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January 30, 2015

Via Electronic Mail (*Anthony.DeMeola@Omnicare.com*) and USPS Regular Mail

Anthony DeMeola, R.Ph., General Manager
Omnicare of New York, LLC dba Omnicare of Whippany
121 Algonquin Parkway
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Subject: RFP #14-X-23246 - Protest of Scheduled Award of Contract T0472
Unit Dose Pharmaceutical Services

Dear Mr. DeMeola:

This letter is in response to your letter dated September 23, 2014, by which you protest, on behalf of Omnicare of New York, LLC d/b/a Omnicare of Whippany ("Omnicare"), the scheduled award of the *Unit Dose Pharmaceutical Services* term contract to Partners Pharmacy, LLC ("Partners"), as announced by the Procurement Bureau, the unit of the Division of Purchase and Property ("Division") which conducts the Division's competitive procurement programs. Omnicare contends that the Evaluation Committee ("Committee") "overlooked Partners' demonstrable inability to perform the task and instead made a preference for cost savings that Omnicare believes will ultimately prove illusory." Omnicare further asserts that "both Partners' proposal and the evaluation process are flawed and that real harm could occur if not corrected." For the reasons set forth in its September 23, 2014 letter, Omnicare requests that the September 9, 2014, notice of intent to award be rescinded and that a new intent to award be issued naming Omnicare as the intended awardee or in the alternative, that the State cancel Request for Proposal ("RFP") #14-X-23246 and re-procure this contract at a later date.

Omnicare's letter also requests the opportunity of an in-person presentation. I have reviewed the Procurement Bureau's record of the subject procurement, relevant portions of the record of the prior attempt to procure these services in 2012 pursuant to RFP #12-X-22172, commentary of the Procurement Bureau staff member who oversaw the subject procurement relative to the points of protest presented in Omnicare's letter dated September 23, 2014, Partners' response to Omnicare's letter, and applicable statutes, regulations and case law. This review has provided me with sufficient information to render an informed final agency determination regarding this matter. Therefore, an in person hearing is not necessary. N.J.A.C. 17:12-3.3(d).

Background

By way of background, the Procurement Bureau publicly advertised RFP #14-X-23246, Unit Dose Pharmaceutical Services, on February 28, 2014. On the same date, the Bureau announced the RFP on the Division's website, where it was available for download by interested parties. Notice of the RFP release was also provided directly to several firms known to provide services similar to those requested in the RFP. The RFP was issued on behalf of the New Jersey Department of Human Services ("DHS") and the New Jersey Department of Military and Veterans Affairs ("DMAVA") to solicit proposals from firms to provide pharmaceuticals, primarily in unit dose, and a system for their distribution, including computerized support, equipment and personnel, to select State long-term care facilities/hospitals. The contract resulting from the RFP will provide pharmacy services to 14 facilities/hospitals servicing 4,667 clients/beds, including seven Division of Developmental Disabilities ("DDD") centers, four Division of Mental Health and Addiction Services ("DMHAS") psychiatric hospitals and three veterans' homes. The RFP requested firm fixed pricing, capitated on a per-client, per-day basis for three separate categories of capitation which included DDD clients, DMHAS clients and DMAVA clients.

The RFP is a re-procurement of the Unit Dose Pharmaceutical Services term contract, T0472, which was last re-procured in 2002. Omnicare is the incumbent contractor under the current T0472 contract. A prior attempt to re-procure these services was undertaken by the Procurement Bureau in 2012. That solicitation failed to produce a successful award thus requiring the issuance of the current RFP.[1]

Optional site visits were held at three facilities on March 7, 2014. Pursuant to Section 1.3.1 of the RFP, an electronic question and answer period resulted in Addendum #1, dated April 8, 2014, which provided answers to the questions submitted. Addendum #2, dated April 9, 2014, extended the proposal opening date from April 16, 2014 to May 2, 2014. Two proposals were received by the Division on May 2, 2014, one from Omnicare and the other from Partners. Both proposals were deemed responsive by the Division's proposal intake unit. Pricing was removed from the proposals and the proposals were distributed to the newly formed Committee.[2]

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[1] While the Evaluation Committee for RFP #12-X-22172 recommended award of the contract to Omnicare, Omnicare's Ownership Disclosure form submitted with its proposal was incomplete, which disqualified Omnicare from consideration. The Division did not award the contract to the sole remaining responsive bidder, Partners, as the Director found that there were significant concerns with Partners' submission that called into question whether "the State's needs for timely and clinically accurate pharmacy services would be met if the contract were awarded" to Partners based upon that proposal. See Letter of Director Desai-McCleary dated November 27, 2012, ("2012 Final Agency Decision") p. 14, attached as Exhibit A to Omnicare's letter dated September 23, 2014.

[2] The Committee formed for the evaluation of proposals received in response to this 2014 procurement was comprised of one Division representative, one DMAVA representative, and four DHS representatives from its various hospitals and management units, only one of which had served on the 2012 Committee.

The proposals were evaluated based upon the criteria set forth in the RFP. The respective weights assigned to each criterion were determined by the Committee prior to the bid opening in accordance with Division policy. The criteria were weighted as follows: Personnel (33 percent or 330/1,000 points); Experience of the Firm (33 percent or 330/1,000 points); and Ability of the Firm to Complete the Scope of Work Based on the Presentation in its Technical Proposal (34 percent or 340/1,000 points). These criteria were broken down into 22 more specific sub-factors for evaluation purposes. Price was assigned less significance than the technical score. The Committee assigned points by applying the below pre-defined 11-point (0-10) scale to each sub-factor.

Predefined 11-Point Score	Predefined Point Score Description
9-10	Substantially Exceeds the Criteria Requirements.
7-8	Exceeds the Criteria Requirements.
5-6	Meets the Criteria Requirements.
3-4	Does Not Meet the Criteria Requirements.
1-2	Is Significantly Below the Criteria Requirements.
0	Provides Insufficient Information to allow a higher rating.

