

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.)

**RESPONDENT-INTERVENOR'S MEMORANDUM IN
SUPPORT OF ITS MOTION FOR PARTIAL SUMMARY JUDGMENT**

NOW COMES Respondent-Intervenor Aetna Life Insurance Company ("Aetna"), by and through its attorneys of record, and submits this Memorandum in Support of its Motion for Partial Summary Judgment filed contemporaneously herewith.

INTRODUCTION

Respondent North Carolina State Health Plan for Teachers and State Employees ("State Health Plan" or "Plan") issued a request for proposals ("RFP") for third-party administrative services ("TPA Services") on August 30, 2022 ("2022 TPA RFP"). On December 14, 2022, consistent with the written recommendation of the Evaluation Committee, and pursuant to the unanimous vote of its Board of Trustees, the State Health Plan awarded the contract to provide TPA Services ("TPA Contract") to Aetna. Accordingly, for the first time in over 40 years,

Petitioner Blue Cross and Blue Shield of North Carolina (“Blue Cross NC”) will no longer provide third-party administrative services (“TPA Services”) to the State Health Plan.

Awoken from its decades-long sense of security by this loss, Blue Cross NC now seeks reversal of the State Health Plan’s decision to change its vendor for TPA Services primarily by challenging the structure and terms of the 2022 TPA RFP after fully participating in the RFP process without raising any concerns. These belated challenges are untimely and improper. The 2022 TPA RFP required Vendors to raise “questions, issues, or exceptions regarding any term, condition, or other component” of the RFP *before* proposals were due. Blue Cross NC failed to observe this mandatory requirement, and for the reasons stated below, has waived its right to raise these challenges in post-award litigation.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

I. 2022 TPA RFP

The State Health Plan last issued an RFP for the TPA Contract in 2019 (“2019 TPA RFP”), which resulted in an award to Blue Cross NC. (R. Watson Dep. 15:6–8, 16–18.) Services under the contract awarded pursuant to the 2019 TPA RFP began on January 1, 2022, with the initial term ending on December 31, 2024, and the possibility for two optional one-year terms in the State Health Plan’s sole discretion. (2019 TPA RFP at 10, 22; *see also* R. Watson Dep. 30:10–12.) On April 5, 2022, only three months into Blue Cross NC’s performance of the contract awarded pursuant to the 2019 TPA RFP, the State Health Plan informed Blue Cross NC that it would putting the TPA Contract out for bid for a 2025 go-live date mainly due to “the disappointing FACETS transition [(Blue Cross NC’s new claims processing system)], lack of confidence in issue resolution and general[ly] the lack of cooperation and support relative to data transparency[.]”

(Dep. Ex. 20; *see also* D. Jones Dep. 256:5–266:18; Blue Cross NC 30(b)(6) Dep. 36:9–37:2; Dep. Ex. 21.)

On May 9, 2022, Aetna first learned that the State Health Plan declined to exercise the two option years under Blue Cross NC’s current contract, and that the TPA Contract would instead be put out to bid. (Aetna 30(b)(6) Dep. 59:6–17.) The State Health Plan met with prospective Vendors in June 2022 to discuss the upcoming RFP, including modernizations to the procurement process, and to give Vendors the opportunity to ask questions. (*See* D. Jones Dep. 44:3–45:13, 59:6–7, 246:7–251:1; *see also* Dep. Ex. 13 at ¶¶ 7–25; R. Watson Dep. 40:5–41:1; Blue Cross NC 30(b)(6) Dep. 263:25–265:22; Aetna 30(b)(6) Dep. 118:1–120:16.) While Aetna met with the State Health Plan twice before the issuance of the 2022 TPA RFP, (D. Jones Dep. 52:2–5), Blue Cross NC only met with the State Health Plan once, (Blue Cross NC 30(b)(6) Dep. 44:3–12). According to Aimee Forehand, the Associate Vice President of Blue Cross NC’s State Health Plan Segment, (Blue Cross NC 30(b)(6) Dep. 9:1–3), prior to the issuance of the 2022 TPA RFP, Blue Cross NC’s main “focus at that time was really on fixing all the problems we had related to the [FACETS] migration. . . . We were trying to do everything we could to solve those problems so that perhaps it wouldn’t go out to bid.” (Blue Cross NC 30(b)(6) Dep. 13:9–14.)

On August 30, 2022, the State Health Plan issued the 2022 TPA RFP. (Dep. Ex. 5 at 1.) The 2022 TPA RFP included two phases. First, all prospective Vendors were asked to confirm that they could meet all Minimum Requirements of the 2022 TPA RFP. (*Id.* at 13.) Vendors that did not meet the Minimum Requirements were disqualified from further consideration, whereas the Vendors that confirmed all Minimum Requirements were invited to submit cost and technical proposals. (*Id.*) The technical proposal was scored out of 310 points. (*Id.* at 24.) Vendors were asked to complete Attachment L: Technical Requirements Response, by marking “confirm” or

“does not confirm” for each of the 310 Technical Requirements and instructed that “[u]nder no circumstances will narrative or text be accepted as a response.” (*Id.* at 118; *see also* Dep. Ex. 37.)

The cost proposal was scored out of 10 points. (Dep. Ex. 5 at 24.) The 2022 TPA RFP explained that three components of the cost proposals would be scored: network pricing (six (6) points), administrative fees (two (2) points), and network pricing guarantees (two (2) points). (*Id.* at 24–25.) With respect to scoring administrative fees, the 2022 TPA RFP provides:

2) Administrative Fees – two (2) points

- a) Projected administrative fees will be calculated for each Vendor based on their response to the cost specifications.
- b) The highest ranked (or lowest administrative fees) proposal will receive the full two (2) points allocated to this section.
- c) All other proposals will be ranked and may receive one (1) or zero (0) points based on their administrative fees in comparison to the lowest administrative fee proposal and the other proposals.

