IN THE IOWA DISTRICT COURT FOR POLK COUNTY

AETNA BETTER HEALTH OF IOWA, INC., WELLCARE OF IOWA, INC., and MERIDIAN HEALTH PLAN OF IOWA, INC., **Petitioners,** **v.** **IOWA DEPARTMENT OF HUMAN SERVICES,** **Defendant.** **AMERIGROUP IOWA, INC., AMERIHEALTH CARITAS IOWA, INC., and UNITED HEALTHCARE PLAN OF THE RIVER VALLEY, INC.,** **Interveners**	**Case No. CVCV051022** **RULING ON MOTIONS FOR STAY**

I.

Motions for Stay by Aetna Better Health of Iowa, Inc. and WellCare of Iowa, Inc. were heard in a contested reported proceeding on January 14, 2016. WellCare's motion was filed on December 22, 2015. Aetna's motion was filed on December 30, 2015. The motions were resisted by the Iowa Department of Human Services and the interveners.

This is a judicial review of DHS's implementation of the Iowa High Quality Healthcare Initiative, also known as Medicaid Modernization.[1] This is the fifth attempt by Aetna to stay the implementation — three at the agency level and one before District Judge Arthur E. Gamble on October 2, 2015. All were unsuccessful. WellCare sought one stay at the agency level. Aetna and WellCare seek a stay of the Final Decision issued by DHS on December 18, 2015 that confirmed AmeriGroup Iowa, Inc., AmeriHealth Caritas Iowa, Inc. and UnitedHealthCare Plan of the River Valley, Inc. as Medicaid

[1] This case consists of three consolidated cases: *Aetna Better Health Iowa, Inc. v. Iowa Department of Human Services*, CVCV051022; *WellCare of Iowa, Inc. v. Iowa Department of Human Services*, CVCV051039; and *Meridian Health Plan of Iowa, Inc. v. Iowa Department of Human Services*, CVCV051064. As all three cases seek judicial review of the same agency decision by the Department of Human Services. The cases were consolidated under case number CVCV051022 by order of the court on January 7, 2015.

services providers under the Initiative and disqualified WellCare as a provider. The Final Decision followed a contested case hearing in front of Administrative Law Judge Christie Scase and substitute decision maker Janet Phipps, Director of the Department of Administrative Services.[2]

II.

An agency may grant a stay of agency action upon the filing of a petition for judicial review.[3] If the agency does not grant the stay for relief, the reviewing court may grant relief after consideration and balancing of the following four factors of section 17A.19(5)(c) of the Iowa Code:

> (1) The extent to which the applicant is likely to prevail when the court finally disposes of the matter.
> (2) The extent to which the applicant will suffer irreparable injury if relief is not granted.
> (3) The extent to which the grant of relief to the applicant will substantially harm other parties to the proceeding.
> (4) The extent to which the public interest relied on by the agency is sufficient to justify the agency's action in the circumstances.[4]

If the court finds that relief is appropriate, it may remand the matter to the agency with instructions or issue an order granting such relief.[5] The burden is on the applicant to establish the prerequisites for entry of a stay.[6] While the applicant must submit evidence supporting all relevant factors, the court is required to balance the four factors and a particular showing for each factor is not required; even a minimal showing for one or more factors may suffice.[7]

When considering an application for judicial review, appropriate deference must be given to the agency.[8] A "fundamental tenet of administrative law" is that "administrative decisions are to be made

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[2] Governor Branstad appointed Director Phipps substitute decision maker after Director Palmer was called as a witness at the contested case hearing.
[3] Iowa Code § 17A.19(5)(b) (2015).
[4] Iowa Code § 17A.19(5)(c)(1)–(4).
[5] Iowa Code § 17A.19(5)(d).
[6] *Snap-On Tools Corp. v. Schadendorf*, 757 N.W.2d 339, 342 (Iowa 2008).
[7] *Grinnell Coll. v. Osborn*, 751 N.W.2d 396, 401, 403 (Iowa 2008) ("In other words, more of one factor excuses less of another factor.").
[8] *Marovec v. PMX Industries*, 693 N.W.2d 779, 782 (Iowa 2005); Iowa Code § 17A.19(11)(c).

