

STATE OF NORTH CAROLINA
DURHAM COUNTY

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
23 INS 738

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.)

PETITIONER BLUE CROSS AND
BLUE SHIELD OF NORTH
CAROLINA'S MOTION TO COMPEL
DISCOVERY FROM RESPONDENT-
INTERVENOR AETNA LIFE
INSURANCE COMPANY

This case concerns a contract that will affect hundreds of thousands of North Carolinians. Last year, the North Carolina State Health Plan for Teachers and State Employees conducted a Request for Proposal to select a vendor to serve as the Plan's third-party administrator (TPA) beginning in 2025. As outlined in Blue Cross NC's contested-case petition, the RFP process used by the Plan was new, untested, and differed in several respects from prior RFPs conducted by the Plan.

At the conclusion of the RFP process, the Plan awarded the TPA contract to Respondent-Intervenor Aetna Life Insurance Company. The Plan made this award even though its own calculations showed that Blue Cross NC's proposal would cost

the Plan at least \$44 million less than Aetna's proposal, and despite the fact that Blue Cross NC offered a broader network of health care providers than Aetna offered.

In this case, Blue Cross NC has alleged that the Plan's decision was the result of a flawed bidding process—a process that, among other problems, failed to collect and consider relevant information. Blue Cross NC has served discovery requests on Aetna and the Plan, seeking documents and information relevant to this allegation. But Aetna has refused to produce the vast majority of documents and information requested. In fact, Aetna has refused to produce *any* documents in response to at least half of Blue Cross NC's document requests.¹

The alleged basis for Aetna's refusal to produce the requested documents is largely the same for each request. Aetna contends that it is not required to produce any document that was not available to the Plan when the Plan was deciding which bidder would be awarded the TPA contract. Based on this argument, Aetna refuses to produce (a) internal documents and communications related to the preparation of its proposal, and (b) documents and communications related to its efforts to implement the TPA contract.

The documents that Blue Cross NC has requested are directly relevant to key issues in this dispute. They will show, for example, whether Aetna had a legitimate basis for confirming the seven technical requirements that Blue Cross NC did not

¹ Blue Cross NC's Requests for Production to Aetna are attached as Exhibit 1 to this motion. Aetna's responses to those requests are attached as Exhibit 2.

confirm. These seven requirements were dispositive: the Plan told Blue Cross NC at a post-award meeting that it did not win the contract because it failed to confirm seven of the 310 technical requirements. If discovery shows that Aetna cannot fulfill these requirements, that would mean Blue Cross NC—the lowest-cost bidder, and the bidder with the broadest provider network—was denied the TPA contract based on technical requirements that even the winning bidder cannot comply with.

This is not a hypothetical concern. Discovery has shown that the Plan was concerned that this new process did not give the Plan the information needed to evaluate a bidder's true abilities. Commenting on a draft of the RFP, Vanessa Davison (the Plan's Director of Procurements and Contracts), noted:

I'm concerned that with only a handful of exceptions, this SOW only asks Vendors to confirm statements to provide services (very few "describe", "provide" statements.) This RFP does not allow Vendors to demonstrate their abilities to provide services. This will not allow the Evaluation Committee to *evaluate* and score the responses accordingly. . . . If during the implementation or soon after, the Plan realizes the awarded Vendor is unable to perform, even though they agreed they could, what will the Plan do? Is this a risk the Plan is willing to take on?

I understand the Plan's Leadership feels this different approach to writing a RFP and evaluating responses will be quicker, but I wonder about the outcome of this approach. Guess we will know in a few months!

SHP 0025036 (attached as Exhibit 3) (emphasis in original).

The documents requested by Blue Cross NC bear directly on the Plan's legitimate concerns about its own RFP process. They will also address other key issues, including:

- Whether Aetna had a legitimate basis for the pricing (from health care providers) it proposed to the Plan, or whether Aetna promised pricing and discounts that it cannot deliver;
- Whether the letters of intent with providers that Aetna relied on in its proposal were enforceable as contracts, as required by the RFP's terms;
- Whether the terms of those letters of intent were sufficiently concrete, including with respect to pricing and discount terms, to allow Aetna to rely on them in formulating its proposal; and
- Whether Aetna recognized that there were significant gaps in its provider network that could cause disruption to the health care of Plan members, which were not identified by the Plan because the RFP asked only whether each bidder's network met certain minimum requirements.

Aetna argues that none of this information is relevant because it was not considered by the Plan during the RFP process. But that is exactly why discovery on these issues is needed. A critical question in this case is whether the Plan's newly designed RFP process gathered the information needed for the Plan to make an informed decision. The requested discovery goes to the heart of this question.

Having been unable to resolve these issues through discussions with Aetna, Blue Cross NC brings this motion pursuant to this Tribunal's Rule 03.0112 and Rule 37(a)(2) of the North Carolina Rules of Civil Procedure, seeking an order compelling Aetna to comply with its discovery obligations.

BACKGROUND

On April 10, 2023, Blue Cross NC served sixteen document requests on Aetna. Aetna served its written responses and objections on May 10. Aetna refused

to produce any documents in response to eight requests.² For three requests, Aetna refused to produce any documents created or sent after December 14, 2022 (the date the Plan awarded the contract to Aetna).³

Blue Cross NC certifies that it has conferred with Aetna in good faith in an effort to resolve this dispute. Counsel for Blue Cross NC and Aetna met and conferred by phone on May 16 about Aetna's responses. The parties discussed Aetna's response to each document request. Aetna confirmed its position that it would not produce any documents not available to the Plan during the RFP process.

Aetna completed its document production on May 26. Acting on its narrow view of the scope of discovery here, Aetna produced only 285 documents, many of which were duplicates.

Because Aetna has refused to produce documents relevant to this dispute, Blue Cross NC brings this motion to compel with respect to the following requests⁴:

Request No. 4. The letters of intent (as that term is used in Section 1.2.1 of Attachment A of the 2022 RFP) and rate agreements for providers listed in your Cost Proposal with a NetStatus of "L," that were binding at the time of the repricing.

Request No. 5. All documents related to Aetna's ability and efforts to enter into contracts with the providers listed in your Cost Proposal with a NetStatus of "L".

² See Aetna's Responses Nos. 4, 5, 8, 9, 12, 13, 14, & 15.