Omnicare received a total score of 641 and Partners received a total score of 575 for their respective technical proposals. The table below shows a breakdown of Omnicare's and Partners' scores for each of the three criteria.

Technical Evaluation Criteria (RFP Section 6.7.1)	Omnicare	Partners Pharmacy
Personnel	220.0	170.5
Experience of the Firm	214.5	198.0
Ability of the Firm to Complete the Scope of Work based on the presentation in its Technical Proposal.	206.4285714	206.4285714
Total Technical Score	**641**	**575**

Best and Final Offers (BAFOs) were requested from both bidders on May 28, 2014. Both bidders submitted timely responses. Partners reduced its pricing by approximately 4.05 percent, from $11,878,721 to $11,397,227, and Omnicare reduced its pricing by approximately 5.24 percent, from $15,186,102.40 to $14,390,125.00. Omnicare's BAFO price of $14.4 million for the four-year contract was 26.3 percent higher than Partners' BAFO price of $11.4 million. Both Partners' and Omnicare's proposals were technically scored in the "Meets the Criteria

Requirements" range of the 1,000 point scale, with Omnicare's proposal receiving 66 technical points more than Partners' proposal. Based upon these results, the Committee determined that the proposal from Partners represented the most advantageous offer to the State, price and other factors considered and recommended that the contract be awarded to Partners. The Procurement Bureau issued its letter of intent to award the contract to Partners on September 9, 2014. Omnicare submitted a timely protest which was received by the Division on September 23, 2014. Omnicare's points of protest are addressed below in the order presented in Omnicare's letter, and using Omnicare's point headings.

I. <u>Omnicare Contends that Partners' Proposal Should Be Rejected Based on Ability to Perform</u>

A. <u>Partners' Technical Scores Mandate Rejection as in 2012</u>

Omnicare asserts that Partners' response to the subject RFP is similar to its response to the failed 2012 RFP, and received a similar technical score. Therefore, Omnicare contends, "the Evaluation Committee should have rejected Partners as a[n] [in]competent vendor as it correctly did two years ago." Omnicare comments that a Final Agency Decision issued by the Division in response to a protest filed regarding the 2012 procurement stated that there were "significant" questions and concerns as to Partners' ability to fulfill the State's needs for timely and clinically accurate pharmacy services. Omnicare argues that "[t]his concern was based on a technical score of 56 percent of the available points," and that since Partners' 2014 proposal received a score of 57.5 percent of all available points, the latter proposal should also be rejected.

Before addressing this point of protest, I will clarify that the 2012 Final Agency Decision expressed concerns about Partners' 2012 proposal and not upon any finding of incompetence as a viable, experienced pharmaceutical service provider, contrary to Omnicare's assertions.

There are several flaws in Omnicare's reasoning, the first of which is its basic premise that the two RFPs are the same and that Partners' proposals in response to both RFPs are so "similar" as to justify the same result. While the 2012 and 2014 RFPs are similar with regard to most requirements, there are significant differences. For example, one of the psychiatric hospitals listed in the 2012 RFP was closed in the intervening time. As a result, the 2014 RFP included only 14 facilities/hospitals, four of which are psychiatric hospitals, where the 2012 RFP included 15 facilities/hospitals, five of which were psychiatric. The total number of patients to be served by each RFP is also different; the 2012 RFP census was 5,250 patients, and the 2014 RFP census was only 4,667, a difference of 583 patients/residents. Another difference in the RFPs is that 14-day brand-name and 30-day generic bingo cards were required in the 2014 RFP for the seven DDD centers and the three DMAVA veterans homes. The 2012 RFP required a seven-day bingo card for both brand-name and generic products. The 2014 RFP also required billing reports to include "client-State identification numbers," as well as query functionality in the data processing system that can produce ad hoc reports related to patient-oriented pharmacy management and pharmaceutical consultation on medication-specific utilization within two business days. These requirements were not found in the prior 2012 RFP. The 2014 RFP further required bidders to demonstrate their specialized knowledge and expertise regarding requirements in RFP Section 4.4.4.6 (a) – (g), whereas the 2012 RFP did not mandate that level of detail in these areas of the submission. These differences in the technical requirements of the two RFPs, among others, preclude a direct comparison of the technical proposals submitted in response to each RFP and the respective scores they received.

In addition to differing requirements, the 2014 RFP also contained different evaluation weights for the evaluation criteria from those in the 2012 RFP. While both RFPs included the three primary evaluation criteria: personnel, experience of the firm, and ability of the firm to complete the scope of work based on the presentation in its technical proposal, the weights for each criterion were different in the two respective RFPs. The weights for the 2012 RFP were 15 percent for personnel, 30 percent for experience of the firm and 55 percent for the ability of the firm to complete the scope of work based on the presentation in its technical proposal. In contrast, the weights for the 2014 RFP were 33 percent for personnel, 33 percent for experience of the firm and 34 percent for the ability of the firm to complete the scope of work based on the presentation in its technical proposal. The 2014 RFP also included evaluation sub-factors with assigned weights within each of the three primary evaluation criteria. The 2012 RFP did not utilize sub-factors.

Moreover, the 2012 RFP incorporated the use of a formula to determine the intended awardee, namely, the technical score was pre-designated, i.e., established before proposals were received, to be 70 percent of the total score and pricing was pre-designated to be 30 percent of the total score. Consistent with Division practice, the 2014 evaluation was based upon which proposal was the most advantageous to the State, price and other factors considered. Here, price was pre-designated as less significant than the technical score. Thus, the scores given to Partners' proposals in 2012 and 2014 were based on different RFP requirements, and were calculated using a different technical/price evaluation methodology[3] and different technical criteria weights. The two scores, therefore, cannot be compared based solely upon a similarity of the final, total numbers, as Omnicare alleges in its protest letter.

