FIRST JUDICIAL DISTRICT COURT
COUNTY OF SANTA FE
STATE OF NEW MEXICO

MOLINA HEALTHCARE OF NEW MEXICO, INC.,

Plaintiff,

Case assigned to Shaffer, Gregory S.

v. Case No. D-101-CV-2018-00356

NEW MEXICO HUMAN SERVICES DEPARTMENT,
and BRENT EARNEST, in his official capacity
as Cabinet Secretary of the New Mexico
Human Services Department,

Defendants.

COMPLAINT

Pursuant to Rule 1-008 NMRA, and NMSA 1978, §§ 44-6-1, *et seq*., 39-3-1.1 & 13-1-183, Plaintiff Molina Healthcare of New Mexico, Inc., a New Mexico corporation, respectfully files this action seeking Declaratory and Injunctive Relief to maintain its delivery of managed care, healthcare services, and networks of medical and behavioral health providers to 224,000 New Mexico Medicaid recipients during the pendency of an RFP award protest.

NATURE OF THE ACTION

1. Molina Healthcare of New Mexico, Inc. ("Molina") is one of four incumbent, or current, Managed Care Organizations ("MCOs") providing managed care to New Mexicans under New Mexico's Centennial Care Medicaid program. Managed care is similar to insurance but more comprehensive, providing networks of medical and behavioral health providers, managing care and services, processing claims, and similar services. Molina's contract to provide such services ends December 31, 2018, but could have been extended by the New Mexico Human Service Department ("HSD").

2. Rather than extend the contracts of the incumbent insurers, and for reasons unknown to the public, HSD issued a Request for Proposals ("RFP") under the New Mexico Procurement Code. The decision to procure bids was not necessary, as the contracts for incumbent providers could have been extended for an additional year. HSD has accelerated the RFP process as it has proceeded. HSD retained a contractor, "Mercer," and relied on Mercer during the RFP process. Mercer was largely responsible for the development of RFP 18-630-8000-0001 including drafting the RFP, developing its evaluation factors and rate tables, managing the procurement process, evaluating bids, and "coaching" HSD personnel in the evaluation of bids.

3. HSD issued RFP 18-630-8000-0001 on September 1, 2017. Molina timely submitted a responsive bid on November 3, 2017. Seven other companies provided bids, including all incumbent MCOs. On December 20, 2017, Mercer issued recommendations regarding which bidders should be awarded a contract. On January 19, 2018, about two months before the date set forth in the RFP, HSD announced the bidders that were awarded contracts.

4. HSD awarded contracts to Presbyterian Health Plan ("PHP"), Blue Cross Blue Shield of New Mexico ("BCBS"), and Western Sky Community Care ("Western Sky"). Western Sky is a subsidiary of Centene Corporation. PHP and BCBS are incumbent MCOs that currently provide managed Medicaid healthcare services in New Mexico. Western Sky is not an incumbent MCO. Services under the new contracts are proposed to begin on January 1, 2019.

5. HSD did not award contracts to Molina or United Healthcare ("UHC"), another incumbent MCO in New Mexico.

6. As explained below, HSD has admitted that the rates to be paid to MCOs under the RFP are not actuarially sound. *See* Paragraphs 36-43. Such unsustainable rates will likely result in a loss of services to New Mexicans.

7. Molina has been providing services to New Mexicans since 2004. Molina currently provides healthcare services to about 263,000 New Mexicans. It provides services to about 224,000 New Mexicans through Medicaid (about 26% of all New Mexico Medicaid members), 5,500 New Mexicans through Medicare, and an additional 29,000 New Mexicans through the Exchange, also referred to as the Marketplace, created by the Affordable Care Act ("ACA") (which is about 58% of all New Mexico Exchange members). Molina has a large national call center in downtown Albuquerque. Molina has 1,119 employees in New Mexico, and networks of medical and mental healthcare providers totaling 14,000 providers, the largest in New Mexico.

8. Molina serves some of New Mexico's most vulnerable Medicaid populations. For instance: Molina manages care for over 22,000 New Mexicans with serious mental illnesses; over 2,300 New Mexicans in opioid treatment programs; over 103,000 New Mexicans with diagnosed chronic conditions; and, over 12,500 New Mexicans who receive durable medical equipment such as wheelchairs, oxygen supply equipment, patient lifts, and equipment related to blood sugar and diabetes. In New Mexico, 103,205 Molina members receive behavioral health services, and 35,036 Molina members receive substance abuse services. Molina serves over 5,800 New Mexicans who receive Long Term Care services such as nursing homes or community based care, over 3,300 New Mexicans receiving Personal Care Services, and 1,950 New Mexicans with disabilities on waiver services. By not selecting Molina to continue as an MCO beyond 2018, HSD is

forcing all of these vulnerable populations to select new health plans. Their plans of care will also have to be restarted and, in many cases, they will be moved to new healthcare providers.

9. Molina also provides Medicaid managed care to over 10,000 Native Americans in New Mexico. Molina's extensive services include: collaboration with tribal officials to provide health education and literacy to Native Americans; consultation with Native officials to provide better services to incarcerated Native Americans; grants to other providers such as $145,000 to Pine Hill Clinic; and assisting with the installation of telemedicine infrastructure at First Nations, whose locations are in Albuquerque, Farmington, and Gallup. Molina was the first MCO in New Mexico to provide a Traditional Healing Benefit to Native American members for traditional customs and ceremonies.

