

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
19 DHR 02032

North Carolina Provider Owned Plans
Inc d/b/a My Health by Health
Providers,
 Petitioner,
 v.
NC Department of Health and Human
Services,
 Respondent,
 and
UnitedHealthcare of North Carolina,
Inc.,
 Respondent-Intervenor,
 and
Blue Cross and Blue Shield of North
Carolina,
 Respondent-Intervenor,
 and
WellCare of North Carolina, Inc.,
 Respondent-Intervenor,
 and
AmeriHealth Caritas of North Carolina,
Inc.,
 Respondent-Intervenor,
 and
Carolina Complete Health, Inc.,
 Respondent-Intervenor.

**ORDER ON
PETITIONER'S
MOTION FOR STAY OF CONTESTED
ACTIONS**

THIS MATTTTER COMES on for consideration on the Motion for a Temporary Restraining Order and Stay of Contested Actions (the "Motion") filed by Petitioner North Carolina Provider Owned Plans, Inc. d/b/a My Health by Health Providers ("Petitioner" or "My Health"). In support of, and in opposition to, the Motion, Petitioner, Respondent, and Respondent -Intervenors filed numerous affidavits and

other evidentiary materials. On 2 May 2019, this Tribunal held a hearing on the Motion.

Having considered the Motion, briefs, exhibits, and affidavits supporting and opposing the Motion, and the parties' arguments at the hearing, the Undersigned finds and concludes that the Petitioner's request for a stay of contested action should be DENIED for the reasons explained below.

I.

BACKGROUND

1. This case arises from the State's transformation of its Medicaid delivery system from one that is primarily based on a fee-for-service model to a managed care system operated by Prepaid Health Plans ("PHPs") under capitated contracts. N.C. Sess. Law 2015-245, as amended (the "Transformation Act").¹ The transformation is intended to "provide budget predictability for the taxpayers of this State while ensuring quality care to those in need." N.C. Sess. Law 2015-245, § 1.

2. Pursuant to the Transformation Act, the General Assembly mandated that Respondent, the North Carolina Department of Health and Human Services (the "Department"), conduct a procurement as directed in the Transformation Act and award PHP contracts resulting from that competitive process. *See generally* N.C. Sess. Law 2015-245, as amended. The Department issued a request for

¹ N.C. Sess. Law 2015-245 was amended by N.C. Sess. Law 2016-121; N.C. Sess. Law 2017-57, § 11H.17.(a); N.C. Sess. Law 2017-186, Part IV; N.C. Sess. Law 2018-5, § 11H.10.(c); N.C. Sess. Law 2018-48; N.C. Sess. Law 2018-49, §§ 4-6.

proposals, and, after receiving eight proposals, the Department conducted an evaluation process.

3. At the conclusion of the evaluation process, the Department's Evaluation Committee determined that My Health was the sixth-ranked offeror. The Department awarded four statewide PHP contracts and two regional PHP contracts to five separate awardees but did not award any contract to My Health. Petitioner's Motion seeks a stay of the implementation efforts for the awarded PHP contracts pending the full adjudication of its Verified Petition for Contested Case Hearing ("Petition").

II.

PROCEDURAL HISTORY

4. On 25 February 2019, My Health submitted a request for a bid protest meeting to the Department protesting the Department's decision not to award it six regional contracts. A bid protest meeting was held on 26 March 2019, and the Department denied My Health's request for relief by the Protest Denial Letter on 5 April 2019. Petition ¶ 132. My Health filed its Petition and the Motion on 9 April 2019. The Tribunal denied the request for a temporary restraining order on 15 April 2019, leaving the request for a stay of contested actions pending before the Tribunal.

5. The Department filed memoranda in opposition to the Motion on 12 April 2019, and 24 April 2019. Respondent-Intervenors² filed their memoranda in

² This Tribunal granted five Intervenors the right to intervene for purposes of My Health's request for injunctive relief and has otherwise deferred ruling on the motions to intervene:

opposition on 24 April 2019, and My Health filed its brief in support on 29 April 2019. The Tribunal heard argument on the request for a stay of contested actions on 2 May 2019. The portion of the Motion requesting a stay of contested actions is now ripe for determination.

III.

FACTUAL BACKGROUND

6. This Tribunal recites the following factual basis solely for the purpose of deciding this Motion. These facts are not binding at a final hearing on the merits. *Lohrmann v. Iredell Mem'l Hosp., Inc.*, 174 N.C. App. 63, 75 (2005) (noting that it is “well settled that findings of fact made during a preliminary injunction proceeding are not binding upon a court at a trial on the merits”).

A. The Medicaid Transformation Act

7. In September 2015, the General Assembly enacted the Transformation Act, North Carolina Session Law 2015-245, requiring transformation of the State’s Medicaid program for most beneficiaries and services from a predominantly fee-for-service model to a Medicaid managed care model. The Transformation Act was amended several times between 2015 and 2018. *See supra*, footnote 1.

8. North Carolina’s Medicaid managed care program is expected to serve over 1.6 million people and involve annual funds of about \$6 billion. Affidavit of James Edward Ludlam, IV (“Ludlam Aff.”), ¶ 6.

UnitedHealthcare of North Carolina, Inc. (“United”); Blue Cross and Blue Shield of North Carolina (“BCBSNC”), WellCare Health Plans of North Carolina, Inc. (“WellCare”); AmeriHealth Caritas North Carolina, Inc. (“ACNC”); and Carolina Complete Health, Inc. (“CCH”). All intervenors, except CCH, filed briefs and made oral argument for the Tribunal’s consideration. CCH has taken no position on this Motion.