³ See Aetna's Responses Nos. 6, 7 and 16.

⁴ Although Aetna also refused to produce documents in response to Request Nos. 9 and 13, Blue Cross NC has elected not to move to compel with respect to those requests.

Request No. 6. All documents that relate to, show, or support Aetna's confirmation of [the seven technical requirements that Blue Cross NC did not confirm]. This request includes all internal and external communications related to Aetna's ability and efforts to comply with these technical requirements.

Request No. 7. All communications between you and the Plan related to the 2022 RFP [after December 14, 2022].

Request No. 8. All communications between you and the Plan during the implementation period for the TPA Contract.

Request No. 12. All documents containing, reflecting, or referring to any comparison or analysis of the provider networks of Aetna and either Blue Cross NC or UMR, Inc.

Request No. 14. All documents that show the underlying formulas or calculations that you used or relied on in preparing the price guarantees in your Cost Proposal in response to the 2022 RFP.

Request No. 15. Documents sufficient to show your policy(ies) for paying claims received by out-of-network providers, including rate tables, formulas, and any documentation showing the methodologies applied and rates that would be paid according to Aetna subscriber agreements.

Request No. 16. All communications referring to possible savings or other advantages with respect to the TPA contract based on your affiliation with Caremark PCS Health, LLC (CVS) or CVS's contract to serve as the Plan's pharmacy benefits manager.

For Requests 6, 7, and 16, Aetna agreed to produce documents through December 14, 2022 (or stated that no responsive documents exist through this date). However, Aetna refused to produce documents created or sent after this date. For these requests, Blue Cross NC seeks an order compelling Aetna to produce documents created or sent after December 14, 2022.

ARGUMENT

Documents related to the preparation and implementation of Aetna's bid are relevant to this dispute, regardless of whether or not those documents were considered by or available to the Plan during the RFP process.

Aetna claims that these documents are not relevant because they would have no bearing on whether the Plan made an error in its decision to award the TPA contract to Aetna, but that argument ignores a key argument in Blue Cross NC's challenge. One of the fundamental flaws in the Plan's RFP process was a failure to collect and evaluate information on each bidder's true ability to meet the Plan's needs. The documents at issue in this motion will show whether a sound RFP process—one that collected the information needed to make an informed decision—would have produced a different result.

The North Carolina Rules of Civil Procedure apply in this Tribunal, unless another rule or statute of the OAH applies. 26 N.C. Admin. Code 03.0101, .0112. Under Civil Rule 26(b)(1), non-privileged matters are discoverable as long as they are "relevant to the subject matter involved in the pending action" and "reasonably calculated to lead to the discovery of admissible evidence." N.C. Gen. Stat. § 1A-1, Rule 26(b)(1).

Aetna's argument that this Tribunal may consider only information and documents that were available to the Plan at the time the contract was awarded, and that Blue Cross NC's discovery is equally limited, lacks support in North Carolina law.

In the parties' discussions on Aetna's responses, Aetna argued that its position was supported by decisions such as *Britthaven, Inc. v. North Carolina Department of Human Resources, Division of Facility Services*, 118 N.C. App. 379, 455 S.E.2d 455 (1995). *Britthaven* is readily distinguishable on multiple grounds.

First, *Britthaven* addressed what types of evidence are *admissible* in a contested case, not what information is discoverable. *See id.* at 382, 455 S.E.2d at 459. The scope of discovery is broader than admissibility, so *Britthaven's* holding is therefore irrelevant to this dispute. *See* N.C. Gen. Stat. § 1A-1, Rule 26(b)(1) ("It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to the lead to the discovery of admissible evidence")

Moreover, *Britthaven* was decided in the unique context of a contested case about a certificate-of-need (CON) application. *See* 118 N.C. App. at 382, 455 S.E.2d at 459; *see also Robinson ex rel. Robinson v. N.C. Dep't of Health & Hum. Servs.*, 215 N.C. App. 372, 374, 715 S.E.2d 569, 570 (2011) (distinguishing *Britthaven* and noting that it "was describing 'the nature of contested case hearings *under the CON law* and the Administrative Procedure Act'" (quoting *Britthaven*, 118 N.C. App. at 382, 455 S.E.2d at 459).

Later decisions have expressly limited *Britthaven's* holding to CON cases. In *Robinson*, for example, the agency at issue reversed a decision of this Tribunal on the grounds that the Tribunal considered evidence that was not available to the

agency at the time of the agency's contested decision. *Robinson*, 215 N.C. App. at 374, 715 S.E.2d at 570. The agency cited *Britthaven* as the basis for its ruling. *Id.*

The Court of Appeals reversed, holding that “*Britthaven* is limited to cases in which CON law is applicable.” *Id.* at 376, 715 S.E.2d at 572. The court explained that *Britthaven* turned on a CON regulation that bars an applicant from amending a CON application once it is completed. The court noted, however, that there was no regulation that barred the Department of Health and Human Services (the final adjudicator in *Robinson*) from considering information that the department did not have when it made the decision at issue. *Id.* at 376, 715 S.E.2d at 571-72. There is no such regulation here, either.

The Court of Appeals reiterated the *Robinson* holding in *Clark v. North Carolina Department of Public Safety*, No. COA15-624, 2016 WL 4608179 (N.C. Ct. App. Sept. 6, 2016). There, the court noted that “in the absence of a rule or regulation to the contrary, the ALJ may consider evidence not offered to the agency.” *Id.* at *4.

In compliance with *Robinson*, this Tribunal has applied the *Britthaven* evidentiary limit in CON cases. For example, in *Randolph Surgery Center v. North Carolina Department of Health & Human Services*, the Tribunal pointed out that the evidentiary limit applies “[i]n CON contested cases.” No. 11 DHR 12275, 2012 WL 1301212, Conclusions of Law ¶ 14 (N.C. Ofc. Admin. Hrgs. Mar. 19, 2012) (Lassiter, J.) The Tribunal specifically attributed that evidentiary limit to CON jurisprudence. *Id.*

Unlike *Britthaven*, this is not a CON case. Here, moreover, no regulation prohibits this Tribunal from considering evidence that the Plan did not collect or consider during the RFP process. Those distinctions from *Britthaven* defeat Aetna's reliance on that case. They also confirm that the documents Blue Cross NC is seeking from Aetna are relevant and discoverable.⁵

Aetna has also cited *Stark v. North Carolina Department of Environment & Natural Resources* for the argument that discovery should be limited to documents and information that were available to the Plan when it awarded the contract to Aetna. 224 N.C. App. 491, 736 S.E.2d 553 (2012). Like *Britthaven*, however, *Stark* is distinguishable.