In its report, the Committee found that the current proposal Partners submitted met all of the latest RFP's requirements and represented the most advantageous offer to the State, price and other factors considered. As more fully set forth below, my independent review of the record supports this conclusion. Moreover, since the proposal Partners submitted in response to RFP #14-X-23246 addressed all of the deficiencies that were noted in my 2012 Final Agency Decision, rejection of this proposal is not warranted despite the similarity in total score to the rejected 2012 proposal.

My decision in 2012 not to award the contract resulting from the prior procurement effort under RFP #12-X-22172 to Omnicare or Partners was, relative to Partners' proposal, premised upon specific deficiencies in Partners' proposal, and not solely upon the percentage of technical evaluation points that Partners' proposal received. These deficiencies included Partners' failure to submit a detailed recruitment plan for personnel or a disaster recovery plan, lack of detail regarding Partners' approach to delivery, lack of detail concerning the establishment of on-site pharmacies or a computerized support system, and lack of information about on-site training for nursing and medical staff. As more fully set forth in the 2014 *Evaluation Committee Report*, and

[3] For the record, but not material to the decision being rendered herein, if the pre-set 70% technical/30 % price ratio set ratio formula used in the 2012 procurement is applied to the results of the 2014 evaluation, Partners remains the intended awardee.

further demonstrated in Partners' proposal, Partners addressed all of these deficiencies in its proposal submitted in response to RFP #14-X-23246.

In its current proposal submitted in response to RFP #14-X-23246, Partners included the resumes of over 60 pharmacists, 15 of whom have five to 10 years of experience and 22 of whom have more than 10 years of experience with bingo card unit dose distribution systems. Partners also submitted resumes of 12 pharmacists who have five to 10 years of experience and 16 pharmacists who have over 10 years of experience with 24-hour unit dose. Partners also provided resumes for 129 pharmacy technicians in the 2014 proposal. In addition to providing more than 12 times the resumes provided in the 2012 proposal, Partners indicated in the 2014 proposal that it is prepared to staff the subject contract fully with existing Partners' staff and also will seek to employ the incumbent's staff by offering signing bonuses and two to five percent raises. Partners further stated in the 2014 proposal that its recruitment strategy includes actively headhunting through online media resources, direct mailing campaigns and continuous internal and external hiring events. In addition, Partners stated that it will develop comprehensive pharmacy-specific landing pages in an effort to drive traffic back to its career site and application process. Partners also indicated that it will commence a Google ad campaign, a LinkedIn campaign, and a direct email campaign to engage local pharmacists and other personnel required for this contract. See Partners' 2014 Proposal, pp. 24-25. Thus, in its response to the State's 2014 RFP, Partners addressed the recruitment plan deficiencies that were cited in my 2012 Final Agency Decision. More importantly, its proposal addressed the requirements of the current RFP.

Partners' proposal also included a disaster recovery plan, a detailed approach to delivery, and detailed plans for establishing on-site pharmacies and a computer support system. See Partners' 2014 Proposal, p.13-15, pp. 2-4. In addition, the 2014 proposal included detailed sections on in-service and client training. See Partners' 2014 Proposal p. 9. Since the proposals submitted by Partners in response to the 2012 RFP and the 2014 RFP are different in many regards, a direct comparison of the technical scores for these two proposals cannot be made. Accordingly, I find no merit in Omnicare's argument that, based upon the similar technical scores assigned to the two proposals, Partners' proposal in response to the 2014 RFP must be rejected on the same basis as its 2012 proposal was rejected in my 2012 Final Agency Decision.

B. Partners' Experience and Basic Plan is Unchanged from 2012 and Wanting

i. Partners Has Virtually No Similar New Jersey-Based Experience

Omnicare contends that "[t]he primary basis for the Department to evaluate whether a new vendor will be able to service this complex account is an analysis of its experience." However, as set forth above, while experience is an important factor, it is one of three primary evaluation criteria and weighted as 33 percent of the total technical score. Omnicare further alleges that "Partners has offered virtually no new information from its deficient 2012 proposal and insufficient information to allow the Committee to determine that its New Jersey pharmacy locations could perform the work." This statement is not supported by the record. Partners' experience as described in its 2014 proposal differed significantly from its experience as described in its 2012 proposal.

Five contracts were listed in Partners' response to RFP #14-X-23246, as opposed to only three in its response to RFP #12-X-22172. Additionally, only two of the five contracts listed in the 2014 response were the same as those provided in 2012. In both proposals, Partners referenced its contract with CareOne (HealthBridge Management/CareVirginia)[4], for which it services 8,244 beds, including experience with 24-hour unit dose and 10, 14 and 30-day bingo cards. Both proposals also noted Partners' contract with Runnells Specialized Hospital ("Runnells"), which involves 24-hour unit dose services for 334 beds in a behavioral health and skilled nursing setting. Partners' 2014 proposal also included its contract with Salmon Health, Liberty Commons, Park Avenue Nursing, Marian Manor and Briarwood Rehabilitation (all in Massachusetts), which includes experience with 14-day/30-day unit dose bingo cards for 1,370 beds in 10 facilities. The 2014 response further listed Partners' contract with Marlton Rehabilitation Hospital (New Jersey), which includes 24-hour unit dose service in an acute care setting for 46 beds, and its contract with Windsor Health Care (New Jersey), which includes 14-day/30-day unit dose bingo cards experience for 1,700 beds. The 2014 proposal also provided additional information with regard to each contract listed, including the facility type and dispensing method utilized at each facility. This information was not included in the 2012 proposal. Finally, Partners separately identified all of the New Jersey contracts that evidence 24-hour unit dose experience and those New Jersey contracts that evidence 14-day/30-day unit dose bingo cards in its 2014 proposal. <u>See</u> Partners' 2014 Proposal, pp. 29-36.

