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

MOLINA HEALTHCARE OF NEW MEXICO, INC.,

Plaintiff,

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

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

Defendants.

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF APPLICATION FOR TEMPORARY RESTRAINING ORDER OR, IN THE ALTERNATIVE, A PRELIMINARY INJUNCTION

Molina Healthcare of New Mexico, Inc. ("Molina") submits this Memorandum of Law in Support of its Application for a Temporary Restraining Order or, in the Alternative, a Preliminary Injunction. Pursuant to the Procurement Code, NMSA 1978, § 13-1-173, and Rule 1-066 NMRA, Molina seeks an order directing the New Mexico Human Services Department ("HSD") to stay all actions related to certain contracts awarded pursuant to RFP #18-630-8000-0001 for Managed Care Organization ("MCO") Contractors for Centennial Care 2.0 (the "RFP"),[1] including enjoining HSD from negotiating, further executing, or implementing any of the contracts pending Molina's statutorily-authorized bid protest and any related Rule 1-074 appeal.

Molina is entitled to injunctive relief because 1) HSD acted in violation of the law and arbitrarily and capriciously by, among other things, using undisclosed scoring factors to evaluate

[1] The RFP is available on HSD's website at http://www.hsd.state.nm.us/LookingForInformation/open-rfps.aspx.

Molina's proposal, and 2) the harm to New Mexico citizens—Molina's nearly 260,000 members and its over 1,100 employees, along with the harm to Molina, outweighs the minimal, if any, harm to HSD.

As discussed in more detail below, HSD violated the Procurement Code and its own rules throughout this RFP process. By way of example, HSD used a contractor to draft and evaluate the RFP, a contractor that has financial ties with one of the MCOs that was awarded a contract. In so doing, HSD has created at least an appearance of impropriety, and jeopardized the integrity of the competitive bidding process, requiring injunctive relief. *Planning & Design Solutions v. City of Santa Fe*, 1994-NMSC-112, ¶ 25, 118 N.M. 707, 885 P.2d 628. HSD also introduced new evaluation factors after the RFP was issued, which is a violation of law and arbitrary and capricious. *Id.* ¶¶ 16-17, 24. New Mexico law on this subject is clear and warrants the injunctive relief Molina requests: "By unlawfully introducing, considering, and relying on a criterion not listed in the [RFP], [HSD] breached an informal contract that it would follow the [Procurement Code] in considering each bid." *Id.* ¶ 30. In a likely attempt to minimize the relief available to bidders like Molina who were harmed by HSD's conduct, HSD is refusing to stay the procurement process despite procurement being well ahead of HSD's anticipated schedule. Injunctive relief is thus warranted.

INTRODUCTION

On September 1, 2017, HSD issued the RFP seeking proposals ("Proposals") from Managed Care Organizations ("MCOs") for a Managed Care Service Contract ("Contract") pursuant to which MCOs would provide services to members of the New Mexico Medicaid managed care program, beginning January 1, 2019. The RFP detailed an estimated schedule, which, had it been followed, would have had a March 15, 2018 contract award date and an April

1, 2018 contract effective date. *See* RFP at 17. The RFP stated that "HSD's intent is to contract with three to five MCOs unless it is in the State's best interest to do otherwise." *Id.* at 11.

The RFP included three scored components: Technical Proposal; Cost Proposal, and References. The RFP also allowed for oral presentations, an additional scored component, at HSD's discretion. RFP at 21. HSD did not hold oral presentations.

On January 19, 2018, Molina received HSD's "Announcement of Award", which notified Molina that HSD had selected three MCOs: two incumbents, HCSC Insurance Services Company (Blue Cross & Blue Shield of NM) and Presbyterian Health Plan, Inc., and one new MCO, Western Sky Community Care, Inc. (Centene Corp.). Award Letter attached as Exh. A. Molina also received nearly two-thousand pages of documents related to HSD's decision. According to the Award Letter, the bid protest deadline is February 5, 2018. Molina is preparing its bid protest, which it will submit on or before February 5, 2018, asking HSD to set aside the Contracts and resolicit proposals to correct the many errors in the procurement process.

On January 22, 2018, Molina requested that HSD stay the award of the Contracts pending Molina's bid protest. *See* 1/22/18 Letter attached as Exh. B. HSD's response did not squarely address Molina's request for stay. *See* 1/25/18 Letter attached as Exh. C. Counsel for Molina learned from HSD that it had already executed the Contracts with the other MCOs—a decision clearly prejudicial to Molina's protest rights and a violation of the Procurement Code's presumption of a stay. *See* 1/25/18 E-mail attached as Exh. D. Molina's counsel requested copies of the signature pages of the executed Contracts, only to be told that it would have to submit an IPRA request. *Id.* Molina's counsel submitted a request and HSD responded on January 30, noting that the signature pages were available on HSD's website. The signature pages demonstrate that the Contracts were signed by HSD on January 18, 2018.

I. BACKGROUND FACTS

A. Molina's Background and Service to New Mexico

Molina is a multi-state health maintenance organization, which arranges for the delivery of health care services and offers health information management solutions to nearly five million individuals and families who receive their care through Medicaid, Medicare and other government-funded programs in twelve states plus the Commonwealth of Puerto Rico. With its acquisition of Cimarron Health Plan in 2004, which had served New Mexico's families since 1997, Molina became a critical part of the care of more than 40,000 New Mexicans. *See* Declaration of Daniel Sorrells attached as Exh. E, ¶ 4 ("Sorrells Decl."). By 2005, the number of New Mexicans assisted by Molina had grown to 61,000 members. *See id.*

Molina was awarded the MCO Centennial Care contract in New Mexico in 2014. *See* Sorrells Decl. ¶ 5. Now Molina provides services to nearly 260,000 New Mexicans as follows: approximately 224,000 New Mexicans through Medicaid (about 26% of all New Mexico Medicaid members and just under ten-percent of New Mexico's estimated population), approximately 5,500 New Mexicans through Medicare, and approximately 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 Marketplace members). *See* Sorrells Decl. ¶ 6. Molina has a medical and mental health provider network of 14,000 providers, the largest in New Mexico. *See id.* ¶ 7.

Molina serves more of New Mexico's most vulnerable Medicaid populations than any other MCO in the State. *See generally* Sorrells Decl. ¶¶ 8-9. Molina cares 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 diabetic equipment. Molina serves over 5,800 New Mexicans in long term care 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. Molina also provides Medicaid managed care to over 10,000 Native Americans in New Mexico and is an MCO with the demonstrated ability to provide culturally competent services to Native populations in New Mexico and other states. *See id.* ¶¶ 10-16.

Molina also provides funding and services to other providers and local public agencies. 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. *See* Sorrells Decl. ¶ 17. 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).

Molina is a large contributor to state and local economies, through its employment opportunities and its presence in New Mexico. Molina employs over 1,100 employees in New Mexico, and paid $12.6 million in salaries to its New Mexico employees in 2017. *See* Sorrells Decl. ¶¶ 20-25. Those employees work in an office location in Albuquerque, a large call center in downtown Albuquerque, a data center in Albuquerque, and rural areas of New Mexico. Molina pays approximately $4 million for the office space/properties it leases annually.

B. Background of RFP Process

Rather than extend the contracts of the incumbent MCOs, and for reasons unknown, HSD decided to issue the RFP, and has accelerated that process as it has proceeded. HSD issued the RFP on or about September 1, 2017, despite the fact that HSD had an option to extend Molina's current contract. Molina timely submitted a responsive bid on November 3, 2017. *See* Declaration of Kelly Good attached as Exh. F, ¶ 3 ("Good Decl."). Seven other companies submitted Proposals, including all incumbent MCOs. *See id.*

HSD contracted with Mercer to provide services related to the RFP, including drafting the RFP, training or "coaching" HSD subject matter experts on how to evaluate Proposals, and conducting "consensus scoring meetings," through which individual scores from individual evaluators were "blended" or adjusted into one consensus score. *See* Good Decl. ¶¶ 12, 13.[2] Mercer also drafted the scoring summary and provided a memorandum recommending award of the Contracts, *see* Mercer December 20, 2017 Executive Evaluation Committee Recommendation ("Mercer Memo"), attached as Attachment 1 to the Sorrells Decl. On January 19, 2018, about two months before the date set forth in the RFP, HSD announced the MCOs that were awarded contracts.

Mercer's services also included setting the "cost structure" or "cost table" for the RFP. *See* Sorrells Decl. ¶ 27. The cost table is a range of "capitation 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.

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[2] Contracts available at http://www.hsd.state.nm.us/LookingForInformation/medical-assistance-division.aspx.

Additionally, Mercer is the entity that has set the rate structure for the incumbent MCOs for several years. *See* Sorrells Decl. ¶ 26. In other words, for years Mercer has set the rates MCOs received, and then Mercer was allowed to set the rates upon which bidders would be scored in the RFP process. 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. *See id.* ¶¶ 29, 33-37. 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. *Id.* ¶¶ 33-37. Mercer 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. Centene and its subsidiaries, by contrast, would be more amenable to accepting Mercer's rates due to their business relationship, discussed below.

HSD's procurement process did not include important stakeholders such as the New Mexico Department of Health, the New Mexico Department of Education which oversees School Based Health Centers and Medicaid School Based Services, the New Mexico Children, Youth and Families Department, and the Office of Superintendent of Insurance. *See* Good Decl. ¶ 11. These agencies, unlike Mercer, are all critical for the delivery of Medicaid services in New Mexico and should have had a seat at the table. Yet, HSD failed to include them and instead rubber stamped Mercer's biased and flawed recommendations.

C. Mercer's and Centene's Conflict of Interest

Mercer's undisclosed relationship with Envolve, a specialty health services company (providing services such as pharmacy benefit delivery), which is a Centene subsidiary creates a conflict of interest, given Mercer's heavy-handed involvement in the RFP creation and evaluation process that culminated in Western Sky, another Centene subsidiary, being awarded a contract. Mercer and Centene, through Envolve, have a billion or multi-billion-dollar contractual business relationship.[3] While Western Sky disclosed its relationship with Envolve in its Proposal, Western Sky did not disclose the relationship between Centene and Mercer in the Proposal, *see* Good Decl. ¶ 7, nor is it known whether Mercer disclosed to HSD that its own finances are interwoven with one of the bidders it chose to receive a contract. And, in fact, Western Sky's Proposal heavily references Envolve and details its plans utilize Envolve for many specialty services, *see id.* ¶¶ 8-9—a utilization that will likely enrich Mercer.

II. A STAY IS WARRANTED PURSUANT TO THE PROCUREMENT CODE.

Issuance of a temporary restraining order is appropriate here because both the Procurement Code and HSD's regulations governing protests presume a stay will issue when a protest is filed—a presumption that can only be overcome if an agency "makes a determination that the award of the contract is necessary to protect substantial interests of the state agency." NMSA 1978, § 13-1-173 ("In the event of a timely protest under Section 145 of the Procurement Code, the state purchasing agent or a central purchasing office *shall not proceed further* with the procurement unless the state purchasing agent or a central purchasing office makes a determination that the award of the contract is necessary to protect substantial interests of the state agency or a local public body. (emphasis added)); *see also* Rule 7.1.6.11 NMAC (same). Section 13-1-52 of the Procurement Code, in turn, defines determination as "the written documentation of a decision of a procurement officer including findings of fact required to support a decision."