by the agencies not the courts...court interference with any agency determination is extremely rare."[9] The party challenging the agency action has the burden of demonstrating the invalidity of that action.[10] A reviewing court will only grant relief when an agency has exceeded its legal authority, it acts capriciously, arbitrarily or unreasonably, it does not support its factual decisions with substantial evidence, or its actions are otherwise affected by some other error of law.[11] The court will overturn an agency decision based on factual determinations that are vested in the discretion of the agency only when that decision is not supported by substantial evidence.[12] "Evidence is substantial if a reasonable person would find it adequate to reach the given conclusion, even if a reviewing court might draw a contrary inference.[13]

When determining whether an applicant will suffer an "irreparable injury," the applicant must show that there has been an invasion of a right.[14] It is a well-established rule that loss of revenue does not constitute an irreparable injury.[15] Even "extreme financial loss" is not considered irreparable injury unless the very existence of a business is threatened by the lack of relief provided by a stay.[16]

III.

Aetna and Wellcare seek stays for different reasons and seek differing remedies. Aetna seeks to stay the entire implementation process while it argues that the Initiative should be completely rebid. WellCare seeks to stay its disqualification from participation in the Initiative.

Aetna

Aetna wants implementation of the Initiative stayed while it litigates its claim that the entire bidding process was flawed, should be vacated and rebid.

Aetna argues that that it is likely to succeed on the merits because it will be able to show that DHS

[9] *Leonard v. Iowa State Bd. Of Educ.,* 471 N.W.2d 815, 816 (Iowa 1991).
[10] Iowa Code § 17A.19(8)(a).
[11] Iowa Code § 17A.19(10).
[12] Iowa Code § 17A.19(10)(f).
[13] *Burns v. Board of Nursing*, 495, N.W.2d 698, 699 (Iowa 1993).
[14] *Skow v. Goforth*, 618 N.W.2d 275, 279 (Iowa 2000).
[15] *Grinnell Coll.*, 751 N.W.2d at 402.
[16] *R&V, Ltd. v. Iowa Dept. of Comm., Alcoholic Bev. Div.*, 470 N.W.2d 59, 63 (Iowa Ct. App. 1991).

failed to follow the Request for Proposal ("RFP") and abused its discretion when selecting the winning bidders. Aetna claims that DHS failed to follow the RFP when the committee evaluating the bids presented Charles Palmer, Director of DHS with only a list of numerical scores given to each bidder in a variety of categories, and did not present Director Palmer with a recommendation.[17] Aetna asserts that Director Palmer did not follow the RFP when he selected the top four scoring candidates as the successful bidders. Aetna contends that DHS exercised no discretion when selecting successful bidders and "a failure to exercise discretion is an abuse of discretion."[18] Aetna also notes other flaws in the bidding process, including the ALJ finding of improper communications and withholding of documents by WellCare as proof that the entire selection process was flawed.

DHS avers that it exercised its broad "discretion to determine what constitutes the best results for a public contract."[19] DHS also argues that the Final Decision found that the committee and Director Palmer contemplated the process and believed that the scores represented the best evaluation of the bidders and provided a fair assessment.

Aetna argues it will suffer irreparable injury if the implementation process is not immediately halted. Aetna claims it has a right to participate in a fair bidding process which will be harmed if the implementation process is allowed to proceed.

DHS points out that Iowa law does not support Aetna's argument for a right to a fair bidding process and that the only injury to Aetna will be financial loss.

Aetna contends that granting a stay will not cause any harm to DHS other than a short delay in implementation, noting that implementation has already been delayed once by the federal Centers for

[17] RFP MED-16-009 § 4.5 ("The evaluation committee shall present a final ranking and recommendation(s) to the Director of the Department of Human Services for consideration. In making this recommendation, the committee is not bound by any scores or scoring system used to assist with initially determining the relative merits of each Bid Proposal. The Agency reserves the right to consider any changes in or clarifications to a bidder's proposal that may result from rounds of clarifications, oral presentations, and/or a Best and Final Offer (BAFO) round as part of the evaluation process. This recommendation may include, but is not limited to, the name of one or more bidders recommended for selection or a recommendation that no bidder be selected. The Director shall consider the committee's recommendation when making the final decision, but is not bound by the recommendation.").
[18] *IBP, Inc. v. Al-Gharib*, 604 N.W.2d 621, 631 (Iowa 2000)
[19] *Master Builders of Iowa v. Polk County*, 653 N.W.2d 382, 394 (Iowa 2002).

