

STATE OF NORTH CAROLINA
DURHAM COUNTY

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
23 INS 00738

BLUE CROSS AND BLUE SHIELD OF
NORTH CAROLINA,

Petitioner,

v.

NORTH CAROLINA STATE HEALTH
PLAN FOR TEACHERS AND STATE
EMPLOYEES,

Respondent,

and

AETNA LIFE INSURANCE COMPANY,

Respondent-Intervenor.

PREHEARING STATEMENT OF RESPONDENT
NORTH CAROLINA STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES

Pursuant to 26 N.C.A.C. 03.0104 and the Order for Prehearing Statements of Administrative Law Judge Melissa Owens Lassiter, dated February 16, 2023 (“Order for Prehearing Statements”), Respondent North Carolina State Health Plan for Teachers and State Employees, a Division of the North Carolina Department of State Treasurer (“Respondent” or “State Health Plan”) hereby files its Prehearing Statement. This Prehearing Statement sets forth Respondent’s present positions regarding the issues enumerated below. Respondent expressly reserves the right to supplement and otherwise modify its positions as the contested case progresses.

In response to the specific inquiries in the Order for Prehearing Statements, Respondent states its present positions as follows:

1. The issues to be resolved:

In this contested case, Petitioner Blue Cross and Blue Shield of North Carolina (“Blue Cross” or “Petitioner”) seeks administrative review of a contract award made pursuant to Request for Proposal # 270-20220830TPAS for third-party administrative services to the State Health Plan (the “RFP”). Petitioner Blue Cross and two other commercial insurers (collectively, “Vendors”) responded to the RFP. All Vendors’ proposals were reviewed by the State Health Plan’s Evaluation Committee, which scored each proposal and recommended to the Board of Trustees of the State Health Plan for Teachers and State Employees (“Board”) that the third-party administrative services contract be awarded to Aetna Life Insurance Company (“Aetna”). The Board voted to accept the recommendation, award the contract to Aetna, and reject the competing proposals by Blue Cross and by the third bidder, UMR, Inc. (the “Contract Award Decision”).

Blue Cross subsequently requested a protest meeting by letter dated January 12, 2023, pursuant to the protest procedures in the RFP, requesting the State Health Plan reconsider the Contract Award Decision and declare Blue Cross the winning Vendor; or in the alternative, vacate the Contract Award Decision and conduct a new request for proposal process (the “Protest”). The State Health Plan timely denied Blue Cross’s request for protest meeting by letter dated January 20, 2023 (the “Protest Denial”).

Pursuant to N.C. Gen. Stat. § 150B-23, the issues in this contested case include:

- Whether the Contract Award Decision or the Protest Denial deprived Petitioner of property or otherwise substantially prejudiced Petitioner’s rights;
- Whether the Contract Award Decision or the Protest Denial exceeded the State Health Plan’s authority or jurisdiction; and

- Whether the State Health Plan, in the Contract Award Decision or the Protest Denial, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, or failed to act as required by law or rule.

The issues identified herein are those which Respondent currently believes, at this early stage of the proceedings, are involved in this contested case. Respondent reserves the right to raise additional issues as further information is gained through discovery and investigation.

2. A brief statement of the facts and reasons supporting issue(s) in dispute:

The North Carolina Department of State Treasurer (“Department”) is statutorily charged with administering the State Health Plan and authorized to enter into contracts, including contracts for third-party administrative services. Prior TPA contracts have been awarded via request for proposal processes on four occasions since 2012, and in each prior case, Blue Cross was awarded the TPA contract. Under these contracts and earlier services contracts with the State Health Plan, Blue Cross has served as an administrative contractor for the State Health Plan almost continuously since at least the 1980’s.

