**GOVERNMENT OF THE DISTRICT OF COLUMBIA**
**CONTRACT APPEALS BOARD**

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| **PROTEST OF:**<br><br>AMERIGROUP DISTRICT OF COLUMBIA, INC.<br><br>Under Solicitation No.<br>Doc490243 | CAB No. P-1128<br><br>[redacted] |

**AMERIGROUP DISTRICT OF COLUMBIA, INC.'S MOTION FOR SANCTIONS**

Pursuant to District of Columbia Contract Appeals Board ("**CAB**") Rules 104 and 127, Amerigroup District of Columbia, Inc. ("**Amerigroup DC**") respectfully submits this Motion for Sanctions against the D.C. Office of Contracting and Procurement ("**OCP**"), the D.C. Department of Health Care Finance ("**DHCF**"), and the Deputy Mayor for the District of Columbia Health and Human Services and Director of the District of Columbia Department of Health Care Finance, Wayne Turnage ("**Deputy Mayor**") (collectively, the "**District**"). As demonstrated below, the District unlawfully disclosed confidential, proprietary and protected information that was contained in offerors' proposals and evaluation documents. Critically, the unlawfully disclosed information could only have been obtained improperly by the Deputy Mayor from either the Technical Evaluation Team ("**TET**") or the Contracting Officer ("**CO**") because the protected details he obtained and later disclosed were ***not*** included within the D.C. Contract Appeal Board's redacted, unsealed December 1, 2020 Opinion. In addition, these confidential, protected evaluation details were not otherwise publicly available. The serious nature and extent of the

District's unlawful and unethical violations of the Procurement Practices Reform Act of 2010, as amended[1] ("**PPRA**"), various provisions of the D.C. Code and Municipal Regulations[2] (collectively, "**D.C. Law**"), as well as the protective order entered by this Court ("**Protective Order**") in the Protest of Amerigroup DC, CAB No. P-1128 ("**Protest**") on July 31, 2020, as demonstrated below, warrant sanctions. These disclosure violations have irreparably impacted the integrity of the CAB ordered reevaluation and this entire procurement, all to the prejudice of Amerigroup DC. Accordingly, Amerigroup DC respectfully requests that the CAB sanction the District for these unlawful and unethical disclosure violations, as more fully described and requested below.

**1. Relevant Facts**

On January 6, 2021, a Freedom of Information Act Request ("**FOIA Request**") was submitted to the DC Council requesting, among others, relevant documents and written correspondence between any Councilmember, or their respective staff, and the DC Executive Office of the Mayor relating to any proposed action that would have the effect of exempting any existing Managed Care Organization ("**MCO**") from any contractual or legal requirements under any managed care contract executed as a result of awards made under Solicitation Doc490243.

On July 28, 2021, the DC Council returned a collection of emails that were responsive to the FOIA Request (the "**FOIA Response**"). The portions of this FOIA Response that are relevant to this Motion for Sanctions, are attached as **Exhibit 1**.

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[1] 2009 D.C. ALS 723, 2009 D.C. Act 723 Public Procurement Reform Act of 2010, as amended.

[2] These provisions include Section 417 of the PPRA; DCMR 27-3111.2(a); DCMR § 27-1629.1; D.C. Code § 2-354.01a; the D.C. Ethics Manual; the Code of Conduct defined at D.C. Official Code § 1-1161.01(7) and related code sections such as Chapter VII of the Code of Official Conduct of the Council of the District of Columbia; D.C. Code §1–618.01(a); DCMR Title 6B, Chapter 18, § 1800.3(h), (k), (m) and (n); and the District Personnel Manual.



[redacted]

Upon review of the FOIA Response, Amerigroup DC discovered that the District committed serious violations of various sections of the PPRA, D.C. Law, and of the Protective Order. These disclosure violations concern the intentional release of legally protected, competitively sensitive proprietary or confidential bid and evaluation information (collectively, "**Protected Information**") associated with the evaluation and prospective selection of MCO offerors under Solicitation No. Doc490243 ("**Solicitation**").