9. The Transformation Act gives the Department the “full authority to manage the State’s Medicaid and NC Health Choice programs” and requires it to “be responsible for planning and implementing the Medicaid transformation required by this act.” N.C. Sess. Law 2015-245, § 4(1). Among many other tasks, the Transformation Act further requires the Department to “[o]versee, monitor, and enforce capitated PHP contract performance;” “[e]nsure sustainability of the transformed Medicaid and NC Health Choice programs;” and “[e]nter into capitated PHP contracts for the delivery of the Medicaid and NC Health Choice services ...” *Id.* § 5(3), (4), (6).

10. The Transformation Act required the Department to award four statewide PHP contracts to entities to operate and administer an at-risk, Medicaid managed care business. *Id.* § 4(6), as amended by N.C. Sess. Law 2018-48. The Transformation Act also directed the Department to award “up to 12” regional PHP contracts. N.C. Sess. Law 2015-245, § 4(6), as amended by N.C. Sess. Law 2018-48. It further directed the Department to define six regions comprised of whole contiguous counties that reasonably distribute covered populations across the State. *Id.* § 5(2).

11. A PHP is defined in pertinent part as “an entity, which may be a commercial plan *or* provider-led entity that operates or will operate a capitated contract for the delivery of services . . .” *Id.* § 4(2), as amended by N.C. Sess. Law 2018-48 (emphasis added).

12. A commercial plan (“CP”) is “a person, entity or organization, profit or nonprofit, that undertakes to provide or arrange for the delivery of health care services to enrollees on a prepaid basis except for enrollee responsibility for copayments and deductibles and holds a PHP license issued by the Department of Insurance.” *Id.* § 4(2)a, as amended by N.C. Sess. Law 2018-48.

13. A provider-led entity (“PLE”) is an entity that meets all of the following criteria:

1. A majority of the entity’s ownership is held by an individual or entity that has as its primary business purpose the ownership or operation of one or more capitated contracts described in subdivision (3) of this section or Medicaid and NC Health Choice providers.
2. A majority of the entity’s governing body is composed of individuals who (i) are licensed in the State as physicians, physician assistants, nurse practitioners, or psychologists and (ii) have experience treating beneficiaries of the North Carolina Medicaid program.
3. Holds a PHP license issued by the Department of Insurance.

Id. at 4(2)b, as amended by N.C. Sess. Law 2018-48.

14. CPs could submit offers for statewide contracts only. PLEs could submit proposals for one of the statewide contracts, for a contract for one or more of six regions covering the state, or for both. Affidavit of Mona M. Moon (“Moon Aff.”) ¶ 8; Affidavit of Kimberley Rene Kilgore-Kilpatrick (“Kilgore-Kilpatrick Aff.”), ¶ 3, Ex. A (RFP § II, p. 8).

B. Design of the Procurement

15. The procurement that is the subject of the Motion involved efforts by multiple divisions within the Department and other state agencies spanning multiple years and two gubernatorial administrations. Ludlam Aff. ¶ 3; Affidavit of Sarah Gregosky (“Gregosky Aff.”), ¶ 3.

16. In developing RFP #30-190029-DHB (the “RFP”), the Department acknowledged the significance of Medicaid managed care succeeding, and the risk and potential implications of its failure including the potential impacts on beneficiaries, providers, and PHPs. Ludlam Aff. ¶¶ 6, 7. It also considered the risk to the financial viability of a plan if a PHP does not secure enough members. *Id.* ¶¶ 7, 8; Affidavit of Julia Kraemer Lerche (“Lerche Aff.”), ¶¶ 3, 7.

17. The Department developed the RFP using not only its own employees, but also subject matter expert consultants. Some of the Department’s personnel who were deeply involved in Medicaid transformation had similar experience in other states. Supplemental Affidavit of James Edward Ludlam, IV (“Ludlam Supp. Aff.”), ¶ 11. The national consulting firm retained by the Department, Manatt, Phelps & Phillips, LLP (“Manatt”), also had experience with Medicaid managed care, including experience with PLEs in other states, for review and assistance with development of the RFP. *Id.* ¶ 10. The Department also employed Mercer, a global consulting firm with Medicaid managed care experience, as an actuarial consultant. Lerche Aff. ¶ 4. Among other things, Mercer assisted the Department in considering the minimum number of covered lives needed to ensure financial

viability of PHPs providing Medicaid managed care under contracts awarded through the Department's competitive procurement process. *Id.*

18. Based in part on the information reviewed by Mercer, for this initial implementation of Medicaid managed care, the Department exercised its discretion to establish an outside limit of 10 regional PLE contracts with no more than one PLE contract in each of Regions 1 and 6 and no more than two PLE contracts in the other four regions. Lerche Aff. ¶ 8.

19. Before issuing the RFP, the Department sought input from legislators, the United States Centers for Medicare and Medicaid Services ("CMS"), other states, industry experts, and stakeholders regarding the design and implementation of Medicaid managed care in North Carolina. Ludlam Supp. Aff., ¶¶ 10-14. It also published policy papers and legislative materials stating the Department's intent to issue a single RFP for all PHPs. *Id.* at ¶¶ 12, 14, and Exs. A (p. 16), B (pp. 1, 4-10), C (p. 1), F (p. 33), and G (slide 3).

C. The RFP, My Health's Submission, and the Department's Evaluation Process

20. The Department issued the RFP on 9 August 2018. Kilgore-Kilpatrick Aff. ¶ 7 and Ex. E, p. 1.

21. The RFP refers to a phase-in approach for Medicaid managed care implementation with Phase I scheduled to begin on 1 November 2019, and Phase II scheduled to begin on 1 February 2020. Kilgore-Kilpatrick Aff. ¶ 3 and Ex. A, RFP § I, pp. 6-7.