The form of the 2022 RFP differed in several ways from prior TPA contract requests for proposals, as a result of the State Health Plan’s modernization of its contracting processes. Goals of the modernization included:

- 1) Ensuring that vendors are able and willing to work with the State Health Plan to meet the priorities and requirements of the State Health Plan and the RFP without qualification.
- 2) Avoiding “micromanagement” of every possible detail from the outset to provide the State Health Plan flexibility and adaptability; instead, to use administrative decision memos and business requirements documents to implement initiatives as needed.
- 3) Refining the scope of work to focus on the State Health Plan’s key, non-negotiable items and moving those items to the Minimum Requirements portion of the RFP.

- 4) Increasing the overall objective analysis of RFPs by moving away, as much as reasonably possible, from subjective parsing of vendors' own descriptions of their capabilities.
- 5) Revise the scoring methodology to ensure fair and objective scoring, efficient analysis by the Evaluation Committee, clarity for the Board, the decision-maker, and alignment with the State Health Plan's priorities.

Participation in the RFP was voluntary. The RFP was posted publicly for review by potential bidders on August 30, 2022, including detailed descriptions of the proposal submission process, the RFP schedule, the technical and cost proposals to be submitted, and the manner in which proposals would be evaluated and scored.

The RFP process consisted of two main stages: First, interested vendors submitted responses to the "minimum requirements proposal"; and subsequently, all vendors who met the RFP's minimum requirements were able to submit technical and cost proposals, each of which were evaluated and scored. Before each of the submission deadlines, vendors had a period in which to submit questions regarding the RFP and the upcoming proposal submissions, and the State Health Plan publicly issued addenda to the RFP before the proposal deadline, including written responses to all questions submitted by vendors.

The Evaluation Committee evaluated and scored the Vendors' proposals in accordance with the scoring methodology developed for the RFP and as described in the RFP. Of all three Vendors who met the minimum requirements, the proposal by Aetna received the highest combined score for its technical and cost proposals. Accordingly, the State Health Plan's Evaluation committee recommended to the Board that Aetna be awarded the contract. The Board unanimously voted to award the contract to Aetna. The State Health Plan and the Board acted properly and within their authority and discretion in the Contract Award Decision and in the Protest Denial. The criticisms raised by Blue Cross in its Protest and the Petition for Contested Case

Hearing do not amount to any ground to disturb the Contract Award Decision or the Protest Denial under N.C. Gen. Stat. § 150B-23(a).

This Prehearing Statement sets forth facts and reasons supporting Respondent's positions based on its knowledge at the present time. Respondent anticipates that after it has had the opportunity to conduct discovery and further investigation, it may become aware of additional facts and issues within the scope of this contested case. Respondent expressly reserves the right to present and rely upon such additional facts and legal issues and to adopt additional positions, including but not limited to related legal theories, reasons, and arguments, at the contested case hearing and otherwise in this proceeding.

3. The statutes, rules, and legal precedent, if known:

The statutes, rules, and legal precedent involved in this case are as follows:

- (a) The North Carolina Administrative Procedure Act, N.C. Gen. Stat. Ch. 150B, Article 3;
- (b) Office of Administrative Hearings, Hearing Division Rules, 26 N.C.A.C. Ch. 03;
- (c) N.C. Gen. Stat. Ch. 135, Article 3B, State Health Plan for Teachers and State Employees;
- (d) Case law with respect to substantive and procedural issues; and
- (e) RFP (available online at <https://www.ips.state.nc.us/ips/AGENCY/PDF/15003500.pdf>).

4. A list of proposed witnesses:

Respondent identifies the following individuals known to it at the present time who may be called by it as witnesses in this contested case. However, Respondent reserves the right to call

additional witnesses based upon information learned through discovery and investigation in the course of this contested case.

- (a) Kendall Bourdon, Director, Contracts and Compliance, State Health Plan;
- (b) Matt Rish, Senior Director, Finance, Planning and Analytics, State Health Plan;
- (c) Sam Watts, Interim Executive Administrator, State Health Plan;
- (d) Other representatives of the State Health Plan and/or the Board of Trustees, to be determined;
- (e) Representatives of the Segal Group, Inc., to be determined;
- (f) Representatives of Blue Cross, to be determined;
- (g) Representatives of Aetna, to be determined;
- (h) All individuals identified in discovery or otherwise as witnesses by any other parties;
- (i) All individuals called as witnesses by any other parties; and
- (j) All individuals whose testimony as rebuttal witnesses is needed.