[3] *See* https://aishealth.com/archive/ndbn110416-02.

HSD has not met this burden. The Award Letter states only: "In the event of a protest, HSD will continue with this procurement because the award of the contract is necessary to protect the substantial interests of the Human Services Department (HSD)." *See* Exh. A. This rote statement is not supported by any factual findings supporting HSD's departure from the presumption of a stay—it does not identify what "substantial interests," if any, are at issue or how those interests are protected by not staying the procurement process.

Indeed, it is difficult to understand, based on the circumstances known to Molina at this time, how staying the procurement process would affect HSD's interests at all, much less affect "substantial issues." First, contracted work does not begin until January 2019. Second, HSD's original schedule for this procurement did not anticipate contract awards until March 2018. Finally, Molina, Blue Cross, and Presbyterian have existing contracts and will continue to provide services to New Mexicans. Simply put, staying the procurement process until Molina's bid protest is complete will have no impact on healthcare provided to the citizens of New Mexico, but will ensure that Molina has the opportunity to challenge the procurement process.

As discussed above, Molina requested that HSD stay the procurement process pending Molina's bid protest, which HSD refused to do. Nor did HSD provide any written determination sufficient to justify proceeding with procurement. HSD's actions are contrary to the Procurement Code, HSD's rules governing protests, are arbitrary and capricious, and justify injunctive relief.

III. MOLINA IS ENTITLED TO A STAY PURSUANT TO RULE 1-066.

Judicial relief is available to a disappointed bidder when, as here, an agency acts arbitrarily and capriciously and violates the Procurement Code. *Planning & Design*, 1994-NMSC-112, ¶ 31. And, injunctive relief may be warranted in the context of bid protests. *Davis & Assocs., Inc. v. Midcon, Inc.*, 1999-NMCA-047, ¶ 16, 127 N.M. 134 ("Similarly, a district court may, in an appropriate case, invoke its equitable powers to enjoin further action of a public agency until appropriate judicial review may be had."); s*ee also Clark Constr. Co. v. Pena*, 895 F. Supp. 1483, 1493 (M.D. Ala. 1995) ("[T]he right to fair and equal treatment in bidding for government procurement contracts is a statutory right, which can be adequately protected only by the issuance of injunctive relief"). Molina is entitled to injunctive relief because (1) it "will suffer irreparable injury unless the injunction is granted; (2) the threatened injury outweighs any damage the injunction might cause [HSD]; (3) issuance of the injunction will not be adverse to the public's interest; and (4) there is a substantial likelihood [Molina] will prevail on the merits." *LeBalbo v. Hymes*, 1993-NMCA-010, ¶ 11, 115 N.M. 314; *see also* Rule 1-066 NMRA.

For the reasons that follow, and consistent with the Court of Appeals' statement in *Davis*, this is an appropriate case for this Court to exercise its equitable powers and enjoin further action by HSD until Molina's bid protest is finally resolved.

A. Molina Is Likely to Prevail on the Merits of Its Bid Protest.

There is a substantial likelihood that Molina will prevail in its bid protest because HSD's decision to award the Contracts violated the Procurement Code and was arbitrary and capricious. Consequently, HSD should be enjoined from taking any further steps in the procurement process pending Molina's bid protest.

1. HSD violated the Procurement Code by failing to stay the execution of the Contracts.

As discussed above, HSD, contrary to the plain language of the Procurement Code, executed the Contracts during the bid protest period rendering meaningless the Legislature's intent in NMSA 1978, § 13-1-173, which specifically mandates that an agency "shall not proceed further with the procurement" when a "timely protest" is filed. While it is true that an agency can determine not to stay the procurement process when the agency "makes a determination that the award of the contract is necessary to protect substantial interests" of the agency, *id.*, HSD made no such written determination supported by the facts here. *See* NMSA 1978, § 13-1-52 (defining determination as "the written documentation of a decision of a procurement officer *including findings of fact required to support a decision*" (emphasis added)). HSD's decision to execute the Contracts during the bid protest period is a violation of law and arbitrary and capricious. This unlawful and arbitrary decision alone warrants a grant of injunctive relief as HSD's conduct appears to be intended solely to limit the remedies available to protesting bidders, to prevent a meaningful bid protest, and to insulate HSD from administrative and judicial review of its actions. There is some New Mexico authority which suggests that once a contract has been executed, a protesting bidder's remedy may be limited to bid preparation costs. *See Planning & Design*, 1994-NMSC-112, ¶ 32. While Molina believes that authority is readily distinguishable and inapplicable, HSD's refusal to stay the procurement, rush to execute contracts before the end of the protest period, and acceleration of the procurement itself suggest that HSD is trying to limit Molina's remedies before Molina has even had a chance to file a protest. This is improper, and establishes injunctive relief is required.

2. <u>HSD violated the law by using undisclosed scoring factors to evaluate the Proposals.</u>

There is a substantial likelihood that Molina will prevail on the merits of its bid protest because HSD violated the Procurement Code by, among other things, considering criteria during its evaluation of the Proposals that were not set forth in the RFP. Section 13-1-105 of the Procurement Code specifically precludes this conduct: "The invitation for bids shall set forth the evaluation criteria to be used. *No criteria may be used in bid evaluation that are not set forth in the invitation for bids*." NMSA 1978, § 13-1-105(A) (emphasis added). HSD Rule 7.1.5.9(A) (1) and (5) require that that RFPs include "specifications for the services … to be provided" and "a statement of the relative weights to be given to the factors in evaluating criteria." HSD regulations require that bids be evaluated "based on the evaluation factors and relative weights set forth in the request for proposals." Rule 7.1.5.13(A) NMAC. 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." Rule 7.1.514(A) NMAC. The RFP similarly requires HSD to consider only those criteria it specifies. *See, e.g.*, RFP § 4.3.1 ("Mandatory Requirements Evaluation") ("Each proposal shall be evaluated to determine whether the requirements as specified in this RFP have been met.").

The New Mexico Supreme Court has reiterated the importance of following the procurement process strictly. As the New Mexico Supreme Court has held, "when statutes and regulations define the rules of competitive bidding, these statutes and regulations will be strictly construed against the government entity that solicited the bids." *Planning & Design*, 1994-NMSC-112, ¶ 6. "While it is true that a [governmental agency] has 'wide discretion' to accept or reject offers, *that discretion does not include unlawful departure from its own rules and state procurement statutes*." *Id* ¶ 19 (emphasis added). HSD plainly and repeatedly departed from its own rules and the Procurement Code by reducing Molina's score based on information not requested and by evaluating the Proposals by reference to undisclosed evaluation criteria. Molina was given 30 separate deficiencies that were derived directly from the undisclosed "response considerations" and not the elements of the actual RFP questions. *See* Good Decl. ¶ 16. These undisclosed evaluation factors resulted in a decrease in Molina's overall score.

The response considerations likely were prepared by Mercer and likely Mercer suggested how to apply those response considerations during the training Mercer conducted with the various subject matter experts. *See* 2017 Centennial Care 2.0 Scoring Results Summary p. 1, excerpt attached as Exh. G ("Mercer provided training to subject matter experts (SMEs) from HSD's Medical Assistance Division (MAD) and Behavioral Health Services Division (BHSD) who served as the State's RFP evaluation team. During the training, evaluators were provided a review of the RFP process and goals; instructions for using and completing the evaluator worksheets, scoring methodology, RFP questions, and the consensus scoring process."). That Mercer "trained" the various subject matter experts is, in and of itself, questionable.

The scoring narrative for Question 8 is particularly telling because it is based on undisclosed, inaccurate, and improper scoring criteria. *See generally* Sorrells Decl. ¶¶ 47-54. The narrative cites as concerns, among other things "change in corporate leadership, huge losses reported for Puerto Rico and reducing workforce by 10%." The narrative also noted: "The team is concerned that the financial stability of the company puts the NM line of business at risk." Importantly, these factors were never identified as explicit criteria for scoring the RFP. To the extent this criticism is, at least partly, directed at Molina's parent organization, Molina Healthcare, Inc. ("MHI"), it is unfounded: MHI's debt remained at investment grade levels throughout 2017 even in the wake of financial losses, MHI retained an investment grade Ba1 credit rating, and MHI's stock is trading at an all-time high.

Any concerns regarding changes in corporate leadership are subjective and speculative at best. And, in any event, despite the changes in corporate leadership, Molina's performance in New Mexico improved in each quarter in 2017, as measured by Molina's Administrative and Medical Cost Ratios. *See* Sorrells Decl. ¶ 52. Molina's workforce reductions were prudential actions to right size the company and motivated by aligning Molina's cost structure with the administrative allowance built into Molina's capitation rates by its state partners. *Id.* ¶ 53. In sum, had Molina been asked, Molina would have fully demonstrated its financial stability, that the change in corporate leadership did not impact Molina's services in New Mexico or elsewhere, and that the workforce reduction was a necessary, and wise, business decision.

With respect to the statements regarding Puerto Rico, the reviewers clearly went outside Molina's Proposal and relied upon news and other media sources to obtain information about Molina's parent company and sister plans. Sources that are external to the offeror's response are not appropriate for consideration as HSD afforded Molina no opportunity to explain the skewed information presented by media sources or otherwise address HSD's claimed concerns. Beyond that, the Medicaid program in Puerto Rico is substantially different than the Medicaid program in New Mexico. Losses to the Puerto Rico health plan in no way effect the operation or performance of the New Mexico health plan, and the evaluator exaggerated the impact of those losses. *See* Sorrells Decl. ¶¶ 48, 54.

Molina also provides the following summary examples, which, along with other examples of impropriety, are more fully described in the Good Declaration, ¶¶ 16-28

- Question 25 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.
- Question 30 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." Although behavior health integration information was not listed in the question requirements, Mercer directed the evaluators to score answers based on whether "the Offeror describe(s) any initiatives focused on behavioral health or integration strategies?" Then, HSD reduced Molina's score for failing to provide "Details regarding integration of behavioral health lacked details." The undisclosed evaluation factor resulted in a decrease in Molina's overall score.

- Question 62 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." Question 62 **did not** request how tribal provider complaints would be addressed, nor did it ask about providing equipment or resources to tribal providers. Nevertheless, Molina's response was cited as having the following deficiencies: "Lacked detail to explain how the Offeror would contract with providers and handle disputes for transportation; Indicated they would expand telehealth but did not describe enough about how equipment would be purchased or other details; Plan to expand peer support but only in one small remote area; Response generally lacked enough detail to evaluate fully."
- Molina's response to Question 75 was marked as deficient because the "[r]esponse did not address exemption of ITU services from prior authorization," even though Question 75 did not request information on the prior authorization requirements for ITUs. Yet, Mercer directed the evaluators to score the response based on whether "the response

indicate[s] an understanding that emergency services and services provided by I/T/Us do not require PA?"

