable and fixed costs. Mr. Varitek, another member of the team, ranked APIPA third for fixed costs, Health Choice first for variable costs, and Health Net third for variable costs and second for fixed costs.¹⁰³

⁹⁷ Day 14 Tr. 3248:24-3249:8, Day 13 Tr. 3170:19-3171:9; 3145:12-14.

⁹⁸ Day 13 Tr. 3201:19-23, 3230:7-11.

⁹⁹ Day 14 Tr. 3263:25-3264:19; Ex. 238 at Row 22, Columns B & E.

¹⁰⁰ Compare Ex. 107 (consensus scoring sheet) with Exs. 238, 241, & 243 (individual scoring sheets).

¹⁰¹ Ex. 244 at 584 (native); Day 13 Tr. 3198:17-23; 3207:6-22; 3211:22-3212:9; 3219:11-3221:1; 3226:7-3228:8; Day 14 Tr. 3260:2-24.

¹⁰² Day 13 Tr. 3208:6-14, 3215:8-13.

¹⁰³ Day 14 Tr. 3260:5-24; 3261:25-3263:4; compare Ex. 240 at Row 17, columns B, D, & E (McMillen ranking APIPA second for fixed costs, Health Choice third for variable costs, and Health Net tied for first on

1 75. The scoring of the administrative and case management bids was produced
2 by a formula that was based on the award of three contracts. AHCCCS decided to only
3 award two statewide contracts.

4 76. Case management bids were ranked based on the “Smallest Three Case
5 Management Bids” formula.¹⁰⁴

6 77. Administrative bids were ranked based on the “Smallest Three Admin Bid”
7 formula.¹⁰⁵

8 78. The “Smallest Three Case Management Bids” and “Smallest Three Admin
9 Bid” formulas calculated the number of times each bidder’s bid was one of the three
10 smallest bids, and three lowest bids were used because the RFP “is to award to three
11 offerors.”¹⁰⁶ AHCCCS did not change the calculation to account for only two awards.¹⁰⁷

12 79. The evaluators for the Financial Submission Requirements requested a
13 Best and Final Offer (“BAFO”) on the administrative and cost bid components of the
14 Financial Submission Requirements.¹⁰⁸ The letters seeking BAFOs from the offerors
15 included clarification requests to the offerors specific to their proposals.¹⁰⁹

16 80. AHCCCS’s letters to Health Net and APIPA expressly directed them to
17 rectify problems with their respective initial submissions, but the letter to Health Choice
18 did not ask for clarification about the concern regarding a change in rates.¹¹⁰

19 81. AHCCCS instructed APIPA that it “must submit a revised agreement
20 Accepting Capitation Rates that aligns with RFP Amendment #2” to address the
21 underwriting gain issue that the scoring team had identified as a potential loophole.¹¹¹
22 APIPA did so.¹¹²

23 _____
24 variable and fixed costs) with Ex. 242, Row 17, columns B, D, & E (Varitek ranking APIPA third on fixed
25 costs, Health Choice first on variable costs, and Health Net third on variable costs and second on fixed
26 costs).

27 ¹⁰⁴ Ex. 244 at 584 (native) at “Smallest Three Case Management Bids” tab; Day 14 Tr. 3282:25-3284:1.

28 ¹⁰⁵ Day 14 Tr. 3285:14-3286:19; Ex. 244 at 584 (native) at “Three Smallest Admin Bid” tab.

29 ¹⁰⁶ Ex. 244 at 584 (native) at “Documentation” tab; Day 13 Tr. 3203:20-3204:8; Day 14 Tr. 3286:24-3288:15.

30 ¹⁰⁷ Day 14 Tr. 3288:22-25; *see generally* Ex. 244 at 584 (native) (no tabs or formulas for calculations based
on “two lowest bids”).

¹⁰⁸ Exs. 81, 82, 83, 84, 85; Day 14 Tr. 3270:1-5, 3270:17-25.

¹⁰⁹ Day 14 Tr. 3278:7-20; *see also* Ex. 8 at 320 (“AHCCCS may request clarification of an offer any time
after the Proposal due date and time.”).

¹¹⁰ Exs. 81 (APIPA), 83 (Health Choice), 84 (Health Net).

¹¹¹ Ex. 81.

¹¹² Day 14 Tr. 3274:7-3275:9; Exs. 52, 81.

1 82. AHCCCS instructed Health Net that it “must submit a revised Workbook”
2 including the required components for care management/coordination or
3 interpretation/translation services or explaining why those components were omitted.¹¹³
4 Health Net followed AHCCCS’s direction and submitted a revised workbook—i.e., a
5 revised bid—that included the information it had previously omitted and “reduced our
6 administrative bid.”¹¹⁴

7 83. According to Ms. McMillen, after complying with AHCCCS’s instructions,
8 Health Net received a better ranking from the cost bid scoring team.¹¹⁵

9 84. AHCCCS’s BAFO letter to Health Choice did not ask Health Choice to clarify
10 or explain its concern as to why its bid rates varied with increasing populations.¹¹⁶ The
11 final rankings included a note that “[Health Choice] submitted total administrative rates
12 (fixed and variable) that appear to consistently decrease as membership increases, which
13 does not appear reasonable absent further explanation.”¹¹⁷ Ms. McMillen testified that
14 note was included “because the best and final offer didn’t provide any further
15 clarification.”¹¹⁸ The scoring team’s belief that Health Choice’s administrative cost bid was
16 unreasonable negatively affected Health Choice’s final cost-bid ranking, yet AHCCCS did
17 not seek any clarification from Heath Choice.¹¹⁹

18 85. The cost bids were worth 100 points, or 10 percent of the overall points
19 allotted under the RFP.¹²⁰

20 The Award

21 86. Ultimately, with the assistance of the facilitators, AHCCCS created a final
22 ranking document, with each evaluator signing the final ranking document.¹²¹

23 87. Consistent with AHCCCS’s instructions provided during the training, the
24 evaluators destroyed any personal notes they had taken.¹²²

25 ¹¹³ Ex. 84; Day 14 Tr. 3275:10-23.

26 ¹¹⁴ Ex. 71; Day 14 Tr. 3275:10-3276:9.

27 ¹¹⁵ Day 13 Tr. 3203:8-10; Day 14 Tr. 3268:8-3269:7; 3276:10-14.

28 ¹¹⁶ Ex. 83; Day 15 Tr. 3715:12-24.

29 ¹¹⁷ Ex. 107; Day 14 Tr. 3299:5-3300:7.

30 ¹¹⁸ Day 14 Tr. 3301:25-3302:7.

¹¹⁹ Day 13 Tr. 3228:9-3229:17; Day 14 Tr. 3302:8-22.

¹²⁰ Ex. 97 at 1229.

¹²¹ Exs. 99-109.

¹²² Day 2 Tr. 381:22-382:14, 397:1-7; Day 3 Tr. 625:15-17; Day 5 Tr. 953:17-21; Day 6 Tr. 1198:19-1199:20,
1347:14-25.

1 88. The final rankings on each evaluation factor were used to calculate the
2 individual score of an offeror for each submission element and the total scores were then
3 added, resulting in the following final scores and ranks:¹²³

4 Health Net	715.00 points	Rank 1
5 APIPA	668.00 points	Rank 2
6 Mercy Care	557.50 points	Rank 3
7 Health Choice	537.00 points	Rank 4
8 Banner	522.60 points	Rank 5

9 89. On November 16, 2023, the Scope and Executive Teams met to discuss
10 the scores and ultimate award recommendation.¹²⁴ Carmen Heredia, Cabinet Executive
11 Officer and Executive Deputy Director, was present for the meeting.

12 90. AHCCCS provided agenda minutes from the November 16, 2023 meeting,
13 however, that document did not summarize discussions of the award decision, and no
14 other notes or documentation were produced that memorialized what transpired at this
15 meeting.¹²⁵

16 91. The Scope Team did not meet together to form a recommendation prior to
17 the meeting on November 16, 2023.¹²⁶ At least one of the ranking spreadsheets was not
18 fully signed until the afternoon of November 16, 2023.¹²⁷

19 92. Notwithstanding the decision-making purpose of the November 16, 2023
20 meeting and the apparent importance of that meeting, during the hearing many witnesses
21 were unable to recall specific details about the discussions during the meeting.¹²⁸
22 However, Ms. Lebsock remembered and testified that they did not discuss any concerns
23 about the ranking methodology and whether it exaggerated or underrated the actual
24 quality of the offerors' performances.¹²⁹

25 93. Testimony from several witnesses demonstrated that the primary
26 considerations at this meeting involved the point gap between the two highest scorers

27 ¹²³ Ex. 95 at 1224.

28 ¹²⁴ Ex. 213; Day 3 Tr. 478:3-7.

29 ¹²⁵ See Day 3 Tr. 478:10-24 (Ms. Lebsock confirming no knowledge of other notes); Day 14 Tr. 3394:14-22
(Ms. LaPorte confirming the same); Ex. 213 (agenda minutes).

30 ¹²⁶ See Day 11 Tr. 2605:19-2606:13.

¹²⁷ Ex. 109 at 3.

¹²⁸ Day 13 Tr. 3156:21-25; Day 10 Tr. 2280:20-23; Day 6 Tr. 1230:1-25, 1231:1-23; Day 5 Tr. 1112:7-9.

¹²⁹ Day 3 Tr. 436:1-5.

1 and the bottom three. Specifically, AHCCCS's CPO, Ms. LaPorte, testified that "first and
2 foremost," the team considered the "clear delineation between two [] offerors that . . .
3 ranked higher than the other three."¹³⁰

4 94. The testimony presented appeared to prioritize administrative ease for
5 AHCCCS. The memo to the Governor's staff focused on "protest mitigation," and the
6 decision to award two rather than three contracts appeared to be based largely on the
7 idea that awarding three contracts would "enhanc[e] the risk of protest."¹³¹

8 95. Mr. Cohen, AHCCCS's consultant, testified that the consensus process
9 used was chosen to avoid protest. Mr. Cohen testified that "the consensus process part
10 of that really came out of, frankly, there were a series of protests that I can recall that had
11 occurred over the years . . . [and individual rankings create] an opportunity to challenge
12 the results."¹³²

13 96. Ms. LaPorte testified that "given the size of this RFP and the dollar amount,
14 yes [a protest was reasonably possible]."¹³³

15 97. Notwithstanding Ms. LaPorte's expectation of a protest, AHCCCS directed
16 evaluators to destroy documents and allowed the shredding and burning of individual
17 notes.¹³⁴ Ms. LaPorte testified that in planning for the RFP, "we're always planning to
18 make sure that we can mitigate any appearances that may be protested."¹³⁵

19 98. Other factors were considered in addition to the scores and risk of
20 protest.¹³⁶

21 99. The team members considered administrative burden as a reason for
22 awarding fewer total contracts. Both Ms. Lebsack and Ms. LaPorte testified that the main
23 reason for cutting a third contract award was to enhance AHCCCS's own "administrative
24 convenience."¹³⁷

25 100. Ms. Lebsack testified:

26 _____
27 ¹³⁰ Day 15 Tr. 3522:16-25.

¹³¹ Ex. 572 at 3482-83.

¹³² Day 12 Tr. 2682:7-22.

¹³³ Day 14 Tr. 3481:15-22.

¹³⁴ Ex. 151 at 62; Day 14 Tr. 3481:15-3483:7.

¹³⁵ Day 14 Tr. 3580:24-3581:7.

¹³⁶ Day 2 Tr. 292:24-294:10.

¹³⁷ Day 15 Tr. 3526:3-24, 3530:13-3531:25; Day 3 Tr. 450:23-451:452:8, 458:15-21.

1 Q. Besides administrative convenience to AHCCCS, is there any other
2 reason that led to the decision to award only two contracts and not three or
3 more?

4 A. Not that I recall.

5
6 Q. In terms of the positive factors that would -- that led to the decision
7 to award just two contracts while eliminating two incumbents, the positive
8 factors that you have identified are administrative convenience to AHCCCS
9 and the score sheet, right?

10 A. Yes. All considered.¹³⁸

11 101. Therefore, AHCCCS's awards were based in part on considerations of
12 reducing the administrative burden to AHCCCS.

13 102. "Administrative burden to the Agency" was not listed as a scoring criterion
14 but was instead identified as an "additional factor" that AHCCCS may consider "[i]f
15 AHCCCS deems that there is a negligible difference in scores between two or more
16 competing Proposals for a particular Geographic Service Area ("GSA")."¹³⁹

17 103. At no point did AHCCCS deem that there was a negligible difference in
18 scores between two or more competing proposals for a particular GSA.¹⁴⁰ In fact,
19 AHCCCS did not evaluate the proposals by GSA.