10. HSD's decision to end Molina's Medicaid managed care contract places at risk all of Molina's operations in New Mexico, including the Exchange and Medicare lines of business. HSD's decision also places at risk the State's healthcare infrastructure that Molina has developed.

11. Consumer Reports ranked Molina's Medicaid services as the best in New Mexico from 2013 through 2016, and second best in 2017.

12. HSD's procurement process excluded important stakeholders from participating in the process, including from the proposal review process. These stakeholders include the New Mexico Department of Health; the New Mexico Children, Youth and Families Department; the Office of Superintendent of Insurance; and the Department of Education which oversees School Based Health Centers and Medicaid School Based Services.

13. Beginning with its decision to issue an RFP rather than exercising its option to extend the contracts of the incumbent MCOs, HSD has sought to accelerate the procurement process without a basis, or at least without an articulated basis. Examples include: the decision to announce the award of contracts in January, 2018, rather than March as set forth in the RFP; the decision to proceed with the procurement during protests despite the absence of findings, reasons, basis, or support; and the written refusal to stay the procurement process after a written request from Molina to do so. HSD had the option to hear oral presentations from the bidders as part of the RFP process, but decided not to do so. This decision is questionable in part because HSD selected a new MCO without a formal meeting with its principals.

PARTIES & JURISDICTION

14. Plaintiff Molina Healthcare of New Mexico, Inc. is a New Mexico corporation, doing business in New Mexico.

15. Defendant New Mexico Human Services Department is a State of New Mexico agency.

16. Defendant Brent Earnest is Cabinet Secretary for the Human Services Department and is named in his official capacity.

17. This Court has jurisdiction pursuant to NMSA 1978, §§ 44-6-1, *et seq*., 39-3-1.1, and 13-1-183.

18. Venue is proper in the Court pursuant to NMSA 1978, § 39-3-1.1(C).

ALLEGATIONS

The Law of Evaluating Bids

19. HSD issued RFP 18-630-8000-0001 on or about September 1, 2017. As required by HSD regulations NMAC 7.1.5.9(A)(1) and (5), that RFP included "specifications for the services … to be provided" and "a statement of the relative weights to be given to the factors in evaluating criteria."

20. HSD regulations require that bids be evaluated "based on the evaluation factors and relative weights *set forth in the request for proposals*." NMAC 7.1.5.13(A) (emphasis added).

21. HSD regulations require an award to "the responsible offeror or offerors whose proposal is most advantageous to the department, taking into consideration the evaluation factors set forth in the request for proposals." NMAC 7.1.14(A).

22. Statutes and regulations regarding procurement and competitive bidding are "strictly construed against the government entity that solicited the bids." *Planning & Design Solutions v. City of Santa Fe*, 1994-NMSC-112, ¶ 6, 118 N.M. 707, 885 P.2d 628.

23. When HSD solicits bids, it must comply with its regulations and the New Mexico Procurement Code. Failure to comply with regulations, the Code and the RFP evaluation factors is a violation of law and is arbitrary and capricious. *Planning & Design Solutions*, 1994-NMSC-112, ¶¶ 7, 19, 22-23.

24. By soliciting bids, HSD enters an implied contract to comply with its regulations, the Procurement Code, and its RFP. Moreover, HSD made an implied contract that bids would be evaluated and accepted based on the evaluation factors in the RFP and no other factors. *Planning & Design Solutions*, 1994-NMSC-112, ¶¶ 27, 29.

25. HSD may not introduce new evaluation factors after the RFP is issued or during the bidding process. To evaluate a bid or offer based on evaluation factors outside the RFP is a violation of law and arbitrary and capricious. *Planning & Design Solutions*, 1994-NMSC-112, ¶¶ 16-17, 24.

26. HSD failed to abide by the Procurement Code, regulations, and factors in the RFP, and by that failure HSD has created at least an appearance of impropriety, and jeopardized the integrity of competitive bidding. *Planning & Design Solutions*, 1994-NMSC-112, ¶ 25. Further, HSD's conduct may deter future qualified providers from bidding in the future, leading to fewer and lower quality choices in insurance and healthcare for New Mexicans. *Id*. ¶ 33.

27. An offeror aggrieved by the HSD procurement process may file a protest. NMSA 1978, § 13-1-172; NMAC 7.1.6.9. After HSD decides the protest, judicial review is available. NMSA 1978, § 13-1-183 (allowing review under NMSA 1978, § 39-3-1.1 and Rule 1-074, NMRA). Molina will file a Protest with HSD regarding the proposed award of RFP 18-630-8000-0001; the Protest will be filed by February 5, 2018, and its contents (and supplements) depend in part on HSD's responses to requests for documents under New Mexico's Inspection for Public Requests Act. HSD has only partially responded and Molina is reviewing the documents.

28. During the pendency of a Protest, HSD's procurement is to proceed no further: "[I]n the event of a timely protest….the department *shall not proceed further* with the procurement…" NMAC 7.1.6.11 (emphasis added); *see also* NMSA 1978, § 13-1-173 ("In the event of a timely protest …. the state purchasing agent or a central purchasing office shall not proceed further with the procurement."). The only exception is if HSD

"makes a written determination" that proceeding during the Protest will meet the "substantial interests" of HSD. *Id*. A "Determination" is defined as "the written documentation of a decision of a procurement officer including findings of fact required to support a decision." NMSA 1978, § 13-1-52; *see also* NMAC 7.1.6.11 ("Such written determination [regarding proceeding during a Protest] should set forth the basis for the determination."). HSD stated in the January 19, 2018, "Announcement of Award" letter, without reasons, findings, basis, or support, that proceeding with the procurement during the pendency of a protest is in the substantial interest of the agency.