- 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.
- The evaluators faulted Molina for not including a discussion of Native American Advisory Boards in its response to Question 15, when the question did not request that information. Beyond that, had Molina been requested to provide that information, its response would have highlighted Molina's work with Native American Advisory Boards.
- The evaluators faulted Molina for not including a discussion of Corrective Action Plan ("CAPS") remediation in response to Question 5, yet the RFP question did not request information on such remediation plans. Molina tracks CAP remediation plans, and could have and would have provided this information had it been requested.
- HSD also criticized Molina's decision to use delegated subcontractors for certain UM or BH functions in Question 13. The consensus score sheet states: "Generic information, lack of detail about vendors and MCO approach to oversight. Lots of vendors with minimal NM experience/presence." Yet, all of Molina's vendors have been reviewed and approved by HSD for Molina's current operations and have worked with Molina in New Mexico to serve Molina's New Mexico members.

These anomalies in the evaluation process demonstrate that the procurement process as a whole was tainted, and that the Contract awards were in violation of the law. HSD's evaluation of the Proposals violated NMSA 1978, § 13-1-105 because HSD considered criteria outside the

RFP itself. In other words, HSD "changed the rules in the middle of the game" by not disclosing factors upon which it intended to rely in scoring the Proposals. *Planning & Design*, 1994-NMSC-112, ¶ 17. In addition, HSD's reliance on undisclosed scoring factors is arbitrary and capricious because HSD "departed from the explicit statutory standards of the [Procurement Code and HSD regulations] and was not governed by any fixed rules." *Planning & Design*, 1994-NMSC-112, ¶ 23 (quoted authority omitted).

HSD obviously chose to consider extrinsic information about Molina *and* base its determination on that information, but HSD has provided no indication as to whether it considered similar information about other bidders, the scope of HSD's apparent search of media sources, or the reliability of any information HSD may have obtained. HSD, as evidenced by the many areas in which it applied new and undisclosed evaluation criteria as well as external information that is not relevant to the RFP "acted without an adequate determining principle." *Planning & Design*, 1994-NMSC-112, ¶ 23. New Mexico law warrants the injunctive relief Molina requests: "By unlawfully introducing, considering, and relying on a criterion not listed in the [RFP], [HSD] breached an informal contract that it would follow the Code and [HSD's rules and the RFP] in considering each bid." *Planning & Design*, 1994-NMSC-112, ¶ 30.

3. <u>HSD's stated award justifications are arbitrary and capricious.</u>

There is a substantial likelihood that Molina will prevail on the merits of its bid protest because HSD's stated award justifications are arbitrary and capricious. The pre-textual justifications set forth in the Mercer Memo, attached to the Sorrells Declaration, do not support eliminating Molina as a New Mexico MCO. The Mercer Memo identified four elements that the evaluators determined would "meet the needs and priorities of the State," none of which withstand scrutiny.

The Mercer Memo's first justification was that the three selected MCOs demonstrated strong scores in the Technical Proposal. Molina's Technical Proposal score was only two points lower than Blue Cross/Blue Shield and only 80 points lower than Western Sky (out of a total possible score of 1390), and would have been higher but for the scoring deficiencies discussed above. *See* Sorrells Decl. ¶ 41. Significantly, Molina's Proposal ranked higher than Western Sky in a number of key areas, including experience and qualifications, provider network, member and provider services, QI/QM, reporting and program integrity, financial management, and value based purchasing---*i.e.*, the issues that matter the most to the nearly 260,000 New Mexican's that Molina already serves and to whom Molina has provided exemplary service.

Despite Molina's strong references, Technical Proposal, and experience serving New Mexicans, HSD chose to award contracts to Presbyterian and Centene (Western Sky). Both companies have potentially significant flaws, flaws that do not appear to have been adequately considered, or considered at all, when evaluating their Technical Proposals. For example, Presbyterian Health Plan recently settled a lawsuit with the New Mexico Attorney General alleging over 15 years "systematic and deliberate"[4] underpayment of taxes to the State on premiums collected. While Presbyterian disclosed this suit and settlement to HSD, that disclosure and the suit itself remarkably appear to have had little or no impact on HSD's evaluation of Presbyterian, which received 50 points (the highest awarded) for Reporting and Program Integrity, and 42 points for Financial Management (again the highest awarded).

Centene and its subsidiaries have and continue to face lawsuits across the county, several of which are here in New Mexico. The New Mexico lawsuits, approximately 17, allege that Centurion, a Centene subsidiary, has failed to provide adequate care to persons in New Mexico's

[4]https://www.bizjournals.com/albuquerque/news/2017/10/30/presbyterian-health-plan-reaches-settlement-with.html.

prisons.[5] In 2013, a Centene subsidiary abruptly ceased providing managed care to Medicaid members in Kentucky. *See* Good Decl. ¶ 29. In December, 2017, another Centene subsidiary agreed to a fine of $1,500,000 imposed by Washington's Insurance Commissioner for failure to provide an adequate medical provider network to its ACA/Marketplace members. *See* Good Decl. ¶ 30 And, Centene was recently sued in federal court in a 15-state class action for selling Marketplace policies that did not cover certain services and resulted in members being balanced billed.[6] The New York Times article reporting the suit states that the lawsuit alleges "'Members have difficulty finding — and in many cases cannot find — medical providers,' who will accept patients covered under policies sold by Centene…." According to the article, "Centene misrepresents the number, location and existence of purported providers by listing physicians, medical groups and other providers — some of whom have specifically asked to be removed — as participants in their networks and by listing nurses and other non-physicians as primary care providers."[7]

These lawsuits highlight Centene's pattern of inability to provide long-term, comprehensive services to its members. Yet, Western Sky received a scores of: 50 on Provider Network (only two points lower than Molina, which has the largest number of providers in New Mexico), despite being brand new to New Mexico and having known deficiencies with respect to providers; 124 on Benefits and Services, despite leaving its members with no services (32 points higher than Molina); and 30 points for Financial Management, despite having a cost model that demonstrably does not work (only 4 points lower than Molina). Western Sky did receive the lowest score for Member and Provider Services, a 46, but with Centene's track record this score,

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[5]http://www.santafenewmexican.com/news/local_news/lawsuits-claim-inmates-still-getting-poor-health-care/article_a8f804d7-14a7-505e-81ab-9c47a8624b4a.html.
[6] *See* https://www.nytimes.com/2018/01/11/health/centene-health-insurance-lawsuit.html.
[7] *Id.*

along with Western Sky's Financial Management score, should have been much lower, and in no event does Western Sky meet the criteria of being advantageous to the State. Based on Molina's review of documents received thus far, which redact compliance information, Molina cannot determine whether the Centene subsidiary reported these issues, in Washington and Kentucky, as sanctions in the compliance history part of its bid responding to the RFP. *See* Good Decl. ¶ 31.

The Mercer Memo's second and third justification both purport to rely on administrative simplicity for providers and choice for members. Bringing in a new MCO, rather than awarding a contract to Molina, exacerbates administrative complexities by inserting new administrative hurdles and deceases stability by requiring members to change MCOs, and potentially providers, and disrupting continuity of care. *See generally* Sorrells Decl. ¶¶ 42-43. While members will have a new MCO option, that option comes at a cost to the very members Mercer asserts would benefit from the change. Molina is especially concerned about the transition for its members with behavioral health and substance abuse disorders. Those members have already experienced a poorly managed transition to out-of-state companies occasioned by HSD's decision to fire hundreds of New Mexico providers and hire out-of-state providers that then refused to provide the services necessary to those vulnerable members. During that transition, until Molina and other MCOs stepped in, those members went without care. HSD's determination to offer Western Sky, an entity new to New Mexico and with demonstrated service flaws, seems to set in motion a similarly failed transition.

Fourth, the Mercer Memo attempts to justify the decision to only award three contracts (instead of up to five as provided in the RFP) on the grounds that reducing the number of MCOs will create economies of scale and encourage lower administrative cost. Eliminating Molina and bringing in a new MCO will hinder, not create, economies of scale and will increase administrative costs. It will also weaken the State's negotiating power relative to each health plan. Having fewer health plans places the State in danger of not being able to provide choices to members if health plans threaten to exit the market. *See* Sorrells Decl. ¶ 44.

Simply put, shuttering facilities, terminating employees, terminating contracts with New Mexico vendors, eliminating substantial revenue to State and local governments seems contrary to the Mercer Memo's determination that refusing to award Molina a contract takes into consideration the "needs and priorities of the State."

4. HSD arbitrarily and capriciously deviated from the RFP schedule.

There is a substantial likelihood that Molina will prevail on the merits of its bid protest because HSD arbitrarily and capriciously deviated from the RFP schedule. HSD did not provide the offerors the opportunity to make oral presentations. *See* RFP at 17, 21. While allowing oral presentations is at HSD's discretion, HSD's decision to not allow those presentations here is an abuse of discretion because HSD selected a new provider without meeting it and oral presentations would have given HSD an opportunity to inquire about the financial integrity and provider/benefit issues that Centene has had in other states. *See* Sorrells Decl. ¶ 38.

HSD's unexplained determination to have only three MCOs rather than up to five was also arbitrary and capricious. The RFP stated that "HSD's intent is to contract with three to five MCOs unless it is in the State's best interest to do otherwise." RFP at 11. Clearly, then, HSD anticipated awarding contracts to up to five MCOs, at HSD's discretion. Yet, HSD inexplicably determined to only award contracts to three MCOs, and to not award a contract to Molina. To date, HSD has provided no information justifying how its decision to depart from its stated intent to contract with up to five MCOs is in the State's best interest. It is difficult to imagine how reducing the number to eliminate Molina from Centennial Care is in the State's best interest, given Molina's service to the State and its citizens over the past thirteen years. In sum, HSD's decision to reduce the number of MCOs from up to five to only three is arbitrary and capricious.

B. The Public Interest Will Be Harmed in the Absence of Injunctive Relief.

The public interest will be harmed if the Court does not issue a temporary restraining order. HSD's decision not to award a Contract to Molina means that Molina very likely has no choice but to leave New Mexico entirely, which in turn, means that Molina will no longer be serving New Mexico citizens. If Molina leaves New Mexico, the harm to New Mexico members will be substantial. Molina provides services to about 260,000 New Mexicans, including more of New Mexico's most vulnerable Medicaid population than any other MCO in the State, and including the largest Medicaid population by county in the United States—McKinley County, New Mexico.

If HSD's proposal goes forward, between 224,000 and 258,000 New Mexicans will be forced to seek a new MCO and new health plans, and 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. Those members will be forced to scramble for care, care which is currently and professionally provided by Molina. Many will likely be forced by HSD to seek one or more new medical and behavioral health providers. If Western Sky ultimately becomes a New Mexico MCO, some or many New Mexicans may find an inadequate medical provider and behavioral health network, as those in Washington and as alleged in 14 other states, and may find inadequate care, as alleged in the lawsuits here in New Mexico.