On August 5, 2021, Amerigroup DC sent a letter to the Office of the Attorney General for the District of Columbia ("**OAG**"), advising the OAG of the disclosure violations revealed by the FOIA Response. ("**August 5 Letter**"). A true and correct copy of the August 5 Letter is attached as **Exhibit 2**. In the August 5 Letter, Amerigroup DC advised the OAG that the FOIA Response revealed that the District committed at least two distinct violations of the Protective Order and applicable D.C. Law, including the following:

- On various dates in December 2020, the OCP and, in particular, its Technical Evaluation Team ("**TET**"), improperly and illegally disclosed Protected Information to the Deputy Mayor for the District of Columbia Health and Human Services and Director of the District of Columbia Department of Health Care Finance, Wayne Turnage ("**Deputy Mayor**"). The Deputy Mayor is not part of the evaluation process for this Solicitation and is not admitted to the Protective Order.

- On various dates in December 2020, the Deputy Mayor further improperly and illegally disclosed Protected Information to various members of the D.C. Council, (collectively, **Council Members**").

Exh. 2 at 1. Amerigroup DC requested that the OAG immediately advise Amerigroup DC of how the District intended to address and remediate these unlawful disclosures. The District delayed its response to the August 5 Letter until August 13, 2021, noted that it had made little progress and requested a teleconference with Amerigroup DC for Monday, August 16, 2021.



[redacted]

On Monday, August 16, 2021, the OAG and Amerigroup DC participated in a teleconference to discuss the disclosure violation concerns raised in Amerigroup DC's August 5 Letter. Later that same day, Amerigroup DC sent the OAG another letter specifying the particular portions of the FOIA Response that violated the PPRA, D.C. Law, and the Protective Order ("**August 16 Letter**"). A true and correct copy of the August 16 Letter is attached as **Exhibit 3**.

Because of the serious nature and extent of the District's disclosure violations, as well as its detrimental impact on the integrity of the pending procurement—before the reevaluation ordered by the CAB had begun, much less been completed, sanctions must be ordered against the District. Specifically, Amerigroup DC requests the CAB order a new reevaluation of the remaining competitive range proposals by a new, independent Technical Evaluation Team and a new Contracting Officer, because the existing TET and CO have demonstrated that they are not capable of ensuring a fair and impartial reevaluation of the existing competitive range proposals. Amerigroup DC further requests that the CAB order that the Deputy Mayor be restricted from any further involvement in matters relating to this Solicitation, reevaluation and related award. If the CAB deems it necessary to address the District's disclosure violations, the CAB may schedule a hearing and compel the Deputy Mayor, the CO and the TET to testify as to the disclosure violations set forth in this Motion for Sanctions, and be subject to cross-examination. Finally, Amerigroup DC requests that the CAB order that Amerigroup DC be awarded its attorneys' fees and costs incurred relating to the preparation, filing and presentation of this Motion.

## 2. The District's Violation of the PPRA, D.C. Law and the Protective Order

### A. Sanctions are Appropriate to Address the Unlawful Disclosures at Issue

The CAB rules permit sanctions in instances, where, as here "a party or the party's representative fails or refuses to comply with a Board order or rule, or engages in unreasonable or



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vexatious conduct." DC CAB Rule 127.1. In such cases, the Board may, on its own initiative or on motion of a party, sanction the offending party or representative as it considers necessary to the just and expeditious conduct of the case." *Id*. The sanctions sought in this Motion are warranted under this rule based upon the Deputy Mayor and TET's improper disclosure violations. *See Protests of Corvel Corp., Nylcare Health Plans of Mid-Atl., Inc*., DCCAB No. P-482, DCCAB No. P-490 (D.C.C.A.B. Aug. 22, 1997) (imposing a sanction for the District's improper disclosure of the protestor's price proposals to the awardee during protest proceedings).

The CAB rules also authorize sanctions for violations of the CAB's protective orders. Specifically, CAB Rule 104 states that "[a]ny violation of the terms of a protective order may result in the imposition of sanctions as the Board deems appropriate, including referral to appropriate bar associations or other disciplinary bodies and restricting the violator's practice before the Board." DC CAB Rule 104.1(d). This rule also squarely addresses the Deputy Mayor and TET's violation of the governing protective order. *See Appeal of W.M. Schlosser Co., Inc.*, DCCAB No. D-894, (D.C.C.A.B. Apr. 14, 1993) (imposing sanctions for the District of Columbia Department of Public and Assisted Housing's failure to comply with the Board's discovery order). The Protective Order entered in this case incorporates CAB Rule 104 and specifically states: "Any violation of the terms of this protective order may result in the imposition of such sanctions as the Board deems appropriate." *See* CAB Protective order, Filing ID #65813700, dated July 31, 2020 at 2. The Protective Order further provides that "[a] party whose protected information is improperly disclosed shall be entitled to all remedies under law or equity, including breach of contract." *Id*.