Medicare and Medicaid Services. DHS will honor existing provider contracts through March 31, 2016, and is prepared to operate under the old system through at least that time. Only uncertainty follows that date.

DHS argues that a stay will cause significant harm to the Agency. DHS is presently working closely with CMS to meet criteria for implementation, primarily the building of adequate provider networks, communications with members and providers, and adequate staffing — all of which will be brought to halt if a stay is granted. DHS further notes that continued delay in implementation will cause significant budget issues for the agency.

Aetna argues that the public has an interest in a fair bidding process and that it is "worth it" to take additional time to examine the bidding process when 560,000 Iowans are served by the program.

DHS counters that a stay will only cause confusion, instability and harm to Medicaid members, providers and in the healthcare market. DHS is concerned that a stay could delay the process months or years while the issue is fully litigated.

WellCare

WellCare only seeks to stay the order that disqualified it as successful bidder and cancelled its contract to provide managed care as part of the Initiative. WellCare was originally a successful bidder. It was disqualified in the Final Decision after DHS found it had failed to disclose documents relating to a multi-million dollar settlement for welfare fraud and engaged in improper communications with the Governor's staff during the selection period.

WellCare believes that it will ultimately succeed on the merits because it can show the Final Decision made an incorrect finding that WellCare deprived the selection committee and Director Palmer of the opportunity to fully exercise their discretion by allegedly failing to disclose the existence of past adverse legal action. WellCare argues that the alleged improper communications were not improper, but if they were, they did not prejudice any other bidders or influence the selection process. WellCare also argues the Final Decision is an improper substitution of the ALJ and Director Phipps'

judgment for that of the committee and Director Palmer.

DHS contends that the decision to disqualify WellCare was entirely within the discretion given to DHS in the RFP.

WellCare argues that if a stay is not granted it will suffer irreparable injury in the form of extreme financial loss. While WellCare acknowledges that financial loss does not generally rise to the level of irreparable injury, it argues that it will lose significant investment in the form of employees and infrastructure.[20]

DHS counters that the injury to WellCare will be wholly financial in nature and therefore not an irreparable injury.

WellCare claims that DHS will not suffer harm as a result of a stay. But DHS believes a stay will cause substantial harm, impeding its ability to meet goals set by CMS. It would be prevented from creating a definitive provider network and assigning Medicaid members to the proper managed care provider.

WellCare argues a stay serves the public interest by creating the least amount of confusion. There are currently 134,500 Iowans assigned to WellCare that will be reassigned if the stay is not granted who will have to be reassigned should WellCare succeed on the merits.

DHS notes that the uncertainty of whether Medicaid members may or may not select WellCare creates the most confusion. These members need certainty and clarity so they can make the best decision about their healthcare.

IV.

Probable success on the merits

[20] WellCare has approximately 180 employees in Iowa, which it states it will lose should the stay be denied. It is not clear whether these employees will be lost by a decision by WellCare to terminate their employment or due to the employees leaving by choice.

The arguments of Aetna and WellCare are unpersuasive. Both parties ask the court on a limited record to substitute its own judgment for that of DHS and Director Phipps. The decisions here challenged are "administrative decisions . . . to be made by the agencies not the courts."[21] Aetna asks the court to find that the RFP's language, stating that the committee and Director Palmer are "not bound by the scores or scoring system,"[22] means that they are required to use more than the scoring system when selecting successful bidders. Aetna points to the factual findings regarding WellCare to support its position that the entire selection process was flawed.

The RFP is not as constraining and rigid as Aetna contends. The evaluative process regarding the bidders accords significant latitude to DHS. The likelihood that DHS's exercise of discretion would be found arbitrary or irrational is low. The question is not whether the court might have done things differently, or reached a different result, but whether the agency operated within the parameters of its authorized discretion. DHS discreetly excised the bidder it considered to be the worst offender. The contact by the agent of the discredited bidder with the Governor's staff in violation of the "black out rule" certainly taints that bidder, but not necessarily the other bidders who complied with the rule.

DHS can point to particular reasoned actions it took in deciding which companies were granted contracts. Aetna's demand to immediately start the entire process anew is an extreme solution in relation to the claimed infirmities. The approach of DHS in dealing with the challenges presented by the process was measured and permitted the process to move forward. The record does not support a conclusion that Aetna will probably be successful on the merits.