Transitioning during treatment is especially difficult for Molina's 103,205 members receiving behavioral health services and 35,036 members receiving substance abuse services. *See generally* Sorrells Decl. ¶ 9. These members are particularly vulnerable to transitions in services and providers. If Molina were to leave, the healthcare infrastructure that Molina has developed and provides to these members will be lost, infrastructure that 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. *See id.* New Mexicans receiving behavioral health services will also likely face long wait times to receive needed treatment.

New Mexico Medicaid members with behavioral health and substance abuse disorders recently experienced a poorly managed transition to out-of-state companies in 2013, when HSD suspended Medicaid payments to up to 15 behavioral health centers, which in turn meant the loss of hundreds of New Mexico providers. HSD hired out-of-state providers, that then refused to provide the services necessary to New Mexico Medicaid members with behavioral health and substance abuse disorders unless they were provided with higher reimbursement rates than had been provided for the New Mexico behavioral health providers. When the out-of-state providers were unsuccessful in their endeavors to obtain higher reimbursement they left the State, leaving tens of thousands of New Mexicans without access to outpatient behavioral health services. During that transition, until Molina and other MCOs stepped in, many of those members went without care. *See* Sorrells Decl. ¶ 46. Selecting an out-of-state MCO to award a Contract is not in the State's best interest because it sets the stage for a repeat of the failed transition in 2013, a repeat that is not in New Mexico's best interest.

New Mexicans receiving durable medical equipment will likely face long wait times to receive needed equipment. Moreover, as a result of HSD's proposal, 10,000 Native American New Mexicans will lose an MCO with the demonstrated ability to provide culturally competent services to Native populations in New Mexico and other states. *See generally* Sorrells Decl. ¶¶

10-16. Such services were called out in the RFP as necessary in New Mexico. In addition, the services that Molina offers to other providers and local agencies will no longer be available if Molina leaves New Mexico. *Id.* ¶ 17. Enjoining HSD now allows Molina to protest the procurement process without the danger of HSD taking further steps to cement the relationship with Western Sky—a relationship that is not in the best interests of the members HSD serves.

Injunctive relief is also warranted to prevent substantial harm to Molina's employees and their families who rely on the salaries Molina pays. *See* Sorrells Decl. ¶¶ 20-25. In total, Molina currently employs over 1,100 employees in New Mexico, including the hundreds of employees who are employed by Molina at its Albuquerque administrative office, the employees who work at Molina's national call center in Albuquerque, employees who work at Molina's national data center, and employees that work in rural areas of New Mexico. Molina paid $12.6 million in salaries to its New Mexico employees in 2017. If Molina leaves, the New Mexico market will not absorb all these employees. *See id.* ¶ 24. HSD's decision not to award a Contract to Molina means the loss of these jobs, along with their secondary and tertiary benefits to state and local governments (state income tax, gross receipts tax, etc.), and the loss of the $4 million in annual rentals Molina pays for its office space and other buildings.

The public interest will be served by requiring HSD to adhere to the Procurement Code's requirements. "The purposes of the Procurement Code are to provide for the fair and equitable treatment of all persons involved in public procurement, to maximize the purchasing value of public funds and to provide safeguards for maintaining a procurement system of quality and integrity." *See* NMSA 1978, § 13-1-29(C). According to the Supreme Court of New Mexico, "[o]f all the interests involved in competitive bidding, the public interest is the most important," and "[t]he public has both economic and moral interests in assuring that government entities adhere to the Code as well as their own published regulations." *Planning & Design*, 1994-NMSC-112, ¶ 8, 33; *see also id.* ¶ 8 ("It is certainly in the public interest that the [awarding agency] abide by the procurement rules it has set for itself."). Issuing an injunction now will serve the public interest by allowing Molina to prosecute its bid protest to ensure that HSD does not and did not ignore the clear and unambiguous rules set forth in the Procurement Code.

In addition, a stay would vindicate the public interest by allowing HSD to fully vet Western Sky's adequacy as a MCO in light of the fact that it may be subject to suspension or debarment under the New Mexico Procurement Code, *see* NMSA 1978, § 13-1-178, given the conflicts of interest presented by Centene's and Mercer's substantial involvement in Envolve, a Centene subsidiary. As the Supreme Court has recognized: "The Code and the Procurement Manual are designed to preclude even the appearance of impropriety. By its actions [HSD] defeated the object and integrity of the competitive bidding process." *Planning & Design*, 1994-NMSC-112, ¶ 25 (quoted authority omitted).

As discussed above, Western Sky is a subsidiary of Centene, and Mercer and Centene have a substantial business relationship through Envolve, another Centene subsidiary. While Western Sky disclosed Centene's relationship with Envolve in its Proposal, Western Sky did not disclose the relationship between Centene and Mercer in the Proposal. *See* Good Decl. ¶ 7. Many of the sections in which Western Sky references the use of Envolve's services were scored particularly high. Interestingly enough, in two questions focusing on Pharmacy Benefits, Western Sky received 17 comments for superior elements. *See id.* ¶¶ 8-9.

Given Western Sky's stated intent to rely on Envolve's services heavily in New Mexico, it would appear that Mercer has a vested interest in having Centene win the RFP, including the possibility of financial benefit arising from Mercer's contractual relationship with Envolve. In other words, the very entity that decided what scores to give each bidder and what bidders to recommend be awarded contracts will financially benefit from its recommendation that HSD award a contract to Centene. This impropriety is self-evident. *See* NMSA 1978, § 13-1-190 (making it "unlawful for any state agency or local public body employee . . . to participate directly or indirectly in a procurement when the employee . . . has a financial interest in the business seeking or obtaining a contract"); *Hub City Solid Waste Servs., Inc. v. Compton*, 186 Cal.App.4th 1114, 1125 (2013) (applying California's conflict of interest prohibition to any person who "influences an agency's contracting decision or otherwise acts in a capacity that demands the public trust" to conclude that corporate consultant hired by municipality was subject to conflict of interest prohibitions).

Not only did Mercer evaluate the RFP, and select Western Sky, Mercer also was responsible for setting the rates that bidders were required to adhere to when making their proposals. Western Sky, a new MCO to the state and a subsidiary of Centene, which is known in the industry for bidding at the bottom of the rate range, this time bid in the rate range of 40%. Molina, to the contrary, bid in the rate range of the 70th percentile. *See* Sorrells Decl. ¶31. 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. *See id.* Molina is an incumbent MCO to 224,000 New Mexicans. It knows what it costs to provide quality health care to New Mexicans with Medicaid coverage. Molina priced its bid accordingly. *See id.* ¶ 32. Conversely, Western Sky offered prices in the 40th percentile and scored 254 points on the cost evaluation factor. *See id.* ¶ 30.

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 by Molina 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.

See Sorrells Decl. ¶¶ 33-37. In other words, HSD acknowledged that the rates it set as part of the RFP were not actuarially sound and that it would not accept rates outside of that range in response to the RFP. *See id.* ¶ 35. Mercer, who set the rate range for HSD, has an obligation to the State to present and recommend to the State an actuarially sound rate. *See id.* HSD's response to Question 38 clearly indicates that did not happen. *Id*. Molina, by bidding in the rate range of the 70th percentile, sought to be responsive to HSD's predetermined rate range, while at the same time taking a realistic, thoughtful approach to structuring its cost proposal, based on Molina's experience purchasing services for New Mexico Medicaid members. Conversely, proposals offering rates in the bottom half of the rate range are not actuarially sound rates and are not sustainable long term. *Id.* ¶¶ 36-37.

The fact that the capitation rates set by Mercer are not actuarially sound, and the potential bias and a conflict of interest between Mercer and Western Sky's parent, Centene, make the cost evaluation process HSD used in violation of law, arbitrary/capricious, lacking in an evidentiary foundation, and fraudulent or in bad faith. More importantly, it resulted in 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.

C. Molina Will Suffer Irreparable Harm in the Absence of Injunctive Relief.

Molina has and will suffer irreparable harm if injunctive relief is not ordered by this Court. First, Molina has been harmed and will continue to be harmed by HSD's violation of the law—HSD's refusal to stay the procurement process, *see* NMSA 1978, § 13-1-173 and Rule 7.1.6.11 NMAC; HSD's use of undisclosed scoring factors, *see* NMSA 1978, § 13-1-105, and HSD's arbitrary and capricious actions with respect to evaluating the RFP. These violations of the law constitute irreparable injury warranting injunctive relief.

Second, if Molina is not awarded a Contract, which is HSD's current path, Molina will likely leave New Mexico entirely as Medicaid is the most significant portion of Molina's current business within the State. Molina serves 224,000 New Mexican Medicaid members. That loss is such a large portion of all its New Mexico members, nearly 260,000, that Molina will likely have to cease all services in New Mexico because the cost per member will increase considerably.

Molina will have to unwind its extensive business operations. Molina will also lose its ability to expand its business opportunities over the next five years, which opportunities it should have had but for the improprieties in the RFP evaluation process discussed above. In other words, HSD's proposal puts at jeopardy 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 which Molina has developed. *See* Sorrells Decl. ¶ 19. Molina also will be harmed because it 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. 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.

Molina will see a loss in market share of New Mexicans seeking insurance through the ACA Exchange, Medicare, and Medicaid because as uncertainty (and rumors) about Molina's future increase, members will disenroll and seek care elsewhere, and potential members will be disinclined to seek insurance from Molina. Ending Molina's Medicaid contract will harm Molina's ability to re-enter the New Mexico market if HSD 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. In addition, the elimination of its contract in New Mexico will impact its business opportunities in other states through loss of reputation.

Injunctive relief is warranted to halt this harm now, to allow Molina's protest to go forward without the prejudice that will occur to Molina, its members, its employees, and the State if HSD takes further steps with Western Sky. 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. A stay of any further processes under the RFP is appropriate here to allow Molina's bid protest to proceed without prejudice to Molina, as the Procurement Code requires. In the absence of an injunction, HSD will continue to refuse to stay the procurement and will likely proceed to the public's and Molina's detriment.

D. An Injunction Will Not Harm HSD.

While the public interest and Molina will be harmed if an injunction does not issue, HSD will not be harmed by maintaining the status quo, and in fact, HSD likely will benefit from an injunction given the very real negative impacts HSD's proposal will have on HSD's constituents.

HSD cannot demonstrate that it will be harmed by a stay here because 1) New Mexico citizens are currently receiving health care and will continue to do so from Molina, Blue Cross, and Presbyterian under existing contracts through December 31, 2018, 2) HSD itself originally planned for the procurement process to last at least another two months, and 3) the Contracts will not go into effect until January 2019. There simply is no harm to HSD in staying this process pending Molina's statutorily mandated bid protest.

Granting an injunction may benefit HSD because HSD's proposal to eliminate two incumbent providers of Medicaid insurance will create instability in the Medicaid market or program. At least 26% of New Mexico Medicaid members will have to change MCOs. HSD's elimination of two incumbent MCOs, and addition of a one MCO, will create unnecessary administrative costs for itself. Established business relationships, from technical to personal, will be ended and changed. HSD will have to end its processes with Molina, as it establishes processes with the Centene subsidiary. Administrative costs will also be incurred as a result of the forced change in insurance for at least a quarter of New Mexicans with Medicaid coverage.

