Council of the District of Columbia
OFFICE OF COUNCILMEMBER KENYAN R. MCDUFFIE, WARD 5
MEMORANDUM
1350 Pennsylvania Avenue, NW, Washington, D.C. 20004

TO:	Councilmembers and Staff
FROM:	Brett Allen, Senior Legal Counsel
RE:	"Fidelity in Compliance of Contracting and Procurement Emergency Amendment Act of 2021" Background Memo
DATE:	May 29, 2021

Background

On January 10, 2020, OCP issued a solicitation seeking three contractors to provide healthcare and pharmacy services for the District's Medicaid Managed Care Program. Of the seven managed care organizations ("MCO") that submitted proposals, only four were deemed to be in the competitive range and further evaluated by the Technical Evaluation Panel ("TEP"): Medstar, AmeriHealth Caritas, CareFirst (Trusted), and Amerigroup. Medstar was the only non-incumbent to make it to the TEP. On July 9, 2020, the contracting officer ("CO") notified Amerigroup that it had been "eliminated from consideration for award." On July 16, 2020, Amerigroup filed a Contract Appeals Board (CAB) protest, alleging, among other things, that (1) the District's evaluation of Amerigroup's proposal was unreasonable; and (2) the District failed to provide meaningful discussions with Amerigroup. *Please see CAB Decision for additional background.*

The CAB's Decision Sustaining Amerigroup's Protest

On December 1, 2020, the CAB upheld Amerigroup DC's protest, which alleged more than 10 procurement violations.[1] Judge Nicholas Majett found that the Office of Contracting and Procurement (OCP) violated both the law and the terms of its own solicitation. The Board ordered OCP to reevaluate the proposals and allowed for Medstar, AmeriHealth, and CareFirst to complete the first year of the

[1] District of Columbia Contract Appeal Board, CAB No. P-1128, Protest of Amerigroup District of Columbia

contract if they were eliminated in the reevaluation. In his written opinion, Majett stated "Amerigroup may have received a contract award" if the contracting officer had followed the law and terms of the solicitation. On March 15, 2021, the CAB denied the District's motion to reconsider its previous ruling. The base year of the contract ends on September 30, 2021, and as of May 28, 2021, OCP has yet to begin the court-ordered reevaluation.

The CAB stated, "having sustained Amerigroup's protest for the above reasons, we need not decide all the remaining protest allegations." The CAB further stated, "Although we do not address all of the protestor's remaining allegations regarding the evaluation of offerors' proposals, it would be prudent for the District to be mindful of these allegations as appropriate when implementing the remedy herein."

Effect of the Conduent CAB Decision

On August 20, 2020, the CAB issued the first of two black-eyes to OCP for violating procurement laws by awarding a contract to a bidder whose proposal was non-responsive because it failed to submit a subcontracting plan required by law and the solicitation. As a result, the CAB ordered the contract to be terminated. The Conduent decision set a legal precedent that continues to reverberate with the Amerigroup CAB Decision, ruling that "Amerigroup was unequally treated" and required that all proposals be reevaluated. While not specifically addressed in the Amerigroup CAB Decision, the facts revealed that Medstar failed to submit a subcontracting plan in violation of both District law[2] and the terms of the solicitation."[3] If the CAB's order in the Amerigroup protest ruled on that issue, precedent suggests this

[2] *See,* D.C. Official Code § 2-218.46(d)(3)

[3] MCO Contract H.9.2- Subcontracting Plan: If the prime contractor is required by law to subcontract under this contract, it must subcontract at least 35% of the dollar volume of this contract in accordance with the provisions of section H.9.1 of this clause. ***The plan shall be submitted as part of the proposal and may only be amended after award with the prior written approval of the CO and Director of DSLBD.*** Any reduction in the dollar volume of the subcontracted CW69127 Managed Care Organization (MCO) 230 portion resulting from an amendment of the plan after award shall inure to the benefit of the District. Each subcontracting plan shall include the following: (1) The name and address of each subcontractor; (2) A current certification number of the small or certified business enterprise; (3) The scope of work to be performed by each subcontractor; and (4) The price that the prime contractor will pay each subcontractor.

violation would result in the termination of the MCO Contract. As expressed in the May 28, 2021 legislative staff call, the Executive fears that after the proposals reevaluated, Medstar will no longer qualify because, based on Conduent, their proposal will now be deemed "non-responsive."