22. The RFP provided that only CPs were eligible to submit offers for statewide contracts and that PLEs were “eligible to submit offers for Statewide and/or Regional Contracts.” Kilgore-Kilpatrick Aff. ¶ 3 and Ex. A, RFP § II, p. 8. The RFP further stated that the Department would determine the award of statewide contracts before determining regional contract awards, and that if a PLE was awarded a statewide contract it would no longer be considered for a regional contract award. *Id.* Additionally, the RFP “strongly encouraged” PLEs to submit proposals for more than one region and stated that the Department would award no more than one regional contract for each of Regions 1 and 6 and no more than two regional contracts for Regions 2, 3, 4, and 5. *Id.*

23. The RFP specified the following five areas in which proposals would be evaluated and the weight assigned to each area:

- Offeror Qualifications/ Experience (20% weight)
- Scope of Services (70% weight)
- Use Cases (5% weight)
- Client References (5% weight)
- Bonus Points: Marketplace Participation (2.5% weight)

Id. pp. 17-19. The “Scope of Services” subsection was further broken down into eight sub-subsections, with individual weights ranging from 5% to 25% of the total evaluation. *Id.* pp. 17-18.

24. The RFP sought responses and explanations to at least 65 questions not including subparts, along with 7 use case scenarios, which set out detailed, multifaceted health care scenarios and requested the offerors to respond with “the program and services listed within each use case” and directed that offerors could

“include a detailed narrative, diagrams, exhibits, examples, sketches, descriptive literature or detailed information specifically tailored for the North Carolina Medicaid Managed Care to demonstrate its ability to meet or exceed requirements.” Kilgore-Kilpatrick Aff. ¶ 5 and Ex. C.

25. At proposal opening on 19 October 2018, the Department received proposals from eight offerors: Aetna; ACNC; BCBSNC; CCH; My Health; Optima Family Care of North Carolina, Inc. (“Optima”); United; and WellCare. Ludlam Aff. ¶ 21.

26. Evaluation Question 1 in Section VIII, Attachment O to the RFP, required an offeror to indicate if it was submitting a proposal for a statewide or a regional contract, or both. Kilgore-Kilpatrick Aff. ¶ 5 and Ex. C, RFP § VIII, p. 8. Evaluation Question 2 in Section VIII, Attachment O to the RFP, required an offeror submitting a regional proposal to indicate the regions it was proposing to serve. *Id.*

27. WellCare, United, BCBSNC, ACNC, and Aetna, which are CPs, all submitted proposals for statewide contracts. *See Moon Aff. ¶ 9.* Of the three PLE offerors, My Health and CCH also submitted proposals for statewide contracts. *Id.* CCH and Optima submitted proposals for regional contracts. *Id.*

28. My Health responded to Evaluation Question 1 by indicating that it was applying for a Statewide Contract:

Offeror Qualifications/Experience

Evaluation Question

1.	The Offeror shall indicate if it is submitting a proposal as a Statewide or Regional contract. Check all that apply.
Response	
Statewide Contract <u>XX</u> Regional Contract _____	

Kilgore-Kilpatrick Aff. ¶ 11 and Ex. I, Excerpts of My Health Proposal, p. 8. My Health similarly directed its application for a statewide, and not regional, contract throughout its response to the RFP. Specifically, My Health: submitted a cover letter stating that it was submitting a proposal in response to the RFP as a “*Statewide Prepaid Health Plan qualifying as a Provider-Led Entity*”; did not mark any regions in response to Question 2; and stated that questions associated with regional contracts were “not applicable” in responding to Table 1: Minimum Qualifications Table in Section III, Attachment O. *Id.* and Ex. J, October 18, 2018 letter from My Health (emphasis in original); Moon Aff ¶ 8.

29. The Department established an Evaluation Committee that included individuals with significant experience with Medicaid, complex government programs, and managed care. Ludlam Aff. ¶ 22. The Evaluation Committee consulted subject matter experts during the evaluation process including a physician, pharmacists, nurses, and social workers. *Id.* ¶ 23. The subject matter experts had experience in health care, state budgeting, claims payment, technology, and other areas impacting Medicaid. *Id.*

30. The Evaluation Committee met 46 times over four months. *Id.*; Moon Aff. ¶ 4. Evaluation Committee training and kick-off meetings were held between 17 October 2018, and 24 October 2018. *Id.* The Evaluation Committee then met to

evaluate and score the proposals, beginning on 25 October 2018, and finishing on 24 January 2019. *Id.* ¶ 5. The Evaluation Committee rated the proposals by section for each offeror using a consensus method of scoring. *Id.*

31. After the Evaluation Committee completed its scoring, the Department's Medicaid contracting section conducted a quality assurance review of the scoring. *Id.* ¶ 7.

32. Of the offerors that submitted proposals, WellCare received the highest score followed by United, BCBSNC, ACNC, Aetna, My Health, CCH, and Optima. *Id.* ¶ 9.

33. My Health received a score of 626.71280, which was 61.435% of the total possible points. *Id.* The highest scoring offeror, WellCare, received 71.824% of the total possible points (with a score of 736.19304), and the fourth ranked statewide offeror, ACNC, received 68.943% of the total possible points (with a score of 706.66204). *Id.*

34. CCH received a score of 628.39969 (or 61.307% of the total available points), and Optima (which only sought regional contracts in Regions 4, 5, and 6) received a score of 573.48539 (or 55.950% of the total available points). *Id.*

D. Contract Awards

35. After conducting its evaluation process, the Evaluation Committee recommended the award of the statewide contracts to the four highest rated offerors (WellCare, United, BCBSNC, and ACNC). Moon Aff. ¶ 11. The committee did not recommend the award of any regional contracts. *Id.* at ¶ 12.