Stark did not involve review of a procurement decision. Instead, it involved a homeowner's challenge to the grant of an expanded mining permit for an adjoining property. *Id.* at 506, 736 S.E.2d at 563. The Court of Appeals affirmed a refusal to allow the homeowner to introduce seismograph readings taken after the expanded permit was issued. The court held that this proposed evidence was cumulative of other evidence. *Id.* at 507, 736 S.E.2d at 564. It also held that the homeowner could not introduce evidence created after the agency's decision, because the

⁵ Aetna has also cited *In re Wake Kidney Clinic*, 85 N.C. App. 639, 355 S.E.2d 788 (1987), and *Dialysis Center of North Carolina, LLC v. North Carolina Department of Health & Human Services*, 137 N.C. App. 638, 529 S.E. 2d 257 (2000), in support of its proposed limit on discovery. Like *Britthaven*, both of these cases addressed the admissibility of evidence in the CON context, not discovery in a non-CON context. For that reason, these decisions shed no light on the issues here.

homeowner had already participated in the agency's review of the expanded permit. *Id.* at 505-06, 736 S.E.2d at 563.

Aetna has argued that *Stark* bars the discovery at issue here because Blue Cross NC, like the homeowner in *Stark*, had an opportunity to participate in the Plan's decision-making process. That argument misunderstands the holding in *Stark*. Unlike Blue Cross NC, the petitioner in *Stark* was not alleging that the agency in question made its decision through a flawed evaluation process. Here, Blue Cross NC alleges exactly that. *See, e.g.*, Pet. ¶¶ 47-49, 56-59, 80-81, 93, 105. The requested discovery will show whether the Plan's new and untested RFP process failed to collect and consider information that it should have in order to make an informed decision on the contract award. *Stark* did not involve those issues.

In any event, the discussion in *Stark* was limited to information and documents created *after* the agency award at issue. 224 N.C. App. at 506-08, 736 S.E.2d at 563-64. The decision in that case therefore has no bearing on Blue Cross NC's request for documents related to the preparation of Aetna's proposal. Those documents existed before the contract was awarded.

* * *

North Carolina law mandates that "the discovery rules 'should be construed liberally' so as to substantially accomplish their purposes." *AT&T v. Griffin*, 39 N.C. App. 721, 727, 251 S.E.2d 885, 888 (1979) (quoting *Willis v. Duke Power Co.*, 291 N.C. 19, 34, 229 S.E.2d 191, 200 (1976)). In light of that liberal standard, Aetna

has no basis for refusing to produce documents that are central to Blue Cross NC's allegation that the Plan's newly designed RFP process resulted in an arbitrary decision.

CONCLUSION

The documents at issue on this motion are relevant to the subject matter of this case. Blue Cross NC respectfully requests that the Tribunal order Aetna to produce them promptly.

This 9th day of June, 2023.

ROBINSON, BRADSHAW & HINSON, P.A.

/s/ Matthew W. Sawchak

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CERTIFICATE OF SERVICE

I certify that today, I caused this motion to be filed through this Tribunal's electronic-filing system. Under Rule 03.0501(4), the system will electronically serve the motion on the following counsel:

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This 9th day of June, 2023.

/s/ Matthew W. Sawchak
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EXHIBIT 1

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
23 INS 738

BLUE CROSS NC'S FIRST SET OF
REQUESTS FOR PRODUCTION OF
DOCUMENTS TO AETNA

Pursuant to Rules 26 and 34 of the North Carolina Rules of Civil Procedure and 26 N.C. Admin Code 03.0112, Blue Cross and Blue Shield of North Carolina (Blue Cross NC) serves the following requests for the production of documents and electronically stored information on Aetna Life Insurance Company (Aetna). Rule 03.0112(f), calls for Aetna to provide responses, documents, and electronically stored information—or offer a schedule for reasonable compliance with the requests—within fifteen days of receipt. Please deliver any physical documents to the Raleigh office of Robinson Bradshaw. Please deliver all electronically stored information to Blue Cross NC's counsel as described in the instructions below.

DEFINITIONS AND INSTRUCTIONS

1. Unless otherwise defined herein, capitalized terms have the meanings ascribed to them in the 2022 RFP.

2. “Blue Cross NC” means Blue Cross and Blue Shield of North Carolina and all of its past and present employees, agents, affiliates, attorneys, representatives, consultants, advisers, experts, investigators, and any other persons acting on its behalf.

3. “The 2022 RFP” means Request for Proposal #270-20220830TPAS that the Plan issued on August 30, 2022, and all addendums, attachments, and exhibits thereto.

4. “Aetna,” “You,” and “Your” means Aetna Life Insurance Company, and its affiliates, successors, officers, directors, members, managers, past or present employees, consultants, advisers, agents, attorneys, and any other persons acting on its behalf.

5. “Communication(s)” means any written or oral communication of any kind including, but not limited to, letters, emails, text messages, social media postings, telegrams, facsimiles, calendar invitations, face-to-face meetings, and telephone conversations.

6. “Document(s)” means any information or thing within the scope of Rule 34 of the North Carolina Rules of Civil Procedure as well as ESI. Different versions of the same document, including but not limited to drafts or documents with

handwritten notation marks or marks not found on the original or other copies, are different documents.

7. “Electronically stored information” or “ESI” has the meaning set forth in Rules 26(b)(1) and 34 of the North Carolina Rules of Civil Procedure. It includes any specific information, including metadata fields, which the parties agree or are ordered to produce in any ESI protocol.

8. “External communication” means any communication that includes any person other than Aetna or its officers, directors, members, managers, past or present employees, consultants, advisers, agents, attorneys, and any other persons acting on its behalf.

9. “Internal communication” means any communication that includes any person associated with Aetna, including its officers, directors, members, managers, past or present employees, consultants, advisers, agents, attorneys, and any other persons acting on its behalf.

10. “Person” or “party” shall mean any natural person or any business, legal, or governmental entity or association.