20 104. Ms. Lebsack further noted a concern about getting a third plan up to speed
21 with forthcoming federal regulations,¹⁴¹ but the offerors' un rebutted testimony was that
22 they were accustomed to and prepared for changes to federal regulations.¹⁴²

23 105. The team members were also cognizant that the awards to the proposed
24 awardees—which would result in displacing two incumbent MCOs—would require
25 member transition, and the teams discussed those anticipated impacts and AHCCCS's
26 likely response.¹⁴³

27 106. There was also confusion about what, if anything, was decided at the
28 November 16, 2023 Scope/Executive Teams meeting. Certain Scope Team members did
29 not believe that any final award decision had been reached at the meeting.¹⁴⁴ Ms. Arzabal

30 ¹³⁸ Day 3 Tr. 456:19-23, 458:15-21.

¹³⁹ Ex. 8 at 319.

¹⁴⁰ Day 3 Tr. 447:12-13; Day 14 Tr. 3491:19-21.

¹⁴¹ Day 3 Tr. 451:2-6.

¹⁴² See, e.g., Day 16 Tr. 3894:18-3895:20.

¹⁴³ Day 4 Tr. 855:20-856:13; Day 7 Tr. 1588:18-22, 1634:11-24; Day 12 Tr. 2725:6-2726:10, 2728:15-20.

¹⁴⁴ See Day 10 Tr. 2384:12-19.

1 testified that she was anxious after the meeting to find out how many contracts would be
2 awarded.¹⁴⁵ Mr. Cohen recalled a recommendation, not a final decision, being made to
3 Ms. Heredia by the Scope team.¹⁴⁶ Ms. Quast also described the Scope Team presenting
4 a recommendation to the Executive Team, but she could not say if a final decision was
5 made at the meeting, who was involved in making the final decision, or whether a memo
6 authored by AHCCCS's staff to the Governor's staff reflected the agency's ultimate
7 recommendation.¹⁴⁷ Ms. Price testified that there would be a further or final approval from
8 Ms. Heredia after the November 16, 2023 meeting.¹⁴⁸

9 107. No vote was taken at the November 16, 2023 meeting.¹⁴⁹ Yet, Ms. Johnson
10 testified that there was a decision made to move forward with the recommendation from
11 the Scope Team to award two statewide contracts.¹⁵⁰

12 108. According to Ms. McMillen, Ms. Heredia made the "final decision" at that
13 meeting to award two statewide contracts, and the agency was merely going to notify the
14 Governor.¹⁵¹

15 109. The AHCCCS witnesses' un rebutted testimony was that Ms. Heredia,
16 ostensibly the neutral arbiter of Appellants' appeals, was the final decision maker
17 regarding the contract awards:

18 a. "I recall the decision being made that there would be two contractors, and
19 I recall that *that was [Ms. Heredia's] final decision.*"¹⁵²

20 b. "[S]o this was all coming to her fresh for her consideration, and *she would*
21 *be the ultimate decision maker within the agency, really the first among*
22 *equals. . . . [S]he had the final authority to make a decision, I believe."¹⁵³*

23 110. At a minimum, Ms. Heredia participated in the Executive and Scope Teams'
24 final meeting and approved the ultimate contract award decision.¹⁵⁴

25 ¹⁴⁵ Day 6 Tr. 1278:2-1279:4, 1280:3-6.

26 ¹⁴⁶ Day 12 Tr. 2769:4-2770:4.

27 ¹⁴⁷ Day 10 Tr. 2272:21-2273:17, 2278:9-2279:2, 2319:19-2320:12.

28 ¹⁴⁸ Day 11 Tr. 2619:12-23.

29 ¹⁴⁹ Day 3 Tr. 596:21-597:8.

30 ¹⁵⁰ Day 7 Tr. 1586:23-1587:12.

¹⁵¹ Day 13 Tr. 3155:25-3157:10; 3159:21-3160:5.

¹⁵² Day 13 Tr. 3156:12-3157:10 (emphasis added).

¹⁵³ Day 12 Tr. 2852:16-2853:1, 2919:14-18 (emphasis added).

¹⁵⁴ See Day 3 Tr. 483:11-484:23, 593:10-594:6, 597:9-13 (noting Director Heredia's participation in November 16 meeting); Day 6 Tr. 1232:3-7 (same); Day 11 Tr. 2615:18- 2616:5 (noting Director Heredia's agreement with two statewide contract awards).

1 111. After the November 16, 2023 meeting, AHCCCS employees (though
2 witnesses could not identify who) met with some members of the Governor's office to
3 discuss the contract award.

4 112. Prior to the meeting with the Governor's office, AHCCCS staff prepared a
5 memorandum to the Governor's office that presented two options: either award two
6 statewide contracts or award two statewide contracts with a third contract in the central
7 GSA.¹⁵⁵ AHCCCS recommended awarding just two statewide contracts on grounds that
8 the three-contract option would "enhanc[e] protest risk."¹⁵⁶ The specter of a protest was
9 readily apparent from a reading of the memo, as it was mentioned multiple times as a con
10 to awarding two statewide contracts and a third contract in the Central GSA.¹⁵⁷

11 113. On December 1, 2023, AHCCCS announced its decision. Consistent with
12 its recommendation to the Governor, AHCCCS awarded contracts to APIPA and Health
13 Net.¹⁵⁸

14 114. Also on December 1, 2023, AHCCCS revealed for the first time how it
15 scored the competing proposals, including how it allocated assigned points using the
16 ranking system and its allocation (weighting) of points between the various RFP
17 components.

18 115. Appellants each made public records requests to AHCCCS for additional
19 documents related to the RFP. While AHCCCS produced documents, others were
20 produced during the hearing, and others have not been produced because they were
21 destroyed at AHCCCS's direction. Some documents lacked significant data rendering
22 them incomplete.

23 Appellants' Protests

24 116. Mercy Care filed a protest of AHCCCS's contract awards on December 20,
25 2023.¹⁵⁹ Banner and Health Choice filed their protests of the contract award decision on
26 December 21, 2023.¹⁶⁰

27
28 ¹⁵⁵ Ex. 572.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ Ex. 91, Ex. 93.

¹⁵⁹ Ex. 132.

¹⁶⁰ Exs. 130, 131.

1 117. Mercy Care’s protest alleged, in summary, that AHCCCS: did not formulate
2 a scoring methodology until after it had received and reviewed proposals; erroneously
3 scored oral presentations, according them too much weight in the evaluation; employed
4 an “unreasonable” format for the oral presentations; erroneously used a ranking
5 methodology for scoring; and arbitrarily scored several categories including both Oral
6 Presentations, B5, B7, and B9.¹⁶¹ Mercy Care also reserved the right to supplement its
7 protest in the event additional public records or materials demonstrated further legal or
8 factual bases for protest.¹⁶²

9 118. Banner’s protest alleged, in summary, that AHCCCS: did not formulate a
10 scoring methodology until after the proposals were opened; used an erroneous ranking
11 methodology; erroneously devalued past performance in the evaluation; weighted oral
12 presentations too heavily in the evaluation; and erroneously scored the cost bids, B10,
13 and B11, among other issues.¹⁶³ Banner’s protest also stated that it expressly reserved
14 its right to supplement its protest as additional public records related to this procurement
15 process were produced.¹⁶⁴

16 119. Health Choice’s protest alleged, in summary, that AHCCCS: did not
17 formulate a scoring methodology until after the proposals were opened; erroneously used
18 a ranking scoring methodology; failed to disclose the weighting of the evaluation factors
19 and subfactors; and erroneously scored B4 through B11, and the cost bids.¹⁶⁵ Health
20 Choice also reserved the right to amend or supplement its protest based upon materials
21 that AHCCCS had not yet produced.¹⁶⁶

22 120. Although none of the protests alleged that AHCCCS was required and failed
23 to evaluate the proposals or award contracts on a GSA-by-GSA basis, the evidence
24 presented at hearing established that such information was not known to Appellants until
25 that information was divulged at hearing. Further, the statutes and rules applicable to the
26 matter require AHCCCS to evaluate on a per-GSA basis.

27
28 ¹⁶¹ Ex. 132.

¹⁶² *Id.*

¹⁶³ Ex. 130.

¹⁶⁴ *Id.*

¹⁶⁵ Ex. 131.

¹⁶⁶ *Id.*

The Protest Denials

1
2 121. On February 2, 2024, AHCCCS’s CPO issued a detailed decision denying
3 the three protests.¹⁶⁷

4 122. The CPO found that several of Appellants’ protest grounds were untimely
5 because they related to elements that were apparent from the face of the RFP and thus
6 were required to be raised in a protest before the proposal submission deadline.¹⁶⁸

7 123. The CPO also found that Appellants were required and failed to establish
8 actual and sufficient prejudice to their opportunity for award as a result of each alleged
9 impropriety.¹⁶⁹

10 124. In addition to rejecting certain protest grounds as untimely, the CPO
11 rejected the protest grounds that she determined were timely made.¹⁷⁰

12 125. With respect to Appellants’ claim that the scoring methodology was not
13 developed until after the proposals were opened and reviewed, the CPO rejected this
14 argument as factually incorrect and based on a typographical error that was “regrettably
15 overlooked” in the Executive Summary summarizing the procurement.¹⁷¹ Specifically, the
16 statement that “The Scope Team met October 2, 2023 through November 15, 2023, to
17 determine the scoring methodology and came to an agreement to apply the scoring
18 methodology detailed in the Evaluation Process Overview document available in the
19 procurement file.”¹⁷²

20 126. The CPO also rejected arguments that AHCCCS was required and failed to
21 disclose the specific evaluation criteria and scoring and weighting details, noting that such
22 arguments were untimely as the protestors were on notice after RFP Amendment 1 that
23 AHCCCS would not disclose such information but failed to protest.¹⁷³ The CPO found that
24 even if timely, this argument failed because no controlling law required AHCCCS to
25 disclose additional details about its evaluation criteria and scoring methods.¹⁷⁴ The CPO

26 ¹⁶⁷ See Ex. 144.

27 ¹⁶⁸ Ex. 144 at 2399-400.

28 ¹⁶⁹ Ex. 144 at 2401.

29 ¹⁷⁰ Ex. 144 at 2403-33.

30 ¹⁷¹ Ex. 144 at 2403-05.

¹⁷² Ex. 144 at 2403.

¹⁷³ Ex. 144 at 2405-06.

¹⁷⁴ Ex. 144 at 2406-07.

1 noted that AHCCCS elected not to require disclosure of such details in its RFPs because
2 highly detailed listing of scoring criteria can lead to offerors trying to “game” the process
3 and focus their proposals on supplying information for the factors capable of earning them
4 the most possible points while shorting their responses to “low-value” submission
5 factors.¹⁷⁵

6 127. The CPO rejected Banner’s and Mercy Care’s arguments that AHCCCS
7 failed to disclose that oral presentations would be scored given the RFP’s express
8 language including a statement indicating that they would be used in the evaluation
9 process, and further found that protests about the format of the oral presentations were
10 untimely because information about the oral presentations was apparent from the face of
11 the RFP.¹⁷⁶ The CPO concluded that Banner and Mercy Care also failed to establish
12 prejudice from the scoring of the oral presentations, because they did not demonstrate
13 that they would have structured or performed any differently had they “known” AHCCCS
14 would score the oral presentations.¹⁷⁷

15 128. The CPO also rejected arguments about the use of a consensus ranking
16 methodology to score the proposals, finding, among other things, that the ranking
17 methodology did not violate any law; the consensus ranking methodology used in this
18 procurement was consistent with the scoring methodology AHCCCS had used in prior
19 managed care procurements; and the better proposals received a higher rank than
20 inferior proposals on each evaluation criterion with ties being awarded for equivalent
21 responses.¹⁷⁸

22 129. The CPO denied the protests and upheld AHCCCS’s decision to award
23 statewide contracts to Health Net and APIPA.¹⁷⁹

24 *Appellants’ Appeals*

25 130. On February 7, 2024, Mercy Care, Banner, and Health Choice appealed the
26 CPO’s decision.¹⁸⁰

27
28 ¹⁷⁵ Ex. 144 at 2407.

¹⁷⁶ Ex. 144 at 2408-10.

¹⁷⁷ Ex. 144 at 2410.

¹⁷⁸ Ex. 144 at 2415-21.

¹⁷⁹ See Ex. 144 at 2432-33.

¹⁸⁰ See Exs. 147, 148, 149.