With respect to Partners' experience, Omnicare also asserts that "[u]nlike Omnicare's listed experience (Omnicare 2014 Proposal, Volume II, Tab 2, pages 4-7), 63 percent of the total beds listed by Partners are outside New Jersey and therefore presumably not serviced in any way by the Partners pharmacy location or individuals who will be servicing the state contract." Omnicare asserts that it, too, could have listed tens of thousands of beds serviced by other Omnicare, Inc. subsidiaries throughout the United States, but that such experience is not relevant to whether or not the Whippany pharmacy and operators have the ability to service the State contract.

The experience requirement for RFP # 14-X-23246 was set forth in Section 4.4.4.5 of the RFP:

> <u>4.4.4.5 EXPERIENCE WITH CONTRACTS OF SIMILAR SIZE AND SCOPE</u>
>
> The bidder should provide a comprehensive listing of contracts of similar size and scope that it has successfully completed, as evidence of the bidder's ability to successfully complete the services required by this RFP. Emphasis should be placed on contracts that are similar in size and scope to the work required by this RFP. A description of all such contracts should be included and should show how such contracts relate to the ability of the firm to complete the services required by this RFP.

Under a plain reading of Section 4.4.4.5, there is no requirement that the experience listed by a bidder must be limited to New Jersey contracts. All of the contracts listed in Partners' response were contracts held by the bidder, Partners. Although Omnicare states that it could have listed tens of thousands of beds serviced by other Omnicare, Inc. subsidiaries, only the experience of the legal entity bidding on the subject RFP, namely, Omnicare of New York, LLC d/b/a Omnicare of Whippany, would be responsive to this section of the RFP. While Partners included

[4] States (beds): New Jersey (3,514), Connecticut (1,803), Massachusetts (1,897), Virginia (883), Maryland (147).

evidence of relevant experience in contracts outside of New Jersey, I note that four of the five contracts referenced include New Jersey facilities, totaling almost 5,600 beds serviced in the State of New Jersey. These contracts evidence experience in all of the types of service and manners of distribution required by the subject RFP.

Omnicare states that the only behavioral health beds that Partners serviced in New Jersey are the 334 beds at Runnells Specialized Hospital, and contends that "only 44 of the beds at Runnells would be a good comparison to those serviced under the [current] State contract." As such, Omnicare asserts that Partners' experience does not support the Committee's conclusion that Partners' proposal demonstrates the experience necessary for the new contract resulting from the subject procurement. As the third largest long-term care pharmacy nationally with over 42,000 residents serviced in 13 states, 20,000 of which are located in New Jersey, Partners clearly demonstrated extensive experience with 14-day and 30-day bingo cards. However, as listed in its 2014 proposal, Partners' experience includes facilities that do not contain as many beds as the State-run facilities, and is limited with regard to its behavioral health contracts. More specifically, the number of beds serviced under Partners' contract with Runnells is lower than the number of beds in three of the four State psychiatric facilities covered under the contract.

The RFP did not require the "same" experience as the current contract but experience of "similar" size and scope. The New Jersey State facilities and hospitals covered by this contract are larger than most privately held facilities in the State. This is especially true for behavioral health facilities. <u>See</u> "Hospital Beds" listing prepared by the New Jersey Department of Health, attached hereto as Exhibit A. As such, I cannot fairly require that a bidder must demonstrate experience with facilities the "same" size as are serviced under the current State contract, since that magnitude of experience can be demonstrated only by the contractor presently holding the T0472 contract. Here, such an interpretation would unlevel the playing field.

The Committee took into consideration the fact that Partners' experience was limited in certain areas, and assigned Partners only 198 points out of a possible 330 points for the "Experience of the Firm" criterion. While it is evident that Partners has not serviced behavioral health facilities as large as those serviced under the current State contract, it has successfully provided 24-hour unit dose medication dispensing services to Runnells' Medicare/Medicaid patients for seven years, establishing a record of providing comprehensive pharmacy services in a governmental hospital facility in line with the requirements of the RFP. Partners' 2014 proposal has demonstrated that, overall, it has successfully performed pharmacy services under contracts of comparable size, such as the CareOne contract, which includes over 8,000 beds across five states and involves the coordination of many different delivery models, including 24-hour unit dose, unit dose box, multi dose box and 14-day and 30-day bingo cards. As such, the Committee, which included members with actual knowledge of the pharmacy needs of the individuals in the State hospitals and facilities, concluded that Partners has the experience in contracts of similar size and scope and the ability to meet or exceed the requirements of the RFP, as evidenced by its score for this criterion. I find that the Committee's evaluation of Partners' experience as reflected in this scoring was appropriate and supported by the record of this procurement.

ii. <u>Partners Has Virtually No 24-Hour Unit Dose Experience</u>

Omnicare contends that there should be greater concern from the State that Partners has virtually no experience in servicing psychiatric facilities of the size and magnitude required by this contract. Omnicare argues that "[n]one of the accounts listed [by Partners] requires the complexity or expertise mandated by the multifaceted service sought by the state [sic] for this contract." According to Omnicare, Partners' proposal fails to meet the "technical requirements on all three key elements of the size [and] scope umbrella," including no experience with "24-hour unit dose dispensing to this scale," no experience "servicing facilities with a psychiatric population in the magnitude of this contract," and no experience "managing a very complex network of off-site first dose dispensing pharmacies as required by this contract." Omnicare contends that Partners highlights only its experience of servicing 5,369 beds with 14-day and 30-day unit dose bingo cards. As discussed in the previous point, while Partners' experience may not completely match the exact composition and size of the State contract, its experience as described in its proposal demonstrates that it has successfully completed requirements that are similar to the scope of work. The Committee, which consisted of members having actual knowledge of the needs of the State facilities included in the contract and the requirements for performance of the services set forth in the scope of work, was satisfied that Partners' experience met the requirements of the RFP, and scored Partners' proposal accordingly. Based on my independent review of the matter, I find that the Committee's score of 198 of 330 points and its determination that Partners met the requirements of the RFP in this area is an appropriate evaluation of Partners' proposal.