(*Id.* at 25.) With respect to network pricing guarantees, the 2022 TPA RFP provides:

3) Network Pricing Guarantees – two (2) points

- a) Proposals will be evaluated and ranked based on their proposed network pricing guarantees. The value of the pricing guarantees will be based on the combination of the competitiveness of the guaranteed targets and the amount placed at risk.
- b) The proposal that offers the network pricing guarantees with the greatest value will be ranked the highest and will receive the full two (2) points allocated to this section.
- c) All other proposals will be ranked and may receive one (1) or zero (0) points based on the value of their proposed pricing guarantees in comparison to the highest ranked proposal and the other proposals.

(*Id.*)

For the network pricing component of the cost proposal, Vendors were given a claims repricing file containing the State Health Plan’s claims experience for calendar year 2021 and were

asked to reprice each claim line of that file “based on provider contracts in place, or near-future contract improvements bound by letters of intent, at the time of the repricing.” (*Id.* at 83.) The 2022 TPA RFP did not request, require or instruct the Vendors to submit any provider contracts or letters of intent used in their repricing of the 2021 claims file.

The 2022 TPA RFP states that the cost and technical proposals would each be given 50% weight, (*id.* at 24), and the Vendors’ proposals would be ranked separately based on their technical scores out of 310 points and their cost scores out of 10 points:

The Vendors will be ranked in descending order based on the total points earned. *The Vendor earning the least points **out of the total 310** will receive the rank of one (1).* The bids will fall in line according to total scored points, with *the Vendor earning the most points **out of the total 310** receiving the highest rank.* Should two (2) Vendors earn the same score in *technical points*, they will be given equal rank.

...

The Vendors will be ranked in descending order *based on the total cost proposal points earned.* *The Vendor earning the least cost proposal points **out of the total 10** will receive the rank of one (1).* The bids will fall in line according to total cost proposal points, with *the Vendor earning the most points **out of the total 10** receiving the highest rank.* Should two Vendors earn the same score in the cost proposals, they will be given equal rank.

(*Id.* at 24–25 (emphasis added).)

The 2022 TPA RFP also mandated that, to the extent a Vendor had any questions, issues or exceptions to any term, condition or other aspect of the RFP, that Vendor *must* timely submit such questions, issues or exceptions to the State Health Plan in the form of written questions.

Section 2.3 of the 2022 TPA RFP provides:

*If Vendors have questions, issues, or exceptions regarding any term, condition, or other component within this RFP, those **must** be submitted as questions in accordance with the instructions in Section 2.5 PROPOSAL QUESTIONS. **If the State determines that any changes will be made as a result of the questions asked, then such decisions will be communicated in the form of an Addendum.*** The State may also elect to leave open the possibility for later negotiation and amendment of specific provisions of the Contract that have been addressed during the question-and-answer period.

...

If a Vendor desires modification of the terms and conditions of this solicitation, it is urged and cautioned to inquire during the question period, in accordance with the instructions in this RFP, about whether specific language proposed as a modification is acceptable to or will be considered by the State.

(*Id.* at 11 (emphasis added). The 2022 TPA RFP defines “must” as “that which is a mandatory requirement.” (*Id.* at 20.)

Under Section 2.4, the schedule for the 2022 TPA RFP included two question submission deadlines: September 12, 2022 for “Written Minimum Requirements Questions,” and October 10, 2022 for “All Written Questions.” (*Id.* at 11–12.) Consistent with Section 2.3 and 2.4 of the 2022 TPA RFP, on September 16th and October 14th, 2022, the Plan issued addenda responding to the Vendors’ questions. (*See* Dep. Ex. 43; 2022 TPA RFP Add. 2.) **It is undisputed that Blue Cross NC did not ask any questions objecting to the terms or scoring methodology of the 2022 TPA RFP.** (Dep. Exs. 41–42; *see also* Blue Cross NC 30(b)(6) Dep. 269:7–271:13.)

Though four Vendors submitted questions regarding the minimum requirements, only Aetna, Blue Cross NC, and UMR, Inc. (“UMR”) ultimately submitted proposals in response to the 2022 TPA RFP. (*See* D. Jones Dep. 45:9–13; Cigna Min. Reqs. Questions.) The State Health Plan awarded the TPA Contract to Aetna pursuant to the recommendation of its evaluation committee, and the unanimous vote of its Board of Trustees. (Dep. Ex. 86 at 4–5.)

II. Blue Cross NC’s Protest and Appeal to the Office of Administrative Hearings

On January 12, 2023, Blue Cross NC submitted a bid protest letter to the State Health Plan, arguing that the Plan’s evaluation metrics and process were unsound, challenging the Award to Aetna, and requesting a bid protest meeting. (Blue Cross NC Protest.) On January 20, 2023, the Plan’s Interim Executive Administrator, Samuel Watts, sent Blue Cross NC written notice denying its request for a protest meeting and explaining that a protest meeting would serve no purpose. (Plan’s Resp. to Blue Cross NC’s Protest.)

On February 16, 2023, Blue Cross NC filed a Petition for Contested Case Hearing in the Office of Administrative Hearings in Durham County, North Carolina, restating the arguments in its bid protest letter primarily challenging the design of the 2022 TPA RFP, and asking this Tribunal: (1) to order that the TPA Contract be awarded to Blue Cross NC; and (2) in the alternative, vacate the Award to Aetna and order the Plan to issue a new RFP. The Parties have exchanged interrogatories, requests for production of documents, and requests for admission; and have taken the depositions of fact and putative expert witnesses. All discovery closed on December 1, 2023, and this contested case is now ripe for disposition by summary judgment.