29. A bidder may be debarred, meaning barred from providing the services for which HSD is soliciting bids, for the following reasons, among others:

> (8) violation by a bidder, offeror or contractor of contract provisions, as set forth in this paragraph, of a character that is reasonably regarded by the state purchasing agent or a central purchasing office to be so serious as to justify suspension or debarment action, including:
>
> (a) willful failure to perform in accordance with one or more contracts; or
>
> (b) a history of failure to perform or of unsatisfactory performance of one or more contracts; provided that this failure or unsatisfactory performance has occurred within a reasonable time preceding the decision to impose debarment; and provided further that failure to perform or unsatisfactory performance caused by acts beyond the control of the contractor shall not be considered to be a basis for debarment;
>
> (9) any other cause that the state purchasing agent or a central purchasing office determines to be so serious and compelling as to affect responsibility as a contractor.

NMSA 1978, § 13-1-178(A)(8), (A)(9).

HSD's Initial Violations of Law

30. RFP 18-630-8000-0001 had three categories of evaluation factors: technical, references, and cost. The total possible score was 2090 points: 1390 from technical factors, 300 from references, and 400 from cost factors. Molina scored the highest (more accurately, tied for the highest with PHP) with regard to its reference score. Molina was evaluated fifth (by two points) in its technical score, but HSD violated the law in scoring the technical evaluation factors.

31. When evaluating Molina's bid for RFP 18-630-8000-0001, HSD reduced Molina's score because Molina did not provide certain information. However, that information was not requested in the RFP. For example,

   a. In Section 6.3, Question 25, HSD asked: "The New Mexico Behavioral Health Collaborative has a vision of a statewide crisis response system that meets unique community and Member needs. Describe how your organization's crisis intervention services will be provided to Members in Urban, Rural, Frontier and Tribal areas of the State." Molina's score was reduced for failing to provide information about workforce development, admission timeframes, or justice involved members; but such information was not sought in Question 25.

   b. In section 6.7, Question 62, HSD asked: "Describe any current or planned efforts or strategies and any barriers and proposed solutions to secure contracts with Tribal organizations for: a) Non-emergency medical transportation services; b) Care coordination and/or case management services; c) Behavioral health services, including the treatment of substance abuse; and d) Any other Medicaid-covered services provided outside of a clinic or hospital." Molina's score was reduced for failing to provide details about the resolution of disputes or complaints with Tribes and how equipment would be purchased; but such information was not sought in Question 62.

The reduction in Molina's score for its alleged failure to provide information not requested in the RFP was a violation of law, was arbitrary and capricious, and was material to the RFP evaluation.

32. When evaluating Molina's bid for RFP 18-630-8000-0001, HSD reduced Molina's score using undisclosed evaluation factors. This occurred up to 30 times. In other words, HSD changed the evaluation factors and/or added new evaluation factors during the bid process up to 30 times, and then reduced Molina's technical score based on those new, undisclosed, factors. For example,

a. In Section 6.4, Question 30, HSD asked "Identify any measurable results in terms of clinical outcomes and program savings that have resulted from the Offeror's care coordination and/or service coordination initiatives." HSD reduced Molina's score for failing to provide "Details regarding integration of behavioral health lacked details." Although behavior health integration information was not listed in the question requirements, HSD directed its evaluators to score bids based on whether "the Offeror describe(s) any initiatives focused on behavioral health or integration strategies?" The undisclosed evaluations factor resulted in a decrease in Molina's overall score.

b. In Section 6.9, Question 75, HSD asked: "Describe your organization's single case agreements and prior authorization (PA) process. Include, at a minimum: a) How PAs will be applied for Members requiring out-of-network services, or services for conditions that threaten the Member's life or health; b) How the Offeror will ensure that services are not arbitrarily or inappropriately denied or reduced in amount, duration, or scope; c) Your process for Member access to emergency and nonemergency transportation; d) Your process for accessing out of state services or placements that require authorization; and e) How you will ensure and monitor for consistent application of review criteria." Molina's response was marked as deficient because the "Response did not address exemption of ITU services from prior authorization." Although the question did not request information on the prior authorization requirements for ITU's, HSD directed its evaluators to score the response based on whether "the response indicate[d] an understanding that emergency services and services provided by I/T/Us do not require PA?" The undisclosed evaluations factor resulted in a decrease in Molina's overall score.

The reduction in Molina's score based on undisclosed evaluation factors was a violation of law, was arbitrary and capricious, and was material to the RFP evaluation.

33. When evaluating Molina's bid for RFP 18-630-8000-0001, HSD reduced Molina's score using information that was outside the RFP process. For example,

a. Questions 42 and 74 were both scored on whether the HSD evaluators "liked" the innovations Molina presented. Reviewing an RFP response based upon an evaluator's personal preference is based on "information" outside the RFP process and is improperly based on subjectivity.

b. The HSD evaluators reduced Molina's score because "Team concerned about change in corporate leadership, huge losses reported for Puerto Rico and reducing workforce by 10%. There are specific risks and uncertainties noted in the response. If contracted, the state will need to discuss additional protections for NM." No such information was provided by Molina in its proposal or otherwise during the RFP process. The HSD evaluators appear to have relied upon news and other media sources, or Mercer personnel, to obtain information about Molina's parent company and sister plans.

The reduction in Molina's score based on information obtained outside the RFP process was a violation of law, was arbitrary and capricious, and was material to the RFP evaluation.