Omnicare additionally contends that the Committee minimized Omnicare's vast experience and decades of service to the State. Omnicare takes issue with the Committee's statement that ". . . the strongest contributor to Partners Pharmacy's score, overall, was its demonstration to the Committee of the firm's knowledge of the nature of the work, especially implementation and problem solving." Omnicare states that, as the incumbent pharmacy providing pharmaceutical services to the State under this contract for over 30 years, it is impossible to imagine that any other provider could have a better understanding of the overall "knowledge of the nature of the work" required under the RFP.

Contrary to Omnicare's contention, as reflected by the 2014 *Evaluation Committee Report*, the Committee did not "minimize" Omnicare's experience and service to the State. The summary of Omnicare's technical proposal in the *Evaluation Committee Report* stated that "[Omnicare] works toward optimizing patient care and takes pride in the relationships established through decades of service with the staff and management at State locations." As to Omnicare's personnel, the Committee concluded that "Omnicare demonstrated a persuasive staffing structure; and, as the current contract holder, its proposal was able to receive greater points than Partners Pharmacy in this area for the strong and lengthy experience demonstrated in the resumes of the personnel that were already on staff for the current contract." The Committee further acknowledged Omnicare's significant experience as follows:

> Omnicare demonstrated the experience of the firm (please refer to Chart Number 4 shown below) by describing its role as the current contract holder of pharmacy services, which includes service to the State's 1,659 psychiatric facility beds and 3,008 beds of other types. The Proposal described the firm's service history as including significant experience across large, multi-facility, multi-dispensing system environments, and that the firm already possesses in-depth knowledge of all facility systems, staffing and service requirements. . . .

The Proposal provided information on 2,511 additionally serviced beds as further demonstration of the firm's experience with contracts of similar size and scope.

Bidder's Contracts: Omnicare	Time Period	Comment
Andover Sub-Acute & Rehabilitation Center #1	1992-Present	195 Skilled Nursing Facility Beds;
Andover Sub-Acute & Rehabilitation Center #2	1992-Present	543 Skilled Nursing Facility Beds;
Meadowview Psychiatric Hospital	2013-Present	84 Psychiatric Facility Beds;
Ramapo Ridge Psychiatric Hospital	2011-Present	58 Skilled Nursing Facility Beds; and
Various Other Facilities	N/A-Present	171 Assisted Living Facility Beds, 1,298 Skilled Nursing Facility Beds, 142 Psychiatric Facility Beds, and 20 Beds of Another Type.

Chart Number 4

All of this discussion of Omnicare's high level of experience indicates, not that the Committee failed to properly consider this element of Omnicare's proposal, but that it took Omnicare's experience into proper consideration when scoring the proposal.

However, Partners' proposal also demonstrated a clear understanding of the requirements of the RFP as well innovative approaches to addressing some of these requirements, as stated by the Committee. Partners' proposal included new technology that would provide instant online access to delivery manifests, electronic signatures, real-time proof of delivery and real-time GPS tracking of all deliveries. See Partners' 2014 Proposal, p. 4. Partners' proposal also offered the option of utilizing Onsite Emergency Medication Management Systems at no cost to the State, if approved by the State Contract Manager. These systems would increase secure medication access when the onsite pharmacy is closed and would help meet the growing need for "STAT," emergency and first dose medication. These systems also offer the opportunity to provide improved quality of care through faster access to medication as well as improved regulatory compliance and medication security. See Partners' 2014 Proposal, pp. 3 and 6.

Partners' proposal also demonstrated problem solving by addressing potential issues such as when a pharmaceutical is in short supply. According to its proposal, Partners is a Cardinal Health (Cardinal) key account and receives product allocation on a priority basis. Partners' pharmaceutical supply chain directly integrates dispensing activity from its enterprise pharmacy computer system, in real-time, with Cardinal's order management system. As a result, a Partners' pharmacy would receive immediate feedback from Cardinal's system regarding any potential product availability issues, which would give Partners the ability to promptly attempt to obtain the product through its drug wholesalers and distributors, back-up pharmacies and Partners pharmacies. See Partners' 2014 Proposal, p. 5.

The Committee clearly considered and assessed both Omnicare's and Partners' relevant but different experience as well as other relevant but different elements of their proposals. Thus, I find the Committee's conclusion that Partners demonstrated its "knowledge of the nature of the work, especially implementation and problem solving" to be an appropriate observation of the contents of the proposal and appropriate support for Partners' technical score.

Finally, Omnicare asserts that "[a]s the incumbent pharmacy provider, Omnicare also gets no credit for implementation as this would not be applicable as the current provider." This is not an accurate characterization of the manner in which the Division considers an incumbent's response to the requirements of the RFP concerning implementation. To the extent implementation or other provisions of an RFP are the same or similar to a current contract, the incumbent contractor is obliged to submit a proposal that provides descriptive assurances that it will continue to meet those requirements. Otherwise, an incumbent contractor is deemed to have an unfair advantage. An incumbent contractor also needs to address any modified or new requirement(s) set forth in the RFP. To provide the necessary assurances, the incumbent contractor's proposal should acknowledge the new requirement(s) and provide sufficiently detailed information as to how it will attend to those new or modified requirements if it is awarded the contract. Thus, just like any other bidder, the incumbent contractor is at risk of receiving lessened technical scores if it opts to rely on the State's familiarity with the contractor's past performance, particularly where, as with this RFP, there are new requirements. The Committee's report and scoring reflects this appropriate consideration for both bidders.

iii. <u>Partners' Delivery Plan Won't Work</u>

Omnicare contends that "[a]nother area where Omnicare's knowledge of the requirements and significant experience with this contract and the 24-hour unit dose system becomes evident is Omnicare's use of company-employed delivery drivers for this service." Omnicare asserts that its 30 years of experience with this contract have led it to conclude that company-employed drivers are superior to subcontracted delivery, because subcontracted couriers are not accustomed to servicing 24-hour unit dose exchange systems. Omnicare states that multiple 14-foot box trucks are required and that the delivery and exchange process must occur within a very narrow and defined timeframe. This often leads to changes to delivery schedules that are more readily accomplished, Omnicare argues, when the delivery drivers are the contractor's employees.