1 131. Banner argued in its appeal that: the CPO erred by applying the wrong
2 burden of proof, level of discretion, and standard of review; the CPO erred in requiring
3 Banner to establish prejudice, but in any event, Banner established such prejudice;
4 Banner's protest was timely; mistakes in recordkeeping and "blame shifting" justified
5 sustaining Banner's appeal; oral presentations were noticed for evaluation but not
6 scoring; the scoring process resulted in numerous errors, including overvaluation of the
7 oral presentations and AHCCCS's failure to give appropriate consideration to past
8 performance; AHCCCS failed to score the cost bids appropriately; the evaluations and
9 final rankings were not supported by the record; and a summary list of "[o]ther issues"
10 that Banner contended justified sustaining Banner's appeal, including "the incomplete
11 procurement file and outstanding public records requests."¹⁸¹

12 132. In its appeal, Health Choice argued in summary that: the CPO applied the
13 incorrect standard of review; Health Choice met its burden to show prejudice; Health
14 Choice's protest was timely; the timeline of the development of the scoring methodology
15 and evaluation criteria warranted a rebid; AHCCCS erred in applying a "forced ranked
16 scoring methodology"; AHCCCS erred in not disclosing the weighting of evaluation
17 factors; and the final rankings illustrate scoring errors, specifically in B4 through B11, and
18 the cost bid.¹⁸²

19 133. In its appeal, Mercy Care argued in summary that: the CPO applied an
20 inappropriate burden of proof; allocating 29 percent of the available points to the oral
21 presentations was irrational and violated the RFP; the ranking scoring system failed to
22 measure the relative merits of the proposals; and AHCCCS's scoring of Oral
23 Presentations, B5, B7, and B9 was arbitrary.¹⁸³

24 134. AHCCCS referred the appeals to the Office of Administrative Hearings for
25 hearing pursuant to A.A.C. R9-22-604(I), (J), and (K).

26 Establishment of Scoring Methodology

27 135. Health Choice argued in its appeal that AHCCCS failed to establish the
28 scoring methodology to be used in the RFP before receipt and scoring of the proposals.

29

¹⁸¹ Ex. 147.

30 ¹⁸² Ex. 148.

¹⁸³ Ex. 149.

1 136. The evidence presented at hearing confirmed that AHCCCS decided to use
2 its consensus and ranking scoring methodology prior to the issuance of the RFP.

3 137. Witnesses, including the CPO herself, credibly testified that the statement
4 in the Executive Summary that the scoring methodology was not finalized until November
5 15, 2023, was a typographical error.¹⁸⁴

6 138. Appellants argued that AHCCCS's finalization of the scoring tools, including
7 the Broad Categories and Criteria Considerations, after issuance of the RFP amounted
8 to the creation of new evaluation criteria.

9 139. AHCCCS argued it met its obligation under A.A.C R9-22-602 by identifying
10 the "scored portions of the evaluation" in "relative order of importance" with the phrases:
11 (1) "Programmatic Submission Requirements" and (2) "Financial Submission
12 Requirements."¹⁸⁵ However, the RFP failed to identify *evaluation criteria*, which are
13 different from *evaluation factors*, and *the criteria*, not the two "factors," were "*used to*
14 *evaluate*" the proposals.¹⁸⁶

15 140. The RFP (and the Administrative Code) did not allow AHCCCS to use
16 undisclosed evaluation criteria. Section 8 of the Instructions identified the Programmatic
17 Submission Requirements and Financial Submission Requirements as the "scored
18 portions" or the items to be evaluated.¹⁸⁷ Section 8 further provided awards would be
19 made to the proposals determined "to be the most advantageous to the state based upon
20 the *evaluation criteria*."¹⁸⁸ The RFP did not distinguish between "evaluation factors" and
21 "evaluation criteria"—both were used to describe how the proposals would be evaluated.

22 141. The terms "Programmatic Submission Requirements" and "Financial
23 Submission Requirements" were "high-level" descriptors and effectively failed to provide
24 any guidance to the offerors as to what AHCCCS was seeking in the submissions.
25 Furthermore, the RFP did not disclose the evaluation criteria used by the evaluators.
26 None of the evaluators testified that they used "Programmatic Submission Requirements"
27 to evaluate their assigned question.

28 ¹⁸⁴ Day 1 Tr. 185:18-186:4; Day 11 Tr. 2500:6-23; Day 14 Tr. 3362:4-24.

29 ¹⁸⁵ Ex. 8 at 319.

30 ¹⁸⁶ See Ex. 144 at 2406-07.

¹⁸⁷ See Ex. 8 at 320.

¹⁸⁸ Ex. 8 at 319. (emphasis added).

1 142. The evaluation teams met after the RFP was issued, in August and
2 September 2023, to develop the Broad Categories and criteria considerations.¹⁸⁹ These
3 “criteria considerations” were not in the RFP or even the final rationale spreadsheets.¹⁹⁰
4 They were contained only in the individual evaluator scoring tools.¹⁹¹

5 143. Yet even though the scoring tools were allegedly “locked down” on
6 September 28, 2023, AHCCCS instructed the evaluators to create additional evaluation
7 criteria after reviewing the proposals. Evaluators used the “Other Notable Considerations”
8 to give “extra credit” for items that did not fit under the locked down criteria, including
9 items that did not fall under the submission requirement.¹⁹² Evaluator Michelle Holmes
10 created a criterion for B10 regarding NCQA accreditation and STAR ratings, which were
11 outside the scope of B10 and were covered in other submission requirements.¹⁹³

12 144. The B10 scoring tools did not mention or reference an 80 percent
13 substantial noncompliance standard.¹⁹⁴ Notwithstanding such, the B10 evaluation team
14 created, of its own volition, such a standard during the consensus meetings.¹⁹⁵ This
15 criteria was not on their individual scoring tools.

16 145. AHCCCS’s assertion that the “Other” category was needed to account for
17 innovative proposals was not persuasive because “innovative” was itself a locked-down
18 criteria or category on multiple submission requirements.¹⁹⁶ Moreover, Ms. LaPorte
19 testified that the “Other” category went beyond innovation.¹⁹⁷

20 146. Therefore, not all of the criteria were determined, as indicated in the RFP,
21 when the RFP was published.

22 147. Based on the credible, substantial and probative evidence of record, the
23 Administrative Law Judge finds that AHCCCS created new evaluation criteria after
24 opening and reviewing the proposals.

25 _____
26 ¹⁸⁹ Ex. 144 at 2426; Day 1 Tr. 86:5-18; Day 5 Tr. 902:904:5, 906:8-21.

27 ¹⁹⁰ See, e.g., Ex. 100.

28 ¹⁹¹ e.g., Ex. 220 (B5 individual scoring tool).

29 ¹⁹² Day 7 Tr. 1400:11-23; see also Day 3 Tr. 566:9-13, 591:11-20, Day 4 Tr. 802:12-803:11, Day 5 Tr.
30 985:17- 986:10; Day 7 Tr. 1492:6-20; Day 8 Tr. 1752:8-11, 1773:18-1775:8.

¹⁹³ Day 10 Tr. 2200:1-2202:18.

¹⁹⁴ Exs. 233, 234, 235.

¹⁹⁵ Day 3 Tr. 567:7-25, Day 5 Tr. 994:2-11, 1062:22-24.

¹⁹⁶ Ex. 157 (B7 scoring tool); Ex. 158 (B8 scoring tool).

¹⁹⁷ Day 15 Tr. 3558:15-3559:11.

The Scoring Methodology, and What Was Disclosed About It

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2 148. Appellants argued that the ranking system AHCCCS used was
3 inappropriate because it failed to account for the relative merits of the proposals, “forcing”
4 a 20 percent score differential between offerors by virtue of the 1 through 5 ranking.
5 Health Choice also challenged AHCCCS’s decision not to disclose additional information
6 regarding the evaluation criteria, including that the ranks would be converted to points
7 and the weights of the various evaluation factors.

8 149. AHCCCS’s consultant, Mr. Cohen, explained that ranking was a common
9 and even preferable way to conduct the evaluation of offers by MCOs to differentiate
10 between companies that can all likely perform the work—as compared to a simple
11 process where scores are awarded—by allowing the agency to focus on identifying the
12 offerors that best align with the agency’s goals and priorities.¹⁹⁸

13 150. Mr. Cohen further explained why it was rational, even preferable, not to
14 disclose to the evaluators the effect of their rankings so that evaluators could focus on
15 the task before them—evaluating the proposals against the relevant evaluation factors—
16 while not being distracted by what the ranks could potentially mean for final scoring of the
17 proposals.¹⁹⁹

18 151. Mr. Cohen also testified that it was not unreasonable for some evaluators,
19 due to their dual roles as evaluators and members on the Scope and/or Executive Teams,
20 to be aware of the final ranking methodology, and there was no evidence that anyone in
21 such a dual role behaved inappropriately in the procurement process.²⁰⁰

22 152. However, in the evaluation of this RFP, there were 22 evaluators, 5 of whom
23 were on the Scope and/or Executive Teams, and therefore knew the differential in scores
24 the ranks would create, and also knew the points allocated to each submission.
25 Furthermore, Ms. Quast served on the B7, B10, and B11 scoring teams, accounting for a
26 total of 130 points; Ms. Lebsock served on B10 and both oral presentation scoring teams,
27 accounting for a total of 325 points; Ms. Ashlock served on B5 and both oral presentation
28

29 ¹⁹⁸ Day 12 Tr. 2684:7-2685:3, 2686:5-2687:4, 2710:9-2173:6.

30 ¹⁹⁹ Day 12 Tr. 2849:20-2850:19.

²⁰⁰ See Day 12 Tr. 2853:17-2854:19.

1 scoring teams for a total of 435 points; and Ms. Arzabal served on the B5 and both oral
2 presentation scoring teams for a total of 435 points.

3 153. The hearing confirmed AHCCCS's ranking system resulted in a 20 percent
4 point spread between each offeror in each category, even if the responses varied only
5 "slightly" in merit.²⁰¹

6 154. The record is replete with testimony that the responses in each category
7 were generally close in merit, yet —by design—there was no opportunity to reflect that in
8 the rankings—unless the proposals were truly indistinguishable, and therefore, resulted
9 in a tie.

10 155. Despite numerous witnesses testifying that all responses were "adequate,"
11 "B averages," or "generally strong," etc., the points awarded never reflected this
12 closeness in merit or actual responsiveness to the criteria.²⁰² The ranking system utilized
13 by AHCCCS ensured there was "no way to show how close or far apart the bidders were
14 to each other."²⁰³

15 156. The only opportunity evaluators had to document the closeness in
16 responses was to award a tie, but Ms. Borys—the evaluator trainer—testified that she
17 discouraged ties, and others testified that ties "would make it more difficult to figure out
18 our ranking in [the] final run"; and that ties were awarded only where there was no "shade
19 of difference" or "no difference discerned" between the responses.²⁰⁴

20 157. Evaluators were required to rank offerors 1 through 5 in the consensus
21 meetings, unless there was a tie in responses, no matter how close or far apart the
22 responses were to each other in actual responsiveness or merit or if the top response
23
24
25
26
27

28 ²⁰¹ See Ex. 151; Day 6 Tr. 1263:2-25.

29 ²⁰² Day 8 Tr. 1821:4-7; Day 3 Tr. 576:1, Day 3 Tr. 574:23; Day 7 Tr. 1449:3-5, Day 7 Tr. 1449:10-25, Day
7 Tr. 1450:18-25.

30 ²⁰³ Day 8 Tr. 1723:17-25, 1724:1-6; Day 8 Tr. 1907:4-15; Day 4 Tr. 430:12-14; Day 11 Tr. 2534:16-21.

²⁰⁴ Day 8 Tr. 1723: 24-25; Day 12 Tr. 2691:1-4.