11. “Segal” means The Segal Company, Inc., and its parents, affiliates, successors, officers, directors, members, managers, past or present employees, consultants, advisers, agents, attorneys, and any other persons acting on its behalf.

12. “The Plan” means the North Carolina State Health Plan for Teachers and State Employees and all of its past and present employees, agents, attorneys,

representatives, consultants, advisers, experts, investigators, trustees, committees, and any other persons acting on its behalf.

13. “TPA Contract” means the 2025-2027 contract for third party administrative services that the Plan awarded to Aetna.

14. All documents and things subject to these requests must be produced in accordance with Rule 34(b) of the North Carolina Rules of Civil Procedure. Pursuant to Rule 34(b), Blue Cross NC requests that all ESI be produced as Bates-stamped images with all associated metadata fields and searchable text files. The image files should be provided as single-page black and white TIFFs with the associated image load file in a LOG format. Each TIFF should be named in accordance with the corresponding Bates number. If color images are requested, please produce them in JPG format. The metadata should be provided in CSV or DAT load files. Excel spreadsheets should be produced in native format. If the parties enter into a protocol for the collection, review, and production of documents and ESI in this case, then your responses to these requests should adhere to the terms of that protocol.

15. If these requests call for the production of documents that you believe to be missing, destroyed, or otherwise disposed of, identify those documents and their disposition, the identity of the person last known to have the document in his or her possession, custody, or control, and the identity of each person you have reason to believe had knowledge of the document’s contents or received a copy of the document.

16. If Aetna asserts that any responsive document is protected by the attorney-client privilege or work-product doctrine, please state the nature of the privilege that is being claimed and the facts sufficient to support the privilege or work-production assertion.

17. Unless otherwise stated, these requests seek documents created, revised, reviewed, transmitted, or otherwise relied upon by Aetna at any time from January 1, 2022 to the present.

18. These requests are continuing in nature. You have a duty to supplement your responses as required by North Carolina Rule of Civil Procedure 26(e).

REQUESTS FOR PRODUCTION

1. Aetna's complete submission to the Plan in response to the 2022 RFP, including all attachments, clarifications, Best and Final Offer proposals, and supporting materials. Documents responsive to this request should be produced in Excel if they exist in that format, and without redactions.

RESPONSE:

2. Machine-readable files containing Aetna's in-network rates and out-of-network allowed amounts for all providers located in North Carolina as of November 22, 2022. This request includes a request for all required information identified by 26 C.F.R. § 54.9815-2715A3(b)(1).

RESPONSE:

3. Documents sufficient to show the name, address, National Provider Identifier (NPI), Taxpayer Identification Number, and network status for each provider that you identified as part of your proposed provider network in response to the 2022 RFP.

RESPONSE:

4. The letters of intent (as that term is used in Section 1.2.1 of Attachment A of the 2022 RFP) and rate agreements for providers listed in your Cost Proposal with a NetStatus of "L," that were binding at the time of the repricing.

RESPONSE:

5. All documents related to Aetna's ability and efforts to enter into contracts with the providers listed in your Cost Proposal with a NetStatus of "L".

RESPONSE:

6. All documents that relate to, show, or support Aetna's confirmation of any of the following technical requirements stated on Attachment L of the 2022 RFP: 5.2.3.2(b)(iii), 5.2.6.2(b)(xvi), 5.2.7.2(b)(xxiv)(1)-(4), and 5.2.8.2(b)(v)). This request includes all internal and external communications related to Aetna's ability and efforts to comply with these technical requirements.

RESPONSE:

7. All communications between you and the Plan related to the 2022 RFP.

RESPONSE:

8. All communications between you and the Plan during the implementation period for the TPA Contract.

RESPONSE:

9. All joint-defense agreements, or common-interest agreements, or similar agreements between you and the Plan.

RESPONSE:

10. All communications between you and Segal related to the 2022 RFP.

RESPONSE:

11. All data files or documents that the Plan or Segal provided to you in connection with the 2022 RFP.

RESPONSE:

12. All documents containing, reflecting, or referring to any comparison or analysis of the provider networks of Aetna and either Blue Cross NC or UMR, Inc.

RESPONSE:

13. All documents containing, reflecting, or referring to any analysis related to or substantiating either of the following statements in the January 25, 2023 letter from Jim Bostian to North Carolina legislators: “more than 98% of the claims the State Health Plan paid were to providers currently in Aetna’s network” and “more than 98% of the total dollar value of the claims the State Health Plan paid were paid to providers currently in Aetna’s network.”

RESPONSE:

14. All documents that show the underlying formulas or calculations that you used or relied on in preparing the price guarantees in your Cost Proposal in response to the 2022 RFP.

RESPONSE:

15. Documents sufficient to show your policy(ies) for paying claims received by out-of-network providers, including rate tables, formulas, and any documentation showing the methodologies applied and rates that would be paid according to Aetna subscriber agreements.

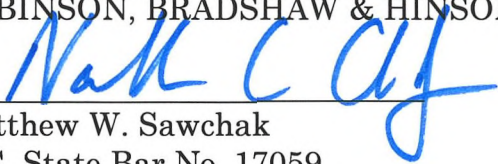
RESPONSE:

16. All communications referring to possible savings or other advantages with respect to the TPA Contract based on your affiliation with Caremark PCS Health, LLC (CVS) or CVS's contract to serve as the Plan's pharmacy benefit manager.

RESPONSE:

This the 10th day of April, 2023.

ROBINSON, BRADSHAW & HINSON, P.A.


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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing document was served on the following by electronic mail at the electronic mailing addresses shown below:

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This 10th day of April, 2023.



Nathan C. Chase, Jr.

EXHIBIT 2

STATE OF NORTH CAROLINA
DURHAM COUNTY

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
23 INS 00738

BLUE CROSS AND BLUE SHIELD OF)
NORTH CAROLINA,)
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Petitioner,)
)
v.)
)
NORTH CAROLINA STATE HEALTH)
PLAN FOR TEACHERS AND STATE)
EMPLOYEES,)
)
Respondent,)
)
and)
)
AETNA LIFE INSURANCE COMPANY,)
)
Respondent-Intervenor.)