36. The Evaluation Committee made its recommendation to Mona M. Moon, North Carolina Medicaid's Chief Operating Officer. *Id.* ¶ 14. Ms. Moon then made the recommendation to the Department's Deputy Secretary of NC Medicaid, Dave Richard. *Id.* Mr. Richard accepted the Evaluation Committee's recommendation regarding the award of the four statewide contracts, and he also recommended the award of a contract to CCH for Regions 3 and 5. *Id.*; Kilgore-Kilpatrick Aff. ¶ 10 and Ex. H, p. 1.

37. Department Secretary Mandy Cohen accepted Mr. Richard's recommendation, Moon Aff. ¶ 14, and, on 4 February 2019, the Department awarded statewide PHP contracts arising out of the RFP to WellCare, United, BCBSNC, and ACNC, and regional PHP contracts covering Regions 3 and 5 to CCH. Kilgore-Kilpatrick Aff. ¶ 8 and Ex. F. The contracts consisted of the RFP and the successful offerors' responses, along with other documents specifically enumerated in the RFP. *Id.* ¶ 3 and Ex. A, RFP § I, p. 8.

38. On the same day, the Department publicly announced the contract awards and provided information regarding the implementation timeline including launch of Medicaid managed care in Regions 2 and 4 in November 2019, followed by the launch of Medicaid managed care in Regions 1, 3, 5, and 6 in February 2020. *Id.*

E. Implementation Activities

39. Following the 4 February 2019 contract awards, the Department and the Intervenor began work toward implementing Medicaid managed care. Gregosky Aff. ¶ 4.

40. Over 300 Department employees, consultants, and contractors are working on behalf of the Department to implement Medicaid managed care. *Id.* Vendor support staff has been trained in the details of North Carolina Medicaid managed care design. Ludlam Supp. Aff. ¶ 8.

41. As of April 8, 2019:

- a. The Department had hosted 208 meetings with the contract awardees;
- b. The contract awardees had provided 819 deliverables to the Department required under their contracts; and
- c. The Department had reviewed and provided feedback on 196 of those deliverables.

Gregosky Aff. ¶ 5.

42. The Department has identified features and tasks that must be completed before performance of the contracts. *Id.* ¶ 8. As of April 12, 2019, the Department expected 210 features and 790 tasks to have been completed by the end of April 2019, and an additional 274 features and 650 tasks to have been completed by the end of May 2019. *Id.* Additional CMS approvals are needed before launch. Ludlam Supp. Aff. ¶ 6. Notices to potential program beneficiaries must be printed, beneficiaries must be educated about their choices, and open enrollment must occur. Gregosky Aff. ¶¶ 6, 7. Provider contracts also must be finalized. *See id.* ¶ 9.

F. MyHealth's Bid Protest

43. My Health submitted a request for a bid protest meeting to Secretary Cohen and Kimberley Kilpatrick, the Department's Contract and Compliance

Specialist, on 25 February 2019, pursuant to 1 N.C. Admin. Code 05B .1519(c)(1) and the terms of the RFP. Kilgore-Kilpatrick Aff. ¶ 14 and Ex. L.

44. In its protest, My Health asked that the Department amend its award decisions by offering My Health six regional contracts. *Id.* My Health also requested that the Department permit My Health to participate in implementation activities while its protest was pending. *Id.* My Health’s protest does not specifically request award of a statewide contract. *Id.*

45. Secretary Cohen designated Principal Deputy Secretary Susan Perry-Manning to act as the Department’s executive officer for purposes of My Health’s protest. Petition, Ex. A, p. 1. A protest meeting was held before Principal Deputy Secretary Perry-Manning on 26 March 2019. *Id.*

46. On 5 April 2019, Principal Deputy Secretary Perry-Manning issued her decision denying My Health’s protest. *Id.* p. 28. This contested case followed.

IV.

ANALYSIS

A. *Standard of Review*

47. Petitioner brings this contested case pursuant to the Administrative Procedure Act of North Carolina (“NC APA”), N.C. Gen. Stat. § 150B-23 *et. seq.* The NC APA specifically authorizes an Administrative Law Judge to “[s]tay the contested action by the agency pending the outcome of the case, upon such terms [s]he deems proper, and subject to the provisions of G.S. 1A-1, Rule 65[.]” N.C. Gen. Stat. § 150B-33(b)(6).

48. Rule 65 of the North Carolina Rules of Civil Procedure authorizes the issuance of a preliminary injunction. Like a temporary restraining order, a preliminary injunction serves to maintain the status quo pending trial on the merits. *Providence Volunteer Fire Dep't v. Town of Weddington*, __ N.C. App. __, 800 S.E.2d 425, 435 (2017).

49. A preliminary injunction “is an *extraordinary measure*.” *Ridge Cmty. Inv'rs, Inc. v. Berry*, 293 N.C. 688, 701, 239 S.E.2d 566, 574 (1977) (emphasis added). It will be issued *only* if: (i) a petitioner is able to show the likelihood of success on the merits of its case *and* (ii) is likely to sustain irreparable loss unless the injunction is issued or if, in this Tribunal’s opinion, such relief appears necessary for the protection of petitioner’s rights during the course of litigation. *Providence Volunteer Fire Dep't*, __ N.C. App. at 435; *see also* G. Gray Wilson, North Carolina Civil Procedure § 65-1 (2018). The burden is on the petitioner to establish its right to a preliminary injunction. *Pruitt v. Williams*, 288 N.C. 368, 372, 218 S.E.2d 348, 351 (1975).