Molina insures approximately 224,000, or about 26% of New Mexicans with Medicaid, and is the single largest Medicaid MCO for New Mexicans. Eliminating Molina as an MCO 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. HSD's proposal to reduce the number of Medicaid MCOs will reduce HSD's negotiating power with those remaining. 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.

CONCLUSION

For the foregoing reasons, Molina Healthcare of New Mexico, Inc. respectfully requests that this Court grant its Application for a Temporary Restraining Order or, in the Alternative, a Preliminary Injunction, award the relief requested therein, and grant such other and further relief as the Court deems fair and just.

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

By: *<u>/s/ Brian K. Nichols</u>*
Michelle A. Hernandez
Brian K. Nichols
Jeremy Harrison
Attorneys for Plaintiff
Post Office Box 2168
500 Fourth Street, N.W. Suite 1000
Albuquerque, New Mexico 87103-2168
Telephone: (505) 848-1800

I HEREBY CERTIFY that on this 8th day of February, 2018, I submitted for e-filing and service the foregoing through "Odyssey File & Serve." I FURTHER CERTIFY that on such date I emailed the foregoing to the below counsel via email.

Brent Earnest (Brent.Earnest@state.nm.us)
Cabinet Secretary
New Mexico Human Services Dep't
2009 S. Pacheco Street
Pollon Plaza
Santa Fe, NM 87505

Christopher Collins (Christopher.Collins@state.nm.us)
Christopher T. Foster (christophert.foster@state.nm.us)
Office of General Counsel: NMHSD
2009 S. Pacheco Street
Pollon Plaza
Santa Fe, NM 87505

Dan Gershon (deg@sheehansheehan.com)
Leah M. Stevens-Block (lsb@sheehansheehan.com)
Sheehan & Sheehan, P.A.
6001 Indian School Rd., NE, Suite 400
P.O. Box 271
Albquerque, NM 87103
505-247-0411
Attorneys for Interventor Estern Sky Communicty Care

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

Exhibit A to Memorandum of Law

(Award Letter)

Exhibit A

HUMAN SERVICES
DEPARTMENT

Susana Martinez, Governor
Brent Earnest, Secretary
Nancy Smith-Leslie, Director

To: Tina Rigler
VP, Government Contracts
Molina Healthcare of New Mexico, Inc.
400 Tijeras Blvd. NW
Albuquerque, NM 87102

From: Daniel Clavio
Procurement Manager
NM Human Services Department

Date: January 19, 2018

Subject: Announcement of Award - RFP # 18-630-8000-0001
For Managed Care Organization Contractors for Centennial Care 2.0

Via email: Tina.Rigler@MolinaHealthCare.com

Dear Offeror:

This letter is to advise you that on January 19, 2018 contracts were awarded to the following vendors as a result of the referenced procurement, RFP # 18-630-8000-0001 for Managed Care Organization Contractors for Centennial Care 2.0:

- HCSC Insurance Services Company, operating as Blue Cross and Blue Shield of New Mexico
- Presbyterian Health Plan, Inc.
- Western Sky Community Care, Inc. (Centene Corp.)

The following documents summarizing the RFP evaluation and scoring process are attached in this email:

- Scoring Results Summary – Executive Report, no attachments
- Evaluation Committee Report to Secretary Earnest
- Evaluation Committee Report Signatures
- Evaluation Committee Meeting Notes Memo

The Scoring Results Summary with attachments (1600+ pages) will be sent in a separate email.

The protest period shall begin on January 20, 2018 and end at 5:00 p.m. Mountain Time Zone on February 5, 2018. In the event of a protest, HSD will continue with this procurement because the award of the contract is necessary to protect the substantial interests of the Human Services Department (HSD).

Requests for additional documents related to this procurement should be directed to Julie Lovato, HSD Public Records Custodian, at Julie.Lovato@state.nm.us .

Sincerely,

Daniel Clavio

Daniel Clavio
Procurement Manager

cc: Christopher Collins, General Counsel, HSD
Gary O. Chavez, Chief Procurement Officer, HSD

Exhibit B to Memorandum of Law

(1/22/18 Letter)

Exhibit B

MODRALL SPERLING

LAWYERS

Jeremy K. Harrison
505.848.1883
Fax: 505.848.1899
jeremy.harrison@modrall.com

January 22, 2018

VIA EMAIL TO brent.earnest@state.nm.us

VIA HAND DELIVERY TO
Brent Earnest
Cabinet Secretary
New Mexico Human Services Dep't
2009 S. Pacheco Street
Pollon Plaza
Santa Fe, NM 87505

VIA U.S. MAIL TO
Brent Earnest
Cabinet Secretary
New Mexico Human Services Dep't
P.O. Box 2348
Santa Fe, NM 87504

Re: Request to Stay Procurement and Contract Signing Related to RFP 18-630-8000-0001

Dear Secretary Earnest,

This letter is in regard to the procurement of RFP **# 18-630-8000-0001** (the RFP). This letter is not a bid protest,[1] but rather a request that the New Mexico Human Services Department (NMHSD) stay the procurement process pending the filing and resolution of Molina Healthcare of New Mexico, Inc.'s (Molina) forthcoming bid protest.

On January 19, 2018 Molina received an Announcement of Award advising Molina that 2019 Centennial Care 2.0 contracts were awarded by NMHSD to HCSC Insurance Services Co., Presbyterian Health Plan, Inc., and Western Sky Community Care, Inc. On that same day, Molina received nearly two-thousand pages of documentation related to NMHSD's decision making process.

Molina has submitted three requests to NMHSD under the New Mexico Inspection of Public Records Act (IPRA) seeking additional information about the procurement process, the proposals of other bidders, and other information that is relevant to a bid protest that Molina intends to file within the time frame required by the RFP. Molina has not yet received documents responsive to its IPRA requests, and NMHSD in fact has advised Molina that it will not be responding until January 31, 2018. It is unclear whether NMHSD intends to provide Molina with the requested documents on that date, or to simply respond in some other fashion on that date. Assuming that NMHSD intends to fully comply with Molina's IPRA requests, Molina will have a very short amount of time to analyze the requested documents prior to the February 5, 2018 bid protest deadline identified in the Announcement of Award.

[1] Molina intends to file a bid protest within the applicable deadline, and reserves the right to raise in that protest any and all issues regarding the procurement of RFP #18-630-8000-0001.

Modrall Sperling
Roehl Harris & Sisk P.A.

500 Fourth Street NW
Suite 1000
Albuquerque,
New Mexico 87102

PO Box 2168
Albuquerque,
New Mexico 87103-2168

Tel: 505.848.1800
www.modrall.com

While Molina has not yet had sufficient time to fully analyze the information received from NMHSD on January 19, 2018, Molina's preliminary analysis of the documents provided has revealed numerous failures by NMHSD to follow the RFP that governed the procurement. These issues include, but are not limited to:

1) Deduction of points in Section 6.1, question 5 based on criteria that were not disclosed in the RFP;
2) Deduction of points in Section 6.1, question 8 based on criteria that were not disclosed in the RFP;
3) Deduction of points in Section 6.7, question 62 based on criteria that were not disclosed in the RFP;
4) Deduction of points in Section 6.7, question 67 based on criteria that were not disclosed in the RFP;
5) Deduction of points in Section 6.8, question 72 based on criteria that were not disclosed in the RFP;
6) Deduction of points in Section 6.11, question 87 based on criteria that were not disclosed in the RFP;
7) Deduction of points in Section 6.12, question 94 based on criteria that were not disclosed in the RFP;
8) An incorrect characterization of the financial stability of Molina's parent corporation, inappropriately considering that assessment;
9) A failure to consider Molina's successful compliance with reporting requirements in New Mexico and elsewhere;
10) The deduction of points based on Molina's choice of words when describing audit findings;
11) A failure to consider the quality of the subcontractors Molina intended to utilize for certain UM or BH functions;
12) NMHSD's decision to issue the RFP in September 2017, despite the fact that NMHSD had a contractual option to extend existing Centennial Care contracts;
13) NMHSD's unjustified decision to reduce the number of contracts awarded from up to five, as stated in the RFP, to only three; and,
14) NMHSD's arbitrary decision not to hold oral presentations.

Based just on Molina's preliminary analysis, and without access to a substantial amount of additional relevant information, it appears that there were serious defects in the procurement process that resulted in Molina's non-selection for a contract with NMHSD. We believe that review of the additional requested documentation, which has not yet been provided to Molina, will reveal further protestable issues. We also believe that the issues with the procurement are material, have tainted the procurement process as a whole, likely would have changed the order of bidders, and would have resulted in Molina being awarded a contract with NMHSD. NMHSD's reliance on undisclosed criteria may require rejection of all bids and re-solicitation of the RFP with complete disclosure of all material conditions.

As you are no doubt aware, the procurement of RFP **# 18-630-8000-0001** is a significant issue for the citizens of New Mexico. NMHSD's proposed elimination of Molina as an MCO for the State of New Mexico will have wide-ranging consequences to the more than 227,000 New Mexicans that Molina currently serves and to the more than one thousand (1,000) New Mexico based Molina employees whose positions may be eliminated as a result of NMHSD's actions. Molina already has the infrastructure in place to serve New Mexico, and the elimination of Molina as an MCO in this state will significantly disrupt the provision of health care in New Mexico, will result in increased cost to the taxpayers, and will have far-reaching consequences within the State.

Our request is simple. Please stay further procurement pending resolution of the bid protest that Molina will be filing related to the above issues and other issues revealed as Molina continues to delve into NMHSD's decision-making process. Awarding contracts to the three successful bidders is not in the best interests of NMHSD or the public and will have disastrous results to the State of New Mexico.

Staying the procurement will not adversely impact NMHSD or the public in any way. NMHSD's original schedule for this procurement did not anticipate contract awards until March 2018. Contracted work does not begin until January 2019. A stay pending completion of Molina's forthcoming bid protest will thus have no impact on the provision of services to the citizens of New Mexico, and will likely only result in the procurement taking place in accordance with the original schedule proposed by NMHSD.

The importance of this issue cannot be understated. If NMHSD does not stay the procurement process, Molina will likely seek injunctive relief. Litigation regarding a stay of the procurement will tax the resources of both NMHSD and Molina, and is not necessary if NMHSD voluntarily stays the procurement. It is thus in the best interests of all interested parties if NMHSD voluntarily stays the procurement pending completion of Molina's forthcoming bid protest.

Because of the pressing nature of this issue, please let us know no later than Wednesday, January 24 at 11:00 a.m. if NMHSD will agree to stay the procurement pending resolution of Molina's forthcoming bid protest.