**AETNA LIFE INSURANCE COMPANY'S RESPONSES TO BLUE CROSS
AND BLUE SHIELD OF NORTH CAROLINA'S FIRST SET OF
REQUESTS FOR PRODUCTION OF DOCUMENTS**

NOW COMES Aetna Life Insurance Company ("Aetna"), by and through its undersigned counsel, and hereby responds to Blue Cross and Blue Shield of North Carolina's ("Blue Cross") First Set of Requests for Production of Documents ("Requests") as follows:

REQUESTS FOR PRODUCTION

1. Aetna's complete submission to the Plan in response to the 2022 RFP, including all attachments, clarifications, Best and Final Offer proposals, and supporting materials. Documents responsive to this request should be produced in Excel if they exist in that format, and without redactions.

RESPONSE: On May 1, 2023, Respondent produced Aetna's submission in response to the 2022 RFP, as a result of which responsive documents to this request have already been produced. Aetna will review the Plan's production of Aetna's proposal and will supplement the Plan's production to the extent it is incomplete.

2. Machine-readable files containing Aetna's in-network rates and out-of-network allowed amounts for all providers located in North Carolina as of November 22, 2022. This request

includes a request for all required information identified by 26 C.F.R. § 54.9815-2715A3(b)(1).

RESPONSE: Aetna objects to the extent the foregoing request seeks documents in addition to Aetna’s proposal in response to the 2022 RFP and the machine-readable files identified in 26 C.F.R. § 54.9815-2715A3(b)(1) in effect on November 22, 2022, because it is not reasonably calculated to lead to the discovery of admissible evidence under Rule 26(b)(1) of the North Carolina Rules of Civil Procedure. Specifically, any documents in addition to Aetna’s proposal in response to the 2022 RFP and the machine-readable files identified in 26 C.F.R. § 54.9815-2715A3(b)(1) were neither available to nor requested by the Plan in connection with its evaluation of Aetna’s proposal and award of the TPA Contract to Aetna. Moreover, Aetna is not aware of any legal authority that would have required the Plan to evaluate this information. Therefore, the documents requested are immaterial to whether the Plan violated N.C. Gen. Stat. § 150B-23(a). Aetna further objects to the extent this request asks Aetna to produce the machine-readable files required by 26 C.F.R. § 54.9815-2715A3(b)(1) and which are currently in effect, as those files are publicly posted on Aetna’s website and the burden of deriving the information Blue Cross seeks from those documents is the same for Blue Cross as it is for Aetna. Aetna also objects to the extent this request seeks insight into the mental impressions of counsel.

Subject to and without waiving the foregoing objections, there are no documents responsive to this request. Machine readable files required by 26 C.F.R. § 54.9815-2715A3(b)(1) are updated monthly, and there is no requirement that group health plans and health insurance issuers retain machine-readable files from prior months. Accordingly, Aetna has not retained the machine-readable files in effect on November 22, 2022. Moreover, Aetna’s in-network and out-of-network allowed amounts are plan specific. Therefore, there are no machine-readable files containing universal in-network and out-of-network allowed amounts for providers located in North Carolina.

3. Documents sufficient to show the name, address, National Provider Identifier (NPI), Taxpayer Identification Number, and network status for each provider that you identified as part of your proposed provider network in response to the 2022 RFP.

RESPONSE: On May 1, 2023, Respondent produced Aetna’s submission in response to the 2022 RFP, which included a Provider Listing tab in Attachment A-2.a containing the name, address, NPI number, Tax Identification Number, and network status for providers in Aetna’s network, as a result of which documents responsive to this request have already been produced.

4. The letters of intent (as that term is used in Section 1.2.1 of Attachment A of the 2022 RFP) and rate agreements for providers listed in your Cost Proposal with a NetStatus of “L,” that were binding at the time of the repricing.

RESPONSE: Aetna objects to this request because it is not reasonably calculated to lead to the discovery of admissible evidence under Rule 26(b)(1) of the North Carolina Rules of Civil Procedure. Specifically, Aetna did not submit any “letters of intent” or “rate agreements” to the Plan with its proposal because it was not required to do so by the RFP. Accordingly, the Plan did not review or assess Aetna’s “letters of intent” or “rate

agreements” in conjunction with its evaluation of the proposals submitted in response to the RFP, and Aetna is not aware of any legal authority that would have required the Plan to do so. Additionally, Aetna’s agreements with providers were not otherwise available to the Plan. Therefore, the documents requested are immaterial to whether the Plan violated N.C. Gen. Stat. § 150B-23(a). Aetna is withholding documents based on the foregoing objection. Aetna also objects to the extent this request seeks insight into the mental impressions of counsel. Aetna further objects to this request to the extent it asks for confidential commercial or other confidential or sensitive information or other material that would qualify for protection under Rule 26(c) of the North Carolina Rules of Civil Procedure and/or Sections 261 through 264 of the Federal Health Insurance Portability and Accountability Act of 1996, Public Law 104-191, and 45 CFR Parts 1690 and 164. Aetna is not withholding documents solely on the basis that they contain confidential commercial information.

5. All documents related to Aetna’s ability and efforts to enter into contracts with the providers listed in your Cost Proposal with a NetStatus of “L”.

RESPONSE: Aetna objects to this request because it is not reasonably calculated to lead to the discovery of admissible evidence under Rule 26(b)(1) of the North Carolina Rules of Civil Procedure. Specifically, any “documents related to Aetna’s ability and efforts to enter into contracts with the providers listed in” its cost proposal with a NetStatus of “L” were neither available to nor requested by the Plan in connection with its evaluation of Aetna’s proposal and award of the TPA Contract to Aetna. Moreover, Aetna is not aware of any legal authority that would have required the Plan to evaluate the information in any such documents. Therefore, the documents requested are immaterial to whether the Plan violated N.C. Gen. Stat. § 150B-23(a). Aetna also objects to the extent this request seeks documents protected by attorney-client privilege or the work product doctrine. Aetna further objects to this request as overbroad, unduly burdensome, duplicative, and disproportionate to the needs of the case to the extent it requests “all” documents related to Aetna’s ability and efforts to enter into contracts with the providers listed in its Cost Proposal with a NetStatus of “L.” Aetna is withholding documents based on the foregoing objections. Aetna also objects to this request to the extent it asks for confidential commercial or other confidential or sensitive information or other material that would qualify for protection under Rule 26(c) of the North Carolina Rules of Civil Procedure and/or Sections 261 through 264 of the Federal Health Insurance Portability and Accountability Act of 1996, Public Law 104-191, and 45 CFR Parts 1690 and 164. Aetna is not withholding documents solely on the basis that they contain confidential commercial information.