In this regard, Partners proposes to utilize a subcontractor, Strategic Delivery Solutions ("SDSrx"), for these services and to subcontract additional delivery services to RX Services and Priority Express, a New Jersey small business. SDSrx currently manages Partners' New Jersey delivery operations from within the Cranford Central Pharmacy. SDSrx has participated in all of Partners' contracts serviced from the Central Pharmacy for the prior year and has proven itself to be a valuable resource to Partners. <u>See</u> Partners' 2014 Proposal, p. 25. "SRDrx [sic] supervisors will be dedicated to the State contract and will personally visit all sites and gain a deeper understanding of delivery requirements." <u>See</u> Partners' 2014 Proposal, p. 18. All deliveries and vehicles utilized under this contract will be dispatched from the onsite SDSrx office at Partners' Central Pharmacy and all vehicles utilized for this contract will be exclusive to the State Contract. <u>See</u> Partners' 2014 Proposal, p. 4. All SDSrx drivers are uniformed and appropriately screened with background checks and fingerprinting in conjunction with RFP requirements. <u>See</u> Partners' 2014 Proposal, p. 4. Additionally, each driver will be equipped with handheld mobile devices with barcode scanning and signature capture capabilities. <u>See</u> Partners' 2014 Proposal,

p. 4. While Partners proposes 10 sedans and four larger vans to be assigned to initiate the contract, its proposal indicates that additional vehicles and drivers are available as may be required and that SDSrx has a fleet of over 800 drivers and vehicles available, including sedans, small vans and panel trucks. See Partners' 2014 Proposal, p. 4. The SDSrx tracking software is interfaced with Partners Pharmacy software to provide instant online access to delivery manifests, electronic signatures, real-time proof of delivery, real-time GPS tracking of all vehicle locations and delivery status. See Partners' 2014 Proposal, p. 4. Partners' proposal includes a chart that outlines the delivery schedule to the facilities that have been driven and tracked for traffic patterns and timing to ensure timely delivery. See Partners' 2014 Proposal, Tab 3. The RFP permitted the use of subcontractors, and the Committee concluded that the above delivery plan demonstrates Partners' ability to meet the requirements of the RFP. I find this assessment to be appropriate and supported by the record.

iv. Partners' Staffing Plan is Insufficient

Omnicare asserts that Partners' staffing plan "won't work" because Partners' proposal indicates its intention to attempt to hire supervisors, pharmacist and staff currently working for Omnicare under the current State contract using incentives such as signing bonuses and salary increases from two percent to five percent. However, Omnicare states that its management and professional staff have binding non-competition agreements which would preclude Partners from hiring its employees. That being said, it is important to note that Partners' proposal also states that Partners is prepared to take over the State contract with existing staff, including a minimum of 21 pharmacists and 42 pharmacy technicians to staff the 12 onsite pharmacies. Additionally, Partners has provided the resumes of 213 additional staff, including executives, key personnel, supervisors, pharmacists and pharmacy technicians who will be available to provide services as part of this contract. See Partners 2014 Proposal, p. 24-25 and Tab 1. Accordingly, Partners' successful implementation of this contract is not reliant solely upon Partners' hiring of the current contractor's staff.

Omnicare also contends that Partners' recruitment and hiring strategy is virtually identical to the plan submitted in response to RFP #12-X-22172. This statement is factually incorrect. Partners did not commit existing staff to fulfill all of the requirements of the contract in the 2012 proposal. Rather, Partners stated that it was its "intention to interview, evaluate and hire as many of the present provider's supervisors, on-site pharmacists and staff as is necessary to fulfill the terms of this contract." Partners further indicated in its 2012 proposal that "[i]n the event that this plan is not feasible, Partners is confident in our ability to hire and train sufficient staff to perform the duties of the contract both during the transition and ongoing." See Partners 2012 Proposal, p. 5. As previously noted, the 2014 proposal committed Partners' existing employees to staff the contract and attached the resumes of over 200 executive, key personnel, supervisory, pharmacists and pharmacy technicians who are available to provide services as part of this contract. See Partners' 2014 Proposal, p. 27-28 and resumes attached thereto. By comparison, the 2012 proposal included only 14 resumes of key management, indicated the intent to rely on hiring the incumbent's employees, and stated that it would have no difficulty recruiting and hiring qualified registered pharmacists and technicians from Monster, Career Builder and similar on-line services. See Partners' 2012 Proposal, p. 21 and pp. 25-57. Partners' response to RFP#14-X-23246 also contains much more detail on its strategy to recruit additional staff as set forth on pages 24-25 of its proposal. Thus, Partners' 2014 proposal is quite different, and much more detailed, with regard to staffing than its 2012 proposal. Accordingly, I find that Partners' staffing structure and the number and experience of the personnel proposed meet the criteria of the RFP.

II. <u>RFP Failed to Follow Best Practices</u>

Omnicare asserts that the State acted improperly "by throwing away the technical evaluation's 11.5 percent win by Omnicare." Omnicare states that there was no basis for the State to award the contract to Partners, and alleges that "[t]he State completely disregarded Omnicare's 66 point technical evaluation superiority, including superiority in every technical category (except a seven decimal place tie in one category) . . . ." Omnicare questions why the 2014 RFP did not include a mathematical formula giving specific weights to the proposals' price and technical scores when determining the contract award, as the 2012 RFP did. Omnicare alleges that "[a]ssigning point values and grading to all aspects of [a proposal] provides for proper analytical review and allows for public oversight." Omnicare further contends that "the change to a subjective, unquantifiable cost component has led to the curious result of a previously unfit vendor winning an award despite no significant change in qualifications."

