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# CONFIDENTIALITY DETERMINATION

Solicitation Number: YH23-0093
Service: Specialty Pharmacy Services for Anti-Hemophilia and Other Blood Disorder Medications RFP
Offeror's Name: Caremark, L.L.C. ("CVS Health")

In accordance with Arizona state rules and regulations, it is determined that the following records are confidential and exempt from public disclosure as requested by the Offeror listed above:

**For a list of specific records to be kept confidential, see the detailed legal analysis contained in the Offeror's Proposal and attached here.**

The Offeror has supplied acceptable documentation identifying the portions of the bid along with the specific hard or prejudice which may arise if disclosed.

Signature: DocuSigned by: Meggan LaPorte 6720D03E007E4A8...
Title: Chief Procurement Officer
Date: 6/30/2023

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CVSHealth 2100 E. Lake Cook Road, 5th Floor | Buffalo Grove, IL 60089

**VIA AHCCCS Secure File Share (ASFS)**
Procurement@azahcccs.gov

June 1, 2023

Cynthia Smolens
Senior Procurement Specialist
AHCCCS Procurement Office
701 E. Jefferson, MD5700
Phoenix, Arizona 85034

Re: Proprietary, Confidential, and Trade Secret Information Contained Within Caremark, L.L.C.'s Proposal for Services (the "RFP Response") Requested in Solicitation No. YH23-0093: Specialty Pharmacy Services for Anti-Hemophilia and Other Blood Disorder Medications (the "RFP")

Dear Ms. Smolens:

Caremark, L.L.C. ("CVS Health") submits this Statement to the Arizona Department of Administration ("ADOA") in accordance with the requirement contained in RFP Special Instruction, Section 11 "Request for Confidential/Proprietary Determination." that, "If an Offeror believes that a specific portion of its bid, proposal, offer, specification, or protest contains information that should be withheld from public inspection due to confidentiality, the Offeror shall submit to the Procurement officer a list of distinct portions, including exact page numbers, of their document is requested to be kept confidential, along with a detailed legal analysis, prepared by legal counsel, which sets forth the bases for the requested non-disclosure and the specific harm or prejudice which may arise if disclosed." In that regard, please be advised that the RFP Response contains CVS Health's highly confidential, not generally available to the public and proprietary commercial information (the "CVS Health confidential information"). As such, the information is expressly made confidential under the Arizona Procurement Code and the Arizona Uniform Trade Secrets Act ("UTSA"), and may not be disclosed. Further, the information is also exempt from disclosure under the Arizona Public Records Law ("PRL") and therefore must be redacted before the RFP Response is produced in response to any PRL request. *See* A.R.S. § 41-2533(D) (Procurement Code provision stating that "[t]o the extent the bidder designates and the state concurs, trade secrets and other proprietary data contained in the bid documents shall remain confidential in accordance with rules adopted by the director"); *Phoenix Newspapers, Inc. v. Keegan*, 201 Ariz. 344, 351 (Ct. App. 2001) (noting that trade secrets are protected "by the confidentiality exception to disclosure" under the PRL); *Berry v. Dep't of Corrections*, 145 Ariz.

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12, 14 (Ct. App. 1985) (PRL is a general statute; where other statutes make specific records confidential, those specific designations control over the PRL's disclosure provisions).

This letter sets forth the factual and legal bases underlying the confidential, commercial, trade secret and PRL-exempt status of the CVS Health confidential information contained in the RFP Response, and supporting that CVS Health's confidential information is expressly protected from disclosure under the Procurement Code and the UTSA. Further, as a result, it is exempt from disclosure under the PRL and therefore must not be released in response to any PRL request.

**The Exempt Information**

The Exempt Information consists of three types of information: the pricing information associated with various services that CVS Health is offering to perform under the Proposal, the performance guarantees that CVS Health is offering to AHCCCS, and certain proprietary program terms that CVS Health has included in the Proposal.

The pricing information, is highly confidential and not available to the public. This information is the product of CVS Health's efforts to negotiate aggressive pricing from CVS Health's suppliers, and of CVS Health's efforts to provide a pricing model that will allow it to make competitive bids to potential clients. CVS Health spends millions of dollars and thousands of person-hours each year negotiating pricing discounts from suppliers and manufacturers, and developing its pricing models for its proposals and contracts accordingly. CVS Health uses this model to calculate the pricing and discount offerings that CVS Health can make to a prospective specialty pharmacy customer in a given contract situation, in order to offer attractive pricing to the prospective customer while remaining profitable. CVS Health's model takes into account myriad factors, based on information provided by CVS Health's customers. A client's demands and needs—and, correspondingly, the financial and other terms CVS Health offers it—vary according to the size and demographic makeup of the client. CVS Health takes these differences into account and generates different financial terms depending on a client's specific needs.