34. During the procurement process, and before bidders submit responses, bidders may ask HSD questions, which HSD then answers in a public format. The new/undisclosed scoring criteria were not disclosed during the pre-bid Question & Answer process. After bidders submit responses to the RFP, HSD may ask clarifying questions to individual bidders to address questions about individual bids that HSD may have. It is common for state agencies to ask for clarifications from MCOs, but HSD did not send any questions or requests for clarifications after reviewing Molina's bid. Thus, HSD reduced Molina's score due to "missing information" not requested, new and undisclosed evaluation factors, and information outside the RFP process without addressing these issues in either the pre-bid Question & Answers, or through post-bid clarifying questions and requests.

35. Other bidders did not conform to the rules of the bid process. For instance, BCBS exceeded the page limit for discrete portions of the RFP response on six occasions. HSD reserved the option to disqualify a response for such failures to conform, but did not.

Mercer Creates Unsustainable Rates in the RFP

36. HSD contracted with Mercer to provide services related to RFP 18-630-8000-0001. Mercer's services included drafting the proposal documents, reviewing the proposal, training or "coaching" HSD subject matter experts on how to evaluate the bids, and conducting "consensus scoring meetings," through which individual scores from individual evaluators were "blended" or adjusted into one consensus score for an evaluation factor. Mercer also drafted the scoring summary and other documents announcing HSD's proposed award.

37. Mercer's services included setting the "cost structure" or "rate table" for RFP 18-630-8000-0001. The rate table is a range of rates, from a minimum to a maximum, within which each bidder offers a price. The pricing is set at dollars per member per month. The pricing varies considerably depending on the "category" of member – a member known to require behavioral health services, or living in a nursing home, is considerably more expensive than the pricing for a healthy adult or child.

38. For instance, one category was physical health services for children whose parents receive TANF benefits (Temporary Assistance for Needy Families) who are 0 to 2 months old. The rate range (rounded) was $5,004 to $5,281 per member per month. Each bidder then offered a price within that range; if accepted by HSD, the bidder would receive that amount per member in the category, per month regardless of whether services were provided (this rate is termed a "capitation rate").

39. Lower prices offered by bidders resulted in higher scores on the cost factor.

40. Setting aside considerable detail, Molina generally offered prices in the 70th percentile of the rate table. Thus, if the range was 0-100, Molina's offered price was about 70.

Molina's offered price was the highest of the eight bidders, and Molina was scored lowest of the eight bidders on the cost evaluation factors, receiving 120 points out of a possible 400. Molina's pricing offer is actuarially sound, and ensures that it can provide managed healthcare services to New Mexicans.

41. Molina is an incumbent MCO providing healthcare services to 224,000 New Mexicans. Thus, Molina knows what it costs to provide quality healthcare to New Mexicans with Medicaid, and priced its bid accordingly.

42. By contrast, HSD admitted during the RFP process that the rate table created by Mercer was not actuarially sound. In response to Question 38, submitted during the pre-bid Question & Answer process, HSD provided the following answer, which is public information:

> The min/max capitation **rates provided as part of this RFP are not the actuarially sound capitation rate range**. These are the range of rates HSD is willing to accept in response to the RFP. RFP Section 7.3, as well as the Data Book Narrative, outline elements that have been excluded from the min/max rates that will be adjusted following the contract award. (emphasis added).

43. The fact that the capitation rates set by Mercer are not actuarially sound, and bias and a conflict of interest between Mercer and Western Sky's parent, Centene, make the cost evaluation factor in violation of law, arbitrary/capricious, lacking in an evidentiary foundation, and fraudulent or in bad faith. More importantly, it resulted in proposed awards, which will harm New Mexicans by forcing them to change MCOs (and likely health and behavioral healthcare providers) and will undermine the sustainability of Medicaid health coverage in New Mexico.

Mercer and Centene Have a Business Relationship; Thus Mercer has a Conflict of Interest

44. Western Sky, to which HSD awarded a contract as a result of RFP 18-630-8000-0001, is a wholly-owned subsidiary of Centene Corporation. Centene has another subsidiary, Envolve, which is a specialty health services company (providing services such as pharmacy benefit delivery).

45. Mercer has a substantial contractual relationship with Envolve; based on information and belief, Mercer and Centene, through Envolve, have a billion or multi-billion dollar contractual business relationship. https://aishealth.com/archive/ndbn110416-02. The bid by Centene/Western Sky is clear that Envolve will be heavily utilized by Western Sky in New Mexico. Mercer has a vested interest in the success of Envolve, and apparently will benefit from any revenue and profit Envolve obtains from operations in New Mexico.

46. In its bid, Centene/Western Sky references Envolve often, and details its plans to utilize Envolve for many specialty services. When Centene/Western Sky referenced the use of Envolve's services, many of HSD's evaluators scored the bid particularly high. In addition, HSD evaluators made 17 comments for superior elements when evaluating two questions focusing on pharmacy benefits; Mercer's partnership with Envolve focuses specifically on pharmacy services.

47. Envolve, a company in which both Centene and Mercer have a direct interest, was integral to the bid by Centene's captive subsidiary, Western Sky. Mercer has a significant interest in how Envolve was perceived, whether Western Sky was evaluated and selected, and Envolve's revenue and profit. Yet Mercer was also centrally involved in developing, managing, and evaluating RFP 18-630-8000-0001.

48. Mercer's contract with HSD for RFP 18-630-8000-0001 prohibits Mercer from "any interest, direct or indirect…which conflict in any manner or degree with … services provided."