1 had flaws and weaknesses²⁰⁵ A first place ranking resulted in 100 percent of points
2 awarded to the offeror even if the top response was not perfect.²⁰⁶

3 158. Similarly, even if no response was a complete failure, evaluators had to
4 choose one to be ranked fifth place, thus receiving only 20 percent of points available.²⁰⁷

5 159. The percentage of awarded points was predetermined by a formula which
6 divided the total number of points available by the total number of offerors and multiplied
7 the quotient by the Offeror's inverse ranking, resulting in an equal divide in number of
8 points awarded between each ranked offeror.²⁰⁸

9 160. Because there were five offerors in the ALTCS procurement, whoever
10 ranked first on a given criteria received 100 percent of the available points, second place
11 received 80 percent, third place received 60 percent, fourth place received 40 percent,
12 and last place received just 20 percent.²⁰⁹

13 161. To further illustrate this methodology, if there had been 15 offerors, points
14 would have been divided by 6.66 percent, with each ranking receiving 6.66 percent more
15 than the rank behind it; conversely, if there had been two offerors, the points would have
16 been divided by 50 percent, with first place receiving 100 percent of points available and
17 second place receiving 50 percent.²¹⁰

18 162. For the written portions of the RFP, the process required evaluators to
19 individually review the submissions, take notes, and prepare a draft ranking based on
20 their individual assessment.²¹¹ This was known as the "individual evaluation process."²¹²
21 After deciding their individual rankings, the evaluators gathered (typically virtually) to

22
23 ²⁰⁵ Day 6 Tr. 1263:2-25, 1189:3-7, 1204:9-1205:14, 1223:9-25 (confirming the purpose of evaluation was
24 to rank offerors 1-5 even if only "slightly" better than another); Day 11 Tr. 2534:16-21 (confirming the score
25 sheet "doesn't tell you anything about how closely the evaluators thought the bidders were in terms of their
26 relative merit"), 2537:3-15 (testifying the actual responses "could have been something other than 20
27 percent" when asked if the ranking "doesn't translate to actually how far apart" the responses were); Day 3
28 Tr. 432:12-23.

29 ²⁰⁶ Ex. 97 at 1230-31 (explaining the formula that awards all available points to top-ranked response); Ex.
30 96 at 2 (demonstrating same).

²⁰⁷ Day 3 Tr. 432:12-23; Day 2 Tr. 398:7-10 (confirming fifth place received 20 percent of points); Ex. 96 at
2 2 (demonstrating same).

²⁰⁸ See Ex. 97 at 1230.

²⁰⁹ Ex. 96.

²¹⁰ Day 5 Tr. 898:12-25, 899:4-8.

²¹¹ Ex. 151 at 59-61.

²¹² *Id.*

1 discuss their individual, draft rankings and come to a consensus on the final ranking.²¹³
2 This was known as the “consensus meetings.”²¹⁴ The comparative ranking system also
3 required a ranking of 1 through 5, even if all responses were inadequate in objective merit.
4 For example, Mr. Jay Dunkleberger’s comments in review of B7 stated “most plans don’t
5 really address [the criteria] in detail, hard to pick a better one.”²¹⁵ Mr. Dunkleberger ranked
6 Health Net first, and Health Net received 100 percent of the possible points for B7.²¹⁶

7 163. As confirmed by Ms. Lebsack, the comparative ranking system did not score
8 the “actual merits” of the proposals; rather the evaluators “rank them, and then . . . a
9 correlating formula established points that they receive.”²¹⁷

10 164. During the consensus meeting for each criteria submission, the evaluators
11 discussed their individual impressions of the submissions and came to a collective
12 decision regarding the final rankings.²¹⁸

13 165. During the consensus meetings, the evaluators did not discuss the impact
14 of their ranks on the total number of points awarded, because they were not trained on
15 the topic and many simply felt “those were not the instructions.”²¹⁹

16 166. When asked about a hypothetical, Ms. Cynthia Layne, who assisted in
17 developing the scoring methodology, testified three offerors with all A-minus responses
18 could result in the same ranking as three offerors, one “who knocks it out of the park,”
19 and two that are “really poor,” and she agreed that the ranking “wouldn’t tell you anything
20 about how different those two scenarios were.”²²⁰

21 167. Mr. William Kennard felt “surprised” when he learned, during the hearing,
22 how the ranks translated into points.²²¹

23 ²¹³ Day 3 Tr. 503:18-25; Ex. 151 at 39-40.

24 ²¹⁴ Ex. 151 at 68.

25 ²¹⁵ See Ex. 226; Day 8 Tr. 1710:11-16.

26 ²¹⁶ Ex. 96 at 4.

27 ²¹⁷ See Day 5 Tr. 898:20-25, 899:1- 3; see also Day 2 Tr. 399:7-10 (ranking process determined “how we
28 felt each plan did comprehensively in comparison to the others”).

29 ²¹⁸ Day 7 Tr. 1550:1-12; Ex. 151 at 40.

30 ²¹⁹ Day 7 Tr. 1437:4-15; see also Day 8 Tr. 1723:6-1736:7 (confirming no knowledge of how B8 rankings
would translate into points but stating knowledge of impact of rankings on points earned would not have
been useful because he “followed the process we were asked to do”); Day 8 Tr. 1804:24-1805:19
(confirming no training on or consideration of translation of rankings into points).

²²⁰ Day 11 Tr. 2537:16-25, 2538:1-8 (testifying, “Yes, you would only see 1, 2, or 3”); see also Day 11 Tr.
2510:9-10 (confirming evaluators’ “job is just to do a ranking”).

²²¹ Day 9 Tr. 2007:9-19.

1 168. At the hearing, the evaluators confirmed that no response was perfect and
2 that the bidders were close to each other on the merits. Multiple examples of such
3 testimony include the following:

4 a. Ms. Melissa Arzabal agreed the B5 proposals were “somewhere in the
5 middle, not excellent, not terrible.”²²²

6 b. Ms. Danielle Ashlock, stating that Health Net did not have a “perfect”
7 submission,²²³ and “perhaps still had flaws,” agreeing no one was
8 “exemplary” on B5.²²⁴

9 c. Ms. Georgette Chukwuemeka testified “not necessarily, no” as to whether
10 one B6 proposal was “much worse than the others.”²²⁵

11 d. Regarding the number one ranked proposal on B7, Mr. Dunkleberger
12 testified “I can’t say [Health Net was] perfect. I can’t say they knocked it out
13 of the park. I think I can say that they were the highest ranked in my scoring
14 sheet” and his notes on his scoring sheet indicate that there “wasn’t much
15 differentiation between the plans” on a B7 criteria consideration.²²⁶

16 e. Ms. Gini Britton didn’t recall that any offeror “knocked it out of the park”
17 and she “didn’t feel that” any offeror failed to respond to B7’s questions.²²⁷
18 She thought the responses were “all adequate.”²²⁸

19 f. Mr. Kennard testified, “overall, . . . there was some consistency” in three
20 responses to B8 and that he “made some observations that there were good
21 parts about all of those proposals.”²²⁹

22 g. Dr. Melissa Del-Colle agreed that the five [B9] submission[s] were
23 generally strong”, that the submission who ranked fourth was not “markedly
24 better” than the fifth-ranked submission, and that the submission ranked in
25 first place “wasn’t perfect.”²³⁰

26 h. Ms. Susan Kennard testified, regarding B9, “I wouldn’t say that [Health
27 Net’s] response was worse” than the other offerors or that the “No. 1 ranked
28 offer was perfect.”²³¹

29 i. Ms. Rachel Conley agreed that it was “fair to say that [the] evaluation team
30 concluded that all of the offerors did a pretty good job on responding to
31 B9.”²³²

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²²² Day 6 Tr. 1189:3-7; see also 1187:2-8, 1224:15-21 (none of the oral presentation or B5 submissions “deserved an A plus or 100 percent,” “each oral presentation had at least some shortcomings”), Day 6 Tr. 1263:2-25 (“[N]o one was perfect . . . [but] the way it was ranked was, you know, with one better, even if slightly, than another.”)

²²³ Day 6 Tr. 1327:16-22

²²⁴ Day 6 Tr. 1330:17-20; Day 7 Tr.1386:6-14

²²⁵ Day 8 Tr. 1895:12-18.

²²⁶ Day 8 Tr. 1688:2-7; see also Day 8 Tr. 1710:11-16

²²⁷ Day 8 Tr. 1804:2-13.

²²⁸ Day 8 Tr. 1821:4-7.

²²⁹ Day 9 Tr. 1981:1-7; Day 9 Tr. 2006:21-22.

²³⁰ Day 7 Tr. 1449:3-5, 1449:10-25, 1450:18-25.

²³¹ Day 7 Tr. 1477:3-6, 1485:6-10; see also Ex. 232 (Ms. Kennard ranking Health Net in last place).

²³² Day 10 Tr. 2399:5-7.

1 j. Regarding B10, Ms. Michelle Holmes confirmed that the scores were “very
2 closely bunched together.”²³³

3 k. Ms. Lebsock, testified that for B10 submissions, “[t]hey’re close to B
4 averages” and “none are perfect.”²³⁴

5 169. None of the evaluators testified that any of the bidders failed on the
6 submission requirement they evaluated.²³⁵

7 170. Ms. Lebsock testified that if “somebody came in first, but marginally in first”
8 they received all points, while “if somebody came in fifth but in terms of overall quality,
9 they weren’t that far behind” the others, they only received one-fifth of the points.²³⁶

10 171. Ms. Arzabal testified that she did not consider whether anyone should have
11 received 100 percent of the points, because “even an imperfect response still required us
12 to rank someone 1 through 5, and that’s really what we did” and “at the end of the day,
13 you had to decide who was going to be ranked first.”²³⁷ Ms. Arzabal also confirmed that
14 she was “required by AHCCCS to rank [the offerors] 1 to 5 regardless of how close the
15 bidders were on B5” and even “[i]f somebody did a little better than another, they would
16 be ranked ahead.”²³⁸

17 172. Dr. Del-Colle ranked the offerors 1 through 5 because “those were our
18 instructions.”²³⁹ She had no opinion regarding fifth place receiving only 20 percent of the
19 available points because “that’s not how we were making any decisions.”²⁴⁰ She agreed
20 proposals were ranked ahead of others “even [if] marginally better than the next one.”²⁴¹

21 173. Ms. Kennard also confirmed that it was “fair to say that if one offer was even
22 marginally better than another, it would rank higher than the one that was marginally
23 better than.”²⁴² She did not have a “complete understanding” of the translation of rankings
24 to points “since that wasn’t [her] focus, and [her] focus was just the ranking.”²⁴³

25 ²³³ Day 9 Tr. 2214:15-21.

26 ²³⁴ Day 3 Tr. 576:1, Day 3 Tr. 574:23.

27 ²³⁵ See, e.g., Day 7 Tr. 1486:14-25 (definitely that wasn’t the way I considered it that [Mercy Care] had only
28 addressed a fifth [of the criteria]); Day 6 Tr. 1270:12 (the bottom two B-5 offerors “did not fail, no”).

29 ²³⁶ Day 4 Tr. 430:12-14; Day 3 Tr. 432:12-23.

30 ²³⁷ Day 6 Tr. 1189:3-7, 1204:9-1205:14, 1223:9-25.

²³⁸ Day 6 Tr. 1268:9-12, 1287:5-8.

²³⁹ Day 7 Tr. 1449:18-24.

²⁴⁰ Day 7 Tr. 1437:4-15, 1452:1-10.

²⁴¹ Day 7 Tr. 1451:24-1452:3.

²⁴² Day 7 Tr. 1485:14-19.

²⁴³ Day 7 Tr. 1472:3-10.

1 174. Mr. Dunkleberger confirmed there was “no way to show how close or far
2 apart the bidders were to each other,” whether “all of the bidders performed well,” or
3 whether they “did not do a good job” in terms of “meeting the submission requirement”;
4 rather, he testified that “there was only the 1-5 scale.”²⁴⁴

5 175. Ms. Chukwuemeka agreed that the ranking did not “necessarily” reflect
6 “how close . . . or far apart the bidders were from each other” and that there was “possibly”
7 a close gap between responses; instead, she testified, the evaluation methodology was
8 “a way to rank, to distinguish based on the responses received and the criteria
9 considered.”²⁴⁵

10 176. The evidence established that the points awarded in the ranking system did
11 not reflect the *actual* performance of the offerors, only their *relative* strength. Under this
12 ranking methodology, an offeror who failed to address important criteria could
13 nonetheless receive 100 percent of available points if it fared somewhat better than the
14 others who also failed to address important criteria. Testimony confirmed this exact
15 situation occurred. Mr. Dunkleberger’s comments in review of B7 stated “most plans don’t
16 really address [the criteria] in detail, hard to pick a better one,” yet he ranked Health Net
17 first.²⁴⁶ Health Net received 100 percent of the possible points for B7.²⁴⁷ Evaluators
18 testified throughout the hearing that top-ranked responses had flaws, but they
19 nonetheless received 100 percent of the available points.²⁴⁸ Evaluators also did not view
20 the fifth-place rankings as failures, yet they received only 20 percent of the available
21 points.²⁴⁹

22 177. The evidence established that the evaluators did not actually determine how
23 each submission fared against the stated goals of the RFP. Instead, they merely
24 compared the proposals against each other and ranked them 1 through 5.

25 ²⁴⁴ Day 8 Tr. 1723:17-25, 1724:1-6. See also Day 8 Tr. 1700:9-25.

