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ATTORNEYS AT LAW

January 31, 2013  
Via email and hand delivery

ATTORNEYS

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David Bohna  
Procurement Officer  
Department of Administration  
Division of Retirement and Benefits  
333 West Willoughby, Sixth Floor  
Juneau, AK 99811  
David.bohna@alaska.gov

Re: Protest of Section 1.14 Requirement Added on January 25, 2013 to  
Request for Proposals (RFP) Number: 2013-0200-1396

Dear David Bohna, Procurement Officer:

We have been retained by HealthSmart Benefits Solutions, Inc. (hereafter HealthSmart) to file this Protest with respect to RFP 2013-0200-1396, and in particular the Section 1.14 requirement added by the State on January 25, 2013.

HealthSmart files this Protest reluctantly out of an abundance of caution. HealthSmart believes that it was not the intent of the State to restrict the potential bids to preclude HealthSmart from submitting a bid using the ASA Network or to restrict any other potential offeror or network from submitting bids in a similar manner. Because disqualification of HealthSmart's bid and Aetna's bid could result from a perceived inadequate certification, HealthSmart sees no option but to file this Protest before the bids are submitted.

### A. Information Required under A.S. 36.30.560

#### 1. Name, address and telephone number of the Protester

The appeal is submitted by HealthSmart Benefits Solutions, Inc., 602 Virginia Street East, Charleston, WV 25301-2154, (304) 556-4792

2. Signature of the protester or the protester's representative

We have been authorized to sign this Protest on behalf of HealthSmart Benefits Solutions

3. Identification of the contracting agency and the solicitation or contract at issue

The contracting agency is the Department of Administration, Division of Retirement and Benefits. The RFP at issue is RFP 2013-0200-1396. The section at issue is:

Section 1.14, or any other provision of the RFP, will not disqualify an Offeror based on an independently negotiated network solution if the offeror and the network provider both certify in writing that the network offered in the proposal was negotiated independent of this RFP and the network is not controlled or operated by a competing offeror. If you are providing this certification, please attach it to your proposal.

4. Detailed statement of the factual and legal grounds of the protest

B. Factual Background

HealthSmart Benefits Solutions is the current Third Party Administrator (TPA) for the AlaskaCare Health Plans. Beginning at least six months ago, HealthSmart advised the Division of Retirement and Benefits that the State could save at least \$30,000,000 per year by allowing HealthSmart to modify its provider network strategy on the AlaskaCare plans. The modification proposed by HealthSmart would change the network in the Lower 48 from the Beech Street network to the Aetna network. HealthSmart has access to the Aetna provider network through an agreement with Aetna Signature Administrators (hereafter ASA). ASA is a separate division of Aetna that markets its services to large Third Party Administrators such as HealthSmart. HealthSmart's agreement with ASA allows HealthSmart to utilize the Aetna network to assist on any clients that it chooses in accordance with its agreement with ASA. The agreement between HealthSmart and ASA predates, and was negotiated independent of, any future proposal submission by HealthSmart in response to the State's RFP.

On November 9, 2013, the Department of Administration (hereafter Department) issued RFP 2013-0200-1396. As part of the pre-bid process, numerous questions and inquiries have been posed to the Department to which the Department has responded.

On February 1, 2011, HealthSmart entered an agreement with ASA allowing HealthSmart to offer TPA services in conjunction with the use of the Aetna Network. HealthSmart intends to submit its proposal on RFP 2013-0200-1396 using the Aetna network as a part of its overall network

strategy, as it is entitled to do in accordance with its contract with ASA. As noted above, the potential savings to the State as a result of HealthSmart's proposed overall network strategy likely exceeds \$30,000,000 annually.

Because ASA is a Division of Aetna, HealthSmart desired to confirm with the State that the agreement between HealthSmart and ASA did not contravene any aspects of the RFP Requirements. HealthSmart requested that confirmation on January 18, 2013.

On January 25, 2013, the Division responded as follows:

Section 1.14, or any other provision of the RFP, will not disqualify an Offeror based on an independently negotiated network solution if the offeror and the network provider both certify in writing that the network offered in the proposal was negotiated independent of this RFP and the network is not controlled or operated by a competing offeror. If you are providing this certification, please attach it to your proposal.

Additionally, the Division stated:

Per Section 2.21 of the Introduction and Instructions document, "Protests based on any alleged impropriety or ambiguity will be disallowed if objections are not brought to the attention of the Procurement Officer, in writing, at least ten days before the time set for opening as provided in AS 36.30.565." This requires offerors protest the form or content of the solicitation, including the method for evaluation, on or before January 31, 2013.

In light of the Division's response of January 25, 2013, HealthSmart has been forced to file this Protest.

### C. Legal Grounds for Protest

HealthSmart contends that if the intent of the State with respect to Section 1.14, set out in the Division's response on January 25, 2013, is to deny HealthSmart the right and opportunity to submit a competitive bid utilizing the services of ASA, the proposed interpretation of Section 1.14 is improper or ambiguous. HealthSmart requests that under the circumstances as set out above in Part A. the Department confirm that a bid submitted by HealthSmart utilizing ASA does not contravene Section 1.14 and that HealthSmart and Aetna may certify their separate bid under Section 1.14, with HealthSmart utilizing ASA, without either bid being subject to disqualification under Section 1.14.