STANDARD OF REVIEW

Summary judgment is appropriate if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.” N.C. Gen. Stat. § 1A–1, Rule 56(c). A tribunal may enter partial summary judgment. *Id.* at Rule 56(a); *see also Hill Truck Rentals, Inc. v. Hubler Rentals*, 26 N.C. App. 175, 215 S.E.2d 398 (1975). N.C. Gen. Stat. § 150B-33(b)(3a) authorizes this Tribunal to rule on motions for summary judgment. *See also* 26 N.C.A.C. 03 .0115.

“A fact is material only if it constitutes a legal defense to a charge, or would affect the result of the action, or its resolution would prevent the party against whom it is asserted from prevailing on the point at issue.” *Hilliard v. N.C. Dept. of Corr.*, 173 N.C. App. 594, 598, 620 S.E.2d 14, 18 (2005). “A genuine issue of material fact is one that can be maintained by substantial evidence. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion and means more than a scintilla or a permissible

inference[.]” *Ussery v. Branch Banking and Trust Co.*, 368 N.C. 325, 335, 777 S.E.2d 272, 278–79 (2015) (internal quotation marks and citations omitted).

Under the North Carolina Administrative Procedures Act, to prevail on the merits, a petitioner must demonstrate that the respondent agency:

has deprived the petitioner of property, has ordered the petitioner to pay a fine or civil penalty, or has otherwise substantially prejudiced the petitioner’s rights and that the agency did any of the following:

- (1) Exceeded its authority or jurisdiction.
- (2) Acted erroneously.
- (3) Failed to use proper procedure.
- (4) Acted arbitrarily or capriciously.
- (5) Failed to act as required by law or rule.

N.C. Gen. Stat. § 150B-23(a).

There are no issues of material fact relating to the Blue Cross NC waiver of its ability to challenge the terms of the 2022 TPA RFP under N.C. Gen. Stat. § 150B-23(a). Therefore, Aetna is entitled to partial summary judgment, and Blue Cross NC’s claims should be dismissed to the extent they are predicated on the express terms of the solicitation.

ARGUMENT

Over the course of this litigation, Blue Cross NC has mounted numerous and evolving challenges to the terms of the 2022 TPA RFP. Blue Cross NC alleges that the 2022 TPA RFP: **(1)** failed to fully explain how points would be awarded for administrative fees and network pricing guarantees in the cost component of the Vendors’ proposals, (Pet. Contested Case Hearing, Attach. A, ¶¶ 19, 21, 66–70); **(2)** failed to allocate points amongst the cost criteria according to their relative importance, (*id.* at Attach. A, ¶¶ 60–63); **(3)** assigned equal points to all technical requirements though they were of varying importance, (*id.* at Attach. A, ¶¶ 34, 75–76); **(4)** did not allot any points to separately scoring the Vendors’ networks, (*id.* at Attach. A, ¶¶ 8, 46; *see also* Dep. Ex. 417 at 5); **(5)** included an irrational overall scoring methodology that assigned greater

weight to “minor technical features” than “the cost of providing medical care” to Plan members, (*id.* at Attach. A, ¶ 113); (6) barred narrative responses to the technical requirements, (*id.* at Attach. A, ¶ 31); and (7) included technical requirements that were impossible for all Vendors to confirm or that were not in the best interest of the State Health Plan’s members, (*id.* at Attach. A, ¶ 36).

Additionally, Blue Cross NC has forecasted that it intends to offer the following opinion testimony through its putative experts, Mary Karen Wills and Gregory Russo:

- “The Plan’s final scoring methodology for the RFP—a methodology in which the Plan assigned the vendors one set of points on each of the two components, then ranked the vendors based on that first set of points, . . . —failed to follow best practices for procurements.” (Dep. Ex. 403 at 2);
- “The Plan’s final scoring methodology for the cost component of the RFP—a methodology that was not explained in the RFP, . . . —did not follow best practices for procurements.” (*Id.*);
- “The Plan’s approach to the technical component of the RFP—an approach in which the Plan barred all narrative responses, . . . —did not follow best practices for procurements.” (*Id.*); and
- The State Health Plan erred by failing to validate Aetna’s repricing submission by reviewing the Aetna’s agreements with providers. (*See* Dep. Ex. 417 at 5; *see also* Pet. Contested Case Hearing, Attach. A, ¶¶ 53–59).

Each of these opinions is predicated upon disagreement with the express terms of the 2022 TPA RFP. For the reasons stated below, under the terms of the 2022 TPA RFP and consistent with the rule observed in federal bid protest litigation, Blue Cross NC has waived its ability to challenge the terms of the 2022 TPA RFP as agency error under N.C. Gen. Stat. § 150B-23(a)(1)–(5) because it failed to timely raise these supposed infirmities during the procurement process as required by Section 2.3–2.5 of the 2022 TPA RFP.

