

NOTICE OF FINAL RULEMAKING

TITLE 9. HEALTH SERVICES

CHAPTER 22. ARIZONA HEALTH CARE COST CONTAINMENT SYSTEM

ADMINISTRATION

PREAMBLE

**1. Article, Part, or Section Affected (as applicable)**

**Rulemaking Action:**

R9-22-601	Amend
R9-22-604	Amend
R9-22-605	Amend
R9-22-606	Amend

**2. Citations to the agency's statutory rulemaking authority to include both the authorizing statute (general) and the implementing statute (specific):**

Authorizing statute: A.R.S. § 36-2906

Implementing statute: A.R.S. §§ 36-2903(M), 36-2904(J), and 36-2906(C)

**3. The effective date of the rule:**

The agency selected an effective date of 60 days from the date of filing with the Secretary of State as specified in A.R.S. § 41-1032(A).

**4. Citations to all related notices published in the Register to include the Register as specified in R1-1-409(A) that pertain to the record of the final rulemaking package:**

Notice of Rulemaking Docket Opening: 18 A.A.R. 1149, May 18, 2012

Notice of Proposed Rulemaking: 18 A.A.R. 1112, May 18, 2012

**5. The agency's contact person who can answer questions about the rulemaking:**

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**6. An agency's justification and reason why a rule should be made, amended, repealed or renumbered, to include an explanation about the rulemaking:**

A.R.S. § 36-2906 authorizes the Administration to adopt rules for the RFP process and the award of contracts. The Administration is proposing revisions to several rules in Article 6 to streamline and clarify the RFP and

contract award process, correct inaccurate references, and eliminate redundant language. The proposed rules are more clear, concise, and understandable. In particular, the proposed rules more clearly delineate the process for filing a protest alleging improprieties in an RFP or an amendment to the RFP. Additionally the proposed rules specify the legal bases for hearings as well as contract performance disputes. The term “procurement file” is defined in the proposed rule, and the term sanction is clarified to include actions beyond monetary sanctions and enrollment restrictions.

**7. A reference to any study relevant to the rule that the agency reviewed and either relied on or did not rely on in its evaluation of or justification for the rule, where the public may obtain or review each study, all data underlying each study, and any analysis of each study and other supporting material:**

A study was not referenced or relied upon when revising the regulations for Contracts and RFPs.

**8. A showing of good cause why the rulemaking is necessary to promote a statewide interest if the rulemaking will diminish a previous grant of authority of a political subdivision of this state:**

Not applicable.

**9. A summary of the economic, small business, and consumer impact:**

The Administration anticipates a minimal economic impact on the implementing agency, small businesses and consumers. The contractors, members, providers, and AHCCCS are nominally impacted by the changes to the rule language. These rules set forth the request for proposal and contract process pertaining to covered services under the AHCCCS Program as referenced in the procurement. The Administration is amending these rules to make the rules more clear, concise, and understandable. In addition, the proposed rules eliminate redundant language, update incorrect cross references, and streamline the RFP process.

It is anticipated that the private sector, including small businesses or political subdivisions, will be minimally impacted since the proposed rule language streamlines and clarifies the existing rules, including rules delineating the protest process. The Administration, contractors, and providers will benefit because the changes provide clarification of the rule.

**10. A description of any changes between the proposed rulemaking, to include supplemental notices, and the final rulemaking:**

No significant changes were made between the proposed rulemaking and the final rulemaking.

**11. An agency’s summary of the public or stakeholder comments made about the rulemaking and the agency response to the comments:**

No comments were received as of the close of the comment period of June 18, 2012.

**12. All agencies shall list other matters prescribed by statute applicable to the specific agency or to any specific rule or class of rules. Additionally, an agency subject to Council review under A.R.S. §§ 41-1052 and 41-1055 shall respond to the following questions:**

No other matters are applicable.

**a. Whether the rule requires a permit, whether a general permit is used and if not, the reasons why a general permit is not used:**

Not applicable.

**b. Whether a federal law is applicable to the subject of the rule, whether the rule is more stringent than federal law and if so, citation to the statutory authority to exceed the requirements of federal law:**

Not applicable.

**c. Whether a person submitted an analysis to the agency that compares the rule's impact of the competitiveness of business in this state to the impact on business in other states:**

Not applicable.

**13. A list of any incorporated by reference material as specified in A.R.S. § 41-1028 and its location in the rule:**

None

**14. Whether the rule was previously made, amended or repealed as an emergency rule. If so, cite the notice published in the Register as specified in R1-1-409(A). Also, the agency shall state where the text was changed between the emergency and the final rulemaking packages:**

Not applicable.