Sincerely,

Jeremy K. Harrison

JKH/kta/W3125415.DOCX

CC: **VIA EMAIL AND USMAIL TO:**

Christopher Collins (christopher.collins@state.nm.us)
General Counsel, HSD
P.O. Box 2348
Santa Fe, NM 87504

Gary O. Chavez (GaryO.Chavez@state.nm.us)
Contracts and Procurement Bureau Chief, HSD
P.O. Box 2348
Santa Fe, NM 87504

VIA U.S. MAIL TO:
United Healthcare of New Mexico, Inc.
100 Stevens Drive
Philadelphia, PA 19113

Western Sky Community Care
7700 Forsyth Blvd., Suite 800
Saint Louis, MO 63105

HCSC Insurance Services Company, operating as
Blue Cross Blue Shield of New Mexico
5701 Balloon Fiesta Pkwy NE
Albuquerque, NM 87113

Presbyterian Health Plan, Inc.
9521 San Mateo Blvd. NE
Albuquerque, NM 87113

Amerigroup Community Care of NM, Inc.
6565 Americas Pkwy # 110
Albuquerque, NM 87110

United Healthcare of New Mexico, Inc.
8220 San Pedro Dr NE, Suite 300
Albuquerque, NM 87113

Wellcare of New Mexico, Inc.
206 S. Coronado Ave,
Espanola, NM 87532

Exhibit C to Memorandum of Law

(1/25/18 Letter)

HUMAN SERVICES
DEPARTMENT

Susana Martinez, Governor
Brent Earnest, Secretary
Christopher P. Collins, General Counsel

January 25, 2018

Jeremy Harrison
Modrall Sperling Roehl Harris and Sisk PA
500 Fourth Street, Northwest
Suite 1000
Albuquerque, New Mexico 87102

Re: RFP#18-630-8000-001

Dear Mr. Harrison:

Your January 22, 2018 letter to Secretary Earnest has been referred to me as general counsel for response.

The first sentence of the second paragraph of your letter acknowledges that "[o]n January 19, 2018 Molina received an Announcement of Award advising Molina that 2019 Centennial Care 2.0 <u>contracts were awarded by NMHSD to</u>…." Your request therefore on page 3 of your letter for HSD to stay the procurement and not award the contracts is untimely. Your footnote on Page 1 of your letter states Molina's intent to participate in the protest process. We agree that nothing in your letter precludes the issues you raise from being addressed in any protest you may file.

HSD has been responsive to your requests for information. Your letter recognizes the fact that HSD has provided initial response to your IPRA request. Furthermore, your letter acknowledges that HSD has been proactive in providing your client information… "Molina received nearly two-thousand pages of documentation related to NMHSD's decision making process."

Thank you.

Christopher Collins
General Counsel, NMHSD

Exhibit D to Memorandum of Law

(1/25/18 E-mail)

EXHIBIT D

Karlene S. Schuman

To: Deana M. Bennett
Subject: RE: Response to January 22 correspondence

From: Collins, Christopher, HSD [mailto:Christopher.Collins@state.nm.us]
Sent: Thursday, January 25, 2018 4:03 PM
To: Brian K. Nichols <bkn@modrall.com>
Cc: Marco E. Gonzales <MEG@modrall.com>; Jeremy K . Harrison <jkh@modrall.com>; Earnest, Brent, HSD <Brent.Earnest@state.nm.us>; Chavez, Gary, HSD <GaryO.Chavez@state.nm.us>; Deana M. Bennett <dmb@modrall.com>; Michelle A. Hernandez <mhernandez@modrall.com>
Subject: Re: Response to January 22 correspondence

***

Mr. Nichols

HSD respectfully requests that your client submit an IPRA.

Thank you,
Chris

Sent from my iPad

On Jan 25, 2018, at 3:59 PM, Brian K. Nichols <bkn@modrall.com> wrote:

> Mr. Collins,
>
> Thank you for your transparency. Would HSD be willing to provide us copies of the signature page(s), or will an IPRA request be necessary?
> Brian
>
> <image001.jpg>
> Brian K. Nichols bkn@modrall.com
> Modrall Sperling | www.modrall.com
> P.O. Box 2168 | Albuquerque, NM 87103-2168
> 500 4th St. NW, Ste. 1000 | Albuquerque, NM 87102
> D: 505.848.1852 | C: 505.604.6286 | F: 505.848.2052
> Licensed in New Mexico, Arizona, and the
> Navajo Nation
>
> ---
>
> **From:** Collins, Christopher, HSD [mailto:Christopher.Collins@state.nm.us]
> **Sent:** Thursday, January 25, 2018 3:50 PM
> **To:** Marco E. Gonzales
> **Cc:** Jeremy K . Harrison; Earnest, Brent, HSD; Chavez, Gary, HSD; Brian K. Nichols; Deana M. Bennett; Michelle A. Hernandez
> **Subject:** Re: Response to January 22 correspondence

***

Marco

Please note you are copying me on your e-mail

Thank you,
Chris Collins

Sent from my iPad

On Jan 25, 2018, at 3:47 PM, Marco E. Gonzales <MEG@modrall.com> wrote:

Shouldn't we ask him when and for copies?

Marco E. Gonzales
Shareholder
Modrall Sperling | http://modrall.com
P.O. Box 9318 | Santa Fe, NM 87504-9318
123 East Marcy Suite 201 | Santa Fe, NM 87501
D: 505.982.8170 | O: 505.983.2020 | F: 505.988.8996

EMAIL NOTICE: UNINTENDED OR UNLAWFUL RECIPIENTS:

The interception or theft of an email or the use of an illegally obtained email is a violation of multiple laws. This email may also contain information that is privileged and confidential. If you are not the addressee any dissemination, copying, distribution or use of this email is strictly prohibited and may violate a number of federal and state, criminal and civil laws including NMSA 30-12-11; 30-45-1 et seq; 18 USC 2701 et seq; and 18 USC 2510 et seq. Attorneys involved in facilitating, perpetuating, aiding and abetting or conspiring to acquire or use emails illegally obtained should consider the obvious and additional ethical obligations of NMRA 16-404. See also Maldonado v. New Jersey 225 FRD 120 (D NJ 2004) (an attorney who receives and uses privileged or confidential materials obtained by tortious or criminal conduct.

On Jan 25, 2018, at 3:22 PM, Jeremy K . Harrison <jkh@modrall.com> wrote:

Mr. Collins,

There is normally a delay between award of a contract and execution of the contract. Can you please confirm whether the contracts have been executed by HSD?

Sincerely,

Jeremy

On Jan 25, 2018, at 2:58 PM, Collins, Christopher, HSD <Christopher.Collins@state.nm.us> wrote:

***

Mr. Harrison

Attached, please find response to your letter of January 22.

Thank you

Christopher P. Collins
Deputy Cabinet Secretary & General Counsel
New Mexico Human Services Department
Santa Fe, New Mexico

<HSD respose to 1 22 letter re Molina.pdf>

Exhibit E to Memorandum of Law

(Declaration of Daniel Sorrells)

Exhibit E

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

MOLINA HEALTHCARE OF NEW MEXICO, INC.,

Plaintiff,

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

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

Defendants.

DECLARATION OF DANIEL SORRELLS IN SUPPORT OF PLAINTIFF'S APPLICATION FOR TEMPORARY RESTRAINING ORDER OR, IN THE ALTERNATIVE, A PRELIMINARY INJUNCTION

I, Daniel Sorrells, declare as follows:

1. My name is Daniel Sorrells. I am over the age of 18 and have personal knowledge of the information set forth in this declaration.

2. I am currently employed as a Plan President with Molina Healthcare of New Mexico, Inc. ("Molina"). I have been employed in that position since April 2017. I reviewed Molina's proposal submitted to the New Mexico Human Services Department ("HSD") in Response to RFP 18-630-8000-0001 (the "RFP"). Molina's records were contemporaneously made by, or with information from, people with knowledge of the information reported and are kept in the course of Molina's regularly conducted business activities. It is the regular practice of Molina to prepare and maintain such records. I have also reviewed the evaluation documents HSD has provided to date and the other proposals submitted to HSD. In connection with the preparation of this declaration, I have reviewed those records, and this declaration is based upon my personal knowledge resulting from that review and the business records themselves.

Exhibit E

Molina's Background and Service to New Mexico

3. Molina began serving New Mexico's most vulnerable in 2004 when it purchased Cimarron Health Plan.

4. With Cimarron Health Plan, which served New Mexico's families since 1997, Molina inherited the care of more than 40,000 New Mexicans and by 2005 had grown to 61,000.

5. Molina was awarded a Centennial Care contract as a Managed Care Organization ("MCO") in New Mexico in 2014. Molina's contract ends December 31, 2018, but could have been extended by HSD.

6. Molina provides services to a total of approximately 258,000 New Mexicans: about 224,000 New Mexicans through Medicaid (about 26% of all New Mexico Medicaid members), about 5,500 New Mexicans through Medicare, and provides services to about 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 Marketplace members).

7. Molina contracts with over 14,000 providers across the State including hospitals, pharmacies, rural providers, tribal health clinics, etc.

8. Molina serves more of New Mexico's most vulnerable Medicaid population than any other MCO in the State. 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. Molina serves over 5,800 New Mexicans in long term care 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.

9. In New Mexico, 103,205 Molina members receive behavioral health services, and 35,036 Molina members receive substance abuse services. Molina has developed infrastructure to provide services to these members, including 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.

10. Molina also provides Medicaid managed care to over 10,000 Native Americans in New Mexico.

11. Molina's Native American Affairs division is very active in engaging and supporting Native American communities.

12. For example, Molina's Native American Affairs division has provided sponsorships to Navajo Nation Community Health Representative (CHR), Native American Professional Parent Resources, Inc., and Zuni Pueblo to bring oral health education engagements or health literacy awareness to Native American community members. Molina will be collaborating with each entity to provide activities, education and resources to members.

13. The Native American Affairs division are working with the Zuni Pueblo and Navajo Nation to further explore opportunities to provide case management to tribal inmates to ensure that Native Americans incarcerated in a tribal facility may receive resources and services such as case management to aid in decreasing recidivism in incarceration due to behavioral health needs. Molina was successful with the same pilot at the Metro Detention Center in Albuquerque.

14. Molina is also expanding access to behavioral health and substance use disorder services for its tribal members through telemedicine. Molina has provided grant funding to First Nations ($21,000), located in Albuquerque; Pine Hill Clinic ($145,000), located in Pine Hill;

Hozho Wellness Center ($7,000), located in Gallup; and Acoma Pueblo ($7,000), located in Acoma. Funding enhances providers' ability to equip their clinics with telemedicine infrastructure (HIPPA compliant telemedicine software or needed hardware, such as computers, audio equipment, lighting or cameras). Once accomplished, tribal members presenting at any one of these clinics gain access to behavioral health prescribers, such as psychiatrists, and substance use counselors who, although physically located offsite, are accessible through telemedicine. Additionally, Molina has provided start-up funding for three behavioral health prescriber groups to set aside weekly blocks of time for medication assisted therapy and substance abuse counseling services for tribal members.

15. Molina has Peer Support staff that are Native American to support our Native American members with a Native American cultural and holistic approach to recovery and healing. One of our Peer Support staff is a traditionalist and provides services in the Navajo language. Molina was the first MCO in New Mexico to provide a Traditional Healing Benefit to Native members for traditional customs and ceremonies.