49. The conflict of interest is exacerbated because, as explained below, Mercer annually sets New Mexico's rates paid to MCOs for Medicaid services. Thus, Mercer will have the ability to raise the rates Centene's subsidiary will be paid, profiting Centene, Envolve, and Mercer itself. Because Mercer has set rates that Molina has shown are not sustainable, this appears likely to occur.

50. It is not known at this time whether Mercer disclosed to HSD its substantial business relationship with Centene/Envolve/Western Sky. Mercer had a contractual obligation to disclose that business relationship. If Mercer did not disclose the business relationship, then RFP 18-630-8000-0001 was conducted in a biased manner, fraudulently or in bad faith, and in violation of law. If the business relationship was disclosed, then HSD had the right to terminate Mercer's contract related to RFP 18-630-8000-0001. Mercer's contract was not terminated. If HSD knew of Envolve, then HSD should have recognized that Mercer had a conflict of interest due to its business relationship with Centene. If HSD allowed Mercer to proceed with the RFP, knowing the business relationship with Centene, then RFP 18-630-8000-0001 was conducted in a biased manner, fraudulently or in bad faith, and in violation of law. The conflict of interest is exacerbated by the low pricing rates that Mercer and Centene both prefer. These low rates are not sustainable.

Low Rates by Mercer, Centene and HSD Create Harm

51. Mercer provides services to HSD outside RFP 18-630-8000-0001. Most importantly, Mercer is the entity that has set the rate structure for the incumbent Centennial Care MCOs for several years. In other words, for years Mercer has set the rates Medicaid MCOs received; and then HSD contracted with Mercer to set the rates upon which bidders would be scored in the RFP process.

52. During the years that Mercer has set capitation rates, Molina has challenged Mercer's rates and persuasively demonstrated (though Mercer has not agreed) that Mercer's rates are not actuarially sound, and are not sustainable. In the short term, these unsound rates mean losses for the businesses providing Medicaid coverage. In the long term, this means that the services promised to New Mexicans will not be provided and MCOs will leave New Mexico.

53. Mercer, and HSD, appears to have an interest in ending Molina's Medicaid contract because Molina vocally and effectively challenges Mercer's rates as unsustainable and not actuarially sound. And, HSD has admitted that it accepts such rates set by Mercer. Centene and its subsidiaries, by contrast, would be more amenable to accepting Mercer's rates due to their business relationship.

54. In RFP 18-630-8000-0001, Mercer could set rates low with the knowledge that Centene, its business partner, shares Mercer's preference for low rates when entering a market and in order to win business through an RFP; and the belief or knowledge that Centene would offer low prices or rates.

55. Western Sky/Centene scored 254 points on the cost evaluation factor. Generally, it offered prices in the 40th percentile. The prices or rates offered by Western Sky/Centene in New Mexico were not actuarially sound.

56. Centene appears to consistently bid low in response to state RFPs, and then pressures a state for more money once established in the state. Centene and its subsidiaries have a history of failing to provide the services promised for the price offered.

57. For instance, in 2013, a Centene subsidiary abruptly ceased providing managed care to Medicaid members in Kentucky when the rates became unsustainable and Centene began to experience adverse financial consequences. Although all of the MCOs in Kentucky at that time experienced similar losses due to the unsustainable rates, Centene was the only company to terminate its contract and leave Kentucky. This left Kentucky, its citizens, and the other MCOs to absorb the losses and solve the issue. The Commonwealth of Kentucky and its agencies estimated Centene's exit from Kentucky cost the state upwards of $40,000,000. A settlement was eventually reached. *Kentucky Spirit Health Plan, Inc. v. Commonwealth of Kentucky*, Case # 12-CI-01373 (Franklin County Court; filed Oct. 22, 2012). We have not located an estimate of the cost to Kentucky's citizens.

58. It also appears that Centene fails to provide an adequate provider network as a means to lower costs. In December, 2017, another Centene subsidiary agreed to a fine of $1,500,000 imposed by the Insurance Commissioner of the State of Washington for Centene's failure to provide an adequate medical provider network to its ACA/Exchange members. The Insurance Commissioner had previously ordered Centene to halt the sale of health plans in Washington.

59. Then, on January 11, 2018, Centene and two of its subsidiaries were sued in federal court in the Eastern District of Washington. *Harvey v. Centene Corp., et al*., No. 18-cv-00012. The Complaint is a 15-state class action alleging essentially the same misconduct as found by the Insurance Commissioner of the State of Washington – failing to provide an adequate medical provider network for members in the following states: Arkansas, Arizona, Florida, Georgia, Illinois, Indiana, Kansas, Massachusetts, Mississippi, Missouri, New Hampshire, Nevada, Ohio, Texas, and Washington. *Harvey*, No. 18-cv-00012, Complaint [Doc. 1], ¶ 26.

60. The failure to provide an adequate provider network is alleged to be a means to avoid the losses which would otherwise result from offering prices for services which are not sustainable. As alleged in the Washington class action, Centene denies valid claims from medical providers as a means of off-setting its low pricing, and therefore cannot sustain an adequate medical provider network. *Harvey*, No. 18-cv-00012, Complaint [Doc. 1], ¶¶ 12-21, 49-58.

61. Finally, another Centene subsidiary, Centurion, has and is facing multiple lawsuits, approximately 17, in New Mexico for failing to provide adequate care to persons in New Mexico's prisons. http://www.santafenewmexican.com/news/local_news/lawsuits-claim-inmates-still-getting-poor-health-care/article_a8f804d7-14a7-505e-81ab-9c47a8624b4a.html.