I. Blue Cross NC has Waived its Right to Challenge the Terms of the 2022 TPA RFP under Sections 2.3–2.5 and Laches.

Blue Cross NC has waived its claim predicated on the terms of the 2022 TPA RFP under

the doctrine of laches and the express terms of the 2022 TPA RFP. “Laches is an affirmative defense that bars a claim where the ‘lapse of time has resulted in some change in the condition of the property or in the relations of the parties which would make it unjust to permit the prosecution of the claim[.]’ ” *Town of Cameron v. Woodell*, 150 N.C. App. 174, 176–77, 563 S.E.2d 198, 200–01 (2002) (quoting *Taylor v. N.C. Dep’t of Transp.*, 86 N.C. App. 299, 304, 357 S.E.2d 439, 441–42 (1987)). The party asserting laches bears the burden of proving that:

(1) the claimant knew of the existence of the grounds for the claim; (2) the delay was unreasonable and must have worked to the disadvantage, injury or prejudice of the party asserting the defense; [and] (3) the delay of time has resulted in some change in the condition of the property or in the relations of the parties[.]

Id. at 177, 563 S.E.2d at 201 (citing *Abernethy v. Town of Boone Bd. of Adjustment*, 109 N.C. App. 459, 464, 427 S.E.2d 875, 878 (1993)). Here, the elements of laches have been met.

A. First, Blue Cross NC knew of the existence of the grounds for its claims on the day the 2022 TPA RFP was issued.

Blue Cross NC knew of the existence of terms in the 2022 TPA RFP it now complains of on August 30, 2022. Blue Cross NC alleges that the 2022 TPA RFP failed to fully explain how points would be awarded for administrative fees and network-pricing guarantees because the 2022 TPA RFP did not state any criteria for deciding whether a vendor that did not quote the lowest administrative fees or the network pricing guarantees with the greatest value would get one point or zero points. (Pet. Contested Case Hearing, Attach. A, ¶ 19, 21, 66–67; *see also* Dep. Ex. 403 at ¶ 46.) Additionally, Blue Cross NC alleges that the 2022 TPA RFP does not define the terms “greatest value” or “value” with respect to scoring network pricing guarantees. (Pet. Contested Case Hearing, Attach. A, ¶¶ 19, 21, 67–70.) Blue Cross NC further alleges that it was arbitrary and capricious for the State Health Plan to assign the same scoring weight to administrative fees and network pricing guarantees because administrative fees are “actual costs to the Plan,” whereas

network pricing guarantees “are conditional rebates of part of a TPA vendor’s administrative fees—rebates that would be made only if a vendor did not meet its pricing commitments.” (*Id.* at Attach. A, ¶¶ 60–63; *see also* Dep. Ex. 403 at ¶ 33.) Each of these supposed infirmities in the 2022 TPA RFP are apparent from the stated scoring methodology for network pricing guarantees and administrative fees, and the definitions section of the 2022 TPA RFP. (*See* Dep. Ex. 5 at 16–21, 25.)

To the extent Blue Cross NC complains that the State Health Plan did not score the Vendors’ networks as a distinct component of the Vendors’ proposals,¹ (Pet. Contested Case Hearing, Attach. A, ¶ 46; *see also* Dep. Ex. 417 at 5 (opining that the differences between the Vendors’ networks “received no weight in the scoring of the proposals”)), this too was apparent from the scoring criteria set forth in Section 3.4 of the 2022 TPA RFP, (*see* Dep. Ex. 5 at 23–25). Similarly, it was apparent that each of the 310 technical requirements was worth one point, which Blue Cross NC contests on the basis that the technical “requirements varied significantly in their importance to the Plan and its members.” (Pet. Contested Case Hearing, Attach. A, ¶¶ 34, 75–76.) The 2022 TPA RFP states that the technical proposal would be scored out of 310 points, (Dep. Ex. 5 at 24), and the Vendors were prompted to confirm 310 technical requirements, (*see* Dep. Ex. 37).

Next, Blue Cross NC claims that the State Health Plan’s overall method for scoring and ranking the Vendors’ proposals under the 2022 TPA RFP is unsound, arbitrary, and capricious because “a vendor whose cost proposal would save the Plan tens of millions of dollars compared to the next-lowest-cost proposal could receive a lower overall score simply because it did not

¹ Instead, the State Health Plan made network management a minimum requirement, (Dep. Ex. 5 at 37–38), and evaluated network access through the Vendors’ repricing submissions, which were scored under the 2022 TPA RFP, (*see id.* at 24–25; *see also* Dep. Ex. 215 (“If . . . [the Vendors] have access problems, it should show up in the pricing in those areas.”)).

confirm a handful of minor technical requirements.” (Pet. Contested Case Hearing, Attach. A, ¶ 113.) Running with this theme, Blue Cross NC’s putative expert witness, Ms. Wills, opines in her report that “[t]he Plan’s final scoring methodology for the RFP—a methodology in which the Plan assigned the vendors one set of points on each of the two components, then ranked the vendors based on that first set of points, . . . —failed to follow best practices for procurements.” (Dep. Ex. 403 at 2.) Ms. Wills states that, in her experience, “the best practice for a final scoring methodology is instead to assign ranks only once, at the end of the scoring process, after combining each vendor’s points (properly weighted) for all components of the RFP.” (Dep. Ex. 403 at 5.) Again, it was clear from the expressly stated scoring methodology in the 2022 TPA RFP that the Vendors’ proposals would not be scored and ranked in this manner. Instead, it provided that the Vendors’ cost and technical proposals would be scored and ranked separately. (*See* Dep. Ex. 5 at 24–25.)