WellCare was found by the ALJ and Director Phipps to have engaged in improper communication and to have withheld information requested by the RFP. The RFP expressly reserves DHS "the discretion … to disqualify Bid Proposals for reasons that include, but may not be limited to," reasons such as: "Bidder initiates unauthorized contact regarding the RFP with employees other than the

[21] *Leonard,* 471 N.W.2d at 816.
[22] RFP MED-16-009 § 4.5.

Issuing Officer;" and "Bidder … fails, in the Agency's opinion, to include the content required for the RFP."[23] The discretion to disqualify bidders for these reasons rests solely with the Agency. WellCare has not shown why this court should not give deference to DHS's decision.

Irreparable Harm

Aetna argues that it will suffer irreparable harm because it has been denied the right to a fair bidding process. Iowa law does not currently recognize that right. Even if it did, that does not mean that the present process was unfair. What Aetna has lost in this case is a lucrative government contract for provision of Medicaid services and the opportunity for profit. Financial loss is not an irreparable injury.[24] Even if the stay were granted, and even if Aetna prevailed on the merits, and even if the process were begun anew, there is no certainty that Aetna would ultimately be awarded a contract. And if not, would it seek a stay of the second attempted implementation? This type of exponential speculation is not sufficient to warrant a stay. At the end of the day, Aetna's claim is potential lost profits – not irreparable harm.

WellCare will experience actual financial loss should the court deny a stay. It has expended significant "time, effort and resources,"[25] in preparation of its provision of Medicaid services. The President of WellCare of Iowa testified that it began preparations the day WellCare submitted its bid; well before DHS announced it would award WellCare a contract. WellCare (like Aetna) has no right to a contract from DHS. Bidding for government contracts is by its very nature a risky business. And the risk rightly falls at the feet of those seeking tax dollars, not those the government must serve. WellCare knew it was risking losing money when it expended sums prior to being awarded a contract. It knew the contract could be lost for improprieties. The monies Wellcare lost were a cost of doing business – a known and accepted risk in the business. Neither Aetna's potential loss of monetary gain nor WellCare's financial loss rises to the level of an irreparable injury.

[23] RFP MED-16-009 § 2.15.2.
[24] *Grinnell Coll.*, 751 N.W.2d at 402.
[25] Affidavit of Lauralie Rubel, President of WellCare, ¶ 6–9.

Harm to the other parties and the public

The final two factors of the test are interrelated. The harm to DHS is the delay in implementation of the Initiative. Delay in implementation causes confusion and uncertainty for Medicaid members and providers. Medicaid members are some of the most vulnerable members of our society. In Iowa, nearly 1 in 6 citizens receives some assistance from Medicaid. Delaying the start of the Initiative will force DHS to use temporary measures to continue to provide Medicaid members with service until that time it can continue implementation. As Director Phipps' stated in her denial of a stay to Aetna following the Final Decision:

> Medicaid Modernization seeks both to improve the quality of care to more than 560,000 Iowans and obtain substantial savings in the delivery of those services. The tangible harm to DHS is without question harm to the public. In addition, the transition is a complex process involving many stakeholders not parties to this proceeding. A disruption of the transition process will create substantial uncertainty in the marketplace for health services, disrupt delivery of these critical services to hundreds of thousands of Iowans, and potentially impose additional costs on stakeholders, not parties, to this process.[26]

"[T]he interest of private litigants in agency action may need to ultimately yield to the greater public interest."[27] The interest of providing a stable, consistent Medicaid program for 560,000 Iowans weighs more heavily on the scales than the potential loss of profits of Aetna and WellCare.

V.

Both litigants seeking stays failed to meet the criteria set out in Iowa Code section 17A.19(5)(c). Aetna and WellCare have not shown that they are likely to be successful on the merits, have not shown that they will suffer irreparable harm, have not shown that there will be minimal harm to DHS, and have not shown that a stay is in the interest of the public.

The motions to stay are **DENIED**.

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[26] Director Phipps Tab O

[27] *Grinnell Coll.*, 751 N.W.2d at 403 (citing *Teleconnect Co. v. Iowa State Commerce Comm'n,* 366 N.W.2d 511, 513 (Iowa 1985)).

State of Iowa Courts

Type: OTHER ORDER

Case Number	**Case Title**
CVCV051022	AETNA BETTER HEALTH V IA DEPT OF HUMAN SERVICES

So Ordered

Robert J. Blink, District Court Judge,
Fifth Judicial District of Iowa