

April 21, 2021

Robert J. Lightfoot
Direct Dial: 608-229-2257
rlightfoot@reinhartlaw.com

VIA E-MAIL

Evan Corbeil, Purchasing Agent
Department of Health Services, Bureau of
Procurement and Contracting
evan.corbeil@dhs.wisconsin.gov

Dear Mr. Corbeil:

I serve as general counsel to LeadingAge Wisconsin. LeadingAge Wisconsin is a trade association consisting of over 500 nonprofit Wisconsin nursing homes, facilities for the developmentally disabled, independent and assisted living facilities, and community service agencies. Statewide, LeadingAge members employ over 38,000 people who provide compassionate care to more than 48,000 individuals daily. I write on behalf of LeadingAge Wisconsin and its members to provide you with an "in-the-trenches" perspective on the Wisconsin Department of Health Service's (DHS) IDR/IIDR RFB and choice of vendor. My perspective is presented as both LeadingAge general counsel and as a healthcare attorney in private practice representing nursing homes who has personally conducted over 18 IDR/IIDR sessions since 2018 and between 100-200 IDR/IIDR sessions with various DHS-chosen IDR vendors over my 26-year career.

The past several years with the current IDR vendor have been, without a doubt, the most disappointing experience in recent memory for Wisconsin nursing homes who have availed themselves of the IDR/IIDR process for several key reasons:

1. Rates of citations upheld – in 2019, the current vendor upheld 91% of citations taken to IDR/IIDR. In 2020, that number was 100%;
2. Quality of the IDR/IIDR Sessions – as a participant in numerous IDR/IIDR sessions with the current vendor, I have personal experience with the sessions themselves not being conducted in a manner that gave even the appearance of neutrality or professionalism. At one IDR session in particular, the reviewer started raising his voice at the provider and later had to be admonished by a Regional Field Operations Director for his behavior;

3. Lack of Knowledge of the IDR/IIDR process – as a participant in numerous IDR/IIDR sessions with the current vendor, I can relate an instance where the vendor did not accommodate a request for Expert Review of a citation pursuant to DQA's written procedures because the vendor was unaware of the Expert Review process and DQA's procedures and did not have an expert readily available for the IDR/IIDR session; and
4. Lack of knowledge of the regulatory standard, Federal State Operations Manual, or applicable standards of practice – as a participant in numerous IDR/IIDR sessions with the current vendor, especially as pertains to citations involving immediate jeopardy violations, the current vendor has continually displayed a lack of knowledge of the standard applicable to immediate jeopardy, the documentation standards required for proper documentation in a Statement of Deficiency, and lack of knowledge of standards of practice as pertains to citations and information from the State Operations Manual and accepted clinical practice for long-term care providers. These attributes are crucial to a fair and neutral IDR/IIDR session for a provider.

Each of these points is discussed in more detail below utilizing the standards set forth in the RFB itself.

I. The Rates of Citations Upheld By the Chosen Vendor Should be Reasonable and the IDR/IIDR Sessions Should be Conducted by a "Neutral Reviewer"

Section 1.2.2 of the RFB provides that the reviewer be "neutral." The current vendor's record of upholding 91% and 100% of all citations taken to IDR/IIDR in the past 2 years has neither the appearance nor quality of neutrality. Prior IDR/IIDR vendors have at least given Wisconsin nursing home providers some hope for success at IDR and faith in the process with lower rates of citations being upheld when reasonable arguments were made at IDR/IIDR. From 2009-2016 the rates of citations upheld ranged from 51% - 71%. Rates of citations being upheld at a rate of 100% is not neutral review, it is rubberstamp review and a waste of time and money for a Wisconsin nursing home provider to even consider IDR/IIDR under the current vendor. Worse yet, rubberstamp review engenders suspicion, distrust and doubt as to the legitimacy of the IDR/IIDR process among Wisconsin nursing home providers, something DHS should oppose. Given the short timeframes involved for providers to submit an IDR/IIDR written submission and related documentation, and the cost of the submission both monetarily and in terms of staff time, DHS owes it to Wisconsin nursing home providers and to itself to demonstrate that it has engaged in and chosen a fair, neutral, legitimate IDR/IIDR process, conducted by reviewers who are neutral both in deed and act, not simply in name.

II. The Quality of the IDR/IIDR Session Should be on a Professional Level

Section 1.2.3 of the RFP requires the vendor to provide "professional reviewers." Lack of reviewer neutrality and a 100% citation substantiation rate, as discussed above, speaks volumes about the quality and professionalism of the IDR/IIDR sessions conducted by the current vendor. An additional indicator of the quality and professionalism of reviewers is the provider awareness at the IDR session itself, of a reviewer not having thoroughly reviewed an IDR/IIDR submission that has often taken a provider many hours to prepare in a short timeframe. The frequent lack of vendor engagement in the IDR/IIDR review session makes a nursing home wonder if in fact the nursing home's submission was reviewed at all. Numerous IDR/IIDR sessions have, in fact, been conducted in the past couple years by the current vendor where not one question or point of clarification was asked by the reviewer or where there is no reviewer interaction beyond the initial introduction. IDR/IIDR sessions have also been conducted in the past couple years where the reviewer was admonished by the Regional Fields Operations Director following the IDR/IIDR session for inappropriate conduct during the IDR/IIDR session for harassing a nursing home during a review session with one question repeated over and over. IDR/IIDR sessions with meaningful interactions between reviewer and nursing home provider, would demonstrate to a nursing home professionalism and engagement by a neutral reviewer, thus demonstrating to the provider that the reviewer had actually taken time to review and reflect on the provider's IDR/IIDR submission. DHS should expect nothing less of its chosen vendor.