Finally, Blue Cross NC contends that the 2022 TPA RFP included seven Technical Requirements that were impossible for all Vendors to confirm or were not in the best interest of the State Health Plan’s members. (Pet. Contested Case Hearing, Attach. A, ¶ 36.) Notably, **Blue Cross NC was the only vendor that failed to confirm these any of the technical requirements.** (*See* D. Jones Dep. 109:15–18; *see also* Dep. Ex. 37.) The technical requirements were listed in the 2022 TPA RFP and were no surprise to Blue Cross NC. (Dep. Ex. 5 at 44–74.) Blue Cross NC also argues that the State Health Plan erred by barring narrative responses to validate the Vendors’ responses to the technical requirements. (Pet. Contested Case Hearing, Attach. A, ¶ 31; *see also* Dep. Ex. 403 at 2.) Blue Cross NC was aware that the State Health Plan was moving at least some of the requirements from narrative responses to “confirm” or “does not confirm” responses as early as a meeting with the State Health Plan in June 2022 before the issuance of the

RFP. (See R. Watson Dep. 41:11–22; see also Blue Cross NC 30(b)(6) Dep. 264:21–265:10, 266:24–268:2.) Once issued, the 2022 TPA RFP made abundantly clear that, with respect to the technical requirements, “[u]nder no circumstances will narrative or text be accepted as a response.” (Dep. Ex. 5 at 118; see also Dep. Ex. 37.) Accordingly, each of the terms of the 2022 TPA RFP that Blue Cross NC now challenges in this litigation was apparent on the face of the RFP.

B. Second, Blue Cross NC’s delay in challenging the terms of the 2022 TPA RFP was unreasonable because Blue Cross NC failed to raise any questions, issues, and exceptions to the 2022 TPA RFP during the procurement process as required by Sections 2.3–2.5 of the 2022 TPA RFP.

Blue Cross NC’s delay in objecting to the terms of the 2022 TPA RFP is unreasonable because Blue Cross NC failed to redress its concerns in a timely manner pursuant to the procedures in the 2022 TPA RFP. Section 2.3 of the 2022 TPA RFP states:

If Vendors have questions, issues, or exceptions regarding any term, condition, or other component within this RFP, those must be submitted as questions in accordance with the instructions in Section 2.5 PROPOSAL QUESTIONS. If the State determines that any changes will be made as a result of the questions asked, then such decisions will be communicated in the form of an Addendum.

...

If a Vendor desires modification of the terms and conditions of this solicitation, it is urged and cautioned to inquire during the question period, in accordance with the instructions in this RFP, about whether specific language proposed as a modification is acceptable to or will be considered by the State.

(Dep. Ex. 5 at 11 (emphasis added)). The 2022 TPA RFP defines “must” as “that which is a mandatory requirement.” (*Id.* at 20.)

The instructions in Section 2.5 of the 2022 TPA RFP provide:

Written questions shall be emailed to Vanessa.Davison@nctreasurer.com with a copy to SHPContracting@nctreasurer.com by the date and time specified above [in Section 2.4 RFP Schedule]. **When submitting Minimum Requirements questions**, Vendors should enter “RFP # 270-20220830TPAS: Minimum Requirements Questions” as the subject for the email. **When submitting all other questions**, Vendors should enter “RFP #270-20220830TPAS Questions.”

...

Questions received prior to the submission deadline dates in Section 2.4, the State's response, and any additional terms deemed necessary by the State will be posted in the form of an Addendum to this RFP[.]

(*Id.* at 12–13 (emphasis added).)

Consistent with Section 2.5 of the 2022 TPA RFP, the RFP Schedule in Section 2.4 included two question submission deadlines: September 12, 2022 for questions pertaining to the Minimum Requirements, and October 10, 2022 for submission of all questions, (*id.* at 11–12), and the State Health Plan issued two addenda to the 2022 TPA RFP responding to questions submitted by the Vendors, (Dep. Ex. 43; 2022 TPA RFP Add. 2).

Blue Cross NC concedes that the procedures in Section 2.3–2.5 of the RFP allowed Blue Cross NC to seek *clarification* from the State Health Plan. (See Blue Cross NC 30(b)(6) Dep. 171:19–21 (“We understood the Q and A periods to be related to items that we needed to better understand.”); see also Blue Cross NC’s Reply Supp. Mot. Compel Discovery from Aetna at 5 (“Aetna pins its argument on sections 2.3 and 2.5 of the RFP. . . . Those sections, however, merely allowed bidders to ask questions to *clarify the RFP’s requirements*.” (emphasis original))). Section 2.5 indeed provides in part that:

Upon review of the RFP documents, Vendors may have questions to clarify or interpret the RFP in order to submit the best proposals possible. To accommodate the Proposal Questions process, Vendors **shall** submit any such questions by the above due dates. Questions received after these dates will not receive a response.

(Dep. Ex. 5 at 12 (emphasis added).) Under the 2022 TPA RFP, “shall . . . [d]enotes that which is a mandatory requirement.” (*Id.* at 20.) Nevertheless, Blue Cross NC did not ask the State Health Plan to clarify how it would determine whether to award one (1) or zero (0) points for administrative fees and network pricing guarantees, or how the State Health Plan defined “greatest value” and “value” for the purpose of scoring network pricing guarantees, though it now claims

these supposed ambiguities constituted agency error resulting in prejudice to Blue Cross NC. (Dep. Exs. 41–42; *see also* Blue Cross NC 30(b)(6) Dep. 269:7–271:13.)

Aetna contends and Blue Cross NC denies that Section 2.3 of the 2022 TPA RFP required Vendors to submit as questions, all “*issues, or exceptions regarding any term, condition, or other component within this RFP.*” (Dep. Ex. 5 at 11 (emphasis added.) Aetna’s and Blue Cross NC’s contrary positions on the scope of Section 2.3 do not create an issue of material fact because the language of the 2022 TPA RFP is clear and “the specific facts of the case [do not] create more than one reasonable interpretation of the” RFP. *Galloway as Tr. of Melissa Galloway Snell Living Tr. Dated May 1, 2018 v. Snell*, 384 N.C. 285, 288, 885 S.E.2d 834, 836 (2023) (quoting *Register v. White*, 358 N.C. 691, 695, 599 S.E.2d 549, 553 (2004)). Simply stated, this is an issue for the Tribunal to decide based upon the plain language of Section 2.3 of the 2022 TPA RFP.