As set forth earlier in this decision, the proposals were evaluated based upon the technical criteria set forth in the RFP and the weights assigned to each of these criteria prior to the bid opening. Price was assigned less significance than the technical score. The Committee assigned points by applying a pre-defined 11-point (0-10) scale to each factor, then calculated the total technical score for each bidder's proposal. Omnicare's proposal received a technical score of 641 and Partners' proposal received a technical score of 575. Both these scores fell within the predefined point score description of "Meets the Criteria Requirements," and were only 66 points apart. The difference in the two bidders' prices, however, was significant, and Partners' proposal was substantially more favorably priced to the State.

The Committee determined that:

> While price had less significance than technical score in the evaluation, both Partners Pharmacy and Omnicare scored in the same range for technical score ("Meets the Criteria Requirements"), so the committee recommends this award to Partners Pharmacy, given the significant price differential of benefit to the State. The overall technical evaluation score placed both firms within the same point range; and Partners Pharmacy's technical score demonstrated the firm employs the personnel able to do so, has prior experience in contracts of similar size and scope, and the ability to meet or exceed the requirements of the RFP. Further, the State will benefit from the use of innovative technology that is proposed by the firm to perform the scope of work, all at a significant cost savings to the State.
>
> *Evaluation Committee Report* dated September 9, 2014, p. 6.

The Division's authorizing statute for publicly advertised procurement, <u>N.J.S.A.</u> 52:34-12, states in pertinent part:

> (g) award shall be made with reasonable promptness, after negotiation with bidders where authorized, by written notice to that responsible bidder whose bid, conforming to the invitation for bids, will be most advantageous to the State, price and other factors considered.

The RFP also clearly indicates the State's intent:

> The intent of the RFP is to award a contract to that responsible bidder whose proposal, conforming to this RFP, is most advantageous to the State, price and other factors considered.
>
> [RFP #14-X-23246, Section 1.1.]

There is no requirement that a mathematical formula be used to determine the intended awardee resulting from a publicly advertised procurement. In fact, the Division has used both models – with and without a mathematical formula – in the past. Both models are consistent with N.J.S.A. 52:34-12(a)(g).

With regard to RFP #14-X-23246, the decision was made not to use the formula and to evaluate the proposals based upon price and other factors, with price having less significance than the technical score. Because the technical scores of the two responsive bidders were both in the same scoring category, and both bidders demonstrated an ability to perform the contract, the Committee determined that it was in the best interest of the State to recommend for the contract award the bidder offering the more advantageous price. Importantly, this choice will save the State approximately $3 million over the four-year contract term from a vendor with a strong technical score. I find the Committee's reasoning to be persuasive and its evaluation of the proposals to be in compliance with applicable law and the evaluation methodology set forth in the RFP. Accordingly, I find no basis to overturn the award to Partners on these grounds.

III. Cost Savings Are a Mirage

A. Partners Cannot Complete the Work for the Price Quoted Putting Patients Aside

Omnicare contends in its protest letter that Partners cannot complete the work set forth in the RFP in an acceptable manner consistent with applicable laws and with proper concern for patient safety for the four-year contract price of $11,397,227. Omnicare alleges that Partners will incur millions of dollars in startup costs which will quite possibly result in a net-loss for the company, despite any profits realized for payments from the medications provided to the facility patients. Omnicare urges the State to request financial information from Partners to determine whether its proposed pricing will result in a profitable contract. Omnicare quotes the 2012 *Evaluation Committee Report* for RFP #12-X-22172, which stated:

> Lastly, the Committee is not convinced that Partners can perform the work described in the scope of work along with the attendant expenses of start-up, expansion of its facility, establishing a large drug inventory, and purchasing of additional delivery vehicles and fifty-five (55) medication carts and cassettes for approximately $3.5 million annually with no engagement of subcontractors.
>
> *Evaluation Committee Report*, RFP #12-X-22172, p. 13.

Omnicare points out that Partners' pricing submitted in connection with RFP #14-X-23246 is now $2,437,627 less than its 2012 pricing, which the 2012 Evaluation Committee questioned. Omnicare also contends that Partners' start-up costs will be at least $517,232 to $687,457 more for the current contract, because Partners offered an emergency medication dispensing system in the 2014 proposal that it did not offer in 2012. Despite an earlier assertion by Omnicare about Partners' inability to recruit Omnicare's employees, Omnicare further notes that Partners proposes to offer signing bonuses and salary increases to Omnicare employees as part of its recruitment plan. See Partners Proposal in response to RFP #14-X-23246, p. 6 and 24.

Again, I have carefully considered Omnicare's arguments regarding this issue, as this contract will provide essential pharmacy services to 14 facilities encompassing approximately 4,667 residents and patients. I note that the 2014 RFP includes one less 24-hour unit dose psychiatric hospital to service and the census for the 2014 RFP includes 583 fewer patients than the 2012 RFP. The 2014 RFP also reduces the bingo card requirement relating to the seven DDD facilities and the three DMAVA veterans' homes from a seven-day bingo card system to a 14-day bingo card unit dose for brand-name drugs and 30-day bingo card unit dose for generic drug distribution. Thus, there were differences between the two RFPs that may account for some of the price difference between Partners' 2012 and 2014 proposals.

We agree that it is incumbent upon the State to take into consideration the financial capacity of the bidder to undertake and successfully complete the contract. N.J.S.A. 52:34-12(g) requires that award be made to the "responsible bidder whose bid, conforming to the invitation for bids, will be most advantageous to the State, price and other factors considered" (emphasis added). However, Omnicare places too much emphasis on the 2012 Committee report in this regard. You will note that in 2014, a Division financial analyst concluded that both bidders were financially responsible.