6. All documents that relate to, show, or support Aetna’s confirmation of any of the following technical requirements stated on Attachment L of the 2022 RFP: 5.2.3.2(b)(iii), 5.2.6.2(b)(xvi), 5.2.7.2(b)(xxiv)(1)-(4), and 5.2.8.2(b)(v)). This request includes all internal and external communications related to Aetna’s ability and efforts to comply with these technical requirements.

RESPONSE: Aetna objects to this request because it is not reasonably calculated to lead to the discovery of admissible evidence under Rule 26(b)(1) of the North Carolina Rules

of Civil Procedure. Specifically, any internal documents and communications or documents and communications that post-date the contract award, and which “relate to, show, or support Aetna’s confirmation” of the technical requirements listed in the above request were neither available to nor requested by the Plan in connection with its evaluation of Aetna’s proposal or award of the TPA Contract to Aetna. Moreover, Aetna is not aware of any legal authority that would have required the Plan to evaluate the information in any such documents. Therefore, the documents requested are immaterial to whether the Plan violated N.C. Gen. Stat. § 150B-23(a). Aetna also objects to the extent this request seeks documents protected by attorney-client privilege or the work product doctrine. Aetna also objects to this request as overbroad, unduly burdensome, duplicative, and disproportionate to the needs of the case to the extent it requests “all” documents that relate to, show, or support Aetna’s confirmation of the above technical requirements. Aetna is withholding documents based on the foregoing objections. Aetna further objects to this request to the extent it asks for confidential commercial or other confidential or sensitive information or other material that would qualify for protection under Rule 26(c) of the North Carolina Rules of Civil Procedure and/or Sections 261 through 264 of the Federal Health Insurance Portability and Accountability Act of 1996, Public Law 104-191, and 45 CFR Parts 1690 and 164. Aetna is not withholding documents solely on the basis that they contain confidential commercial information.

Subject to and without waiving the foregoing objections, to the best of its knowledge, Aetna did not have external communications with the Plan between August 30, 2022 and December 14, 2022 regarding Aetna’s ability and efforts to comply with the technical requirements referenced in this request.

7. All communications between you and the Plan related to the 2022 RFP.

RESPONSE: Aetna objects to this request because it is not reasonably calculated to lead to the discovery of admissible evidence under Rule 26(b)(1) of the North Carolina Rules of Civil Procedure and because the phrase “related to the 2022 RFP” is vague and ambiguous. Specifically, documents related to the implementation of the 2022 RFP were not available to or considered by the Plan in connection with its decision to award the TPA Contract to Aetna. Therefore, documents related to the implementation of the 2022 RFP are immaterial to whether the Plan violated N.C. Gen. Stat. § 150B-23(a). Aetna further objects to the extent this request seeks communications protected by attorney-client privilege, the common interest doctrine, and/or the work product doctrine. Aetna also objects to this request as overbroad, unduly burdensome, and disproportionate to the needs of the case to the extent it requests “all” communications between Aetna and the Plan related to the 2022 RFP. Aetna is withholding documents based on the foregoing objections. Aetna further objects to this request to the extent it asks for confidential commercial or other confidential or sensitive information or other material that would qualify for protection under Rule 26(c) of the North Carolina Rules of Civil Procedure and/or Sections 261 through 264 of the Federal Health Insurance Portability and Accountability Act of 1996, Public Law 104-191, and 45 CFR Parts 1690 and 164. Aetna is not withholding documents solely on the basis that they contain confidential commercial information.

Subject to and without waiving the foregoing objections, Aetna will produce communications with the Plan from January 1, 2022 through December 14, 2022 concerning the 2022 RFP.

8. All communications between you and the Plan during the implementation period for the TPA Contract.

RESPONSE: Aetna objects to this request because it is not reasonably calculated to lead to the discovery of admissible evidence under Rule 26(b)(1) of the North Carolina Rules of Civil Procedure. Specifically, communications between the Plan and Aetna during the implementation period for the TPA Contract post-date the agency actions challenged by Blue Cross and could not have had any bearing on the Plan's decision to award the TPA Contract to Aetna. Therefore, the communications requested are immaterial to whether the Plan violated N.C. Gen. Stat. § 150B-23(a). Aetna further objects to the extent this request seeks communications protected by attorney-client privilege, the common interest doctrine, and/or the work product doctrine. Aetna also objects to this request as overbroad, unduly burdensome, and disproportionate to the needs of the case to the extent it requests "all" communications between Aetna and the Plan during the implementation period for the TPA Contract. Aetna is withholding documents based on the foregoing objections. Aetna further objects to this request to the extent it asks for confidential commercial or other confidential or sensitive information or other material that would qualify for protection under Rule 26(c) of the North Carolina Rules of Civil Procedure and/or Sections 261 through 264 of the Federal Health Insurance Portability and Accountability Act of 1996, Public Law 104-191, and 45 CFR Parts 1690 and 164. Aetna is not withholding documents solely on the basis that they contain confidential commercial information.

9. All joint-defense agreements, or common-interest agreements, or similar agreements between you and the Plan.

RESPONSE: Aetna objects to this request because it seeks documents protected by attorney-client privilege, the common interest doctrine, and/or the work product doctrine. Aetna further objects to this request because it is not reasonably calculated to lead to the discovery of admissible evidence under Rule 26(b)(1) of the North Carolina Rules of Civil Procedure. Specifically, Aetna and the North Carolina Department of State Treasurer, including the Plan as a division of the Department, executed a Joint Defense and Common Interest Agreement on March 7, 2023, recognizing a common interest in defending the contract award to Aetna as of January 12, 2023—the date that Blue Cross filed a bid protest letter with the Plan. This Joint Defense and Common Interest Agreement postdates the challenged agency action, has no bearing on any party's claims or defenses, and knowledge of the terms of this Joint Defense and Common Interest Agreement will not lead to the discovery of relevant evidence by Blue Cross. Aetna is withholding the Joint Defense and Common Interest Agreement based on the foregoing objections.

10. All communications between you and Segal related to the 2022 RFP.

RESPONSE: Aetna will produce all written communications with Segal related to the 2022 RFP.