North Carolina “courts adhere to the central principle of contract interpretation that [t]he various terms of the [contract] are to be harmoniously construed, and if possible, every word and every provision is to be given effect.” *WakeMed v. Surgical Care Affiliates, LLC*, 243 N.C. App. 820, 824, 778 S.E.2d 308, 312 (2015) (quoting *In re Foreclosure of a Deed of Trust*, 210 N.C. App. 409, 415, 708 S.E.2d 174, 178 (2011)). “It is presumed that each part of the contract means something.” *Id.* (quoting *Brown v. Lumbermens Mut. Casualty Co.*, 326 N.C. 387, 393, 390 S.E.2d 150, 153 (1990)).

Aetna’s interpretation is the only harmonious reading that gives every provision meaning and effect. Blue Cross NC would have the statement in Section 2.5 that “Vendors may have questions to clarify or interpret the RFP,” (Dep. Ex. 5 at 12), limit and nullify the separate mandate in Section 2.3 that, “If Vendors have questions, issues, or exceptions regarding any term, condition, or other component within this RFP, those must be submitted as questions in accordance with

the instructions in Section 2.5 PROPOSAL QUESTIONS[,]” (*id.* at 11). Read together, Sections 2.3 and 2.5 require Vendors to submit any questions to clarify and interpret the 2022 TPA RFP, *and* to submit any issues, or exceptions regarding any term, condition, or other component within the 2022 TPA RFP as questions according to the instructions in Section 2.5.

Moreover, Aetna’s understanding of Section 2.3–2.5 is consistent with the State Health Plan’s and other Vendors’, (*see, e.g.*, C. Smart Dep. 220:21–221:14; *see also, e.g.*, D. Jones Dep. 47:14–23, 290:14–292:6; Dep. Ex. 13 at ¶¶ 26–27), and Blue Cross NC was put on notice of the scope of Sections 2.3–2.5 *before* the deadline to submit all questions on October 10, 2022. During the minimum requirements question period, the State Health Plan was asked whether it was willing to amend, modify, and reconsider minimum requirements in the 2022 TPA RFP. The State Health Plan’s answers were issued to all Vendors in the first addendum to the 2022 TPA RFP on September 16, 2022 (“First Addendum”), which Blue Cross NC signed on September 21, 2022. (Dep. Ex. 43 at 1, 5.)

Specifically, in questions 11, 12, 14, and 16 in the First Addendum, one or more of the vendors other than Aetna or Blue Cross NC asked the State Health Plan whether it was willing to amend or negotiate several minimum requirements, and in questions 14 and 16, even explained why amendment was being requested. (Dep. Ex. 43 at 7; *see also* Cigna Min. Reqs. Questions.) The State Health Plan responded to the substance of each of these questions. (Dep. Ex. 43 at 7.) The First Addendum also confirmed that the State Health Plan would not answer questions it deemed improper. In questions 31–35, and 43 in the First Addendum, one or more of the Vendors asked questions about the technical requirements during the minimum requirements period. (Dep. Ex. 43 at 10–12; *see also* Cigna Min. Reqs. Questions.) The State Health Plan responded: “Questions pertaining to Section 5.2 ‘Technical Proposal Requirements and Specifications’ and

Attachment L ‘Technical Requirements Response’ should be submitted by Vendors that pass the Minimum Requirements as set forth in Section 2.4 RFP Schedule.” (Dep. Ex. 43 at 10–12.)

Therefore, even if the Tribunal concludes that the 2022 TPA RFP is ambiguous as to the scope of the questions required by Section 2.3 of the 2022 TPA RFP, which Aetna denies, **Blue Cross NC had actual notice that Vendors were required to raise any objections or requested modifications to the terms of the 2022 TPA RFP more than three weeks before the October 10, 2022 deadline to submit all questions.** (See Dep. Ex. 5 at 12; *see also* Blue Cross NC 30(b)(6) Dep. 269:7–17 (acknowledging that other vendors asked whether the State Health Plan would consider eliminating or modifying certain requirements in the 2022 TPA RFP)). Though Blue Cross had an express opportunity to raise any issues or concerns during the question-and-answer periods before proposals were due and at a time when the State Health Plan could have modified the 2022 TPA RFP, it did not do so. (See Dep. Exs. 41–42; *see also* Blue Cross NC 30(b)(6) Dep. 269:7–271:13; R. Watson Dep. 43:13–44:6.)

C. Third, Blue Cross NC’s delay has worked to Aetna’s disadvantage and resulted in a change in the relations of the parties.

Blue Cross NC’s delay in challenging the terms of the 2022 TPA RFP has also “worked to the disadvantage” of Aetna and resulted in “change in the condition of the property or in the relations of the parties.” *Town of Cameron*, 150 N.C. App. at 177, 563 S.E.2d at 201 (citing *Abernethy*, 109 N.C. App. at 464, 427 S.E.2d at 878). Aetna has now been awarded the TPA Contract, which has a two-year implementation period with contract performance to begin on January 1, 2025. (Dep. Ex. 5 at 12.) Blue Cross NC seeks equitable relief in this contested case, asking this Tribunal: (1) to order that the TPA Contract be awarded to Blue Cross

NC; and (2) in the alternative, vacate the Award to Aetna and order the Plan to conduct a new RFP process. (Pet. Contested Case Hearing, Attach. A, 25.)