B. Analysis

50. My Health argues that it is entitled to a stay because it is likely to succeed on the merits of its claims and it will suffer irreparable harm absent a stay. In support of its Motion, My Health argues the merits of its claims. This Tribunal has carefully considered the parties’ arguments and, in summary, concludes that My Health has not demonstrated the likelihood of success on the merits of its claims.

(i) Standards Governing Contested Cases

51. Prior to addressing the merits of My Health’s claims, this Tribunal first sets out the basic principles which governs its review of this contested case.

52. The actions contested by My Health in this contested case relate to the Department’s procurement of capitated PHP contracts as part of the State’s Medicaid Transformation.

53. The Department is the “single state agency” charged with administering the State’s Medicaid program. 42 U.S.C. § 1396a(a)(5) (requiring “the establishment or designation of a single State agency to administer or to supervise the administration of the plan . . .”); N.C. Gen. Stat. § 108A-54 (“The Department is authorized to establish a Medicaid Program”); N.C. Gen. Stat. § 108A-54.1A (“The Department [] is expressly authorized and required to take any and all necessary action to amend the State Plan and waivers in order to keep the program within the certified budget, except as provided in G.S. 108A-54(f).”). Because the Department has the “full authority to manage the State’s Medicaid and NC Health Choice programs,” it is unsurprising that the General Assembly vested it with the responsibility “for planning and implementing the transformation required by the [act.]” N.C. Sess. Law 2015-245, § 4(1). This included the procurement of capitated PHP contracts. *Id.* at § 4(3).

54. The Department’s discretion under the Transformation Act is broad, but it is not unbridled. Under the NC APA, the Department, may not exceed its authority or jurisdiction, act erroneously, fail to use proper procedure, act

arbitrarily or capriciously, or fail to act as required by law or rule. N.C. Gen Stat. §150B-23. Indeed, to prevail in this contested case, My Health must demonstrate that it was deprived of property or otherwise substantially prejudiced³ and the Department acted in a manner contrary to the NC APA. *Id.*

55. In contested case proceedings, due regard is to be given to the demonstrated knowledge and expertise of the agency with respect to facts and inferences with the agency's specialized knowledge. N.C. Gen. Stat. Ann. § 150B-34. But this does not mean complete deference. It is generally recognized that, when reviewing the underlying merits of an agency's interpretation, "courts consider, but are not bound by, such the interpretations of administrative agencies []." *Morris Commc'ns Corp. v. City of Bessemer City Zoning Bd. of Adjustment*, 365 N.C. 152, 156 (2011).

56. However, a reviewing body "does not have authority to override" discretionary decisions made by an agency when that "discretion is exercise in good faith and in accordance with law." *Lewis v. N.C. Dep't of Human Res.*, 92 N.C. App. 737, 740, 375 S.E.2d 712, 714 (1989). Rather, such decisions may be reversed as arbitrary, capricious, or an abuse of discretion when they are "patently in bad faith" or "whimsical" in the sense they "indicate a lack of fair and careful consideration" or "fail to indicate any course of reasoning and the exercise of judgment." *Id.* at 740 (internal citations and quotations omitted). It is presumed, absent evidence to the contrary, that an agency "discharge[d] its duties in good faith and exercise[d] [its]

³ The harm required to establish substantial prejudice cannot be conjectural or hypothetical; it must be concrete, particularized, actual or imminent. *Surgical Care Affiliates*, 235 N.C. App. 620, 631 (2014).

power in accord with the spirit and purpose of the law.” *Painter*, 288 N.C. 165, 178, (1975); see also *Richardson v. N.C. Dept of Pub. Instruction Licensure Section*, 199 N.C. App. 219, 223-24 (2009) (recognizing that an “agency’s decision is presumed to be made in good faith and in accordance with governing law.”) Thus, the “arbitrary or capricious standard is a difficult one to meet.” *Lewis*, 92 N.C. at 740.

(ii) Likelihood of Success on the Merits

a. My Health is Not Likely to Succeed in Showing that the Transformation Act Requires the Department to Award Six Regional Contracts

57. My Health first claims that the Department violated the Transformation Act; it argues the act required the Department to award a minimum of six regional contracts to PLEs. P’s Brief,⁴ p. 12. Resolution of My Health’s claim first requires this Tribunal to interpret the provisions of the Transformation Act as they relate to the procurement of capitated PHP contracts.

58. The “first principle of statutory interpretation is to ascertain the intent of the legislature and carry out such intention to the fullest extent.” *Parkdale America, LLC v. Hinton*, 200 N.C. App. 275, 278 (2009) (internal citations and quotations omitted) (recognizing that “[a] question of statutory interpretation is ultimately a question of law.”)

59. The words chosen by the General Assembly are the primary consideration in determining its intent. *Id.* In certain circumstances, it is also appropriate for this Tribunal to consider “[t]he construction adopted by the

⁴ “P’s Brief” refers to Petitioner’s Brief in Support of Motion for Stay of Contested Actions dated 29 April 2019.

administrators who execute and administer a law in question [.]” *John R. Sexton & Co. v. Justus*, 342 N.C. 374, 380 (1995). “Testimony, even by members of the Legislature which adopted the statute, as to its purpose and the construction intended to be given by the Legislature to its terms, is not competent evidence upon which the court can make its determination as to the meaning of the statutory provision.”⁵ *Milk Commission v. National Food Stores*, 270 N.C. 323, 332–33 (1967) (disregarding affidavits introduced by plaintiffs as evidence of legislative intent on the grounds they “were not competent for that purpose”).