[redacted]

### B. The Unlawful Disclosure Violations Revealed by the FOIA Response

The FOIA Response reveals that the District violated the PPRA, D.C. Law and the Protective Order in at least two distinct ways. First, the FOIA Response reveals that on various dates in December 2020, OCP and, in particular, its TET, improperly and illegally disclosed Protected Information to the Deputy Mayor, who is not part of the evaluation process for this Solicitation, is not admitted to the Protective Order and should not have had access to confidential Protected Information in the offerors' proposals and evaluation details that are revealed in the FOIA Response. Second, on various dates in December 2020, the Deputy Mayor further improperly and illegally disclosed Protected Information to various members of the D.C. Council. In particular, the FOIA Response reveals that the Deputy Mayor had unlawfully acquired details regarding Protected Information that were included within the offerors' proposals and evaluation documents that were involved in this Solicitation. This Protected Information unlawfully disclosed in the FOIA Response could only have been obtained by the Deputy Mayor unlawfully from either the TET or the CO because as demonstrated below, numerous factual Protected Information details from the offerors' proposals and the evaluation were ***not*** included within the CAB's redacted, unsealed December 1, 2020 Opinion, nor were these evaluation details otherwise publicly available.

On Page 13 of the FOIA Response, Deputy Mayor Turnage stated the following:

> And, as stated, if a legislative solution is not identified to address the subcontracting plan issue for MedStar, the proposal will be ruled non-responsive, ***prior*** to any reassessment by the TET. **However, having reviewed the CAB's unsealed ruling, the head of the TET notes the following**:

Exh. 1 at 13. To begin with, in an active procurement following the CAB's order to conduct a reevaluation, the TET or CO should not have discussed details of its review or its insights with the

Deputy Mayor, who is not part of the procurement process and is not admitted to the CAB's Protective Order. Moreover, contrary to this statement about review of an "unsealed" CAB ruling, the disclosure of information that follows is indisputably ***not*** found in the CAB's unsealed ruling. For example, on page 14 of the FOIA Response, Deputy Mayor Turnage stated the following:

> ***Technical and Methodology.*** The CAB's assessment of the adequacy of MedStar's proposal with respect to resumes is not accurate. The TET assigned a score of 4 to this aspect of MedStar's proposal **because the document included 15 of the 17 references in Attachment A**. **The TET referenced each of these data points in evaluating MedStar's performance.** The remaining two positions had not been filled at the time of proposal so there were no biographies to share. Instead, **MedStar thoroughly explained how the outreach program would be implemented and how those two positions would lead this program**. This is permissible under procurement law since it is contemplated that new vendors may not be fully staff. Hence, the vendor must provide a staffing plan for all unfilled positions during the 90-day readiness review following contract award. Accordingly, the **TET strongly believes the information provided adequately supports their ranking of MedStar on this point** and the CAB admits that this is an arguable point that could be resolved later in the process.

*Id.* at 14. (non-italicized bolded text added). The bolded information above from the FOIA Response was <u>not</u> included in the redacted, unsealed CAB Opinion. Moreover, the CAB did not include this Protected Information in the CAB Opinion at all. Therefore the Deputy Mayor could only have received this detailed information through an unlawful disclosure by the TET or CO of confidential Protected Information of the offeror's proposals and/or evaluation documents in violation of the Protective Order and D.C. Law. The Deputy Mayor also describes above what the "TET strongly believes," *id.*, based on the TET's review of an offeror's proposal or evaluation documents, which again, clearly were not contained within the redacted, unsealed CAB Opinion.

In addition, on page 14 of the FOIA Response, Deputy Mayor Turnage stated as follows:

> ***Medstar References.*** Procurement rules require that a proposal which includes less than 3 references be awarded a neutral score -- a 3 -- if the vendor explains why other references could not be obtained. This provision is designed to prevent vendors with limited references from being disadvantaged in the process by being



[redacted]

> assigned scores below 3. Medstar provided only two unique references **but contacted the TET to explain that their 3rd reference -- a former employee at the Centers for Medicare and Medicaid -- was no longer working at the agency. Based on this communication**, the TET determined that a neutral score of 3 was justified.

Exh. 1 at 14. (non-italicized bolded text added). Here again, the bolded information above was not included in the redacted, unsealed CAB Opinion. Moreover, the CAB did not include this Protected Information in the CAB Opinion at all. Therefore the Deputy Mayor only could have received these details through an unlawful disclosure by the TET or CO of confidential Protected Information from the offeror's proposal and/or evaluation documents in violation of the CAB Protective Order and D.C. Law.