26 ²⁴⁵ Day 8 Tr. 1907:4-15.

27 ²⁴⁶ See Ex. 226; Day 8 Tr. 1710:11-16.

28 ²⁴⁷ Ex. 96 at 4.

29 ²⁴⁸ See Day 3 Tr. 576:1, Day 3 Tr. 574:23; Day 6 Tr. 1263:8-13; Day 6 Tr. 1187:2-8; Day 6 Tr. 1270:12;
30 Day 7 Tr. 1450:22-23, Day 7 Tr. 1486:14-25; Day 7 Tr. 1555:8-14; Day 8 Tr. 1688:2-7; Day 8 Tr. 1804:2-13,
Day 7 Tr. 1477:3-6, Day 7 Tr. 1485:6-10; Day 8 Tr. 1688:2-7; Day 8 Tr. 1710:11-16; Day 6 Tr. 1224:15-18,
Day 6 Tr. 1224:19-21; Day 6 Tr. 1330:17-20; Day 7 Tr. 1386:6-14; Day 6 Tr. 1327:16-19; Day 6 Tr. 1327:20-
22; Day 7 Tr. 1449:3-5, Day 7 Tr. 1449:10-25, Day 7 Tr. 1450:18-25 (all providing testimony that no
response was flawless).

²⁴⁹ See *id.*

Oral Presentations

1
2 178. AHCCCS awarded 290, for 29 percent, of the 1,000 points available in the
3 RFP to two 30- minute oral presentations (145 points per presentation).²⁵⁰

4 179. Offerors were instructed to bring “no more than six individuals to the [oral
5 presentations]” but were told only that their teams should include “individuals with
6 expertise in Medical Management, Case Management, and Quality Management.”²⁵¹

7 180. Offerors were provided the oral prompts one hour before their presentations
8 and had that one hour to prepare each oral presentation after learning the prompt.²⁵²

9 181. Ms. LaPorte testified that the oral presentations were intended to measure
10 “how [the Offerors] did on their feet, how their team works together, information like
11 that.”²⁵³

12 182. AHCCCS sought to use the presentations to “give insight to team chemistry,
13 experience and expertise, culture fit, and commitment and passion.”²⁵⁴ Ms. Lebsock
14 testified that the oral presentations were “the one opportunity for the health plans to stand
15 on their own with the staff that they have hired to share knowledge of how they do
16 business.”²⁵⁵

17 183. Section 8 of the Instructions to Offerors, entitled “Evaluation Factors and
18 Selection Process,” listed two “scored portions of the evaluation” “in their relative order of
19 importance” as “1. Programmatic Submission Requirements” and “2. Financial
20 Submission Requirements.”²⁵⁶ The phrase “Programmatic Submission Requirements”
21 was not defined in the RFP.²⁵⁷ The Instructions to Offerors went on to explain which items
22 were “designated for scoring”:

- 23 a. “The Capitation Agreement/Administrative Cost Bid *will be scored . . .*”
- 24 b. “The Case Management Cost Bid *will be scored . . .*”

25
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27 ²⁵⁰ Ex. 96 at 2.

²⁵¹ Ex. 8 at 332.

²⁵² Day 3 Tr. 522:5-6; Day 6 Tr. 1196:7-11.

²⁵³ Day 14 Tr. 3430:16-24.

²⁵⁴ Ex. 350 at 3364.

²⁵⁵ Day 4 Tr. 703:25–704:3.

²⁵⁶ Ex. 8 at 319; *see also id.* at 320.

²⁵⁷ *See* Ex. 8 at 319-20.

1 c. “With the exception of Narrative Submission Requirements noted as a
2 nonscored item and Narratives that are noted as GSA-specific, Narrative
3 Submission Requirements *will be scored . . .*”²⁵⁸

4 184. Nowhere in that paragraph or elsewhere in the RFP did it say that oral
5 presentations would be scored.

6 185. The Instructions to Offerors referred to Section I, Exhibit H of the RFP for
7 the “Narrative Submission Requirements.”²⁵⁹ RFP Section I, Exhibit H, entitled “Narrative
8 Submission Requirements,” identified narrative submissions B1-B11 and their associated
9 page limits.²⁶⁰

10 186. Section 8 of the Instructions to Offerors did not indicate that oral
11 presentations would be scored or even mention oral presentations at all.²⁶¹

12 187. Section 20 of the Instructions to Offerors stated offerors would participate
13 in oral presentations that “may be audio-taped by AHCCCS for the Agency’s use in the
14 evaluation process.”²⁶²

15 188. Each offeror signed in writing to the commitments made in their written
16 submissions; by contrast, AHCCCS never asked any offeror to substantiate or commit in
17 writing to the representations made orally in their presentations, and no person involved
18 in the procurement actually listened to the audio files to determine what commitments
19 offerors made during their presentations, nor were any oral commitments incorporated
20 into the awarded contract. The oral presentations—at least at the time of the award and
21 the time of Ms. LaPorte’s testimony at the administrative hearing—had *no legal*
22 *significance*, yet the oral presentations accounted for nearly a third of the points of this
23 multi-billion dollar contract affecting thousands of vulnerable Arizonans.

24 189. As previously noted above, all four of the evaluators for both oral
25 presentations were on the Scope Team and were aware of the weighting and points
26 distribution, and therefore were aware that the rankings in the oral presentations would
27 weigh heavily, 29 percent, on the final ranking. The scoring of the oral presentations,

28 ²⁵⁸ Ex. 8 at 320 (emphases added).

29 ²⁵⁹ *Id.*, p. 330.

30 ²⁶⁰ Ex. 16.

²⁶¹ Ex. 8 at 319-20.

²⁶² Ex. 8 at 332.

1 which was inherently subjective, was in the hands of those who knew the ranking and
2 scoring impacts. This gave the appearance of impropriety, and devalues any public
3 confidence in AHCCCS's procurement process.

4 Narrative Submissions B4-B9

5 190. Appellants took no issue with the use of a consensus evaluation process
6 and they did not dispute that a consensus final evaluation may differ from an individual's
7 initial assessment. Appellants contended, and the evidence showed, that the evaluators
8 consistently could not reconcile their individual rankings with the final rankings. This was
9 especially true when all three evaluators individually agreed upon a ranking only to later
10 reverse the order in the final rankings, which happened on both B4 and B5.

11 191. In B5, all three evaluators individually ranked Health Net's proposal above
12 either APIPA or Banner.²⁶³ Yet, the consensus ranking put both APIPA and Banner ahead
13 of Health Net.²⁶⁴ In B4, each of the three evaluators ranked Health Choice's proposal at
14 least two places ahead of APIPA's, yet, the consensus ranking put Health Choice at fourth
15 behind APIPA at third.²⁶⁵ None of the evaluators for B4 or B5 could explain how or why
16 these collective switches occurred.²⁶⁶

17 192. The initial rankings for several submission requirements showed wide
18 variations between the individual evaluators. On B7, Health Net received both the highest
19 and the lowest ranking.²⁶⁷ On B5, Mercy Care received both the highest and the lowest
20 ranking.²⁶⁸ On B6, Banner was ranked both 1st and 4th.²⁶⁹ On B8, APIPA was ranked
21 both 2nd and 5th.²⁷⁰ On B9, Health Choice was ranked both 1st and 5th, while Mercy
22 Care was ranked 1st, 3rd, and 5th.²⁷¹

23 193. The evaluators did not offer any explanations for the final rankings beyond
24 what was presented in the ranking and rationale spreadsheets. As an example, Dr. Del

25 _____
26 ²⁶³ Ex. 506 at 8-9.

27 ²⁶⁴ Ex. 155.

28 ²⁶⁵ Ex. 154.

29 ²⁶⁶ See Day 6 Tr. 1259:11-1260:19 (could not "describe specifically", just explains general process); Day 6
30 Tr. 1339:20-1340:4; Day 8 Tr. 1762:5- 23, 1780:9-18; Day 8 Tr. 1852:3-20.

²⁶⁷ Exs. 224-226.

²⁶⁸ Ex. 506 at 8-9.

²⁶⁹ Ex. 507 at 8-9.

²⁷⁰ Ex. 508 at 9-10.

²⁷¹ Ex. 509 at 12.

1 Colle acknowledged that she could not explain how the evaluators arrived at the final
2 rankings for B9.²⁷²

3 194. Evaluators testified that the evaluation criteria were not always part of the
4 submission requirement. B4, which concerned best practices for case managers,
5 included a criterion regarding “provider level accommodations and education.”²⁷³ B6
6 included criteria regarding Closed Loop Referral System (“CLRS”) and Health Information
7 Exchange (“HIE”) metrics, as well as National Committee for Quality Assurance (“NCQA”) accreditation, none of which were mentioned in B6.²⁷⁴ B7 included a subcriterion relating
8 to GSA under the health equity broad category, even though the question did not mention
9 GSA.²⁷⁵ Therefore, it was not surprising that Mr. Dunkleberger found that the bidders all
10 did poorly on that criterion.²⁷⁶ On B5, the evaluators marked down some proposals for not
11 providing a timeline for implementation of new systems and processes, however, B5 did
12 not ask for such a timeline, unlike B7.²⁷⁷

13 195. Evaluators also used the “Other” category to consider items that did not fall
14 within the submission requirement. Ms. Arzabal created a criterion in B5 for supporting
15 provider training for direct care workers, which was a workforce development issue (a
16 topic covered under B8).²⁷⁸ Ms. Holmes considered STAR ratings as an “Other” criterion
17 in her individual review of B10.²⁷⁹

18 B5

19 196. Section B5 asked how offerors would ensure “person-centered service
20 planning.”²⁸⁰ The evaluators of B5 were Danielle Ashlock, Dara Johnson, and Melissa
21 Arzabal, all of whom were on the Scope Team and knew the question was worth 145
22

23
24 ²⁷² Day 7 Tr. 1455:7-24. See also Day 8 Tr. 1780:9-18 (could not recall); Day 8 Tr. 1852:3-20 (could not
25 recall any details from the discussion); Day 10 Tr. 2214:11-2216:1 (could not provide additional explanation
26 without reviewing the entire documents); Day 14 Tr. 3256:25-3257:13 (could not recall how each
27 component weighed in final cost rankings), 3264:9-3265:1 (did not recall conversation from consensus
28 meeting).

29 ²⁷³ Day 8 Tr. 1752:21-1753:10.

30 ²⁷⁴ Day 8 Tr. 1893:7-21, 1892:1-9.

²⁷⁵ Day 8 Tr. 1709:23-25.

²⁷⁶ Day 8 Tr. 1710:6-20.

²⁷⁷ See Ex. 100; Compare Ex. 16 at 357, 358; see also Day 15 Tr. 3705:15-3706:7.

²⁷⁸ Day 6 Tr. 1239:6-1240:9, 1241:16-24.

²⁷⁹ Ex. 235; Day 10 Tr. 2199:14-22, 2202:23-2203:12.

²⁸⁰ Ex. 100.

1 points, as well as the impact of the ranking.²⁸¹ Health Choice was marked down on B5 for
2 failing to describe how to encourage participation in person-centered service plans
3 (“PCSP”), a topic that was covered in several paragraphs in Health Choice’s proposal.²⁸²
4 Also, Health Choice was marked down for stating that it informed members of the
5 ombudsman process, which Ms. Ashlock agreed was appropriate for MCOs to do.²⁸³

6 197. The B5 ranking and rationale spreadsheet noted only two instances where
7 Mercy Care did not clearly describe a topic: its strategy for recognizing individual
8 strengths and needs and how it encouraged providers’ active participation.²⁸⁴ On this
9 second topic, every offeror received a similar criticism.²⁸⁵ Yet, Mercy Care was ranked
10 fourth behind APIPA at second and Health Net at third, whose proposals were noted as
11 failing to describe or address several topics.²⁸⁶

12 198. The rankings on B5 did not correlate with the oral presentation rankings,
13 given that many of the same programs were relevant to both B5 and the oral
14 presentations, especially Oral Presentation Question 1.²⁸⁷ While Health Choice did very
15 well on the oral presentations, it ranked fifth on B5.²⁸⁸ Conversely, Banner came in first
16 on B5 but fourth on both oral presentations.²⁸⁹ The evidence showed Health Choice was
17 given credit for several programs in connection with the oral presentations but not given
18 similar credit for those same programs on B5, even though Health Choice’s written
19 submission provided much more detail regarding those programs than Health Choice’s
20 oral presentations.²⁹⁰

21 B7

22 199. B7 asked the bidders to provide “action steps and a timeline for the first
23 three years of the Contract.”²⁹¹ B7 was evaluated by Christina Quast, Gini Britton, and

24 ²⁸¹ Ex. 155.