However, to cure OCP's flagrant violations of the law and to keep Medstar engaged, the Executive has introduced the "Department of Health Care Finance Support Act of 2021". This proposed legislation seeks to retroactively change procurement law to exempt the requirement of CBE subcontracting plans for multiple DHCF contracts as a solution to the MCO contract. As a basis for this unprecedented introduction, the Executive needs you to believe that for years, common procurement practice is to accept subcontracting plans from bidders during the "Best and Final Offer" ("BAFO") process, and not when the bidder submits a proposal in accordance with the law. The "we've always done it this way" exemption. This is simply not true. **At no time has there been a generally accepted practice to violate CBE law.** While the Conduent Decision speaks for itself, even it relies on a November 23, 2016 CAB Decision under *Martins Construction*[4], which held that an award is unlawful and improper if the awardee did not submit a compliant required subcontracting plan. As this was a 2016 case against OCP, under the same Director, that resulted in the termination of a contract, any suggestion that OCP did not have notice of its violation of CBE laws is disingenuous. Furthermore, this is just one example of how OCP has continued to flout the District's only small business law for years, and without consequence.

To be clear, the Executive's proposed legislation is not the "solve" it purports to be. While it does retroactively cure its' violation of the CBE law, it does not cure the multiple violations identified in the Amerigroup CAB Decision. To attempt to legislate out of a negative CAB decision because the Council has the power to do so is not only bad policy, but it would certainly invite additional protests by aggrieved parties. If the concern is to avoid a major disruption to the District's Medicaid population, the solution proposed by the Executive will open the door for future disruptions.

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[4] *See*, Martins Constr. Corp., CAB No. P-0969, 2016 WL 8230983 (Nov. 23, 2016).

Need for Emergency Legislation

The intent of the "Fidelity in Compliance of Contracting and Procurement Emergency Amendment Act of 2021" is to ensure that OCP begins the CAB-ordered evaluation in the appropriate time as to avoid major disruption in service for Medicaid beneficiaries. The Medicaid Managed Care contract has timetables and milestones that are required to ensure beneficiaries are adequately covered. In addition to a 30-day notice requirement for any material changes to the contract/program, there is a 120-day review required for any new contractor entering service as a Medicaid Managed Care Organization. By delaying the CAB ordered reevaluation, OCP is ensuring widespread disruption to District residents covered by Medicaid and limiting the freedom of choice Medicaid beneficiaries have enjoyed for nearly the last 10 years. Over the last decade, District residents who have relied on the Medicaid program for health insurance have enjoyed the option of having three managed care organizations to choose from. OCP's strategy of inaction with regards to the CAB-ordered reevaluation, ensures that only two managed care organizations will qualify to serve the nearly 200,000 District residents who rely on this critical safety net program.

On numerous occasions, Deputy Mayor Wayne Turnage has stated in news articles, "If we end up with two plans as a result, at the end of the day, we will not bring a third plan into the system."[5] Even in that scenario, a significant portion of the District's Medicaid population would be transferred to the remaining MCOs, resulting in a disruption in service. One has to question if the motivation is to prevent disruption in service, or to prevent a third MCO from obtaining a contract. Further, at a Committee on Health hearing, DM Turnage stated that he had predetermined the MCOs he would utilize, if he did not get his way, would be AmeriHealth Caritas and CareFirst[6]. Unfortunately, the inaction by OCP and the "predetermination" of winners of procurement by the Deputy Mayor open the District of Columbia to further contract protest.

[5] Ryals, "Bowser Administration Sought to Sidestep Judge's Ruling on Lucrative Medicaid Contract"
[6] Turnage, "DHCF Support Act of 2021 Testimony", April 21st Committee on Health Hearing

Solution

While the CAB's ruling and its denial of the District's motion for reconsideration, addresses issues and violations of Medstar's evaluation, its ruling is not limited to Medstar. The December 1, 2020 ruling orders a complete reevaluation of **all** plans in the competitive range of offerors. As such, if a proper evaluation was conducted, there is no way currently to know the results of the CAB-ordered reevaluation. These actions by the Executive create a chaotic and destabilizing effect on hundreds of thousands of District residents that rely on the Medicaid program. It is practically certain that the actions of the Executive in stating that it has predetermined a procurement award, in opposition to the CAB's ruling, will lead to an additional reassignment of Medicaid members beyond October 1, 2021.

The Council of the District of Columbia must compel OCP to begin the CAB ordered reevaluation immediately to ensure it is compliant with the terms of the solicitation and contract as well as to prevent widespread disruption to the many District residents who rely on this program for their health care, especially during a pandemic. Additionally, the Council must act to protect the levels of choice that District residents who rely on Medicaid Managed Care have enjoyed for nearly a decade by requiring that DHCF maintain three managed care organizations.