62. Based on Molina's review of documents thus far, it appears that the Centene subsidiary did not report these issues, including in Washington and Kentucky, as sanctions in the compliance history part of its bid to RFP 18-630-8000-0001. These issues are substantial enough to warrant consideration for suspension or debarment.

63. Mercer is HSD's contractor for RFP 18-630-8000-0001 and for pricing rates for incumbent Medicaid MCOs. When serving HSD, Mercer prioritizes setting rates that are not actuarially sound, and are not sustainable. Centene, including through its subsidiaries, has a history of offering low prices for Medicaid contracts and other healthcare coverage, but being unable to provide the services promised. Mercer and a Centene subsidiary have a substantial business relationship and aligned business models regarding pricing. Despite that it was or should have been aware of these issues, HSD continued to contract with Mercer to manage RFP 18-630-8000-0001; and awarded a contract with a Centene subsidiary. As the entity setting New Mexico's Medicaid pricing rates, Mercer will have the ability to raise the rates Centene's subsidiary, Western Sky, will be paid, profiting Centene, Envolve, and Mercer itself.

64. The Cost evaluation factor used in RFP 18-630-8000-0001 is not actuarially sound, as HSD has admitted, and is not sustainable. It was developed by Mercer and adopted by HSD despite the business relationship between Centene and Mercer, and Mercer's benefit from Envolve's proposed entry into New Mexico. Mercer had a conflict of interest in RFP 18-630-8000-0001 due to the bid by Centene/Western Sky. Mercer also developed a rate table and cost evaluation factors that benefitted Centene/Western Sky, and caused material harm to Molina. Likely more important, the cost factor has resulted in an award that will result in unsustainable pricing and impair services to New Mexicans. As such, Mercer's rate table, cost evaluation factor, and the award are not in the best interest of HSD, are fraudulent and in bad faith, are arbitrary and capricious, in violation of law, without substantial evidence, and outside the scope of Defendants' authority.

The Damage to New Mexicans

65. As a result of RFP 18-630-8000-0001, HSD proposes to eliminate two incumbent Medicaid MCOs in New Mexico, Molina and United Healthcare. HSD proposes to introduce a new MCO, Western Sky, a Centene subsidiary. And HSD proposes to reduce the number of MCOs in New Mexico from four to three.

66. Partially as a result of HSD's decision, between 224,000 and 263,000 New Mexicans will be forced to seek a new MCO and health plan. Each will undergo the time, expense, and anxiety of changing plans, learning a new system, and trying to form new relationships with the MCO and new providers.

67. Partially as a result of HSD's decision, between 224,000 and 263,000 New Mexicans will be forced to scramble for care, care which is currently and professionally provided by Molina, in a new medical provider network and a new behavioral health network. Approximately 224,000 will be forced to seek one or more new medical and behavioral health providers as a direct result of HSD's decision. Some or many may find an inadequate medical provider and behavioral health network, similar to the experience of people in Washington and, as alleged, in 14 other states.

68. New Mexicans who are Medicaid members of Molina and currently in treatment will be forced by HSD to transition providers during treatment. This is difficult for any person, and is worse for members receiving behavioral health services and substance abuse services. Many of these members receiving behavioral health services had to change providers in 2013, when HSD suspended Medicaid payments to up to 15 behavioral health centers. As a result, many people went without behavioral health services at that time, and may suffer the same outcome as a result of HSD's decision. In New Mexico,

103,205 Molina members receive behavioral health services, and 35,036 Molina members receive substance abuse services. These members are particularly vulnerable to transitions in services and providers. The healthcare infrastructure that Molina has developed and provides to these members will be lost. That infrastructure includes detention center programs, investment in community based care, behavioral health, substance abuse programs, peer wellness centers, behavioral health telehealth equipment and supplies, paramedicine programs, and support for behavioral health providers. New Mexicans receiving behavioral health services will also likely face long wait times to receive needed treatment.

69. New Mexico's other vulnerable populations, including those in Paragraph 8, will be particularly hard pressed to find the time, expertise and resources to change MCOs and providers. New Mexicans receiving durable medical equipment, such as that in Paragraph 8, will likely face long wait times to receive needed equipment.

70. Molina provides funding and services to other providers and local public agencies which is also jeopardized by HSD's decision. For instance, Molina contracts with peer wellness centers to provide peer support services as an extension of Molina's coordination and internal peer support services. Those centers include Inside Out, Albuquerque Center for Hope and Recovery, First Nations Community Healthsource, Catron County Grass Roots, Pine Hill Health Center and Hozho Wellness. Those centers have been able to hire staff and/or expand their services and outreach as a result. Molina has funded local public programs including the Bernalillo County Department of Substance Abuse Program ($200,000), the Dona Ana County Health and Human Services Department ($394,875), and the American Medical Response, Santa Fe Fire Department and Las Cruces Fire

Department ($600,000 for paramedicine programs). Continued funding for these programs and maintaining their current staffing services is at risk due to HSD's decision.

71. As a result of HSD's decision, up to 1,119 New Mexicans currently employed by Molina likely will be forced to seek a new job, with new pay and benefits; and undergo the time, expense, and anxiety of trying to locate new employment, which could cause current Molina employees to move outside the State.

72. Moreover, as a result of HSD's decision, 10,000 Native American New Mexicans will lose an insurer with the demonstrated ability to provide culturally competent services to Native populations in New Mexico and other states. *See* Paragraph 9. Such services were called out in RFP 18-630-8000-0001 as necessary in New Mexico.