11. All data files or documents that the Plan or Segal provided to you in connection with the 2022 RFP.

RESPONSE: Aetna will produce all documents or files provided by the Plan or Segal in connection with the 2022 RFP.

12. All documents containing, reflecting, or referring to any comparison or analysis of the provider networks of Aetna and either Blue Cross NC or UMR, Inc.

RESPONSE: Aetna objects to this request because it is not reasonably calculated to lead to the discovery of admissible evidence under Rule 26(b)(1) of the North Carolina Rules of Civil Procedure. Specifically, “documents containing, reflecting, or referring to any comparison or analysis of” Aetna’s provider network with Blue Cross’s or UMR’s networks were neither available to nor requested by the Plan in connection with its evaluation of Aetna’s proposal or its decision to award the TPA Contract to Aetna. Moreover, Aetna is not aware of any legal authority that would have required the Plan to evaluate the information in the documents requested. Therefore, the documents requested are immaterial to whether the Plan violated N.C. Gen. Stat. § 150B-23(a). Aetna further objects to the extent this request seeks documents protected by attorney-client privilege, the common interest doctrine, and/or the work product doctrine. Aetna also objects to this request as overbroad, unduly burdensome, duplicative, and disproportionate to the needs of the case to the extent it requests “all” documents containing, reflecting, or referring to any comparison or analysis of the provider networks of Aetna and either Blue Cross or UMR. Aetna is withholding documents based on the foregoing objections. Aetna further objects to this request to the extent it asks for confidential commercial or other confidential or sensitive information or other material that would qualify for protection under Rule 26(c) of the North Carolina Rules of Civil Procedure and/or Sections 261 through 264 of the Federal Health Insurance Portability and Accountability Act of 1996, Public Law 104-191, and 45 CFR Parts 1690 and 164. Aetna is not withholding documents solely on the basis that they contain confidential commercial information.

13. All documents containing, reflecting, or referring to any analysis related to or substantiating either of the following statements in the January 25, 2023 letter from Jim Bostian to North Carolina legislators: “more than 98% of the claims the State Health Plan paid were to providers currently in Aetna’s network” and “more than 98% of the total dollar value of the claims the State Health Plan paid were paid to providers currently in Aetna’s network.”

RESPONSE: Aetna objects to this request because it is not reasonably calculated to lead to the discovery of admissible evidence under Rule 26(b)(1) of the North Carolina Rules of Civil Procedure. Specifically, any statements made after the Plan awarded the TPA Contract on December 14, 2022 are immaterial to the Plan’s award decision, and any documents containing, reflecting, or referring to any analysis related to or substantiating those statements are likewise immaterial to the extent they post-date the award or were not considered by or available to the Plan at the time of the award decision. Therefore, the documents requested have no bearing on whether the Plan violated N.C. Gen. Stat. § 150B-23(a). Aetna further objects to the extent this request seeks documents protected by attorney-client privilege, the common interest doctrine, and/or the work product doctrine.

Aetna also objects to this request as overbroad, unduly burdensome, duplicative, and disproportionate to the needs of the case to the extent it requests “all” documents containing, reflecting, or referring to any analysis related to or substantiating statements made by James Bostian on January 25, 2023. Aetna is withholding documents based on the foregoing objections. Aetna further objects to this request to the extent it asks for confidential commercial or other confidential or sensitive information or other material that would qualify for protection under Rule 26(c) of the North Carolina Rules of Civil Procedure and/or Sections 261 through 264 of the Federal Health Insurance Portability and Accountability Act of 1996, Public Law 104-191, and 45 CFR Parts 1690 and 164. Aetna is not withholding documents solely on the basis that they contain confidential commercial information.

14. All documents that show the underlying formulas or calculations that you used or relied on in preparing the price guarantees in your Cost Proposal in response to the 2022 RFP.

RESPONSE: Aetna objects to this request because it is not reasonably calculated to lead to the discovery of admissible evidence under Rule 26(b)(1) of the North Carolina Rules of Civil Procedure. Specifically, any documents showing the underlying formulas or calculations that Aetna used to prepare its price guarantees were neither available to nor requested by the Plan in conjunction with its evaluation of Aetna’s proposal and decision to award the TPA Contract to Aetna. Moreover, Aetna is not aware of any legal authority that would have required the Plan to consider such information. Therefore, the documents requested are immaterial to whether the Plan violated N.C. Gen. Stat. § 150B-23(a). Aetna further objects to the extent this request seeks documents protected by attorney-client privilege, the common interest doctrine, and/or the work product doctrine. Aetna also objects to this request as overbroad, unduly burdensome, duplicative, and disproportionate to the needs of the case to the extent it requests “all” documents that show the formulas or calculations employed by Aetna in preparing the price guarantees in its Cost Proposal. Aetna is withholding documents based on the foregoing objections. Aetna further objects to this request to the extent it asks for confidential commercial or other confidential or sensitive information or other material that would qualify for protection under Rule 26(c) of the North Carolina Rules of Civil Procedure and/or Sections 261 through 264 of the Federal Health Insurance Portability and Accountability Act of 1996, Public Law 104-191, and 45 CFR Parts 1690 and 164. Aetna is not withholding documents solely on the basis that they contain confidential commercial information.

15. Documents sufficient to show your policy(ies) for paying claims received by out-of-network providers, including rate tables, formulas, and any documentation showing the methodologies applied and rates that would be paid according to Aetna subscriber agreements.

RESPONSE: Aetna objects to this request because it is not reasonably calculated to lead to the discovery of admissible evidence under Rule 26(b)(1) of the North Carolina Rules of Civil Procedure. Specifically, the documents requested were neither available to nor requested by the Plan in connection with its evaluation of Aetna’s proposal and its decision to award the TPA Contract to Aetna. Moreover, Aetna is not aware of any legal authority that would have required the Plan to consider the information in the documents requested. Therefore, the requested documents are immaterial to whether the Plan violated N.C. Gen.

Stat. § 150B-23(a). Aetna further objects to the extent this request seeks documents protected by attorney-client privilege, the common interest doctrine, and/or the work product doctrine. Aetna is withholding documents based on the foregoing objections. Aetna further objects to this request to the extent it asks for confidential commercial or other confidential or sensitive information or other material that would qualify for protection under Rule 26(c) of the North Carolina Rules of Civil Procedure and/or Sections 261 through 264 of the Federal Health Insurance Portability and Accountability Act of 1996, Public Law 104-191, and 45 CFR Parts 1690 and 164. Aetna is not withholding documents solely on the basis that they contain confidential commercial information.