In response to Section 4.4.4.6 of the RFP, Partners supplied confidential, consolidated financial statements for Partners and the companies that own it. The financial statements were reviewed by the Division's Financial Analyst, who concluded that they demonstrated that Partners is financially viable to proceed with the Unit Dose Pharmaceutical Services contract. Partners' proposal also indicates that the company has access to an available $35 million line of credit. See Partners proposal, p. 1. Partners supplied the required $3 million performance bond with its submitted proposal, which further protects the interests of the State should Partners encounter any financial difficulties during the contract period. Finally, Edgardo Mercadante, R.Ph., Chief Executive Officer of Partners, signed the signatory page affirming that Partners' accepts all terms, conditions and specifications set forth in the RFP, including all addenda. This action signifies Partners' agreement to be bound, immediately upon notice of acceptance of its proposal by the State, to a contract for the price set forth in the proposal, which must be held firm through issuance of the contract.

Omnicare may not understand how Partners will be able to accomplish the tasks set forth in the RFP for the pricing that Partners submitted in response to the State's request for a BAFO. However, individual businesses have different business models and Partners' business model may permit it to perform the RFP's requirements at a lower cost than Omnicare's model permits. Businesses also sometimes make decisions to operate on a smaller profit margin or even at a loss in order to gain a valuable State contract that may lead to profitable marketing opportunities in the future. A company holding a State contract is often respected within the business community, and the subject contract is one that will demonstrate considerable experience for RFP submissions elsewhere. As Partners' proposal indicates that Partners is the third largest long-term care pharmacy nationally with over 42,000 residents serviced from nine pharmacy locations serving 13 states, I accept that the company has appropriately determined its own business model and pricing for the subject contract. According to the *Evaluation Committee Report* for RFP #14-X-23246, Partners' proposal demonstrates its ability to undertake and successfully complete the technical requirements of the RFP. Partners' financial statements also support this conclusion, and a $3 million performance bond has been submitted to further ensure that the requirements of the RFP will be satisfied. My independent review of the record, including the financial statements and all other aspects of Partners' proposal, leads me to agree with the Committee's assessment and its recommendation, by consensus, to award the T0472 contract to Partners. Accordingly, I find no basis to rescind the Procurement Bureau's notice of intent to award on this basis.

B. Partners Pricing May Implicate the Federal Anti-Kickback Statute (42 USC Sec 1320a-7b)

Without any proof or supporting documentation whatsoever, Omnicare suggests that Partners' proposed pricing may constitute an offer of goods below fair market value which violates the Federal Anti-Kickback Statute. 42 U.S.C. Section 1320a-7b(b). The Division is aware of lawsuits filed against Omnicare's parent company, Omnicare, Inc., for similar claims, and the settlements resulting from those lawsuits.[5] With regard to Omnicare's allegation that Partners' proposed pricing "may" violate the Federal Anti-Kickback Statute, the Division cannot refuse to award a contract to a bidder based upon conjecture that the bidder may violate a law under the contract at some future point in time. Further, the Standard Terms and Conditions incorporated into the RFP and resulting contract require the bidders to comply with all applicable State and federal law. *Standard Terms and Conditions §2.10.* As such, at this point, the State accepts that the binding signature of Mr. Mercadante on the RFP's Signatory Page included as part of Partners' proposal, is an unequivocal assurance that the proposal is in full compliance with all RFP provisions, including past, present, and future adherence to all applicable State and federal law.[6] The Division found nothing in the procurement or public record that suggests that Partners has violated or or may violate the kickback statute. Accordingly, I cannot find this to be a basis to rescind the letter of intent to award to Partners.

In light of the foregoing, the Procurement Bureau's notice of intent to award the contract resulting from RFP #14-X-23246 to Partners is hereby upheld. This is my Final Agency Determination regarding the points of protest submitted by Omnicare.

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[5] See http://nj.gov/oag/newsreleases14/pr20140306a.html.

[6] The attestation statement immediately preceding the signatory block of the Signatory Page reads as follows:

> SIGNATURE OF THE BIDDER ATTESTS THAT THE BIDDER HAS READ, UNDERSTANDS, AND AGREES TO ALL TERMS, CONDITIONS, AND SPECIFICATIONS SET FORTH IN THE REQUEST FOR PROPOSAL, INCLUDING ALL ADDENDA. FURTHERMORE, SIGNATURE BY THE BIDDER SIGNIFIES THAT THE REQUEST FOR PROPOSAL AND THE RESPONSIVE PROPOSAL CONSTITUTES A CONTRACT IMMEDIATELY UPON NOTICE OF ACCEPTANCE OF THE PROPOSAL BY THE STATE OF NEW JERSEY FOR ANY OR ALL OF THE ITEMS BID, AND FOR THE LENGTH OF TIME INDICATED IN THE REQUEST FOR PROPOSAL. FAILURE TO ACCEPT THE CONTRACT WITHIN THE TIME PERIOD INDICATED IN THE REQUEST FOR PROPOSAL, OR FAILURE TO HOLD PRICES OR TO MEET ANY OTHER TERMS AND CONDITIONS AS DEFINED IN EITHER THE REQUEST FOR PROPOSAL OR THE PROPOSAL DURING THE TERM OF THE CONTRACT, SHALL CONSTITUTE A BREACH AND MAY RESULT IN SUSPENSION OR DEBARMENT FROM FURTHER STATE BIDDING. A DEFAULTING CONTRACTOR MAY ALSO BE LIABLE, AT THE OPTION OF THE STATE, FOR THE DIFFERENCE BETWEEN THE CONTRACT PRICE AND THE PRICE BID BY AN ALTERNATE VENDOR OF THE GOODS OR SERVICES IN ADDITION TO OTHER REMEDIES AVAILABLE.

Thank you for your interest in doing business with the State of New Jersey and for registering your firm with NJ START, the State's new eProcurement system.

Sincerely,

Jignasa Desai-McCleary
Director

JD-M/RW

Attachment: Exhibit A

c: L. Dubois
P. Michaels
M. Boragine
E. Mercadante, Partners Via Electronic Mail Only (emercadante@.partnerspharmacy.com)