If Blue Cross NC prevails on the merits of its claims challenging the terms of the 2022 TPA RFP and is granted either form of relief, Aetna will have to absorb its significant implementation costs as it has no recourse against the State Health Plan under the 2022 TPA RFP if the award is reversed. As of the date of this filing, Aetna is halfway through the implementation period, and has already invested significant human and financial resources to meet the technical requirements of the 2022 TPA RFP and to be ready to begin providing services on January 1, 2025. (See Aetna 30(b)(6) Dep. 94:4–16, 183:18–21, 193:7–21, 204:5–7; *see also* C. Smart Dep. 197:16–24; Aetna’s Mot. to Intervene, ¶ 5.) Therefore, each of the elements of a laches defense have been met, and Blue Cross NC has waived the ability to challenge the terms of the 2022 TPA RFP as agency error under N.C. Gen. Stat. § 150B-23(a).

II. Federal Tribunals Universally Recognize Waiver of Untimely Objections to the Terms of a Solicitation in Bid Protest Litigation.

Application of a waiver rule in the context of bid protest litigation is soundly supported by precedent. It is firmly established in federal tribunals that parties that fail to object to the terms of a solicitation before the close of the bidding process have waived their ability to do so in subsequent litigation. *See Blue Gold Fleet v. U.S.*, 492 F.3d 1308, 1313 (Fed. Cir. 2007) (hereinafter *Blue & Gold*) (recognizing as a matter of first impression, “a waiver rule, which requires that a party object to solicitation terms during the bidding process”); *see also M.R. Pittman Grp., LLC v. U.S.*, 68 F.4th 1275 (Fed. Cir. 2023) (reaffirming the *Blue & Gold* waiver rule); FAR 33.103(e) (“*Protests based on alleged apparent improprieties in a solicitation shall be filed before bid opening or the closing date for receipt of proposals.*” (emphasis original)); 4 CFR § 21.2(a)(1) (“Protests based upon alleged improprieties in a solicitation which are apparent prior to bid

opening or the time set for receipt of initial proposals shall be filed prior to bid opening or the time set for receipt of initial proposals.”).

The waiver rule observed in federal bid protest litigation is consistent with Sections 2.3–2.5 of the 2022 TPA RFP, and while the above-cited federal law is not controlling on this Tribunal, the North Carolina Office of Administrative Hearings has repeatedly turned to federal caselaw for guidance in procurement cases. *See, e.g., Long Term Care Mgmt. Servs. LLC d/b/a Liberty Healthcare & Rehabilitative Servs. v. N.C. Dep’t of Admin.*, 21 DOA 04990, 2023 WL 2424088 (N.C.O.A.H. Jan 13, 2023) (citing extensively to federal procurement decisions to determine the substantial prejudice standard for procurement cases); *see also, e.g., Eds Info. Servs., LLC v. Office of Info. Tech. Servs. & N.C. Dep’t of Health & Human Servs.*, 04 DHR 1066, 2005 WL 1413576 (N.C.O.A.H. Jan. 11, 2005) (similar).

The opinion in *Blue & Gold* is particularly instructive. Like the 2022 TPA RFP, the solicitation prospectus at issue in *Blue & Gold* required questions to be submitted in writing before the proposal submission deadline, and provided that answers would be distributed to all potential offerors. *Blue Gold Fleet*, 492 F.3d at 1311. Like Blue Cross NC, one of the losing offerors in *Blue & Gold*, Blue Gold Fleet, challenged the terms of the solicitation for the first time in a post-award protest. *Id.* at 1313 (noting that though Blue Gold Fleet characterized its claim as a challenge to the evaluation of the proposals, its “argument is properly characterized as a challenge to the terms of the solicitation”). The United States Court of Appeals for the Federal Circuit (“Federal Circuit”) held that Blue Gold Fleet waived its opportunity to challenge the terms of the solicitation because:

a party who has the opportunity to object to the terms of a government solicitation containing a patent error and fails to do so prior to the close of the bidding process waives its ability to raise the same objection subsequently in a bid protest action in the Court of Federal Claims.

Id. at 1313, 1315.

The Federal Circuit cited four reasons for its holding: (1) recognition of a waiver rule furthers the statutory mandate that the Court of Federal Claims “shall give due regard to . . . the need for expeditious resolution of the action” under 28 U.S.C. § 1491(b)(3); (2) the patent ambiguity doctrine, which provides that, “where a government solicitation contains a patent ambiguity, the government contractor has ‘a duty to seek clarification from the government, and its failure to do so precludes acceptance of its interpretation’ in a subsequent action against the government,” applies “with equal force in the bid protest context;” (3) the Government Accountability Office (“GAO”) has adopted a similar waiver rule in 4 C.F.R. § 21.2(a)(1), to which the Court of Federal Claims has cited approvingly; and (4) the Federal Circuit has “recognized the utility of the analogous doctrines of laches and equitable estoppel to bar relief even though there is no applicable statute of limitations,” and the Court of Federal Claims has applied the doctrines of laches and equitable estoppel in the bid protest context. *Id.* at 1313–15.

The persuasive authorities on which the *Blue & Gold* Court relied are equally compelling in this case. The *Blue & Gold* Court extended the patent ambiguity doctrine, which governs post-award contract disputes between contractors and the government to the bid protest context, explaining:

Under the doctrine [of patent ambiguity], where a government solicitation contains a patent ambiguity, the government contractor has “a duty to seek clarification from the government, and its failure to do so precludes acceptance of its interpretation” in a subsequent action against the government. *Stratos*, 213 F.3d at 1381 (quoting *Statistica*, 102 F.3d at 1582). ***This doctrine was established to prevent contractors from taking advantage of the government, protect other bidders by assuring that all bidders bid on the same specifications, and materially aid the administration of government contracts by requiring that ambiguities be raised before the contract is bid, thus avoiding costly litigation after the fact. Cmty. Heating Plumbing Co. v. Kelso***, 987 F.2d 1575, 1580 (Fed. Cir. 1993).