5. Whether you wish to pursue discovery. If so, the length of time required:

Respondent intends to pursue discovery, including but not necessarily limited to interrogatories, requests for production, requests for admission, and depositions. No scheduling order has been entered at this time, and no discovery deadline has been set. At this time, Respondent anticipates that four to six months should be sufficient for discovery. The parties' counsel will meet March 23, 2023 to discuss the case schedule and a discovery plan, and will inform the ALJ of the anticipated period needed for discovery. If the parties do not reach agreement on any part of the schedule, the parties will describe the disagreements and provide the parties' competing proposals.

6. Is the date and location of the hearing set forth in the Scheduling Order acceptable?

No scheduling order has been entered at this time. The parties' counsel will meet March 23, 2023 to discuss the case schedule, and will submit proposed hearing date(s) by March 24, 2023 as directed by the ALJ. Respondent respectfully requests that the hearing be held at the Office of Administrative Hearings in Raleigh, for the convenience of the State Health Plan's witnesses and to minimize travel and expense for State employees.

7. If Petitioners do not have an attorney representing them in this contested case, please provide the following information in order to receive communications from this Office. You are required to notify this Office of any changes in this information:

Not applicable. Respondent is represented by undersigned counsel.

8. Estimated length of hearing:

Petitioners anticipate that the hearing will last approximately ten days.

9. Other special considerations:

Petitioners request that the hearing of this contested case be recorded and transcribed by a court reporter and will submit the appropriate form requesting such arrangements.

This, the 20th day of March 2023.

/s/ Marcus C. Hewitt

Robert H. Edmunds

N.C. State Bar No. 6602

bedmunds@foxrothschild.com

Marcus C. Hewitt

N.C. State Bar No. 23170

mhewitt@foxrothschild.com

Elizabeth Sims Hedrick

N.C. State Bar No. 38513

ehedrick@foxrothschild.com

Fox Rothschild LLP

434 Fayetteville Street, Suite 2800

Raleigh, North Carolina 27601

Telephone: (919) 755-8700

Facsimile: (919) 755-8800

*Attorneys for Respondent North Carolina
State Health Plan for Teachers and State
Employees, a Division of the North Carolina
Department of State Treasurer*

CERTIFICATE OF SERVICE

The undersigned does hereby certify that a true and correct copy of the foregoing document was uploaded electronically with the Office of Administrative Hearings, causing electronic service, as defined in 26 NCAC 03 .0501(4), to be made upon the following:

Matthew W. Sawchak
msawchak@robinsonbradshaw.com
434 Fayetteville Street, Suite 1600
Raleigh, North Carolina 27601

Stephen D. Feldman
sfeldman@robinsonbradshaw.com
434 Fayetteville Street, Suite 1600
Raleigh, North Carolina 27601

Nathan C. Chase, Jr.
nchase@robinsonbradshaw.com
101 N. Tryon Street, Suite 1900
Charlotte, North Carolina 28246

*Counsel for Petitioner Blue Cross and
Blue Shield of North Carolina, Inc.*

Lee M. Whitman
lwhitman@wyrick.com
4101 Lake Boone Trail, Suite 300
Raleigh, North Carolina 27607

Benjamin N. Thompson
bthompson@wyrick.com
4101 Lake Boone Trail, Suite 300
Raleigh, North Carolina 27607

Sophia V. Blair
sblair@wyrick.com
4101 Lake Boone Trail, Suite 300
Raleigh, North Carolina 27607

*Counsel for Proposed Respondent-Intervenor
Aetna Life Insurance Company*

This, the 20th day of March 2023.

/s/ Marcus C. Hewitt

Marcus C. Hewitt
Attorney for Respondent