60. The “key question in this contested case” is whether there was a legislative mandate requiring the Department enter award a minimum of six regional contracts to PLEs, in essence, one for each region. P’s Brief, p. 15. This Tribunal, with the aforementioned rules in mind, concludes that My Health’s argument is inconsistent with the plain language of the Transformation Act.

61. The starting point for answering this key question is Section 4(6) of the Transformation Act. In final form, Section 4(6) provides in pertinent part as follows:

Number and nature of capitated PHP contracts. – *The number and nature of the contracts required under subdivision (3)*⁶ of this section shall be as follows:

a. *Four contracts* between the Division of Health Benefits and PHPs *to provide coverage* to Medicaid and

⁵ In support of its Motion, My Health submitted affidavits of two former legislators which the Department moved to strike. At the hearing on May 2, 2019, My Health admitted that these affidavits are not necessary to My Health’s Motion. May 2, 2019 Tr. p. 54. Consistent with *Milk Commission*, this Tribunal has not considered the affidavits of the former legislators in ruling on My Health’s Motion.

⁶ Section 4(3) of the Transformation Act details the “capitated contract with PHPs” required to be entered into by the Department as part of the State’s Medicaid transformation.

NC Health Choice recipients *statewide* (statewide contracts).

b. *Up to 12 contracts* between the Division of Health Benefits and PLEs *for coverage of regions* specified by the Division of Health Benefits pursuant to subdivision (2) of Section 5 of this act (regional contracts). *Regional contracts shall be in addition to the four statewide contracts required* under sub-subdivision a. of this subdivision. Each regional contract shall provide coverage throughout the entire region for the Medicaid and NC Health Choice services required by subdivision (4) of this section. A PLE may bid for more than one regional contract, provided that the regions are contiguous. (emphasis added)

N.C. Sess. Law 2018-48 (emphasis added). Section 5(2) of the Transformation Act requires the Department to:

Define six regions comprised of whole contiguous counties that reasonably distribute covered populations across the State to ensure effective delivery of health care and achievement of the goals of Medicaid transformation set forth in Section 1 of this act. Every county in the State must be assigned to a region.

N.C. Sess. Law 2015-245, § 5(2).

62. MyHealth contends that the above-cited language is evidence of a “mandate of the General Assembly” that reflects its intention that “the Department award regional contracts to [PLEs] to ensure coverage of all six regions.” P’s Brief, pp. 12, 14. This Tribunal is not so persuaded.

63. Section 4(6) – the key provision – details *the number* and *nature* of capitated PHP contracts required under the Transformation Act. As to *the number*, the General Assembly mandated only that the Department enter into a certain number of statewide contracts with “PHPs,” but it did not mandate that the

Department award any of those statewide contracts to PLEs specifically. Further, while the General Assembly explicitly mandated the award of four statewide contracts to PHPs, it used permissive language to authorize “[u]p to 12” regional contracts with PLEs. N.C. Sess. Law 2015-245 § 4(6), as amended by N.C. Sess. Law 2018-48 § 1. By using the phrase “up to,” the General Assembly set a range (12 or less) on the number of contracts to be awarded under Section 4(6)b.⁷

64. My Health argues that the floor for this range is six and, as support, points to “coverage of regions” language appearing in Section 4(6)b. P’s Brief, pp. 15-16. However, the “coverage of regions” language does not appear to set a floor on the number of contracts, but rather distinguishes between the *nature* of the PHP contracts authorized under Section 4(6)a and 4(6)b.

65. While Section 4(6)a mandates the award of statewide contracts to provide coverage statewide, Section 4(6)b permits the Department to award PLEs regional contracts in the six regions designed by the Department for coverage of an entire region. Thus, based on the plain language of Section 4(6)b, the Department not only had the authority to enter into statewide contracts for “coverage. . . statewide,” but it also could enter into regional contracts for “coverage of regions.” Again, the General Assembly leaves it within the discretion of the Department as to the exact *number* of regional contracts, which, based on the plain language of

⁷ None of the parties have cited, nor has this Tribunal found, any North Carolina cases specifically interpreting the meaning of the phrase “up to.” While this Tribunal is not bound by the reasoning of courts in other jurisdictions, it notes that other courts have interpreted the plain meaning of the phrase “up to” as one that sets a range. *See e.g., Kipp v. Kipp*, 844 So. 2d 691, 693 (Fla. Dist. Ct. App. 2003) (“the plain meaning of the phrase “up to” leads us to the inescapable conclusion that the phrase set a cap but not the amount[.]”); *Arness v. Franks*, 138 F.2d 213, 216 (C.C.P.A. 1943) (interpreting the phrase “up to 30%” to mean “anything from zero to 30%”).

Section 4(6)b, could be “up to 12.” The Department, exercising this discretion, awarded CCH regional contracts in Regions 3 and 5 for coverage of those regions.

66. In conclusion, to find as My Health has argued in contested case, would require inserting words into the Transformation Act, and, failing to give the full effect to the words actually selected by the General Assembly. This contravenes the duty of this Tribunal, which is “to give effect to the words actually used in a statute and not to delete words used or to insert words not used.” *Lunsford v. Mills*, 367 N.C. 618, 623, 766 S.E.2d 297, 301 (2014). The General Assembly could have mandated that the Department award a minimum number of PLE regional contracts, like it did for the statewide contracts, *or* award PLE contracts for each of the six regions in the state. It did neither. This Tribunal therefore concludes that My Health is not likely to succeed on this claim.

b. MyHealth is Not Likely to Succeed in Showing that the Department erred in failing to consider it for Regional Contracts

67. My Health next argues that the Department erred in its award of capitated PHP contracts because it “refus[ed] to consider MyHealth for any of the provider-led entity contracts.” P’s Brief, p. 24. My Health alleges that this action, along with the Department’s failure to “offer provider-led contracts in all six regions substantially prejudiced MyHealth.” *Id.*

68. Even if My Health had persuaded this Tribunal to adopt its statutory construction arguments, My Health still would not be likely to prevail in its argument that the Department should have awarded My Health regional contracts for the reasons explained below.