Finally, on pages 14 and 15 of the FOIA Response, Deputy Mayor Turnage stated as follows:

> ***Past Performance.*** The CAB states that both MedStar and Amerigroup offered the same reasoning to explain deficient performance in meeting program standards for serving children. Yet, Amerigroup was treated more harshly as a component of past performance than MedStar. The TET notes that Amerigroup's responded by citing problems or barriers to contacting beneficiaries and listed a litany of strategies to address the problem **that were recycled from previous failed efforts**. On the other hand, MedStar, which had the same deficiency, **demonstrated how the strategies it put place following the identification of the problem, actually improved the plan's performance, using data which demonstrated improvement on this measure**. Moreover, **MedStar's proposal outlined new innovative initiatives and partnerships to further improve program performance for increasing utilization of services for children. This clearly distinguished MedStar's proposal from Amerigroup's which, as noted, simply regurgitated the failed strategies from previous efforts**. That the CAB would overlook these key facts strain credulity. In closing, it should be said that in cases where the independent **CO does not describe the work and conclusions of the TET, upon a second review, it is a straightforward exercise to return to the contemporaneous TET report and identify the supporting documentation**.

*Id.* at 14-15. (non-italicized bolded text added). Once again, the bolded text highlighted above was not included in the redacted, unsealed CAB Opinion. Moreover, the CAB did not include this

Protected Information in the CAB Opinion at all. Therefore the Deputy Mayor only could have received this detailed information through an unlawful disclosure by the TET or CO of confidential Protected Information from the offerors' proposals and/or evaluation documents in violation of the Protective Order and D.C. Law. The Deputy Mayor, also would not have known if the CAB had "overlooked" these "key facts," if he had only reviewed the redacted, unsealed CAB Opinion, nor could he comment on whether it would be a "straightforward exercise to return to the contemporaneous TET report and identify the supporting documentation," without having access to confidential Protected Information in violation of the Protective Order and D.C. Law.

**C. Impact of the District's Unlawful Disclosures on the Procurement**

As demonstrated above, the District has engaged in serious unlawful and unethical violations of the PPRA, D.C. Law, and the Protective Order. These disclosure violations—as evidenced by this one FOIA Response email alone—have irreparably impacted the integrity of this procurement.

"The [procurement] process runs the gamut, from development of competitive procedures, acquisition planning, development of specifications and provisions, soliciting competition (through invitations for bids, requests for proposals, etc.), to determining responsiveness and responsibility, evaluations of proposals, resolving mistakes, negotiations, awards and debriefings." *See Protest of Micro Computer Co., Inc.*, DCCAB No. P-226 (D.C.C.A.B. May 12, 1992). As explained above, the Deputy Mayor did not serve a role in the evaluation process in this Procurement, and he certainly did not serve as a member of the TET. Therefore, when the TET revealed to the Deputy Mayor confidential Protected Information from the offerors' proposals and the TET's evaluation, the TET committed a clear violation of Section 417 of the PPRA. *See* FOIA Response at pdf pages 20, 25, 30; *see also* PPRA §417 ("[Confidential or proprietary] information



[redacted]

shall be treated by the CPO, and any other District employee, in a confidential manner, [and] shall be disclosed only to District employees ***for use in the procurement process, and shall not be disclosed to other persons or parties*** without the prior written consent of the person").

Consistent with PPRA §417, District of Columbia Municipal Rules ("**DCMR**") § 27-1629 restricts the release of information, including information contained in the confidential proposals "to the public or to anyone in the District not required to have access to the information in the performance of his or her duties." Again, in blatant disregard of applicable D.C. law, the TET unlawfully disclosed details of Amerigroup DC's confidential proposal to the Deputy Mayor, along with that of other offerors. *See, e.g.* FOIA Response at pdf pages 20, 25, 30.

Further, the governing Protective Order clearly limits access to protected material, including Amerigroup DC's confidential and proprietary information described herein, only to individuals specifically admitted to the Protective Order and expressly provides for the imposition of sanctions for violations thereof. The Deputy Mayor then committed further disclosure violations by subsequently disclosing the Protected Information he obtained from the TET, to the D.C. Council in an attempt to influence the source selection. *See* D.C. Code § 2-354.01 ("Except for members of a technical advisory group, no District employee or official shall contact any contracting officer or contracting staff in an attempt to influence source selection outside of the processes established in this subchapter.").