CVS Health's pricing model evolves according to economic and market conditions, including fluctuations in drug prices and the terms of CVS Health's confidential contracts with its vendors and suppliers. However, the basic factors that CVS Health considers in determining pricing and financial terms, including the size and demographic makeup of a client, remain essentially the same. Disclosure of any aspect of CVS Health's specialty pharmacy pricing information would assist the recipient in determining both the level of discounts that CVS Health has negotiated for specific pharmaceutical products and how CVS Health prices its proposals generally, which in turn would cause CVS Health substantial competitive injury as it would allow the recipient to seek to gain similar discounts from suppliers—with the leverage of knowing what discounts CVS Health has obtained—and then to underbid CVS Health in future bidding contexts. Below is a summary by document and page number of the confidential pricing information:

- Requirement B1 – Narrative Proposal Method Of Approach. See the performance guarantee information in pages 19-20.
- Requirement 3B – Price Sheet. See entire report Part B3 Attachment 1 – Price Sheet

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The performance guarantee information is likewise the product of CVS Health's efforts to develop its capabilities to assist its clients in controlling drug costs while delivering safe and effective care to its clients' plan members. CVS Health has spent hundreds of millions of dollars to develop its specialty pharmacy service capabilities, of which its performance guarantees (including the amounts it puts at risk to guarantee its performance) are a key component. As with the pricing information, disclosure of the dollars at risk for all or individual performance guarantees would cause CVS Health substantial competitive injury by allowing the recipient to underbid CVS Health in the future. Below is a summary by document and page number of the confidential performance guarantee information:

- Requirement B1 – Narrative Proposal Method Of Approach. See the performance guarantee information in pages 19-20.

CVS Health's proprietary program terms, included in the Proposal are also confidential, not available to the general public and the product of CVS Health's efforts to develop its capabilities to assist its clients in controlling drug costs while delivering safe and effective care to its clients' plan members. Below is a summary by document and page number of the confidential proprietary program terms information:

- Requirement C4 – Exceptions to the Terms, Conditions, or Scope of Work:
  - Item 8 – Uniform Instructions to Offerors (Subcontracting), Section 3.4, page 13 of RFP.
  - Item 9 – Uniform Instructions to Offerors (Delivery), Section 3.10, page 14 of RFP.
  - Item 10 – Uniform Instructions to Offerors (Offshore), Section 3.12, page 14 of RFP.
  - Item 15 – Uniform Terms and Conditions (Offshore), Section 3.13, page 28 of RFP.
  - Item 16 – Uniform Terms and Conditions (Delivery), Section 4.2, page 28 of RFP.

- Requirement 5.2.1 (B1) – Method of Approach:
  - Transition Plan, page 1.
  - Redlands Office Statistics, pages 4.
  - Fulfillment Number, page 6.
  - Assay Management, page 6.
  - Assay Management, page 8.
  - Subcontractor Detail, pages 8-10.
  - Hemophilia Number, page 10.
  - Specific Dosage Information, page 11.
  - Shipping Timing and Interval Diagram, pages 13.
  - Assay Management, pages 15-19.
  - Delivery Times, page 16.
  - Assay Reporting, pages 17-19.

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- Clinical Analysis, including diagram, pages 18-19.
- Trend Reporting, pages 17-18.
- Data Utilization, pages 18-19.

- Requirement 5.5.2 – Experience and Expertise of the Firm:
  - Hemophilia prescription and patient numbers, page 1.
  - Assay Management Data, page 1.
  - Number of Lives and Clients in our Medical Book of Business, page 2.
  - Account team Assignment Name, page 2.
  - Assay Management Goal and Results, page 2-3.
  - Assay Management, page 4.
  - Account Team Biographies, pages 6.
  - Hemophilia Staffing Counts, page 6.
  - Client Specific Pharmacy Assignment and Reasoning, page 6-7.
  - Organizational Chart of Account Team, page 9.
  - Prior and Current Awarded Contracts, page 9.
  - Details of CVS Health's Client References, Names, Contact Information and Contract Details, page 10.