The Damage to HSD

73. HSD's decision to eliminate two incumbent providers of managed Medicaid services will create instability in New Mexico. At least 26% of New Mexico Medicaid patients will have to change insurance. These New Mexicans will also have to change medical and behavioral health provider networks, and likely medical and behavioral health providers.

74. HSD's decision to eliminate two incumbent MCOs, and add a new one, will create unnecessary administrative costs for HSD. Established business relationships, from technical to personal, will end or be changed. HSD will have to end its processes with Molina and UHC, as it establishes processes with the Centene subsidiary. Administrative costs will also be incurred as a result of the forced change in MCOs for at least a quarter of New Mexicans with Medicaid coverage.

75. Approximately 852,000 New Mexicans have health insurance through Medicaid. http://www.hsd.state.nm.us/uploads/FileLinks/587930e6bdd0402c9d4990a78c041734/No

v2017_MSR.pdf. Molina provides healthcare services for approximately 224,000, or about 26% of New Mexicans with Medicaid. Molina is the single largest Medicaid MCO for New Mexicans. Eliminating Molina from Centennial Care will end the economy of scale that Molina has developed. Molina has been able to provide high quality services to New Mexicans, despite unsustainable pricing rates by Mercer/HSD, due to these economies of scale. The loss of this economy of scale will place greater price pressure on Medicaid MCOs, HSD, and New Mexicans.

76. HSD does not seem to recognize the disruption its award will create. In fact, just the opposite. At least in the RFP process, it has not recognized or addressed Molina's stability, economy of scale, or status as the largest provider of managed Medicaid healthcare services. HSD has provided no assessment or analysis regarding how the scope of Molina's services will be replaced, or whether any other provider will be able to match Molina's provider networks, stability, and scale.

77. HSD's decision to reduce the number of Medicaid MCOs will reduce HSD's negotiating power with the remaining MCOs. MCOs will have greater leverage to threaten to leave the state market, as a Centene subsidiary did in Kentucky. The quality of services to New Mexicans will suffer as a result.

The Injury to Molina

78. Molina's business opportunities will be harmed by HSD's decision to eliminate Molina's provision of Medicaid services in New Mexico. If HSD's elimination of Molina as a MCO proceeds, then Molina will suffer the loss of those 224,000 Medicaid members. That loss is such a large portion of Molina's 263,000 total membership in New Mexico, that Molina will likely have to stop all its services in New Mexico because the cost per

member will increase considerably. In other words, HSD's proposal puts at jeopardy all of Molina's healthcare services in New Mexico. In addition, the elimination of its Medicaid contract in New Mexico will impact its business opportunities in other states through loss of reputation.

79. Molina has established a strong physical and virtual presence in New Mexico. It has physical locations in Albuquerque and Las Cruces. It has employees throughout the State including in rural areas. It has nurse advice lines and other services provided remotely. These business advantages will be lost, causing harm to Molina and New Mexicans.

80. Molina will see a loss in market share of New Mexicans seeking coverage through the ACA's Exchange, Medicare, and Medicaid. As uncertainty (and rumors) about Molina's future increase, members will dis-enroll and seek care elsewhere, persons will be dis-inclined to seek insurance from Molina. Molina will lose market share and New Mexicans currently enrolled with Molina for Medicaid will be forced by HSD to change MCOs and possibly medical providers. The stability of the healthcare delivery system will erode as New Mexico moves from 4 to 3 Medicaid MCOs.

81. Molina will suffer losses in its relationship with employees and prospective applicants for employment. Employees will be incentivized to resign and seek employment elsewhere, hoping for greater stability. Applicants will seek employment elsewhere. Eventually, HSD will force most or all of Molina's employees to suffer the disruption and anxiety of changing jobs, or trying to locate new employment. The quality of services that Molina is able to provide to New Mexicans will suffer as employees depart.

82. Molina will suffer losses in its relationship with vendors and contractors. Local communities and community stakeholders will be discouraged to contract with, partner

with, and do business with Molina due to the uncertainty and disruption that HSD proposes.

83. Even if Molina's Protest succeeds, the harm to Molina and New Mexicans will occur unless the procurement process is stopped during the pendency of the Protest and judicial review. If the proposed elimination of Molina and entry of the Centene subsidiary continues during the process, the harm will proceed apace. Only preserving the status quo will avoid the harm to the stability of the healthcare delivery system, members, employees, vendors, contractors, and communities.

84. Finally, ending Molina's Medicaid contract will harm Molina's ability to re-enter the New Mexico Medicaid market if HSD's decision is reversed, or as the result of a new RFP. It will be natural for members, employees, vendors, contractors and communities to associate the disruption and uncertainty with Molina. These persons do not have a relationship with HSD, or Mercer, or Centene. Molina will suffer the harm, regardless of where fault should be placed.

COUNT I: INJUNCTIVE RELIEF

85. Molina incorporates the allegations set forth above as if fully stated herein.

86. Molina is an incumbent supplier of Medicaid healthcare services and a medical provider network to about 224,000 New Mexicans through Medicaid, and 263,000 New Mexicans through all its insurance programs. Injunctive relief would preserve the status quo and the services Molina supplies.

87. Injunctive relief would preserve the current stability of the healthcare delivery system in New Mexico.

88. Under NMSA 1978, § 13-1173 and NMAC 7.1.6.11, during the pendency of a Protest the procurement process "shall not proceed further." HSD has provided no reasons, basis, support, or findings that would justify rebutting this statutory and regulatory requirement.