These reasons underlying the patent ambiguity doctrine apply with equal force in the bid protest context. ***In the absence of a waiver rule, a contractor with knowledge of a solicitation defect could choose to stay silent when submitting its first proposal. If its first proposal loses to another bidder, the contractor could then come forward with the defect to restart the bidding process, perhaps with increased knowledge of its competitors. A waiver rule thus prevents contractors from taking advantage of the government and other bidders, and avoids costly after-the-fact litigation.*** Accordingly, the same reasons underlying application of the patent ambiguity doctrine against parties to a government contract speak to recognizing a waiver rule against parties challenging the terms of a government solicitation.

Id. at 1313–14.

The *Blue & Gold* Court also pointed to decisions by the Court of Federal Claims, which have cited approvingly to GAO’s timeliness regulations. *See, e.g., id.* at 1314 (quoting *N.C. Div. of Servs. For the Blind v. U.S.*, 53 Fed. Cl. 147, 165 (2002) (concluding that if there is a “deficiency or problem in a solicitation . . . the proper procedure for the offeror to follow is not to wait to see if it is the successful offeror before deciding whether to challenge the procurement, but rather to raise the objection in a timely fashion”); *see also, e.g., Argencord Mach. Equip., Inc. v. U.S.*, 68 Fed. Cl. 167, 175 n.14 (2005) (“It would be inefficient and costly to authorize this remedy after offerors and the agency had expended considerable time and effort submitting or evaluating proposals in response to a defective solicitation. Vendors cannot sit on their rights to challenge what they believe is an unfair solicitation, roll the dice and see if they receive award [sic] and then, if unsuccessful, claims the solicitation was infirm.”). In short, a waiver rule aligns the interests of all parties to a procurement, protects the integrity and efficiency of that process, and guards against unnecessary protests and administrative appeals, which burden tribunals, deplete the resources of the agency and government contractors, and distract from implementation of the awarded contract. This rationale is sound in both federal and state procurements.

Furthermore, the *Blue & Gold* Court recognized that the laches and equitable estoppel doctrines, on which the Federal Circuit has relied to bar relief in the absence of statutes of limitation, are analogous to the waiver rule, *see Blue Gold Fleet*, 492 F.3d at 1314, and that the Court of Federal Claims has applied these analogous doctrines in the bid protest context, *see id.* at 1314–15 (citing *Wit Assocs., Inc. v. U.S.*, 62 Fed. Cl. 657, 662 n.5 (2004) (“[I]n some cases, serious delay in raising a claim may . . . lead to the imposition of laches.”); *CW Gov’t Travel, Inc. v. U.S.*, 61 Fed. Cl. 559, 568–69 (2004) (considering delay as part of laches analysis); *Software Testing Solutions, Inc. v. U.S.*, 58 Fed. Cl. 533, 535–36 (2003) (stating that delay may be considered in “the application of equitable doctrines such as laches”); *Miss. Dep’t of Rehab. Servs. v. U.S.*, 58 Fed. Cl. 371, 372–73 (2003) (same)).

The rationale supporting a waiver rule in the federal procurement context applies with equal force to the circumstances of this case, if not North Carolina procurements more broadly. As many federal courts have observed, without such a safeguard, vendors such as Blue Cross NC abuse the system, indifferent to the integrity of an RFP if awarded the contract but quick to cry wolf when they lose. Additionally, requiring vendors to raise design challenges to the terms of an RFP during the procurement does not place an undue burden on government contractors, as Blue Cross NC may argue. If, as Blue Cross NC contends in this case, an RFP contains defects so material that they rise to the level of agency errors under North Carolina’s Administrative Procedure Act and undermine the validity of the award made pursuant to that RFP, waiver of such challenges not timely raised during the procurement process is a just result.² Accordingly, Aetna

² In contrast, if a vendor’s challenge to an RFP’s terms is so technical that it is unduly burdensome for that vendor to raise during the procurement process and requires the assistance of experts to prove, that challenge likely improperly invades the arena of the agency’s discretion. *See CorVel Enter. Comp Inc v. N.C. Dep’t of Admin. Div. of Purchase & Contract*, 19 DOA 05891, 2021 WL 1087852 (N.C.O.A.H. Jan. 14, 2021) (Lassiter, ALJ) (“The reviewing body does not have authority

respectfully requests that the Tribunal grant Aetna's Motion for Partial Summary Judgment and dismiss Blue Cross NC's claims to the extent they are predicated on the express terms of the 2022 TPA RFP.

CONCLUSION

For the reasons set forth above and based upon the authorities cited herein, Aetna respectfully requests that the Tribunal grant Aetna's Motion for Partial Summary Judgment. Aetna further respectfully requests an in-person hearing pursuant to 26 NCAC 03 .0115(b) unless the Tribunal decides in its discretion to rule on the papers.

Respectfully submitted this the 15th day of December, 2023.

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to override decisions within general agency discretion when that discretion is exercised in good faith and in accordance with the law.” (citing *Lewis v. N.C. Dep’t of Human Res.*, 92 N.C. App. 737, 740, 375 S.E.2d 712, 714 (1989))).

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing **RESPONDENT-INTERVENOR'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR PARTIAL SUMMARY JUDGMENT** on the following via electronic transmission:

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