- Other Exhibits:
  - Bleeding Disorders Education Postcard, see entire Exhibit 1.
  - Implementation Timeline, see entire Exhibit 2.
  - FactorMan Comic, see entire Exhibit 3.
  - Hemowise Check the Label, see entire Exhibit 4a.
  - Hemowise Managing Head Injuries, see entire Exhibit 4b.
  - Hemowise, Proactive Joint Health, see entire Exhibit 4c..

**Request for Exemption**

Under Arizona law, "the availability of records for public inspection is not without qualification. There are numerous statutory exemptions to the general 'open access' policy toward public records." *Carlson v. Pima County*, 141 Ariz. 487, 490 (1984). The Attorney General has noted that among the statutory exemptions to PRL disclosure are the confidentiality provisions of the UTSA and the Procurement Code. *See* Arizona Attorney General Agency Handbook, Appendix 6.1 (listing the UTSA and the Procurement Code as statutes exempting information from PRL disclosure).

The CVS Health confidential information is both confidential and proprietary data for purposes of the Procurement Code and trade secret information exempt from disclosure under the UTSA and the Procurement Code. Therefore, and as is further set forth below, the RFP Response must not be released in response to any PRL request referenced unless the confidential CVS Health information is properly redacted as designated in the RFP Response per the RFP instructions.

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## I. The Confidential CVS Health Information Is Exempt Confidential and Proprietary Data Pursuant to the Procurement Code.

The redacted confidential CVS Health information contained in the RFP Response is exempt from disclosure under the PRL because it is "proprietary data" expressly designated as confidential in the Procurement Code. A.R.S. § 41-2533(D); *Berry*, 145 Ariz. at 14. The redacted information contains highly sensitive, confidential, and proprietary information relating to CVS Health's business methodologies and operations. Not surprisingly, it would be extremely harmful to CVS Health—as well as to the ADOA—if CVS Health's proprietary and confidential commercial information were made public, including to CVS Health's competitors. Therefore, the redacted information is proprietary and confidential data expressly exempt from disclosure under the PRL and must be appropriately redacted before the RFP Response is released to the requestor. Furthermore, the pricing information is not generally available to the public, thus meets the definition of "Confidential Information" pursuant to the Arizona Procurement Code. Ariz. Admin. Code § R2-7-103.A.

The confidential CVS Health information is extremely valuable, and CVS Health has invested substantial technology, personnel, and resources in developing, compiling, configuring, projecting, managing, and protecting it. These functions cost CVS Health millions of dollars annually, and the redacted information is the product of substantial expenditures and countless hours of analysis. Disclosure of the confidential CVS Health information would deprive CVS Health of the benefits of its investment and effort.

Disclosure of the information would also give an unfair windfall to competitors and other interested third parties, and would allow CVS Health's competitors and other entities adverse to CVS Health to have access to CVS Health's commercial processes and other proprietary advantages that set CVS Health apart from the competition. Armed with this information, competitors could replicate CVS Health's proprietary processes in order to undercut CVS Health's bids for services, and could adjust their offerings to compete more effectively against CVS Health. Competitors would not only be allowed to exploit such information to CVS Health's disadvantage when pursuing customers in the near term, but they would also be better able to define their own operations, services and products, and focus their resources to strategically position themselves to compete against CVS Health for customers in the long term. Comparable information from competitors is not and will not be available to CVS Health. Therefore, CVS Health would be uniquely adversely affected.

Disclosure would also have an adverse effect on CVS Health's ability to negotiate effectively in the future with its suppliers and also with other clients for similar contracts. *See General Electric Co. v. Dep't of Air Force*, 648 F. Supp. 2d 95, 104 (D.D.C. 2009) (noting that "customer leverage" resulting from putative release of contract information qualifies as substantial competitive harm and "a basis for nondisclosure" under the federal Freedom of Information Act ("FOIA")).

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In sum, disclosure of the confidential CVS Health information would cause immediate, irrevocable, and substantial competitive injury to CVS Health. Accordingly, the information is confidential, and qualifies for exemption under the PRL.

## II. The Redacted Information Constitutes Trade Secrets Under Arizona and Federal Law.

In addition to constituting proprietary data and confidential information exempt from disclosure under the Procurement Code, the redacted confidential CVS Health information in the RFP Response is also protected trade secret information under Arizona statute, and thus also qualifies for exemption under the PRL for this independent reason. *See* A.R.S. § 41-2533(D) (Procurement Code provision that information designated by bidder as trade secret to remain confidential); A.R.S. § 44-405 (provision of UTSA protecting confidentiality of trade secrets); *Phoenix Newspapers,* 201 Ariz. at 351 (trade secrets are exempt from disclosure under the PRL).