89. Molina, and the citizens of New Mexico, face irreparable harm if Defendants proceed with the procurement process as proposed for the reasons set forth in Paragraphs 65 to 84.

90. The harm to Molina, and New Mexicans, if Defendants proceed with the procurement process as proposed will outweigh any injury to Defendants if an injunction issues for the reasons set forth in Paragraphs 65 to 84. Indeed, if Defendants proceed with the procurement process as proposed, HSD will incur expense and injury for the reasons set forth in Paragraphs 73 to 77.

91. Issuance of injunctive relief is not adverse to the public interest; indeed issuance of such relief is in the public interest, for the reasons set forth in Paragraphs 65 to 84.

92. Molina has a substantial likelihood of success on the merits, at a minimum showing that the proposed award is in violation of law and arbitrary and capricious under *Planning &*

Design Solutions v. City of Santa Fe, 1994-NMSC-112, ¶ 6, 118 N.M. 707, 885 P.2d 628, for the reasons set forth in Paragraphs 19 to 64.

COUNT II: DECLARATORY JUDGMENT

93. Molina incorporates the allegations set forth above as if fully stated herein.

94. There is an actual controversy between Molina and Defendants regarding HSD's award to bidders responsive to RFP 18-630-8000-0001, as set forth in preceding paragraphs. The controversy is ripe for judicial determination under the New Mexico Declaratory Judgment Act, NMSA 1978, § 44-6-1, *et seq*.

95. A determination by this Court that the evaluation of bids responsive to RFP 18-630-8000-0001 was fraudulent, in bad faith, in violation of law or arbitrary and capricious would end the controversy between Molina and Defendants. A determination by this Court that Molina must be awarded a contract under RFP 18-630-8000-0001 would end the controversy between Molina and Defendants. A determination by this Court that any proposed or actual contracts under RFP 18-630-8000-0001 must be cancelled or terminated would end the controversy between Molina and Defendants. An alternative declaration of the rights between the Parties would end the controversy between Molina and Defendants.

96. Defendants HSD and Secretary Earnest may be sued under the New Mexico Declaratory Judgment Act, NMSA 1978, § 44-6-13.

COUNT III: JUDICIAL REVIEW

97. Molina incorporates the allegations set forth above as if fully stated herein.

98. Molina will soon, by February 5, 2018, file a Protest regarding the proposed award under RFP 18-630-8000-0001. NMSA 1978, § 13-1-172; NMAC 7.1.6.9.

99. Any proposed contract under RFP 18-630-8000-0001 must be cancelled because the solicitation or proposed award was in violation of law. NMSA 1978, § 13-1-181; *see also* NMCA 7.1.6.16(A).

100. Any fully executed and approved contract under RFP 18-630-8000-0001 should be terminated because the "solicitation or award of the contract was in violation of law" and proceeding with the contract is not in the best interest of HSD. NMSA 1978, § 13-1-182(A); *see also* NMCA 7.1.6.16(B)(2)(a).

101. Any fully executed and approved contract under RFP 18-630-8000-0001 must be terminated because the solicitation or award is in violation of law and "the business awarded the contract has acted fraudulently or in bad faith." NMAC 7.1.6.16(B)(2)(b).

102. HSD should suspend or debar one or more of the proposed providers, including Western Sky, to whom it proposes to award a contract, and terminate any proposed or actual contracts with that provider. NMSA 1978, §§ 13-1-177, 13-1-180.1.

103. If HSD does not cancel the proposed or actual contracts, then Molina seeks judicial review in this Court because:

- HSD and Secretary Earnest acted fraudulently, arbitrarily or capriciously;
- The final decision was not supported by substantial evidence;
- HSD and Secretary Earnest did not act in accordance with law; or,
- The action of HSD and Secretary Earnest was outside the scope of authority.

NMSA 1978, 39-3-1.1; Rule 1-074(R).

PRAYER FOR RELIEF

WHEREFORE, Molina Healthcare of New Mexico, Inc. prays for injunctive relief and declaratory judgment against the New Mexico Human Services Department and Secretary Brent Earnest, in his official capacity, as follows:

1) Injunctive relief restraining Defendants from taking any further steps or actions in the procurement process, including enjoining Defendants from negotiating, executing, seeking approval for, or implementing any of the contracts proposed or awarded pursuant to RFP #18-630-8000-0001 pending resolution of Molina's statutorily authorized bid protest and judicial review;

2) Injunctive relief restraining Defendants from denying Molina a full, complete, and fair bid protest hearing guaranteed under New Mexico law;

3) A declaration that Defendants, Mercer, or bidders acted, in some combination, fraudulently, in bad faith, in violation of law, or arbitrarily and capriciously, or outside of their authority, in issuing and evaluating RFP #18-630-8000-0001;

4) A declaration, if Molina's Protest is denied, that the denial was not supported by substantial evidence;

5) A declaration that one or more proposed or actual contracts under RFP #18-630-8000-0001 are cancelled or terminated;

6) A declaration that Molina must be awarded a contract under RFP #18-630-8000-0001.

7) A declaration that Western Sky, Centene, and any Centene subsidiary is suspended or debarred from providing Medicaid insurance in New Mexico for a period allowed by law, and;

4) Such other and further relief as this Court may deem just and proper.

Respectfully submitted,

MODRALL, SPERLING, ROEHL,
HARRIS & SISK, P.A.

By: ***/s/ Brian K. Nichols***

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