16. Molina was chosen by Kaiser Health News to complete an interview on integrated care and delivery that Molina provides to the largest Medicaid population by county in United States—McKinley County, New Mexico. Molina's program has 11 Native American Care Coordinators, who are from the relevant Native American community, and who are able to communicate with members in their native language. Molina also uses Native American Peer Support and Tribal Liaisons who work together to engage members and assist in coordination of care with Indian Health Services. Molina was recently highlighted in the Navajo Times for its work with Tribal CHR programs to address food scarcity and preventive care and services to remote areas.

17. Molina provides funding and services to other providers and local public agencies. 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).

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

19. If Molina leaves the State, it will have an impact on the overall health care system in New Mexico. In my opinion, not only will Molina's Medicaid and Medicare members be affected, Molina's Marketplace members will also be affected. HSD's decision to end Molina's Medicaid contract places at risk all of Molina's operations in New Mexico and Molina's extensive healthcare infrastructure that it has developed in the State.

Molina's Employees

20. In total, Molina currently employs 1119 employees in New Mexico, which includes the hundreds of employees who work in Molina's Albuquerque office, those employees who work at a national call center in Albuquerque, and those who work at a national data center.

21. Molina paid over $12.6 million in salaries to its New Mexico employees in 2017.

22. Molina leased a building in downtown Albuquerque and Molina's annual rental for its office space and other buildings is $4 million.

23. If Molina were to leave New Mexico, these facilities likely would be shuttered and over 1100 New Mexicans likely would lose their jobs.

24. If Molina leaves New Mexico, the New Mexico market will not absorb all these employees.

25. In addition to Molina's employees, Molina also contracts with New Mexico vendors/small businesses that will be negatively impacted if Molina leaves New Mexico.

Mercer's Role in Cost Setting

26. It is my understanding that Mercer, a contractor to HSD, has for years set the rates MCOs received, and then Mercer was allowed to set the rates upon which bidders would be scored in the Centennial Care 2.0 RFP process.

27. With respect to the RFP, it is my understanding that Mercer's services included setting the "cost structure" or "cost table" for the RFP. The cost 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 considerable 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.

28. 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 cost 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").

29. During the years that Mercer has set capitation rates for the Centennial Care program, Molina has challenged Mercer's rates and persuasively demonstrated (though Mercer has not agreed) that Mercer's rates are not actuarially sound, and were not sustainable.

30. Western Sky, a new MCO to the state, is a subsidiary of Centene, which is known in the industry for bidding within the lower margins of the rate range, this time bid in the rate range of 40th percentile. Western Sky scored 254 points out of a possible 400.

31. Molina bid in the rate range of the 70th percentile. 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—Molina scored 120 points out of a possible 400.

32. Molina is an incumbent MCO providing services to 224,000 New Mexicans. It knows the actual cost of services to provide quality health care to New Mexicans with Medicaid, and priced its bid accordingly.

33. During the Question and Answer period, Molina asked the following question regarding the soundness of the HSD's rates: "Please confirm that the minimum and maximum capitation rates represent the actuarially sound capitation rate range as defined in the federal regulations (42CFR Sections 438.4 through 438.7)."

34. HSD responded as follows: "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. Please refer to RFP Section 7.3.3-7.3.5 for detail related to post award adjustments."

35. In other words, as I read this, HSD acknowledged that the rates it set as part of the RFP are not actuarially sound and that it would not consider rates outside of that range in response to the RFP. In my opinion, Mercer, who set the rate range for HSD, has an obligation to the State to present and recommend to the State an actuarially sound rate. This clearly indicates that did not happen.

36. Molina, by bidding in the rate range of the 70th percentile, sought to be responsive to HSD's predetermined and unactuarially sound rate range, while at the same time taking a realistic, thoughtful approach to structuring its cost proposal, based on Molina's experience purchasing services for New Mexico Medicaid members.

37. Based on my experience with Molina in New Mexico, I do not think that proposals offering rates in the bottom half of the rate range are actuarially sound and I do not think that rates within the bottom half of the rate range are sustainable long term.

38. As part of the procurement process, HSD had the option to hold oral presentations, but decided not to do so. In my opinion, this decision is questionable in part because HSD selected a new MCO without meeting its formally during the RFP process, and oral presentations would have given HSD an opportunity to inquire about the financial integrity and provider/benefit issues that Western Sky's parent, Centene, has had in other states.

Mercer's Unjustified and Unjustifiable Decision to Eliminate Molina

39. In addition to apparently setting the rates that bidders were required to adhere to when making their proposals, Mercer also drafted documents announcing HSD's proposed

award, including preparing the Executive Evaluation Committee Recommendation ("Mercer Memo"), attached as Attachment 1.

40. The Mercer Memo outlined four bullet points purporting to support the recommendation to select two incumbent MCOs, and one new MCO.

41. First, Mercer noted that the three highest scoring plans demonstrate strong scores in the Technical Proposal. Molina's Technical Proposal score was only two points lower than Blue Cross/Blue Shield and only 80 points lower than Western Sky (out of a total possible score of 1390). Molina's Proposal ranked higher than Western Sky in a number of key areas, including experience and qualifications, provider network, member and provider services, QI/QM, reporting and program integrity, financial management, and value based purchasing.

42. Second, Mercer stated that contracting with three MCOs furthers HSD's efforts to create administrative simplicity for providers and state oversight while maintaining adequate choice for Members. Based on my experience, bringing in a new MCO, rather than awarding a contract to Molina, exacerbates administrative complexities by inserting new administrative hurdles and increases harm to members by requiring them to change MCOs and disrupting continuity of care.

43. Third, Mercer stated that the recommendation provided "stability" through the retention of two incumbents while providing a new option for members. As discussed above, bringing in a new MCO, rather than awarding a contract to Molina, reduces stability and, while members will have a new MCO option, that option comes at a cost to the very members Mercer asserts would benefit from the change. Molina's members across the State will have to change MCOs, and potentially, providers, regardless of whether they want to, and will have their care disrupted.

44. Fourth, Mercer attempts to justify the decision to only award three contracts (instead of up to five as provided in the RFP) on the grounds that reducing the number of MCOs will create economies of scale and encourage lower administrative cost. In my opinion, eliminating Molina and bringing in a new MCO will hinder, not create, economies of scale and will increase administrative costs. It will also weaken the negotiating power of the State of New Mexico relative to each health plan. Having fewer health plans places the State in danger of not being able to provide choice to members if health plans threaten to exit the market.

45. Selecting an out-of-state MCO to award a Contract to is not in the State's best interest. Western Sky has no experience in caring for vulnerable New Mexicans. Molina is concerned about how the vulnerable disabled populations will transition and receive services given the last (failed) transition of behavioral health providers.

46. As I understand it, New Mexico Medicaid members with behavioral health and substance abuse disorders recently experienced a poorly managed transition to out-of-state companies in 2013. At that time, HSD suspended Medicaid payments to up to 15 behavioral health centers, which in turn meant the loss of hundreds of New Mexico providers. HSD hired out-of-state providers, which, as I understand it, then refused to provide the services necessary to New Mexico Medicaid members with behavioral health and substance abuse disorders unless they were provided with higher reimbursement rates than had been provided for the New Mexico behavioral health providers. When the out-of-state providers were unsuccessful in their endeavors to obtain higher reimbursement they left the State, leaving tens of thousands of New Mexicans without access to outpatient behavioral health services. During that transition, until Molina and other MCOs stepped in, many of those members went without care.

47. In my review of the consensus scoring sheets, I noted that HSD evaluators appear to have 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."

48. HSD's discussion regarding Puerto Rico is telling because Molina did not provide any information to HSD regarding Puerto Rico as it was outside the scope of the RFP. In other words, the HSD evaluators relied upon news and other media sources, or Mercer personnel, to obtain information about Molina's parent company and sister plans.

49. HSD also reached an erroneous conclusion about the financial stability of Molina Healthcare Inc. (MHI).

50. MHI's debt remained at investment grade levels throughout 2017 even in the wake of financial losses. MHI retained an investment grade Ba1 credit rating. MHI's stock has surged to its highest level.

51. Molina also remained in good standing with the Superintendent of Insurance's office.

52. Despite the changes in corporate leadership, Molina's performance in New Mexico improved in each quarter in 2017, as measured by Molina's Administrative and Medical Cost Ratios.

53. Molina's workforce reductions were prudential actions to right size the company and motivated by aligning Molina's cost structure with the administrative allowance built into Molina's capitation rates by our state partners.

Exhibit E

54. With respect to Puerto Rico, it is true that the Puerto Rico plan's loss ratio in Q2 2017 for the Island was 105%, which while not ideal, should not be characterized as "huge", and which subsequently improved dramatically to 83% for Q3 2017.

[Signature page follows]

Pursuant to Rule 1-011(B) NMRA, I declare under penalty of perjury under the laws of the State of New Mexico that the foregoing is true and correct to the best of my knowledge.

Executed this 31 day of January, 2018, in Albuquerque, NM

Attachment 1 to Sorrells Declaration

(Mercer Memo)

MERCER
MAKE TOMORROW, TODAY

Washington Square
1050 Connecticut Avenue, Suite 700
Washington, DC 20036
+1 202 331 2562
www.mercer.com

MEMO

TO: Dan Clavio, Procurement Manager

DATE: December 20, 2017

FROM: Jessica M. Osborne, Principal

SUBJECT: 2017 CENTENNIAL CARE 2.0 MCO RFP #18-630-8000-0001

Executive Evaluation Committee Recommendation

On Monday December 18, 2017 the Executive Evaluation Committee ("Committee") held a meeting to discuss the information contained in the RFP Scoring Results Summary and develop a recommendation for the Medicaid Director and Secretary of Human Services Department. The Committee reviewed all scores and rankings for each of the Offerors and discussed the needs and priorities of the State.

Based on this discussion, the Committee recommends that the New Mexico Human Services Department select the top three highest-scoring Offerors and initiate negotiations with Presbyterian Health Plan, Inc., Western Sky Community Care, and Blue Cross Blue Shield of New Mexico. The Evaluation Committee notes the following benefits of this recommendation to include:

- The three (3) highest-scoring plans overall demonstrated strong scores in the Technical Proposal.
- Contracting with three (3) MCOs furthers HSD's efforts to create administrative simplicity for providers and state oversight staff while maintaining adequate choice for Members.
- The recommendation will provide stability in the NM Medicaid program through the retention of two incumbent MCOs while providing a new MCO option for Members.
- A reduction in the number of MCOs has the potential to create economies of scale and encourages lower administrative costs.

The Evaluation Committee further recommends that no oral presentations will be required. Please accept this recommendation with the attached executive scoring summary which includes the details regarding the procurement process and results.

Exhibit F to Memorandum of Law

(Declaration of Kelly Good)

Exhibit F

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

MOLINA HEALTHCARE OF NEW MEXICO, INC.,

Plaintiff,

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

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

Defendants.