16. All communications referring to possible savings or other advantages with respect to the TPA Contract based on your affiliation with Caremark PCS Health, LLC (CVS) or CVS's contract to serve as the Plan's pharmacy benefit manager.

RESPONSE: Aetna objects to this request because it is not reasonably calculated to lead to the discovery of admissible evidence under Rule 26(b)(1) of the North Carolina Rules of Civil Procedure. Specifically, and to the extent there are any internal communications responsive to this request, those communications were neither available to nor considered by the Plan in connection with its evaluation of Aetna's proposal or decision to award the TPA Contract to Aetna. Therefore, the documents requested are immaterial to whether the Plan violated N.C. Gen. Stat. § 150B-23(a). Aetna further objects to the extent that this request seeks production of communications after December 14, 2022, as such communications could not have had any bearing on the Plan's decision to award the TPA Contract to Aetna. Aetna also objects to the extent this request seeks documents protected by attorney-client privilege, the common interest doctrine, and the work product doctrine. Aetna further objects to this request to the extent it asks for confidential commercial or other confidential or sensitive information or other material that would qualify for protection under Rule 26(c) of the North Carolina Rules of Civil Procedure and/or Sections 261 through 264 of the Federal Health Insurance Portability and Accountability Act of 1996, Public Law 104-191, and 45 CFR Parts 1690 and 164. Aetna is not withholding documents solely on the basis that they contain confidential commercial information.

Subject to and without waiving the foregoing objections, to the best of Aetna's knowledge, there are no documents responsive to this request. However, to the extent Aetna had communications with the Plan between January 1, 2022 and December 14, 2022 referring to possible savings or other advantages with respect to the TPA Contract based on Aetna's affiliation with Caremark PCS Health, LLC (CVS) or CVS's contract to serve as the Plan's pharmacy benefit manager, they will be produced.

This the 10th day of May, 2023.

WYRICK ROBBINS YATES & PONTON LLP

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Counsel for Respondent-Intervenor

Aetna Life Insurance Company

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing **AETNA LIFE INSURANCE COMPANY'S RESPONSES TO BLUE CROSS BLUE SHIELD OF NORTH CAROLINA'S FIRST SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS** on the following via electronic transmission:

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This the 10th day of May, 2023.

By: /s/ Lee M. Whitman
Lee M. Whitman

*Counsel for Respondent-Intervenor
Aetna Life Insurance Company*

EXHIBIT 3

Account Management

Overview and Expectations

The Plan seeks to partner with a Vendor that has the experience, knowledge, and resources to support all the services outlined in this RFP. ~~The~~ Vendor must be transparent when partnering with the Plan on initiatives or providing internal processes, data, or other information, as requested by the Plan. ~~The~~ Vendor must also show a willingness to develop custom networks and product solutions to support the Plan. Finally, ~~the~~ Vendor must be responsive and have the resources to support Plan operations, implementations, and ongoing data needs.

~~The~~ Vendor confirmed the following in the Minimum Requirements:

- Vendor has provided services to at least one (1) public or private self-funded client with more than ~~one hundred thousand~~ (100,000) covered lives. ~~The~~ Vendor shall provide the Plan with contact information for one (1) such client to complete a reference call related to the services in this RFP.
- Vendor will have three (3) current self-funded clients complete Exhibit 1, "Vendor References," and submit it ~~to the Plan no later than XXXX~~ in accordance with the instructions and by the due date in Exhibit 1.
- Vendor has one (1) or more current or former administrative services only (ASO) clients with more than 25,000 Medicare Primary members.
- Vendor will exercise loyalty and a duty of care to the Plan and its Members in performing its responsibilities under this Contract. Vendor must assume and exercise the same fiduciary responsibility established in N.C.G.S. § 135-48.2 for the State Treasurer, Executive Administrator, and Board of Trustees.
- Vendor will provide subject matter experts, not just account management resources, to work directly with Plan and Plan vendor staff.
- Vendor has a "firewall" between its TPA services operations and any other service operations, such as a ~~pharmacy~~ Pharmacy Benefit ~~manager~~ Manager (PBM), consulting group or any other services.

Resources

~~The~~ Vendor shall confirm it will provide a dedicated resource for each of the following roles.

- **Account Executive** – Responsible for overall account relationship including strategic planning in relation to plan performance, consultative services, recommendations for benefit design and cost containment opportunities, and contract oversight.
- **Operations Director** – Provides oversight of Members Services, Claims Services, Enrollment and Group Set- Up.

Commented [VD1]: Sharon – I'm concerned that with only a handful of exceptions, this SOW only asks Vendors to confirm statements to provide services (very few "describe", "provide" statements). This RFP does not allow Vendors to demonstrate their abilities to provide services. This will not allow the Evaluation Committee to *evaluate* and score the responses accordingly. Is the assumption that Vendors who meet the minimum requirements are very qualified and competent to perform services under the contract, and there is less need to evaluate their abilities?

If a Vendor confirms they will perform per the RFP and has the lowest cost, they will be awarded the contract. If during implementation or soon thereafter, the Plan realizes the awarded Vendor is unable to perform, even though they agreed they could, what will the Plan do? Is this a risk the Plan is willing to take on?

I understand the Plan's Leadership feels this different approach to writing a RFP and evaluating responses will be quicker, but I wonder about the outcome of this approach. Guess we'll know in a few months! 😊

Commented [SS2]: Caroline, at some point we need to calculate the number of points for each section to ensure we set up the Evaluation Tool correctly. There are multiple sections that have many sub-bullets and it is not always clear if they will be assigned a point or not. Nor is it clear if the Vendor is expected to confirm the main bullet or each sub-bullet.

Commented [SS3]: Caroline, what is the purpose of repeating the MRs in the Technical Section?

If we keep these here, we need to ensure they match the final version in the MR section.

Commented [SS4]: Contracts will update Exhibit 1 to include the appropriate instructions and due date.

Commented [SS5]: Do we want biographies for each resource?

Commented [SS6]: Do we need to include "Premium Billing Manager?"