25 ²⁸² Ex. 61 at 797; see also Day 6 Tr. 1247:20-25, 1249:4-10, 1250:22-1251:24.

26 ²⁸³ Day 7 Tr. 1391:25-1394:9, 1400:24-1403:12.

27 ²⁸⁴ See Ex. 100.

28 ²⁸⁵ *Id.*

29 ²⁸⁶ *Id.*

30 ²⁸⁷ Day 6 Tr. 1191:21-1194:2 (acknowledging overlap), 1274:7-19 (couldn’t explain the different scores on
orals versus B5); Day 3 Tr. 601:22-602:9 (agreeing there was overlap); Day 15 Tr. 3692:17-3693:4.

²⁸⁸ See Ex. 96 at 2.

²⁸⁹ *Id.*

²⁹⁰ See Day 3 Tr. 509:24-514:23 (describing positive programs from Health Choice oral presentation); Ex.
61 at 57-61 (Health Choice B5 submission); Day 15 Tr. 3693:16-3694:22, 3704:16-3705:14, 3706:8-25.

²⁹¹ Ex. 16 at 358.

1 Jay Dunkleberger.²⁹² In response to a question submitted by Health Net, AHCCCS told
2 the bidders that the “action steps should focus on the contract start (execution) date.”²⁹³
3 The RFP defined the “term of Contract” to start on October 1, 2024.²⁹⁴ APIPA and Health
4 Net’s acceptance forms also indicated a contract start date of October 1, 2024.²⁹⁵

5 200. Each offeror, with the exception of Health Net, submitted a three-year
6 timeline starting on October 1, 2024, the date the Contract was to start.²⁹⁶ Health Net,
7 submitted a timeline starting from the contract award date (December 2023).²⁹⁷ As a
8 result, Health Net’s submission did not include any action steps to be taken in the third
9 year of the Contract.²⁹⁸

10 201. Ms. Quast testified that the steps Health Net included in its timeline in the
11 months leading up to the contract would not be comparable to the steps taken by an
12 incumbent in the first year of the contract performance.²⁹⁹

13 202. Health Choice was ranked fourth for submitting a “network plan addressing
14 the need for HCBS services that includes the submission requirements for capacity
15 building and getting [nursing facilities] into HCBS services,” which was inherent in the
16 question being asked.³⁰⁰

17 **B8**

18 203. Every bidder was ranked zero for the Broad Category, provider competency
19 development.³⁰¹ None of the witnesses could explain why that row contained only zeros
20 when the final rationale spreadsheet included references to the bidders’ performance on
21 that Broad Category.³⁰²

22 204. The B8 evaluators further offered inconsistent explanations for their final
23 rankings. Mr. Dunkleberger explained that the B8 evaluation team determined which
24 section “was more valuable in the term as an indicator of performance for the plan,”

25 ²⁹² Ex. 157.

26 ²⁹³ Ex. 19 at 384.

27 ²⁹⁴ Ex. 4 at 279 ¶ 51; Day 10 Tr. 2255:11-2256:17.

28 ²⁹⁵ Ex. 92, Ex. 94.

29 ²⁹⁶ Ex. 50; Ex. 56; Ex. 61; Ex. 72; *see also* Day 10 Tr. 2258:16-2261:17.

30 ²⁹⁷ Ex. 67; *see also* Day 10 Tr. 2261:18-2262:17.

²⁹⁸ Ex. 67; Day 10 Tr. 2375:8-2376:1.

²⁹⁹ Day 10 Tr. 2372:16-22.

³⁰⁰ Ex. 226, row 29, *See* Ex. 16 at 358.

³⁰¹ Ex. 573, Combined tab, row 117.

³⁰² Day 9 Tr. 1981:8-14, 1985:8-15, 1989:18-1990:3.

1 therefore, weighting some criteria heavier than others.³⁰³ In contrast, Mr. Kennard denied
2 considering any items “as more or less important or weighted.”³⁰⁴

3 B9

4 205. Mercy Care challenged the scoring of B9 on various grounds in its protest
5 and appeal.³⁰⁵ The B9 evaluators were Dr. Melissa Del-Colle, Rachel Conley, and Susan
6 Kennard.³⁰⁶

7 206. Mercy Care originally received the third highest average score in B9 but fell
8 to fifth after consensus scoring.³⁰⁷ During the hearing, no witness could actually explain
9 the differences in quality of the offerors’ responses to B9 that led to this change.³⁰⁸

10 Past Performance/B10 and B11

11 B10

12 207. The evaluation team for B10 consisted of Christina Quast, Jakenna
13 Lebsock, and Michelle Holmes. B10 concerned the bidders’ operational reviews
14 (“ORs”).³⁰⁹ Because all bidders were incumbent AHCCCS plans, no submissions were
15 necessary for B10.³¹⁰

16 208. AHCCCS utilized the 2023 ALTCS OR for the three incumbent ALTCS-
17 E/PD contractors (Banner, Mercy Care, and APIPA). For the MCOs who had existing non-
18 E/PD contracts with AHCCCS (Health Choice and Health Net), AHCCCS was to use “the
19 most recent finalized” AHCCCS OR.³¹¹

20 209. AHCCCS used Health Choice’s 2022 AHCCCS Complete Care (“ACC”)
21 OR.³¹² AHCCCS used Health Net’s 2020 RBHA OR, even though Health Net was a
22 current ACC contractor and ORs were required to be completed every three years.³¹³ The
23

24 ³⁰³ Day 7 Tr. 1706:1-19.

25 ³⁰⁴ Day 9 Tr. 1965:12-19.

26 ³⁰⁵ Ex. 132 at 1362-63; Ex. 149 at 2625-26.

27 ³⁰⁶ Ex. 159.

28 ³⁰⁷ See Exs. 230, 231, 232; Ex. 96.

29 ³⁰⁸ See Day 7 Tr. 1441:18-1442:24 (could not recall anything about the responses to B9 that made one
30 proposal “markedly worse” than another).

31 ³⁰⁹ Ex. 16 at 359.

32 ³¹⁰ *Id.*; see also Day 9 Tr. 2155:8-2156:10.

33 ³¹¹ Ex. 16 at 359.

³¹² Ex. 160.

³¹³ *Id.*; Day 3 Tr. 561:17-562:18; Day 9 Tr. 2145:22- 2146:1, Day 9 Tr. 2206:18-25.

1 evaluators did not consider the fact that Health Net's 2020 RBHA OR was more distant
2 in time and served a different population.³¹⁴

3 210. Michelle Holmes' individual notes for B10 included references to STAR
4 ratings and NCQA accreditation, even though that was not part of B10 and would not
5 have been within the ORs themselves.³¹⁵ Ms. Holmes testified that she could not recall
6 whether that impacted her individual rankings or if she looked at the proposals to get that
7 information.³¹⁶

8 211. In this RFP, the evaluators did not consider the offerors compliance
9 between 95 percent and 80 percent.³¹⁷ The B10 scoring tool referred to a 95 percent full
10 compliance standard, and evaluators determined the percentage of standards that met
11 that 95 percent compliance standard.³¹⁸ On this measure, all offerors were within four
12 percentage points of each other (from 79.8 percent to 83.8 percent), i.e. a B-minus
13 range.³¹⁹

14 212. The B10 scoring tools did not mention or reference an 80 percent
15 substantial noncompliance standard.³²⁰ Instead, the evaluation team created an 80
16 percent standard *during the consensus meetings*.³²¹

17 213. The offerors were similarly bunched close together on the number of
18 standards below 80 percent.³²²

19 214. The evaluators also examined which standards below 80 percent were
20 particularly impactful for members, even though the scoring tool included no definition or
21 guidance as to what those standards were, and no similar analysis was done for the 95
22 percent full compliance criteria.³²³ The evaluators decided that member-facing standards
23 were the most important, however, the consideration of member-facing standards did not
24 explain the final rankings because Health Choice performed better than APIPA on

25 ³¹⁴ Day 3 Tr. 560:16-561:16.

26 ³¹⁵ Day 10 Tr. 2200:1-2202:18.

27 ³¹⁶ Day 10 Tr. 2199:14-22, 2203:5-9, 2200:1-2202:18.

28 ³¹⁷ Day 10 Tr. 2371:8-17. 208.

29 ³¹⁸ Ex.160; Ex. 234; Day 5 Tr. 993:13-24.

30 ³¹⁹ Day 3 Tr. 553:2-21, 575:4-576:2; Day 5 Tr. 899:9-18. See also Day 9 Tr. 2164:23-2165:4, Day 10 Tr. 2214:11-21.

³²⁰ Exs. 233, 234, 235.

³²¹ Day 3 Tr. 567:7-25, Day 5 Tr. 994:2-11, 1062:22-24.

³²² Day 10 Tr. 2214:6-10.

³²³ Day 10 Tr. 2345:6-17; 2304:25-2305:12, 2306:16-2307:3; Day 5 Tr. 990:12-991:21; 1059:15-1061:10.

1 integrated system of care standards, medical management standards, and standards for
2 adult early periodic screening and diagnostic testing (“EPS/DT”) and maternal-child health
3 (“MCH”), which were all member-facing standards.³²⁴

4 215. Of these, integrated system of care was probably the best indicator of
5 member-facing performance because these standards focused on policies and
6 procedures related to how the health plan provided physical and behavioral services to
7 the entire population.³²⁵ APIPA had six integrated system of care standards below 80
8 percent, Banner had only two such standards below 80 percent, and Health Choice had
9 one such standard below 80 percent.³²⁶ In addition, APIPA was below 80 percent on two
10 medical management standards compared to Health Choice’s one.

11 216. Incumbency was one of the factors used in evaluating B10, even though
12 incumbency was not noted in the question.³²⁷ Ms. Holmes’ individual rankings explicitly
13 noted which offerors were incumbents.³²⁸ Ms. Lebsack affirmed that LTSS experience
14 was part of the consideration, but could not say how much it weighed in the overall
15 rankings.³²⁹ Ms. Holmes also admitted that incumbency was a consideration, and she
16 could not offer any explanation for the final rankings.³³⁰ Ms. Quast also confirmed that
17 incumbency played a role in the evaluations of both past performance submission
18 requirements.³³¹

19 217. In the 2018 ACC RFP, AHCCCS explicitly stated it would give scoring
20 preference to incumbents.³³² No such preference was disclosed in this RFP, and
21 witnesses confirmed that it was important to have a level playing field for both new and
22 incumbent offerors.³³³

23 B11

24
25 ³²⁴ Day 15 Tr. 3658:11-3661:4; Ex. 105.

26 ³²⁵ Day 15 Tr. 3659:4-17.

27 ³²⁶ See Ex. 105.

28 ³²⁷ Day 3 Tr. 556:24-557:22; see also Day 10 Tr. 2215:15-19.

29 ³²⁸ Day 10 Tr. 2205:9-2206:6.

30 ³²⁹ Day 3 Tr. 554:18-555:19.

³³⁰ Day 10 Tr. 2215:15-2216:1.

³³¹ Day 10 Tr. 2316:17-20, 2316:25-2317:3; see also Day 10 Tr. 2302:7-2303:12; 2294:12-2295:19.

³³² Day 1 Tr. 166:24-167:22, 172:14-19, 175:4-15; Ex. 303 at 1896 (noting “Explicit preference given to incumbent plans”); Ex. 326.

³³³ Day 12 Tr. 2602:16-21; Ex. 304; Day 15 Tr. 3662:5-3663:10; Day 12 Tr. 2721:16-18, 2870:17-2871:6.