DECLARATION OF KELLY GOOD IN SUPPORT OF PLAINTIFF'S APPLICATION FOR TEMPORARY RESTRAINING ORDER OR, IN THE ALTERNATIVE, A PRELIMINARY INJUNCTION

I, Kelly Good, declare as follows:

1. My name is Kelly Good. I am over the age of 18 and have personal knowledge of the information set forth in this declaration.

2. I am currently employed as Director of Requests for Proposals with Molina Healthcare, Inc. ("MHI"). Prior to becoming Director of Requests for Proposals, I was a Vice President of Government Contracts. I have been employed at MHI since March 2016. I have worked in the managed Medicaid industry since 2009. During that time, my responsibilities have included preparing proposals in response to Requests for Proposals ("RFPs") and interacting closely with state agencies. Throughout my career, I have been involved in the submission of proposals in at least 15 different states for various managed Medicaid and Children's Health Insurance Program lines of business. My responsibilities at MHI include reviewing draft RFPs and proposed contracts prior to the RFP release and the actual RFP once it is released; conducting a review of proposal responses for question compliance and proprietary and

confidential content; write and edit proposal responses; review competitive intelligence; and partner with the Legal department in all bid protests for both winning and losing bids. I reviewed RFP 18-630-8000-0001 (the "RFP") released by the New Mexico Human Services Department ("HSD") and the final proposal response submitted by Molina Healthcare of New Mexico, Inc. ("Molina") to HSD. I have also reviewed Molina's records that were contemporaneously made by, or with information from, people with knowledge of the information reported and that are kept in the course of Molina's regularly conducted business activities. It is the regular practice of Molina to prepare and maintain such records. I have also reviewed the evaluation documents HSD has provided to date and the other proposals submitted to HSD. In connection with the preparation of this declaration, I have reviewed those records, and this declaration is based upon my personal knowledge resulting from that review and the business records themselves.

Background of RFP and Award

3. HSD issued the RFP on September 1, 2017. Molina timely submitted a responsive bid on November 3, 2017. Seven other companies provided bids, including all incumbent Centennial Care contracted Managed Care Organizations ("MCOs"). On December 20, 2017, Mercer issued recommendations regarding which bidders should be awarded a contract. On January 19, 2018, about two months before planned, HSD announced its award of the 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 in New Mexico. Services under the new contracts are to begin on January 1, 2019.

5. HSD did not award contracts to Molina and United Healthcare, another incumbent MCO in New Mexico.

Exhibit F

<u>Mercer's Conflict of Interest</u>

6. Based on my years of experience, Mercer played a larger role than is typical for consultants in the preparation and evaluation of an RFP, which is especially concerning given Mercer's business relationship with a Centene subsidiary, Envolve. Envolve is a specialty health services company (providing services such as pharmacy benefit delivery).

7. Based on my review of Western Sky's proposal, Western Sky disclosed Centene's relationship with Envolve in its Proposal, but did not disclose the relationship between Centene and Mercer in the Proposal.

8. Based on my review of Western Sky's proposal, it appears that Envolve will be heavily utilized by Western Sky in New Mexico. Western Sky references Envolve often, and details its plans to utilize Envolve for many specialty services.

9. Based on my review Western Sky's proposal, when 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, and Mercer's partnership with Envolve focuses specifically on pharmacy services.

10. Despite what appears to me to be a potential conflict of interest, Mercer was also centrally involved in developing, managing, and evaluating the RFP as a consultant to HSD.

11. Importantly, from the records I have reviewed, it appears that HSD did not consult with or invite agencies such as the New Mexico Department of Health; the Department of Education, which oversees School Based Health Centers and Medicaid School Based Services; the New Mexico Children, Youth and Families Department; and the Office of Superintendent of Insurance Services, to participate in the process.

<u>Mercer's Instruction to Evaluators to Consider Undisclosed Evaluation Criteria</u>

12. Based on my review of the contract between HSD and Mercer, as well as the Executive Evaluation Committee Recommendation that Mercer prepared, attached as Attachment 1 to Daniel Sorrels Declaration, it appears that Mercer was largely responsible for the development of the RFP including, its evaluation factors and cost rates, the management of the procurement process, and "coaching" HSD personnel in the evaluation of proposals.

13. Mercer also conducted the "consensus scoring meetings," through which individual scores from individual evaluators were "blended" or adjusted into one consensus score for an evaluation factor.

14. In my opinion, the Scoring Results consensus score sheets reveal serious flaws in the evaluation of the proposals.

15. For certain RFP questions, it appears that Molina's score was reduced because Molina did not provide certain information, yet that information was not requested in the RFP.

16. In other instances, it is clear that the evaluators considered factors outside the RFP question. This was made clear because for each RFP question, Mercer provided "Response Consideration(s)" which oftentimes include evaluation criteria not included in the RFP question itself. This occurred up to 30 times. In other words, based on my review of the scoring results, HSD changed the evaluation factors and/or added new evaluation factors during the bid process 30 times, and then appears to have reduced Molina's technical score based on those new, undisclosed, factors.

17. In Section 6.3, Question 25, for example, 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.

18. 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 appears to have been reduced for failing to details about the contracts, resolution of disputes or complaints such as about transportation, and how equipment would be purchased; but such information was not sought in Question 62

19. 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 not including "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 evaluation factor appears to have resulted in a decrease in Molina's overall score.

20. 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 ITUs, HSD directed its evaluators to score the response based on whether "the response indicate an understanding that emergency services and services provided by I/T/Us do not require PA?" The undisclosed evaluation factor appears to have resulted in a decrease in Molina's overall score.

21. The consensus score sheet regarding Molina's response to Question 21 criticizes Molina for providing only "limited details regarding cultural considerations," when Question 21 did not request information on cultural considerations.

22. Questions 42 and 74 were both scored on whether the HSD evaluators "liked" the innovations Molina presented.

23. The evaluators faulted Molina for not including a discussion of Native American Advisory Boards in its response to Question 15, when the question did not request that information. Beyond that, had Molina been requested to provide that information, its response would have highlighted Molina's work with Native American Advisory Boards.

24. The evaluators faulted Molina for not including a discussion of Corrective Action Plan ("CAPs") remediation in response to Question 5. CAPs are notices from the state regulatory agency identifying potential violations or violations of the Contract. MCOs then prepare and

implement a remediation plan to address the violations. Molina submitted information on its CAPs but did not submit information regarding remediation plans because the RFP question did not request information on such remediation plans. Molina tracks CAP remediation plans, and could have and would have provided this information had it been requested.

25. HSD also cited weakness in administrative regulatory compliance as a deficiency in Molina's Proposal. The consensus score sheet provides: "There is evidence of a repeated pattern (late reporting, inaccurate reporting, and failure to meet requirements, failure to report, reports incomplete) across the board in many states resulting in CAP and fines."

26. Molina disputed this issue at the time and now. In addition, in my experience, CAPs are not uncommon and, when viewed "across the board," may suggest a pattern of violations, but when viewed on a state-by-state or plan-by-plan basis, the CAPs more likely demonstrate a pattern of improvement, which is true for Molina. In addition, and contrary to the evaluators' comments, Molina Healthcare of New Mexico received almost no penalties for reporting violations in 2016 or 2017.

27. HSD also criticized Molina's decision to use delegated subcontractors for certain UM or BH functions in Question 13. The consensus score sheet states: "Generic information, lack of detail about vendors and MCO approach to oversight. Lots of vendors with minimal NM experience/presence."

28. All of Molina's vendors in New Mexico have been reviewed and approved by HSD for Molina's current operations to serve our New Mexico members.

29. 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. While all MCOs in Kentucky experienced losses due

to the unsustainable rates, Centene was the only MCO to break its contract and leave the State. Based on reporting I have read, the Commonwealth of Kentucky and its agencies estimated Centene's exit from Kentucky cost the state upwards of $40,000,000.

30. In December, 2017, I understand that another Centene subsidiary agreed to a fine of $1,500,000 imposed by the Washington State Insurance Commissioner for Centene's failure to provide an adequate medical provider network to its ACA/marketplace members. It is my understanding that the Insurance Commissioner had previously ordered Centene to halt the sale of health plans in Washington.

31. Based on my review of documents we have received thus far, which redact compliance information, Molina cannot determine whether the Centene subsidiary reported these issues, in Washington and Kentucky, as sanctions in the compliance history part of its bid responding to the RFP.

[Signature page follows]

Pursuant to Rule 1-011(B) NMRA, I declare under penalty of perjury under the laws of the State of New Mexico that the foregoing is true and correct to the best of my knowledge.

Executed this 31 day of January, 2018, in Harrisburg, Pennsylvania.

[signature]
____

Exhibit G to Memorandum of Law

(Scoring Summary excerpt)

Exhibit G

HEALTH WEALTH CAREER

2017 CENTENNIAL CARE 2.0 MCO RFP #18-630-8000-0001

SCORING RESULTS SUMMARY

DECEMBER 22, 2017

New Mexico Human Services Department

MAKE TOMORROW, TODAY MERCER

CONTENTS

1
INTRODUCTION

On September 1, 2017, the New Mexico Human Services Department (NM HSD) released a Request for Proposals (RFP) to procure managed care organizations (MCOs) that will bring innovative approaches to New Mexico's Medicaid/CHIP program (Centennial Care 2.0). The RFP included mandatory requirements that each bidding MCO (hereinafter "Offeror") was required to meet to qualify for the technical evaluation, references and cost proposal scoring. Eight Offerors responded to the RFP and all eight (8) passed the mandatory requirements phase.

On November 6, 2017, Mercer provided training to subject matter experts (SMEs) from HSD's Medical Assistance Division (MAD) and Behavioral Health Services Division (BHSD) who served as the State's RFP evaluation team. During the training, evaluators were provided a review of the RFP process and goals; instructions for using and completing the evaluator worksheets, scoring methodology, RFP questions, and the consensus scoring process.

Following the training, during the weeks between November 6th and December 3rd, 2017, each evaluator independently read and scored each Offeror's response to the RFP and documented their score and notes for each question in the evaluator worksheet for the applicable Offeror.

From December 4th to December 15th, 2017, the evaluators participated in consensus scoring sessions. These sessions were conducted using the individual reviewer score sheets and notes and resulted in one consensus team grade per question and supporting notes. The consensus decisions were documented by consultants from Mercer who served as independent unbiased facilitators. Prior to finalizing a consensus score, all members of the evaluation team agreed to the final score and documentation. These consensus score sheets are attached for reference (Attachment 1 – Technical Proposal Consensus Score Sheets).

Following the consensus scoring, the Executive Evaluation Committee (hereinafter "Committee") reviewed the references submitted as part of the proposal. Each reference was reviewed and scored by the Committee using a predetermined methodology (Attachment 2 – References Consensus Score Sheets).

Finally, the cost proposals were reviewed and assigned a score, again using a predetermined methodology (Attachment 3 – Cost Proposal Score Sheet).

The following chapters of this report reflect the final scores and details for each Offeror (in alphabetical order) including a high-level summary of some of the noted strengths, weaknesses and points for discussion. The summary does not reflect all comments from the evaluation committees, for a complete listing of comments from each consensus session see Attachment 1 - Technical Proposal Consensus Score Sheets.