69. As an initial matter, this Tribunal notes that the RFP's opening directives to offerors stated: "a. CPs are eligible to submit offers for Statewide Contracts. b. PLEs are eligible to submit offers for Statewide and/or Regional Contracts." Kilgore-Kilpatrick Aff. ¶ 3 and Ex. A, RFP § II, p. 8.

70. Evaluation Question 1 required offerors to identify the type of contact it was seeking with its proposal; it stated: "The Offeror shall indicate if it is submitting a proposal as a statewide or regional contract. ***Check all that apply.***" Kilgore-Kilpatrick Aff. ¶ 5 and Ex. C, RFP § VIII, p. 8 (emphasis added). My Health, in response to this question, checked the Statewide Contract option "XX" and *did not check* the regional contract option. Kilgore-Kilpatrick Aff. ¶ 11 and Ex. I, p. 8.

71. Additionally, Evaluation Question 2 stated in pertinent part:

If the Offeror is submitting a Regional proposal (as indicated in Question #1 above), the Offeror shall indicate the Region(s) ... it is proposing to provide Medicaid Managed Care services and coverage. (If the Offeror is submitting a Statewide proposal, it is presumed that the Offeror is proposing to provide Medicaid Managed Care services and coverage in Regions 1-6 in their entirety and the Offeror shall not be required to make any indication.

Kilgore-Kilpatrick Aff. ¶ 5 and Ex. C, RFP § VIII, p. 8. My Health did not mark any regions in response to Evaluation Question 2. Farrell Supp. Aff. ¶ 19.

72. My Health claims that it did not believe that it was required to indicate in its proposal that it was seeking regional contracts in addition to a statewide contract based on the parenthetical in Evaluation Question 2 quoted above. Farrell Supp. Aff. ¶ 19. However, the parenthetical refers to a statewide proposal being required to provide service and coverage in all six regions "in their

entirety” and did not relieve My Health from indicating that it was seeking regional contracts in the event it was not awarded a statewide contract and desired to be considered for regional contracts.

73. My Health’s position also is inconsistent with other aspects of its proposal including that My Health responded “not applicable” to certain questions in Table 1: Minimum Qualifications Table regarding regional contracts and stated in the cover letter to its proposal that it was making a statewide proposal. Moon Aff. ¶ 8; Kilgore-Kilpatrick Aff. ¶¶ 11, 12 and Exs. I and J.

74. In summary, this Tribunal finds that the Department reasonably construed My Health’s responses to the RFP as failing to indicate that it was applying for both statewide and regional contracts and therefore concludes that MyHealth is not likely to prevail on this argument.

c. MyHealth is Not Likely to Succeed in Challenging the Department’s RFP Design and Evaluation Process.

75. Finally, My Health makes a variety of arguments relating to the Department’s RFP design, evaluation process, and scoring of various questions. P’s Brief, pp. 27-35. Given that My Health arguments hinge, in large part, on legislative intent, this Tribunal begins its analysis of these claims with the General Assembly’s intent in enacting the Transformation Act.

76. The General Assembly enacted the Transformation Act with the intent “to transform the State’s current Medicaid and NC Health Choice programs to programs that provide budget predictability for the taxpayers of this State while ensuring quality care to those in need.” N.C. Sess. Law 2015-245, § 1. To accomplish

its goal, the General Assembly chose a capitated system where the Department would enter into capitated contracts with PHPs for delivery of the services to the State's Medicaid beneficiaries. N.C. Sess. Law 2015-245, § 4(3). The capitated contracts were to be the result of a competitive procurement process handled by the Department. *Id.* The General Assembly vested the Department with “the full authority to manage” the State's Medicaid program. N.C. Sess. Law 2015-245, § 4(1), as amended by N.C. Sess. Law 2016-121.

77. My Health primarily argues that the Department erred in procuring capitated PHP contracts because the RFP design and evaluation process was allegedly biased against PLEs and in favor of CPs. P's Brief, pp. 27-35. Similar to its other arguments, My Health's argument is premised on the assumption that the Transformation Act required the Department to award PLEs capitated PHP contracts and, more specifically, contracts in all six regions. *See e.g.*, P's Brief, p. 30 (arguing that the Transformation Act “envisioned that 75 percent (i.e., 12 of 16) of the contracts awarded would be awarded to provider-led entities[.]”) Again, the Tribunal finds this interpretation inconsistent with the Transformation Act and, for the reason explained below, concludes that My Health is not likely to prevail on its arguments challenging the RFP design and evaluation.

78. The Transformation Act gives the Department *broad discretion* in designing the RFP and procuring capitated PHP contracts for the State's Medicaid transformation. The General Assembly “[d]efine[d] the overall goals of transformation and the structure of the delivery systems for the program.” N.C.