1 218. Appellants asserted that AHCCCS relied on undisclosed evaluation criteria
2 to evaluate B11 (STAR rating). STAR ratings came from the federal government, without
3 any involvement by AHCCCS.³³⁴ The maximum possible STAR rating was 5.0.³³⁵

4 219. AHCCCS required the bidders to submit their Arizona 2023 STAR score
5 ratings.³³⁶ Non-incumbents could not submit an AZ Fully Integrated Dual Eligible (“FIDE”)
6 STAR score for 2023.³³⁷

7 220. Although APIPA and Health Choice both had 4.0 STAR ratings, APIPA was
8 ranked first and Health Choice was ranked fourth, behind Mercy Care and Banner who
9 tied for second even though they had 3.0 STAR ratings.³³⁸

10 221. As shown in the consultant notes for B10, Mr. Heiser “[r]anked all of the
11 FIDE D-SNP plans ahead of the HIDE D-SNP plans regardless of whether the FIDE star
12 score was lower than the HIDE star score.”³³⁹ Ms. Quast also ranked Health Choice lower
13 than APIPA because of APIPA’s incumbency.³⁴⁰

14 222. Ms. Quast testified that Health Choice was ranked below Banner and Mercy
15 Care in the final rankings because of the “past history and the existing long-term care
16 contracts and serving that population on the D-SNP side.”³⁴¹ Ms. Quast further confirmed
17 that incumbency played a role in the evaluations of both of the past performance
18 submission requirements.³⁴²

19 223. The evaluators took incumbency into account even though the RFP did not
20 tell the bidders that AHCCCS would award more points to incumbents on past
21 performance.³⁴³

22 224. Mr. Shawn Nau, Health Choice’s Chief Executive Officer, explained that it
23 did not make sense to rank FIDE plans higher than HIDE plans, even beyond the non-
24 disclosure issue, because it was easier for a FIDE health plan to get a higher STAR score

25 _____
26 ³³⁴ Day 10 Tr. 2309:1-11; Day 11 Tr. 2422:1-7.

27 ³³⁵ Day 11 Tr. 2422:8-10.

28 ³³⁶ Ex. 16 at 360.

29 ³³⁷ Day 11 Tr. 2434:9-12; 2435:7-11; *see also* Day 15 Tr. 3679:15-36980:21.

30 ³³⁸ Ex. 106; Day 11 Tr. 2425:2-6.

³³⁹ Day 10 Tr. 2428:2-7.

³⁴⁰ Day 10 Tr. 2312:16-2313:7.

³⁴¹ Day 10 Tr. 2315:3-8.

³⁴² Day 10 Tr. 2316:17-20.

³⁴³ Day 10 Tr. 2316:25-2317:3.

1 than a HIDE health plan because HIDEs did not get the extra financial payment available
2 to FIDEs and because HIDEs had to coordinate with other health plans to get necessary
3 membership information.³⁴⁴

4 Weighting of Past Performance

5 225. Appellants take issue with AHCCCS's weighting of past performance
6 comprising only 5.5 percent of the total points and that the evaluation of past performance
7 was limited to only B10 and B11.

8 226. Ms. Lebsock testified that there was "no broader look at past performance"
9 outside of B10 and B11 at the November 16, 2023 meeting.³⁴⁵ The Scope and Executive
10 Teams did not discuss any of the factors related to past performance listed on pages 5
11 and 6 of the Instructions to the Offerors, including compliance issues involving any of the
12 offerors; satisfactory performance in ALTCS, other lines of AHCCCS business, or
13 Medicare; or even whether there had been civil judgments against any of the offerors.³⁴⁶

14 227. The RFP did not disclose the weights assigned to past performance or
15 clearly state that B10 and B11 would be the only measurement of past performance.³⁴⁷

16 228. In addition to B10 and B11, the RFP made several specific references to an
17 intent to evaluate past performance.³⁴⁸

18 229. One reference to past performance was provided in a stand-alone
19 paragraph which stated "AHCCCS anticipates utilizing the Offerors' past performance
20 when evaluating the Offeror's Proposal."³⁴⁹ When asked about AHCCCS's decision to
21 include the stand-alone paragraph regarding past performance in the Instructions to
22 Offerors, AHCCCS representatives could not provide a clear answer for its inclusion.³⁵⁰

23
24 ³⁴⁴ Day 15 Tr. 3681:10-2683:5.

25 ³⁴⁵ Day 3 Tr. 448:9-25, 449:1-25.

26 ³⁴⁶ Day 3 Tr. 448:9-25, 449:1-23.

27 ³⁴⁷ See generally Ex. 8.

28 ³⁴⁸ See Ex. 8 at 319-20 ("The items which are designated for scoring in this RFP shall be evaluated and
29 scored using only the information submitted to AHCCCS by the Offeror with the exception of past
30 performance"); (If AHCCCS deems that there is a negligible difference in scores between two or more
competing Proposal for a particular Geographic Service Area (GSA), in the best interest of the State,
AHCCCS may consider additional factors in awarding the Contract including, but not limited to. . . An
Offeror's past performance with AHCCCS, and/or An Offeror's past Medicare performance. . .").

³⁴⁹ Ex. 8 at 320.

³⁵⁰ See Day 14 Tr. 3445:16-25, 3446:1-22.

1 230. Ms. Lebsock advocated for even less weight than past performance was
2 ultimately assigned because she believed that past performance should be given “very
3 minimal” weight, if at all.³⁵¹ Yet Ms. Lebsock also testified that “past performance is a
4 good indicator of future performance.”³⁵²

5 231. Prior to finalization of weighting decisions, Mr. Cohen, AHCCCS’s expert
6 consultant, advised AHCCCS of the trend in Arizona and other states towards using and
7 considering past performance in procurements.³⁵³ Mr. Cohen also testified that this trend
8 to use “real world results” was based on offerors’ who “put together a well-written proposal
9 that doesn’t capture for the state any information, if it’s either an incumbent plan or a plan
10 that operates elsewhere that would be a new entrant, as to their ability to actually fulfill
11 their commitments.”³⁵⁴

12 232. Mr. Cohen confirmed that AHCCCS did not consult him in the weighting
13 decisions, including past performance.³⁵⁵

14 AHCCCS Failed to Evaluate or Score By GSA

15 233. Appellants learned for the first time during the hearing that AHCCCS did not
16 make a GSA-by-GSA evaluation or contract decision notwithstanding that the Instructions
17 to the Offerors indicated that AHCCCS would both evaluate and award contracts on a
18 GSA specific basis.³⁵⁶

19 234. The RFP adopted the sub-work group’s recommendation and contemplated
20 that AHCCCS would both evaluate and award contracts on a GSA-specific basis.³⁵⁷ The
21 Instructions informed the offerors that “AHCCCS will award Contracts in each GSA to
22 Successful Offerors in the best interest of the State.”³⁵⁸ The Instructions also anticipated
23 that there could be negligible differences in scores between two or more proposals “for a
24

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26 ³⁵¹ Day 3 Tr. 544:22, 545:1; Day 3 Tr. 545:8-11; see also Day 5 Tr. 987:21-989:12 (Ms. Lebsock testifying
27 “the ones with the higher weights we did consider to be important”).

28 ³⁵² Day 3 Tr. 545:3-8.

29 ³⁵³ Ex. 339.

30 ³⁵⁴ Day 14 Tr. 2801:1-7 (as part of having a well-rounded RFP, we-- and evaluation, we think it adds value
to incorporate that as one component.”).

³⁵⁵ See Day 12 Tr. 2761:1-22.

³⁵⁶ Ex. 8 at 319-22.

³⁵⁷ *Id.*

³⁵⁸ Ex. 8 at 322.

1 particular Geographic Service Area (GSA).³⁵⁹ The evidence of record established
2 otherwise. None of the overall submission requirements were scored on a GSA basis.

3 235. There were no GSA-specific narrative questions in the RFP.³⁶⁰

4 236. Ms. Quast's three submission requirements (B7, B10, and B11) were not
5 evaluated or scored by GSA.³⁶¹ She testified that she did not know the winning bids in
6 each GSA.³⁶²

7 237. The Final Ranking and Rationale Spreadsheet for the Cost Bid identified
8 which case management rates were the lowest "using membership-weighted rates by
9 GSA," yet the evaluation team did not create GSA-specific final rankings for the case
10 management bid sub-component of the Cost Bid.³⁶³ Instead, the offerors were ranked
11 and received points for the overall Cost Bid on a statewide basis.³⁶⁴

12 238. Pamela McMillen could not explain how the final Cost Bid rankings were
13 derived or how much weight the different components were given.³⁶⁵

14 239. Ms. LaPorte affirmed that the Offerors were not ranked overall by GSA in
15 the RFP.³⁶⁶ She also testified that it was impossible for the bidders to have rankings that
16 differed by GSA.³⁶⁷

17 240. None of the witnesses present at the November 16, 2023 Scope and
18 Executive Team meeting testified that AHCCCS made a GSA-by-GSA contract award
19 decision.³⁶⁸

20 241. Ms. Quast, a Scope Team member, did not recall any discussion about
21 awarding on a per-GSA basis as opposed to statewide.³⁶⁹

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23
24
25 ³⁵⁹ *Id.* at 320.

26 ³⁶⁰ Day 1 Tr. 154:17-155:13.

27 ³⁶¹ Day 10 Tr. 2242:2-9; 2325:1-4.

28 ³⁶² Day 10 Tr. 2253:2-15.

29 ³⁶³ Ex. 107.

30 ³⁶⁴ See Ex. 96 at 2.

³⁶⁵ Day 14 Tr. 3219:18- 3220:19.

³⁶⁶ Day 15 Tr. 3553:2-14.

³⁶⁷ Day 14 Tr. 3440:7-15.

³⁶⁸ See, e.g., Day 12 Tr. 2725:3-10.

³⁶⁹ Day 10 Tr. 2280:20-2281:20.

1 242. The memo sent to the Governor’s office regarding the contract award did
2 not discuss individual GSA scores or considerations, nor did it include any option to award
3 contracts on a per-GSA basis.³⁷⁰

4 **CONCLUSIONS OF LAW**

5 1. Appellants bear the burden to establish by a preponderance of the evidence
6 that the awards made by AHCCCS under the RFP did not comply with statutes and
7 regulations or were otherwise improper.³⁷¹

8 2. “A preponderance of the evidence is such proof as convinces the trier of
9 fact that the contention is more probably true than not.”³⁷²

10 3. Appellants must prove “by a preponderance of the evidence, the following:
11 (i) the procurement process was tainted by violations of applicable statutes or rules, by
12 substantial irregularities in the proceedings, or by improper conduct by any of the
13 participants to the process (ii) such improprieties were materially prejudicial to [appellant];
14 and (iii) but for such improprieties, there is a substantial probability that [appellant] would
15 have been the recipient of the contract award.”³⁷³

16 4. “The mere potential for abuses likely to arise from significant deviations from
17 standards designed to eliminate favoritism, fraud, and corruption, avoid misuse of public
18 funds, and stimulate advantageous market place competition is a sufficient basis upon
19 which to grant judicial relief even without a showing that the deviations actually resulted
20 in such abuses.”³⁷⁴

21 5. While AHCCCS enjoys discretion in its procurements and is exempt from
22 the Procurement Code, that does not equate to AHCCCS having unfettered discretion.

23 6. Arizona law requires AHCCCS’s director to “adopt rules regarding the
24 request for proposal process that provide . . . [f]or the awarding of contracts to contractors
25
26

27 ³⁷⁰ Ex. 572; see also Day 10 Tr. 2286:14-2287:3.

28 ³⁷¹ A.A.C. R2-19-119.

29 ³⁷² MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).

30 ³⁷³ *Cigna Healthcare of Arizona, Inc. & Conn. Gen. Life Ins. Co. v. Ariz. State Procurement Off.*, 04-0008-ADM (May 6, 2005).

³⁷⁴ *Eel River Disposal & Res. Recovery, Inc. v. Cnty. Of Humboldt*, 221 Cal. App. 4th 209, 238, 164 Cal. Rptr. 3d 316, 339 (2013).

1 with qualified proposals determined to be the most advantageous to the state for each of
2 the counties in this state.”³⁷⁵

3 7. AHCCCS’s implementation of A.R.S. § 36-2906(C)(7) requires that the
4 award resulting from the RFP process be “a contract to the responsible and responsive
5 offeror whose proposal is determined most advantageous to the state under A.R.S. § 36-
6 2906.”³⁷⁶

7 8. AHCCCS’s contract award decision was flawed because AHCCCS
8 erroneously defined “state” to mean the best interests of the *agency*, rather than the state
9 and its residents, and using that improper definition, based its contract award decision on
10 administrative ease and protest mitigation.

11 9. AHCCCS’s contract award decision was the result of an arbitrary and flawed
12 procurement process that produced false distinctions in the merits of each offeror’s
13 proposal while simultaneously failing to evaluate each offeror’s actual merits and
14 responsiveness to the submission requirements. The final rankings did not reflect the
15 merits of each offeror’s responsiveness to the submission requirements and instead only
16 compared the proposals against each other.

17 10. Appellants have shown that they had a “substantial probability” or
18 “substantial chance” of receiving a contract because the errors they allege would require
19 a re-bidding of the contract, and they could each compete for the contract under a new
20 procurement.³⁷⁷

21 11. AHCCCS abused its discretion by inexplicably weighting oral presentations
22 at 29 percent and cost bids at 10 percent while giving minimal weight to past performance.

23 12. AHCCCS did not provide a sufficient justification for its decision to award
24 only two contracts when the RFP explicitly contemplated a total of three awards.