**15. The full text of the rules follows:**

**TITLE 9. HEALTH SERVICES**

**CHAPTER 22. ARIZONA HEALTH CARE COST CONTAINMENT SYSTEM  
ADMINISTRATION**

**ARTICLE 6. RFP AND CONTRACT PROCESS**

Section

R9-22-601. General Provisions

R9-22-604. Contract or Proposal Protests; Appeals

R9-22-605. Waiver of Contractor's Subcontract with Hospitals

R9-22-606. Contract Compliance Sanction

## ARTICLE 6. RFP AND CONTRACT PROCESS

### R9-22-601. General Provisions

- A. The Director has full operational authority to adopt rules for the RFP process and the award of contracts under A.R.S. § 36-2906.
- B. This Article applies to the award of contracts under A.R.S. §§ 36-2904 and 36-2906 to provide services under A.R.S. § 36-2907 and the expenditure of all public monies by the Administration for pertaining to covered services when the procurement so states under Articles 2 and 12 of this Chapter except as otherwise provided by law. The Administration shall establish conflict-of-interest safeguards for officers and employees of this state with responsibilities relating to contracts that comply with 42 U.S.C. 1396u-2(d)(3).
- ~~C. The Administration shall award contracts under A.R.S. §§ 36-2904 and 36-2906 to provide services under A.R.S. § 36-2907.~~
- ~~D.C.~~ The Administration is exempt from the procurement code under A.R.S. § 41-2501.
- ~~E.D.~~ The Administration and contractors shall retain all contract records for five years under A.R.S. § 36-2903 and dispose of the records under A.R.S. § 41-2550.
- E. The following terms are defined as related to this Article:  
“Procurement file” means the official records file of the Director whether located in the Office of the Director or at the public procurement unit. The procurement file shall include in electronic or paper form a list of notified vendors, final solicitation, solicitation amendments, bids/offers, final proposal revisions, clarifications, and final evaluation report.

### R9-22-604. Contract or Proposal Protests; Appeals

- A. Disputes related to contract performance. This Section does not apply to a dispute related to contract performance. A contract performance dispute is governed by ~~Article 8 of this Chapter~~ A.A.C. 34.
- B. Resolution of a proposal protest. The procurement officer issuing a RFP shall have the authority to resolve proposal protests. An appeal from the decision of the procurement officer shall be made to the Director.
- C. Filing of a protest.
  - 1. A person may file a protest with the procurement officer regarding:
    - a. A RFP issued by the Administration,
    - b. A proposed award, or
    - c. An award of a contract.
  - 2. A protester shall submit a written protest and include the following information:
    - a. The name, address, and telephone number of the protester;
    - b. The signature of the protester or protester's representative;
    - c. Identification of a RFP or contract number;

- d. A detailed statement of the legal and factual grounds of the protest including copies of any relevant documents; and
  - e. The relief requested.
- D. Time for filing a protest.**
- ~~1. A protester filing a protest alleging improprieties in a RFP shall file the protest before the due date for receipt of proposals.~~
  1. A protester filing a protest alleging improprieties in an RFP or an amendment to an RFP shall file the protest at least 14 days before the due date of receipt of proposals.
  - ~~2. A protester filing a protest alleging improprieties that do not exist in the original RFP but are subsequently incorporated into the RFP before the due date for receipt of proposals shall file the protest prior to the amended due date for receipt of proposals.~~
  2. Any protest alleging improprieties in an amendment issued 14 or fewer days before the due date of the proposal shall be filed before the due date for receipt of proposals.
  3. In cases other than those covered in subsections (D)(1) and (2), a protester shall file a protest ~~within no~~ later than 10 days after the procurement officer makes the procurement file available for public inspection. ~~protester knows or should have known the basis of the protest.~~
- E. Stay of procurement during the protest.** If a protester files a protest before the contract award, the procurement officer may issue a written stay of the contract award. In considering whether to issue a written stay of contract, the procurement officer shall consider but is not limited to considering whether:
1. A reasonable probability exists that the protest will be sustained, and
  2. The stay of the contract award is in the best interest of the state.
- F. Stay of contract award during an appeal to the Director.** The Director shall automatically continue the stay of a contract award if:
1. An appeal is filed before a contract award, and
  2. The procurement officer issues a stay of the contract award under subsection (E), unless
  3. The Director issues a written determination that the contract award is necessary to protect the best interest of the state.
- G. Decision by the procurement officer.**
1. The procurement officer shall issue a written decision ~~within no~~ later than 14 days after a protest has been filed. The decision shall contain an explanation of the basis of the decision.
  2. The procurement officer shall furnish a copy of the decision to the protester by:
    - a. Certified mail, return receipt requested; or
    - b. Any other method that provides evidence of receipt.
  3. The Administration may extend, for good cause, the time-limit for decisions in subsection ~~(F)(1)~~ (G)(1) for a time not to exceed 30 days. The procurement officer shall notify the protester in writing that the time for the issuance of a decision has been extended and the date by which a decision shall be issued.