### A. The Redacted Information Constitutes Trade Secrets Under Arizona Law.

Arizona law recognizes "trade secrets" to mean:

> information, including a formula, pattern, compilation, program, device, method, technique or process, that both:
>
> (a) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use.
>
> (b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

A.R.S. § 44-401(4).[1] The redacted information meets both of the required criteria of the definition of trade secret under Arizona law. First, for the reasons set forth in Section I, *supra*, the information plainly derives independent economic value from not being generally known to CVS Health's competitors and others who could obtain economic value from its disclosure. *See*, *e.g.*, *Mgmt. & Eng'g Techs. Int'l v. Info. Sys. Support*, 490 Fed. Appx. 30, 32 (9th Cir. 2012) (profit margin and expense information protectable as trade secret under the UTSA, as competitors could use the information to outbid plaintiff on lucrative contracts in the future); *Food Servs. of Am., Inc. v. Carrington*, No. CV-12-00175-PHX-GMS, 2013 U.S. Dist. LEXIS 120194, at *14-15 (D. Ariz. Aug. 23, 2013) (pricing information protectable as trade secret because competitors could use it to underbid plaintiff on future contract opportunities); *Prudential Ins. Co. v. Pochiro*, 153 Ariz. 368,

[1] The administrative rules incorporated into the Procurement Code define trade secret substantially identically, as "information, including a formula, pattern, device, compilation, program, method, technique, or process, that is the subject of reasonable efforts to maintain its secrecy and that derives independent economic value, actual or potential, as a result of not being generally known to and not being readily ascertainable by legal means." Ariz. Admin. Code § R2-7-101(51).

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371 (Ct. App. 1987) (expense and effort invested in developing information can demonstrate that it is a trade secret).

Second, CVS Health goes to great lengths to ensure that the public and competitors do not gain access to confidential CVS Health information in the RFP Response. Competitors certainly do not have access to CVS Health's confidential commercial information contained within the RFP Response, and there is no method by which competing or other adverse entities could otherwise determine the confidential CVS Health information, including that reflecting the offerings contained therein. Even internally, CVS Health keeps such information carefully guarded. The information is known only to senior management, underwriting, the account manager, the accounting and finance departments, and select legal personnel who have a need to know the information, and its disclosure even to these select personnel is subject to strict confidentiality agreements. The information is secured by password protection when it is stored electronically. *See*, *e.g.*, *Mgmt. & Eng'g Techs.*, 490 Fed. Appx. at 32 (password protection one means of protecting secrecy of information for purposes of the UTSA); *Food Servs. of Am.*, 2013 U.S. Dist. LEXIS 120194, at *24-26 (use of confidentiality agreements and "need-to-know" policies for employee access to information were reasonable efforts to maintain confidentiality of information).

CVS Health also employs strict safeguards to protect the integrity of its proprietary commercial and financial information under those circumstances in which it must allow access to outside entities or individuals. For example, CVS Health requires that auditors and consultants retained by clients sign confidentiality agreements before being provided any such confidential information. CVS Health also requires any third party performing consulting and auditing functions to establish appropriate "firewalls" so that the auditing side of the business cannot share confidential information with the consulting side of the business.

When CVS Health provides this type of information to outside parties like the ADOA, it is careful to note, as it is doing here, that such information is confidential and proprietary. *See*, *e.g.*, *Mgmt. & Eng'g Techs.*, 490 Fed. Appx. at 32 (use of "confidential" stamps on government contract proposal a reasonable means of protecting confidentiality of trade secrets contained therein). And when CVS Health receives notice that its proprietary confidential commercial information is the subject of a records request, it routinely seeks to enforce its legal rights to protect the information, as is the case here. In short, CVS Health goes to great lengths to protect this information.

**B. The Redacted Information Also Constitutes Trade Secrets Under Federal Law.**

In addition to meeting the definition of trade secret under Arizona law as described above, the redacted confidential commercial information in the RFP Response is also exempt because the information satisfies the definition of "trade secret" under 18 U.S.C. § 1839 (3)(A) and (B), as recognized by Congress in passing the Economic Espionage and Theft of Trade Secrets Acts. 18 U.S.C. §§ 1831, 1832. Federal law recognizes "trade secrets" to mean:

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> [A]ll forms and types of financial, business, scientific, technical, economic, or engineering information, including patterns, plans, compilations, program devices, formulas, designs, prototypes, methods, techniques, processes, procedures, programs, or codes, whether tangible or intangible, and whether or how stored, compiled, or memorialized physically, electronically, graphically, photographically, or in writing if – (A) the owner thereof has taken reasonable measures to keep such information secret; and (B) the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information.