25 13. Accordingly, Appellants have met their burden of proof to show that
26 AHCCCS’s contract award decision was not the most advantageous to Arizona.
27

28 ³⁷⁵ A.R.S. § 36-2906(C)(7).

29 ³⁷⁶ A.A.C. R9-22-603.

30 ³⁷⁷ See *Labatt Food Serv., Inc. v. U.S.*, 577 F.3d 1375, 1379 (Fed. Cir. 2009) (holding where protestor contends that errors require re-procurement, and protestor could compete for the contract, the protestor has met the “substantial chance” standard).

1 14. Appellants have also met their burden to show that AHCCCS violated
2 applicable statutes and regulations.

3 15. A.A.C. R9-22-602(B)(2) provides: “The Administration shall evaluate a
4 proposal based on the GSA and the evaluation factors listed in the RFP.”³⁷⁸

5 16. A.R.S. § 36-2904 requires the director to “adopt rules regarding the request
6 for proposal process that provide: . . . 4. For analysis of the proposals for each geographic
7 service area as defined by the director to ensure the provision of health and medical
8 services that are required to be provided throughout the geographic service area pursuant
9 to section 36-2907.”

10 17. The evidence at the hearing established that AHCCCS did not evaluate or
11 score the proposals based upon the GSA. Instead, in contradiction of the RFP and
12 Arizona law, AHCCCS awarded two statewide contracts based on the point scores that
13 were not derived based on GSAs and without discussion or evaluation of GSA-specific
14 considerations.

15 18. Under AHCCCS regulations, the RFP must disclose the “factors used to
16 evaluate a proposal” and then AHCCCS must evaluate the proposals “based on the GSA
17 and the evaluation factors listed in the RFP.”³⁷⁹

18 19. “[A] fair competition necessitates an understanding on the part of all
19 competitors of the basis upon which the award will be made. This is also essential to
20 assure the proposals will be as responsive as possible so the agency can obtain the best
21 possible proposal.”³⁸⁰

22 20. Here, AHCCCS violated A.A.C. R9-22-602(A)(4) and (B)(2) by failing to
23 disclose the criteria used by the evaluators to evaluate the proposals. Listing the “scored
24 portions” of the RFP as “Programmatic Submission Requirements” and “Financial
25 Submission Requirements” was insufficient because these two terms did not tell offerors

26
27 ³⁷⁸ See also A.A.C. R9-28-602 (“The ALTCS RFP for a program contractor (serving members who are EPD
28 shall meet the requirements of A.R.S. §§ 36-2944, A.R.S. § 36-2939, A.A.C. R9-22-602, and Articles 2 and
29 11 of this Chapter.”).

30 ³⁷⁹ A.A.C. R9-22-602(A)(4), (B)(2).

³⁸⁰ See *Isratex, Inc. v. U.S.*, 25 Cl. Ct. 223 (1992) (“As a matter of sound procurement policy, the fullest
possible disclosure of all of the evaluation factors and their relative importance is to be preferred to reliance
on the reasonableness of the offerors’ judgment as to the relative significance of the various evaluation
factors.”).

1 how the proposal would be evaluated, nor did the evaluators use those terms to perform
2 their evaluations. Instead, after the RFP was issued, evaluators created and used
3 undisclosed evaluation criteria that often did not relate to the submission requirements
4 and did not determine offerors' ability to "meet AHCCCS's mission and goals," as stated
5 in the RFP.

6 21. Furthermore, the evaluators were encouraged to develop evaluation criteria
7 after reviewing proposals and did in fact develop such criteria after reviewing proposals
8 and in some instances during the consensus meetings.

9 22. The development of evaluation criteria after reviewing proposals
10 contravenes fundamental tenets of procurement law and creates a potential for bias.³⁸¹

11 23. Here, the development of evaluation criteria after proposals were opened
12 failed to ensure fairness in the process.

13 24. AHCCCS further violated A.A.C. R9-22-602(A)(4) and (B)(2) because it
14 never disclosed its intention to score oral presentations; instead, it explicitly limited the
15 evaluation factors to "Programmatic Submission Requirements" and "Narrative
16 Submission Requirements."

17 25. Accordingly, Appellants met their burden to show that AHCCCS violated
18 applicable regulations regarding the disclosure of evaluation factors.

19 26. Appellants also met their burden to show that AHCCCS committed material,
20 prejudicial errors in the scoring of the narrative submission requirements, the two oral
21 presentations, and the cost bid.

22 27. Appellants met their burden to show that AHCCCS did not treat the offerors
23 fairly with respect to the scoring of B10 and B11 by giving an improper and arbitrary
24 advantage to incumbent offerors.

25
26
27 ³⁸¹ See Decision in Appeal of GuideSoft Bid Protest, RFP BPM003913- MTSMSp-Multi-Temporary Staffing
28 Services-Managed Services Provider, Case No. 22F-003-ADM, *11 ¶ 26 (May 22, 2023) ("Without preset
29 Scoring Criteria, the members of the Evaluation Committee could easily sway the scoring in favor of one
30 offeror or against another offeror."); see also *id.* p. 12 ¶ 29 ("While nothing in the Arizona Procurement
Code explicitly prohibits the formulation of Scoring Criteria after the bids are open and reviewed, such a
process is antithetical to the purposes of the code. Rather, the requirement that Evaluation Tool and
Evaluation Instructions be finalized prior to the offers being opened demonstrates that the offers themselves
should not affect the scoring.").

1 28. Federal regulations require AHCCCS to set rates—including administrative
2 and case management components—based on prior expenses actually incurred, not on
3 bids by offerors.³⁸²

4 29. AHCCCS’s decision to weigh the cost bid at 10 percent of the overall points
5 available is irrational in light of the federal regulations which render the cost bid proposals
6 meaningless.

7 30. Pursuant to A.A.C. R9-22-602(B)(3), AHCCCS “shall provide an offeror fair
8 treatment with respect to discussion and revision of a proposal.”

9 31. AHCCCS significantly deviated from standards of fairness and its regulatory
10 directive when it used the BAFO process to selectively advantage Health Net and APIPA,
11 the two awardees, over other bidders by directing Health Net and APIPA to correct
12 identified flaws or provide additional explanation in their cost bids but not giving similar
13 directions to Health Choice, despite internally concluding that Health Choice’s rates were
14 unreasonable absent further explanation.

15 32. A.A.C. R9-22-603 mandates that “[t]he contract file shall contain the basis
16 on which the award is made.”

17 33. Appellants also met their burden to show that AHCCCS’s scoring of the cost
18 bids was arbitrary and irrational and also violated A.A.C. R9-22-603, as no evidence was
19 submitted that could explain the basis upon which the evaluation team arrived at its
20 ranking decision.

21 34. Appellants also met their burden to show that Acting Director Heredia’s
22 involvement in the contract award decision deprived them of their legal right to two
23 independent levels of review.

24 35. Procurement protest regulations ensure a two-tiered review system, where
25 an impartial Director resolves the appeal of a protest decision by the procurement
26 officer.³⁸³

27 36. AHCCCS’s procurement protest regulations ensure two separate levels of
28 administrative process prior to AHCCCS issuing a final, judicially appealable
29

30 ³⁸² 42 C.F.R. §§ 438.5(b)(3) & (e).

³⁸³ A.A.C. R2-22-604(B), (G), (I).

1 administrative decision.³⁸⁴ First, a procurement officer has authority to resolve a
2 procurement protest.³⁸⁵ Second, AHCCCS' Director resolves an appeal from a protest
3 denial,³⁸⁶

4 37. In resolving an appeal, the Director may refer an appeal for an
5 administrative hearing and make a final agency decision following an administrative law
6 judge's recommended decision.³⁸⁷

7 38. When an administrative agency establishes a two-tier level of administrative
8 review, it must ensure two independent levels of administrative review.³⁸⁸

9 39. AHCCCS's failure to abide by its regulatory established two-tiered
10 administrative process resulted in an invalid "one-sided scheme" that denied Appellants
11 "a neutral, unbiased decision maker" that "rendered the process unenforceable as a
12 matter of law."³⁸⁹

13 40. The law imposes on parties a duty to preserve evidence if they know or
14 reasonably should know that the evidence is relevant to a case or which they reasonably
15 should anticipate will be relevant in a future case.³⁹⁰

16 41. If the court determines that a party has failed to preserve evidence, the trial
17 judge has discretion to determine if a party's conduct warrants sanctions, and if so, what
18 type of sanction would be appropriate under the circumstances.³⁹¹

19 42. Here, AHCCCS failed to preserve evidence regarding the basis and process
20 of its award decision in the RFP. Because AHCCCS failed to preserve the evidence, this
21 Tribunal may assume that the evidence would have been unfavorable to AHCCCS.³⁹²
22 None of the Administrative Law Judge's factual findings or legal conclusions turn on the

23 ³⁸⁴ See A.A.C. R2-22-604(B).

24 ³⁸⁵ *Id.*

25 ³⁸⁶ See A.A.C. R2-22-604(B), (G), (I).

26 ³⁸⁷ See A.R.S. § 41-1092.08(B).

27 ³⁸⁸ See *Falcone Brothers & Assocs. v. City of Tucson*, 240 Ariz. 482, ¶18, 381 P.3d 276, 282-83 (Ariz. Ct.
28 App. 2016) (finding that the city violated its two-tiered administrative regulations where the procurement
29 officer acted as both the first-tier reviewer and the second-tier final decision makers); *R.L. Augustine Const.*
30 *Co., Inc. v. Peoria Unified Sch. Dist.*, 188 Ariz. 368, 936 P.2d 554 (1997) (finding that where administrative
regulations are structured to provide a two-tiered protest process they must have two tiers of review in
substance, not just in form).

³⁸⁹ See *id.* at 490 ¶ 22, 381 P.3d at 283-84.

³⁹⁰ *Souza v. Fred Carries Contracts, Inc.*, 191 Ariz. 247, 955 P.2d 3 (App. 1997).

³⁹¹ *Id.* at 250, 955 P.2d at 6; *McMurtry v. Weatherford Hotel, Inc.*, 231 Ariz. 244, 293 P.3d 520 (App. 2013).

³⁹² *Smyser v. City of Phoenix*, 215 Ariz. 428, 160 P.3d 1186 (App. 2007).

1 application of this presumption, but as a result of the document destruction, the
2 Administrative Law Judge has not given AHCCCS any benefit of the doubt on contested
3 issues that might have been resolved in its favor had evidence been preserved.

4 43. Appellants' protests and appeals were timely filed, and their arguments
5 were timely and not waived because Appellants' arguments were not based on
6 irregularities apparent on the face of the RFP.

7 44. Based on all the foregoing conclusions, Appellants have sustained their
8 burden to establish that AHCCCS violated applicable statutes and rules and the
9 procurement was tainted by substantial irregularities in the proceedings, which were
10 materially prejudicial to Appellants, and but for such improprieties, there was a substantial
11 probability that the Appellants would have been the recipients of a contract award.

12 45. Under A.A.C. R9-22-604(K), the Administrative Law Judge has the authority
13 to issue a recommended decision to the Director of AHCCCS which the Director may
14 accept, reject, or modify.³⁹³ Neither A.R.S. § 41-1092.08 nor A.A.C. R9-22-604 limit what
15 remedies the Administrative Law Judge may recommend.

16 46. The remedies available to the procurement officer are also available on
17 appeal of the procurement officer's decision. These remedies include "a. Terminating the
18 contract; b. Reissuing the RFP; c. Issuing a new RFP; d. Awarding a contract consistent
19 with statutes, rules, and the terms of the RFP; or e. Any relief determined necessary to
20 ensure compliance with applicable statutes and rules."³⁹⁴

21 47. Due to the serious flaws in the procurement process and the arbitrary
22 outcome of the award determination, it is recommended that Appellants' appeal be
23 granted, the procurement cancelled, and a new request for proposal issued.

24 **RECOMMENDED ORDER**

25 Based on the foregoing, it is recommended that the appeal filed by Appellants
26 Mercy Care, Health Choice, and Banner be granted.
27
28
29

30 ³⁹³ See also A.R.S. § 41-1092.08(B).

³⁹⁴ A.A.C. R9-22-604(H).

1
2 *In the event of certification of the Administrative Law Judge Decision by the Director*
3 *of the Office of Administrative Hearings, the effective date of the Order will be forty (40)*
4 *days from the date of that certification.*

5
6 Done this day, August 9, 2024.

7
8 /s/ Sondra J. Vanella
9 Administrative Law Judge

10 Transmitted by either mail, e-mail, or facsimile to:

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