The following is a summary of the legal reasons why the State's additional language of January 25, 2013, is improper and/or ambiguous. Because the State did not provide this new restriction until January 25, 2013, and issued the new restriction without any stated basis or reason, HealthSmart is not being allowed an adequate and fair opportunity to submit more extensive briefing and analysis.

1. The added language "and the network provider both" and "and the network is not controlled or operated by a competing offeror" contravenes 2 AAC 12.120. The certification required by 2 AAC 12.120 is that "the price submitted was independently arrived at without collusion." The offer submitted by HealthSmart will include certification that the negotiations with and agreement with ASA was "independently arrived at without collusion." Aetna could similarly provide the same certification as to ASA. The State's effort to add additional language beyond the requirements of the regulation is unlawful, without any stated reason or basis, is arbitrary, and denies HealthSmart due process and a fair opportunity to submit a competitive bid. We are not aware of any other procurement where the State has required the offeror and a subcomponent company provider of the bid to both provide an anti-collusion certificate.
2. The State has instituted this new requirement only days before the bid date (February 8, 2013) without any reason or basis provided, which demonstrates arbitrary and capricious action by the State.
3. The State is required to act in its best interests when soliciting bids for the RFP and in evaluating and selecting an offeror to provide the service. The State's new requirement, which it might interpret so as to result in HealthSmart not being able to submit a competitive bid, will cost the State at least \$30,000,000 annually, and is clearly not an action in the best interests of the State. At a minimum, the State should either withdraw the requirement or confirm that HealthSmart will not be disqualified if HealthSmart submits its bid using ASA, and allow the bid process evaluation to determine which offeror should be awarded the contract.
4. The State's answer of January 25, 2013 forces HealthSmart and Aetna to submit bids not knowing whether the State will automatically disqualify both bids. The State's action is arbitrary and capricious. It is only fair that the State make clear before the bids are due that neither HealthSmart nor Aetna's bids will be disqualified by HealthSmart using ASA as part of its offer.
5. The agreement between HealthSmart and ASA was independently negotiated by both parties and predates the State's RFP. There is no collusion and no risk of collusion.

The State's January 25, 2013 answers create a new restriction that is prohibitive and not in accordance with 2 AAC 12.120. The new restriction is also not required by any statute or regulation. HealthSmart has no problem providing an anti-collusion certification. To graft on the additional requirement that the network utilized not be "controlled or operated by a competing offeror," is arbitrary and capricious, particularly in light of the State's knowledge that the agreement with ASA was independently negotiated. ASA does not collaborate with any other division of Aetna. The agreement between HealthSmart and ASA does not control HealthSmart's overall pricing. ASA has similar agreements with other Third Party Administrators.

6. It is in the best interests of the State to allow and encourage TPAs to submit proposals. It is contrary to the best interests of the State to use an eleventh hour added requirement, which has no basis in any statute or regulation, to restrict HealthSmart from submitting a competitive bid.
7. By the State providing a definitive ruling that HealthSmart and Aetna's bids will not be disqualified with HealthSmart utilizing ASA, the State will avoid unnecessary potential bid protests and avoid the prospect of delays and extensive expense related to bid protests and possible court action.

#### D. Form of Relief Requested

HealthSmart respectfully requests that the State:

1. Confirm in writing that a bid by HealthSmart utilizing ASA will not be disqualified under Section 1.14, or;
2. Confirm in writing that a bid by HealthSmart utilizing ASA will not disqualify a bid by Aetna under Section 1.14.
3. Alternatively, delay the bid opening currently scheduled for February 8, 2013 to allow complete and thorough evaluation and further legal briefing, or a hearing if necessary, on the State's added restriction. This relief does not prejudice the State as the State has announced its intention to extend the current contract with HealthSmart for six months.

#### E. Conclusion

The State's added certification requirement on January 25, 2013, provided without any reason, justification or legal basis, constitutes an arbitrary and capricious action by the State, which is not in

*Letter of Protest to David Bohna, Procurement Officer  
On Behalf of HealthSmart Benefits Solutions  
Protest of Section 1.14 Requirement Added On January 25, 2013  
To Request For Proposals Number: 2013-0200-1396  
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the best interests of the State, and is specifically contrary to the certification requirements set out in 2 AAC 12.120. The State has not provided any rationale or reasonable basis for making the certification requirements of this RFP more restrictive than required by regulation for any other similar RFP.

HealthSmart respectfully requests that the State rescind that portion of its answer that requires certification that its bid does not include network services provided by a company “controlled or operated by a competing offeror,” or alternatively, confirm that a bid submitted by HealthSmart utilizing ASA will not result in these circumstances to disqualify HealthSmart’s bid or Aetna’s bid.

Sincerely,

A handwritten signature in blue ink, appearing to read "Robert P. Blasco", is written over the typed name.

Robert P. Blasco

cc: James David Kelly, Vice President and General Counsel  
Jennings Hart (J), Senior Vice President