4. If the procurement officer fails to issue a decision within the time-limits in subsection ~~(F)(1)~~-(G)(1) or (G)(3), the protester may proceed as if the procurement officer issued an adverse decision.

**H. Remedies.**

1. If the procurement officer sustains the protest in whole or in part and determines that the RFP, proposed contract award, or contract award does not comply with applicable statutes and rules, the procurement officer shall order an appropriate remedy.
2. In determining an appropriate remedy, the procurement officer shall consider all the circumstances of the procurement or proposed procurement, including:
  - a. Seriousness of the procurement deficiency,
  - b. Degree of prejudice to other interested parties or to the integrity of the RFP process,
  - c. Good faith of the parties,
  - d. Extent of performance,
  - e. Costs to the state, and
  - f. Urgency of the procurement.
  - g. Best interest of the state.
3. An appropriate remedy may include one or more of the following:
  - a. Terminating the contract;
  - b. Reissuing the RFP;
  - c. Issuing a new RFP;
  - d. Awarding a contract consistent with statutes, rules, and the terms of the RFP; or
  - e. Any relief determined necessary to ensure compliance with applicable statutes and rules.

**I. Appeals to the Director.**

1. A person may file an appeal ~~about~~ of a procurement officer's decision with both the Director and the procurement officer ~~within~~ no later than five days from the date the decision is received. The date the decision is received shall be determined under subsection ~~(F)(2)~~-(G)(2).
2. The appeal shall contain:
  - a. The information required in subsection (C)(2),
  - b. A copy of the procurement officer's decision,
  - c. The alleged factual or legal error in the decision of the procurement officer on which the appeal to the Director is based, and
  - d. A request for hearing unless the person requests that the Director's decision be based solely upon the ~~contract record~~ procurement file.

**J. Dismissal.** The Director shall not schedule a hearing and shall dismiss an appeal with a written determination if:

1. The appeal does not state a basis for protest,
2. The appeal is untimely under subsection ~~(H)(1)~~ (I)(1), or
3. The appeal is moot.

K. Hearing. Hearings under this Section shall be conducted ~~under R9-22-802 of this Chapter~~ using the Arizona Administrative Procedure Act under A.R.S. Title 41, Ch. 6.

#### **R9-22-605. Waiver of Contractor's Subcontract with Hospitals**

If a contractor is unable to obtain a subcontract with a hospital as contractually required, the contractor may request in writing a waiver from the Administration as allowed by A.R.S. § 36-2906. The contractor shall state in the request the reasons a waiver is believed to be necessary and all efforts the contractor has made to secure a subcontract. ~~The Administration shall consider the following criteria in deciding whether to grant the waiver:~~

- ~~1. The number of hospitals in the GSA,~~
- ~~2. The extent to which the contractor's physicians have staff privileges at noncontracting hospitals in the service area,~~
- ~~3. The size and population of, and the demographic distribution within, the service area,~~
- ~~4. Patterns of medical practice and care within the service area,~~
- ~~5. Whether the contractor has diligently attempted to negotiate a hospital subcontract with local hospitals capable of serving members in the service area,~~
- ~~6. Whether the contractor has any subcontracts in adjoining service areas with hospitals that are reasonably accessible to the contractor's members in the service area, and~~
- ~~7. Whether the contractor's members can reasonably be expected to receive all covered services in the absence of a hospital subcontract.~~

#### **R9-22-606. Contract Compliance Sanction**

A. The Director may impose ~~one or more of the following~~ sanctions upon a contractor ~~that violates~~ for violation of any provision of this Chapter or of a contract. Sanctions include but are not limited to:

- ~~1. Suspend any~~ Suspension of any or all further member enrollment, by choice and/or assignment, for a period of time ~~commensurate with the nature, term, and severity of the violation.~~
- ~~2. Withhold a percentage~~ Imposition of a monetary sanction ~~of the contractor's capitation prepayment, commensurate with the nature, term, and severity of the violation.~~

B. The Director shall consider the nature, severity, and length of the violation when determining a sanction.

C. The Director shall provide a contractor with written notice specifying grounds and terms for the sanction, ~~which are commensurate with the nature, term, and severity of the violation and one or more of the following:~~

- ~~1. Length of suspension,~~
- ~~2. Amount to be forfeited, or~~
- ~~3. Prepayment to be withheld.~~

D. Nothing contained in this Section shall be construed to prevent the Administration from imposing sanctions as provided in contract under A.R.S. § 36-2903.