Finally, each of the unlawful disclosures of Protected Information between the Deputy Mayor and the TET, and the Deputy Mayor to the DC Council, constitute separate ethical violations. *See* D.C. Ethics Manual, Code of Conduct, and related code sections, such as Chapter VII of the Code of Official Conduct of the Council of the District of Columbia; D.C. Code § 1–618.01(a); DCMR Title 6B, Chapter 18, § 1800.3(h), (k), (m) and (n) (and as set forth in the District



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Personnel Manual) and others, which require, *inter alia*, a "high level of ethical conduct in connection with the performance of official duties" and require all District Officials to "act impartially and not give preferential treatment to any private organization or individual."

The District's unlawful disclosure and ethical violations have prejudiced Amerigroup DC, clearly demonstrated Deputy Mayor Turnage's bias against Amerigroup DC, and have prevented Amerigroup DC from receiving the fair and impartial reevaluation ordered by the CAB. These procurement integrity violations revealed in the FOIA Response have tainted the reevaluation and the entire procurement. There is now no way for Amerigroup DC to get a fair and impartial reevaluation unless the CAB orders the District immediately to conduct a new reevaluation of the proposals remaining in the competitive range by a new independent (and impartial) TET and CO. *See Protest of: M.C. Dean, Inc.*, DCCAB No. P-0955, 2014 WL 2993557 (D.C.C.A.B. June 2, 2014) (finding "that the violations of District procurement law and regulations were sufficiently material and pervasive so as to irreparably compromise the integrity of the selection process and require a resubmission and reevaluation of the offerors' proposals.").

Accordingly, Amerigroup DC respectfully requests that the CAB order a new reevaluation of the proposals remaining in the competitive range by a new and independent TET and CO. Amerigroup DC further requests that the CAB issue an order restricting Deputy Mayor Turnage from any further involvement in this Solicitation, reevaluation and related award. Should the CAB deem it necessary, it should further convene a hearing compelling the Deputy Mayor, the CO and the TET to testify as to their unlawful disclosures evidenced by the FOIA Response and their related actions, and be subject to cross examination. Finally, Amerigroup DC requests that the CAB order that Amerigroup DC be awarded its attorneys' fees and costs incurred relating to this Motion.



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**Conclusion**

The District's unlawful and unethical disclosure violations demonstrated above demonstrate its disregard for the principles of confidentiality and integrity contained in the PPRA, and D.C. Law and the Protective Order. The District's disregard for these authorities and its breach of the Protective Order have resulted not only in serious violations of the law, but also in severe damage to the integrity of this Solicitation, the reevaluation ordered by the CAB, and to the integrity of the District of Columbia public procurement system as a whole. Accordingly, the CAB must impose appropriate and significant sanctions on the District that will not only remedy the harms caused by the District, but that will also serve to discourage similar unlawful and prejudicial disclosure violations by the District in the future. Amerigroup DC therefore respectfully requests that the CAB issue an order imposing such sanctions as soon as possible to prevent further violations by the District associated with this Solicitation, the CAB-ordered reevaluation, and award.



[redacted]

Dated: August 19, 2021

Respectfully submitted,

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| AMERIGROUP DISTRICT OF COLUMBIA, INC. | CAB No. P-1128 |
| Under Solicitation No. Doc490243 | |

## CERTIFICATE OF SERVICE

I hereby certify that on August 19, 2021, I caused a copy of the foregoing Motion for Sanctions to be filed electronically at the D.C. Contract Appeals Board, via File and Serve Express, which will serve a copy on all parties of record.

/s/ Lawrence S. Sher
Lawrence S. Sher

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**[PROPOSED] ORDER**

Having considered Amerigroup District of Columbia, Inc.'s ("Amerigroup DC") Motion for Sanctions, for good cause shown, Amerigroup DC's Motion for Sanctions is hereby GRANTED and the following sanctions are hereby ORDERED:

- A new reevaluation of the proposals remaining in the competitive range in this Procurement shall be promptly completed by the District with a new independent and impartial Technical Evaluation Team and Contracting Officer, none of whom have been involved in this Procurement to date.
- Deputy Mayor Turnage shall not interfere, and is restricted from any and all involvement, in matters relating to this Solicitation, the reevaluation and any re-award.
- Amerigroup DC is awarded its reasonable attorney fees and costs incurred in preparing and filing its Motion for Sanctions.

**SO ORDERED.**

Date: _____

_____
NICHOLAS A. MAJETT
Administrative Judge

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