Sess. Law 2015-245, § 2(1). But the General Assembly delegated the responsibility of “entering into capitated PHP contracts for the delivery of . . . services” to the Department. N.C. Sess. Law 2015-245, § 5(6), as amended by N.C. Sess. Law 2016-121 and N.C. Sess. Law 2018-49. Thus, the Department’s procurement was not simply to include PLEs in the State’s Medicaid transformation but to *procure PHPs* (which could be a CP or PLE) *to operate capitated contracts for the delivery of services to the State’s Medicaid beneficiaries*. Indeed, the General Assembly designed the State’s new Medicaid program to achieve the goal of ensuring the sustainability of the capitated system, as well as ensuring: (i) budget predictability through shared risk and accountability, (ii) balanced quality, patient satisfaction, and financial measures, and (iii) efficient and cost-effective administrative systems and structures. N.C. Sess. Law 2015-245, § 1.

79. When analyzing the record evidence and taking into consideration the clear intent and goals of the General Assembly in enacting the Transformation Act, this Tribunal concludes that My Health has failed to show that the Department acted in a manner that would warrant revisiting the RFP or the evaluation process

80. The Tribunal notes that My Health contends that the language of the Transformation Act required the Department to issue two requests for proposals – one for CPs and one for PLEs. P’s Brief, p. 29 (noting that N.C. Sess. Law 2015-245, § 4(3) states “all contracts shall be the result of requests for proposals (RFPs) issued by the Department[.]”) There is nothing appearing in the plain language of the Transformation Act requiring the Department to undertake such action.

81. The Transformation Act uses the term RFP in both the singular and plural. *Compare* N.C. Sess. Law 2015-245, § 4(3) *with* N.C. Sess. Law 2015-245, § 5(12) (requiring the Department to report to the Joint Legislative Oversight Committee on Medicaid and NC Health Choice the “[t]ime line for issuance of RFP and solicitation of bids”). The General Assembly could have mandated that the Department issue separate RFPs for CPs and PLEs, but it did not. Instead, the Transformation Act requires all PHP contracts to cover the same services and be subject to the same contract terms. N.C. Sess. Law 2015-245, § 4(4) and 5(6), as amended by N.C. Sess. Law 2016-121, N.C. Sess. Law 2018-48, and N.C. Sess. Law 2018-49.

82. As for the request for proposal at issue in this contested case, the record evidence demonstrates that the Department designed the RFP after much thought and based on the input of legislators, CMS, stakeholders, and Medicaid managed care experts to identify the PHPs that were best able to achieve the goals of the new Medicaid managed care model chosen by the General Assembly and comply with the laws and regulations that apply to all PHPs, regardless of whether they are CPs or PLEs. Ludlam Aff. ¶¶ 3, 5-11; Ludlam Supp. Aff. ¶¶ 10, 11, 13; Lerche Aff. ¶¶ 3-8.

83. Moreover, the record is devoid of any evidence the Department discharged its duties in evaluating the proposals other than in good faith. The Department submitted evidence in opposition to the Motion demonstrating that the Department’s evaluation process was extensive, thorough, and fair. This includes

evidence that: the Evaluation Committee consisted of individuals with varied experience relevant to the PHP contracts being procured; the Evaluation Committee consulted subject matter experts; the Evaluation Committee held over 40 meetings from October 2018 to January 2019; the Evaluation Committee used a consensus scoring, an approach that would account for potential differences among committee members; and the Department's Medicaid contracting section conducted a quality assurance review to ensure consistency and accuracy of the scores awarded to proposals. Ludlam Aff. ¶¶ 22-23; Moon Aff. ¶¶ 4-5, 7; Kilgore-Kilpatrick Aff. ¶¶ 6, 7 and Ex. D and Ex. E.

84. Although My Health may disagree with the scores that the Evaluation Committee awarded its proposal on discrete questions, absent My Health showing that the Department abused its broad discretion or erred in some other manner, there is no basis for this Tribunal to disturb the scores awarded by the Department. Likewise, there is no basis for this Tribunal to entertain My Health's invitation to rewrite the RFP by eliminating certain questions characterized by My Health as being "fundamentally flawed commercial-plan-only biased questions."⁸

85. In sum, this Tribunal concludes that My Health is not likely to prevail on the merits of its claims raised in this contested case.

(iii) Irreparable Harm

⁸ See Transcript of Hearing on Petitioner's Motion for A Stay of Contested Actions, p. 38.

86. Having determined that Petitioner has failed to establish a likelihood of success on the merits of its claims, this Tribunal need not reach the question of whether Petitioner will suffer irreparable harm.

V.

CONCLUSION

87. The dispute in this contested case shows that, as in most RFPs, reasonable people could reach different conclusions on how an RFP should be designed and evaluated. However, the current record before this Tribunal shows that the Department properly exercised the discretion granted to it in designing and procuring contracts for Medicaid transformation in North Carolina. It does not appear that anything about the development of the RFP, the evaluation process, the Department's award decisions, or its bid protest process and decision could be considered unlawful, arbitrary and capricious, whimsical, erroneous, or lacking in any judgment.

88. Under these facts, My Health is unlikely to succeed on the merits of its claims against the Department. My Health's request for a stay of contested actions, therefore, is denied.

SO ORDERED, this the 26th day of June, 2019.

A handwritten signature in blue ink that reads "Tenisha S. Jacobs". The signature is written in a cursive style and is positioned above a solid blue horizontal line.

Tenisha S Jacobs
Administrative Law Judge

CERTIFICATE OF SERVICE

The undersigned certifies that, on the date shown below, the Office of Administrative Hearings sent the foregoing document to the persons named below at the addresses shown below, by electronic service as defined in 26 NCAC 03 .0501(4), or by placing a copy thereof, enclosed in a wrapper addressed to the person to be served, into the custody of the North Carolina Mail Service Center who subsequently will place the foregoing document into an official depository of the United States Postal Service:

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This the 26th day of June, 2019.



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