Section 1.2.2 of the RFB requires the chosen vendor as part of the IDR/IIDR process to provide to DQA a written decision regarding the nursing home's IDR/IIDR submission and the vendor's subsequent review of the submission within 21 days of the nursing home's receipt of the Statement of Deficiency. The RFB requires the session to be in narrative format and "with sufficient detail to explain the rationale for the decision..." Sadly, based on the experience of having conducted over 18 IDR/IIDR sessions since 2018, the current vendor has not complied with providing "sufficient detail to explain the rationale for the decision" often giving the provider only a few sentence explanation that is far from sufficient. This has left nursing homes wondering why citations have been upheld at rates of 100% and has created distrust and doubt as to the fairness, legitimacy and neutrality of the process.

III. The Chosen Vendor Should have Full Knowledge of the Wisconsin IDR/IIDR Process

It is apparent that the current vendor did not have full knowledge of the Wisconsin IDR/IIDR process in the past couple years. Personal experience can relate the case of at least one nursing home provider having requested an "Expert Reviewer" for an IDR session in 2020 for a unique clinical issue. The entire IDR required rescheduling because the vendor did not know what an expert reviewer was, did not know DQA's written process for expert review until it was explained to the vendor, and the vendor had not provided an expert reviewer for the IDR/IIDR session. The procedure for expert review is clearly set out in DQA's IDR memo here <https://www.dhs.wisconsin.gov/publications/p01856.pdf> and it's readily apparent the current

vendor was unaware of its own procedure. Per section 1.2.2 of the RFB, an expert reviewer is someone, like a physician, pharmacist or psychologist, with experience beyond that of a professional reviewer. It is imperative with this RFB that the chosen vendor have full knowledge of and staff to accommodate the entire IDR/IIDR process as set forth by DHS in its RFB and DQA's own IDR memo, including requests for expert reviewers and the process for expert review.

IV. The Chosen Vendor Should have Full Knowledge of the Applicable Regulatory Standards, Federal State Operations Manual, and Applicable Standards of Practice

Section 1.2.1 of the RFB requires the vendor to have full knowledge of the applicable regulatory standards, federal state operations manual, and applicable standards of practice. It was apparent, as a participant in numerous IDR/IIDR sessions with the current vendor in the past 2 years, especially pertaining to citations involving immediate jeopardy violations, that the current vendor repeatedly and consistently displayed a lack of knowledge of the standard applicable for immediate jeopardy citations from Appendix Q of the State Operations Manual, the documentation standards required for proper documentation in a Statement of Deficiency, and a lack of knowledge of standards of practice as pertains to citations and information from the State Operations Manual. From personal experience in several IDR/IIDR sessions involving immediate jeopardy citations, the current vendor did not appear, for example, to understand the 2016 change in the State Operation Manual's standard at Appendix Q for immediate jeopardy from "potential for serious harm" to "likelihood of serious harm." While this 2016 change in the regulations was substantial, explanations of how CMS interprets "likelihood of serious harm" was never seriously considered by the prior vendor when raised during IDR/IIDR sessions involving immediate jeopardy citations, thus demonstrating either a lack of knowledge or a lack of neutrality concerning the issue. Similarly, as a participant in an IDR/IIDR session relative to a specific clinical citation, it was also apparent the professional reviewer had a knowledge gap pertaining to the clinical issue raised by the nursing home—knowledge of which was readily available in the federal state operations manual or online standards of practice pertaining to that issue.

The RFB Cost Sheet at Attachment A requires a "responsive, responsible Vendor meeting bid specifications and requirements which is judged to be in the best interest of DHS." A responsible vendor is a vendor that by virtue of its IDR/IIDR decisions conducts itself in a neutral manner, with a decision rate that demonstrates neutrality and professionalism, and in which it is readily apparent to all parties that the vendor has not only reviewed the information supplied to the vendor by the nursing home provider, but also demonstrates the knowledge and resources and staff necessary to conduct appropriate and professional IDR/IIDR sessions for Wisconsin nursing homes in accordance with DQA procedures. Appropriate and professional IDR/IIDR sessions would also be demonstrated by the sessions being more interactive, with the vendor asking questions or requesting points of clarification—not one-sided IDR/IIDR sessions where the provider presents its case and the session is concluded or met with silence.

Evan Corbeil, Purchasing Agent

April 21, 2021

Page 5

Similarly, a vendor judged to be in the best interest of DHS is not only a vendor that meets the above qualifications, but also has a likelihood of demonstrating to DHS that Wisconsin nursing home providers have a semblance of faith in the IDR/IIDR process. In other words, DHS should select a vendor that it believes will promote and conduct a fair, neutral, and professional IDR/IIDR process. In a fair, neutral, and professional IDR/IIDR process, providers who are correctly cited and take a citation to IDR/IIDR have those citations appropriately upheld. Others who were incorrectly cited either entirely or simply by miscoding scope, severity or both, and take a citation to IDR/IIDR while presenting a reasonable case, have such citations reduced in scope/severity or withdrawn. A vendor who upholds citations at rates of 91-100% is not a vendor judged to be in the best interest of DHS.

On behalf of LeadingAge Wisconsin, we appreciate the opportunity to weigh in on this important RFB, which has the potential to either continue to advance an adversary posture and disenchantment and mistrust between DHS and nursing home providers over the IDR/IIDR process or has the possibility of restoring faith in a federally-mandated DHS process that Wisconsin nursing home providers can view as fair, neutral, and professional.

Yours very truly,

A handwritten signature in black ink, appearing to read "Robert J. Lightfoot". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Robert J. Lightfoot

cc: John Sauer, LeadingAge Wisconsin