18 U.S.C. § 1839 (3). Under such statutory authority, CVS Health is the "owner" with respect to the trade secrets contained in the RFP Response, as it is the "entity in whom or in which rightful legal or equitable title to, or license in, the trade secret is reposed." 18 U.S.C. § 1839 (4). For the reasons described above, in addition to being trade secrets under Arizona law, the information in the Responsive Documents also constitutes trade secrets under federal law. *See U.S. v. Martin*, 228 F.3d 1, 11 (1st Cir. 2000) ("trade secret," as defined in 18 U.S.C. § 1839(3), is defined even more broadly than in most civil laws).

Because the confidential CVS Health information constitutes trade secret information under both Arizona and Federal statutory law, the information is exempt from disclosure under the PRL.

## III. <u>Courts Have Held That the Type Of Information Designated by CVS Health Constitutes Trade Secrets</u>.

Courts throughout the nation have consistently recognized and preserved the confidentiality of information like that designated in the RFP Response, based on its status as proprietary, confidential, and trade secret information. For example, courts have found that similar proprietary confidential commercial, financial and business information constitute trade secrets and/or is exempt from disclosure under various public records laws. *See, e.g., McDonnell Douglas Corp. v. U.S. Dep't of the Air Force*, 375 F.3d 1182 (D.C. Cir. 2004) (prohibiting release of pricing information in Air Force contract with private contractor because it was trade secret and confidential financial information); *Outsource Int'l, Inc. v. Barton*, 192 F.3d 662, 668-69 (7th Cir. 1999) (pricing figures and comparable rates protectable as trade secrets); *Orion Research Inc. v. EPA*, 615 F.2d 551, 554 (1st Cir. 1980) (bidder's confidential information properly protected; otherwise "competing firms would be less likely to include novel ideas in their responses to solicitations"); *Johnson Service Group, Inc. v. France*, 763 F. Supp. 2d 819, 830 (N.D. Tex. 2011) (information about a company's bargaining positions protectable as trade secrets under Illinois law); *MCI Worldcom, Inc. v. General Services Administration*, 163 F. Supp. 2d 28 (D.D.C. 2001) (prohibiting release of "line-item" pricing information in government contract); *Pennfield Precision, Inc. v. EF Precision, Inc.*, 2000 U.S. Dist. LEXIS 11971, No. CIV.A.00-2801, 2000 WL 1201381 (E.D. Pa. Aug. 15, 2000) (holding that confidential business information, including

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pricing data, qualified as a trade secret); *American Totalisator Co., Inc. v. Autotote Ltd.*, 1983 Del. Ch. LEXIS 401, No. CIV.A.7268, 1983 WL 21374 (Del. Ch. Aug. 18, 1983) (holding that defendant's method of bidding was a trade secret because it demonstrated the "company's cost factors and how they could be manipulated for varying the margin of profit"; this knowledge was critical for future operation and its improper release would confer a "devastating advantage if it becomes available to its competitors"); *Springfield Terminal Ry. Co. v. Agency of Transp.*, 174 Vt. 341, 345-46 (2002) (holding that financial information in winning bidder's response to an RFP submitted to the Vermont City of Transportation was exempt from disclosure under Vermont's Public Records Act).

In sum, under the resounding authority of case law from across the country, the confidential commercial information contained in the designated portions of the RFP Response qualifies for trade secret protection and exemption under the PRL and must be redacted before being produced, as it is the lifeblood of CVS Health's business, is not known to its competitors, is kept under lock and key, and would cause substantial financial and competitive harm to CVS Health disclosed.

**Conclusion**

For all the above reasons, the redacted CVS Health confidential information contained in the designated portion of the RFP Response is exempt from disclosure under the PRL because it contains confidential, proprietary and trade secret information. If at any time you conclude that you do not concur that the redacted CVS Health confidential information is exempt from disclosure, CVS Health respectfully requests that you provide it with adequate notice to take steps to protect the confidentiality of its information.

Thank you for your consideration.

Very truly yours,

Michael Cardenas
Michael Cardenas (Jun 1, 2023 09:08 MDT)
Senior Legal Counsel – Health Care Services

cc: Marissa Urenda and Terri Sroka, CVS Caremark

# AHCCCS Letter for Signature

Final Audit Report 2023-06-01

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## "AHCCCS Letter for Signature" History

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