

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, )

BLUE CROSS NC'S  
PREHEARING STATEMENT

Respondent, )

and )

AETNA LIFE INSURANCE )  
COMPANY, )

Respondent-Intervenor. )

In accordance with the Tribunal’s order of February 16, 2023, petitioner Blue Cross and Blue Shield of North Carolina (Blue Cross NC) makes this prehearing statement.

1. ISSUES TO BE RESOLVED

Blue Cross NC has challenged the decision of the North Carolina State Health Plan for Teachers and State Employees (the Plan) to award the Plan’s 2025-2027 contract for third-party administrator services to Aetna Life Insurance Company.

Blue Cross NC made the lowest-cost proposal—by over \$44 million—for this contract. It also offered the Plan’s members the most comprehensive network of providers. Despite these facts, the Plan awarded the contract to Aetna instead of Blue Cross NC. The Plan made that award by applying arbitrary criteria, by failing to gather and consider critical information, and by using a distorted scoring system.

Because of those flaws, the process that led to this award was an improper procedure, and the Plan’s award to Aetna was erroneous, arbitrary, and capricious. Blue Cross NC was substantially prejudiced as a result.

2. BRIEF STATEMENT OF FACTS AND REASONS SUPPORTING THE ISSUES IN DISPUTE

The petition contains detailed factual allegations that support Blue Cross NC’s challenge to the Plan’s award. A summary of these allegations follows below.

A. The RFP process

The Plan issued the RFP on August 30, 2022. *See* Pet. Attach. A, Ex. 1. The RFP set a deadline of September 26 for responses to certain minimum requirements. Three vendors—Blue Cross NC, Aetna, and a unit of United Healthcare—satisfied those requirements and later responded to the full RFP. The vendors submitted their main proposals on November 7.

The RFP called for the proposals to answer questions in two categories: (1) cost and (2) technical requirements. The RFP stated that each vendor’s final score would weight these two categories equally.

The cost proposal had three parts: (1) a claims-repricing exercise, (2) administrative fees, and (3) network-pricing guarantees.

By the Plan’s own calculations, Blue Cross NC proposed the lowest cost of any vendor—the lowest by over \$44 million. The Plan’s records show the following combination of the vendors’ network pricing and administrative fees for the three-year term of the contract:

<b>Total Costs Proposed for 2025-2027 (rounded to the nearest \$100,000)</b>					
	<b>2025</b>	<b>2026</b>	<b>2027</b>	<b>Total</b>	<b>Difference from low bid</b>
<b>Blue Cross NC</b>	\$3,102,600,000	\$3,298,700,000	\$3,486,800,000	\$9,888,100,000	Low bid
<b>Aetna</b>	\$3,133,100,000	\$3,307,800,000	\$3,491,900,000	\$9,932,800,000	\$44,700,000
<b>United</b>	\$3,172,300,000	\$3,363,200,000	\$3,550,200,000	\$10,085,700,000	\$197,600,000

Even though Blue Cross NC was the low bidder by over \$44 million, the Plan awarded Blue Cross NC the same number of points on cost that the Plan awarded to Aetna.

On technical matters, the RFP required each vendor to give a yes-or-no answer on each of 310 requirements. A vendor received one point for each yes (“confirm”) answer and zero points for each no (“does not confirm”) answer. That scoring system meant that the Plan weighed each technical requirement the same, even though the requirements varied significantly in their importance to the Plan and its members.

Blue Cross NC said yes (“confirm”) to 303 of the 310 technical requirements. Blue Cross NC had good reasons for not confirming the remaining seven requirements. Blue Cross NC studied the wording of these seven technical

requirements and, for each, concluded that the requirement as phrased was technically impossible or not in the Plan's best interest for any vendor to provide. The Plan, however, refused to consider any explanation of why Blue Cross NC did not confirm these seven technical requirements.

Aetna and United received 310 points each for their technical proposals. Blue Cross NC received 303 points. Because the Plan awarded Aetna and Blue Cross NC the same number of points on their cost proposals, the Plan awarded the TPA contract to Aetna based on the seven-point difference on technical requirements, even though Blue Cross NC submitted the lowest-cost bid.

B. The protest letter

The RFP contained an administrative remedy: If a losing vendor wanted to protest the award, that vendor had to make a written request for a protest meeting with the Plan. The RFP set a deadline for that written request: 30 calendar days from the date that the Plan issued its award.

The Plan awarded the TPA contract to Aetna on December 14, 2022. On January 12, 2023, Blue Cross NC submitted to the Plan a timely and detailed written request for a protest meeting based on the information available to Blue Cross NC at the time.

On January 20, 2023, the Plan sent Blue Cross NC a letter denying the meeting request. The letter asserted that "a meeting to further discuss [Blue Cross NC's] protest of the award would serve no purpose."

Blue Cross NC timely filed its petition in this Tribunal on February 16, 2023.

C. Contested actions of the plan

1. Failure to score each vendor's network

For Plan members, a critical feature of the Plan is its network of health care providers. The Plan's TPA creates that network. If the network does not have enough high-quality providers, the Plan's members will wait longer and pay more for needed health care services.

The RFP's scoring system, however, did not score the vendors' provider networks. Because it treated the networks as only a minimum requirement, the RFP judged the networks on only a pass-fail basis.

Through that pass-fail approach, the RFP mistakenly treated Blue Cross NC's and Aetna's networks as equivalent. Blue Cross NC has significantly more provider locations than Aetna has in North Carolina overall. It also has more providers than Aetna has in almost every county in North Carolina.

The RFP's scoring system also assigned no points to whether the Plan's choice of a vendor would cause disruption to Plan members—for example, by forcing them to change providers. By failing to assign any points to this crucial factor, the Plan contradicted the RFP, which stated that the Plan sought a vendor that provided “a broad provider network with the least disruption.”

2. Failure to validate network-pricing proposals

During the evaluation of each vendor's network-pricing proposal, the Plan did not test the accuracy of any vendor's self-reported pricing or discounts. For example, the Plan could have cross-checked the self-reported discounts against

market data. The Plan did not do so. That choice had significant consequences. Available data shows that Aetna’s network pricing in North Carolina is higher than Blue Cross NC’s pricing.

Because the Plan did not validate the accuracy of Aetna’s network-pricing proposal, the Plan made a significant scoring error: It gave Aetna and Blue Cross NC the same number of points on network pricing. If the Plan had tested the accuracy of the pricing proposals, it would have awarded Blue Cross NC more points than Aetna in the network-pricing category.

### 3. Scoring of administrative fees and network-pricing guarantees

The RFP’s weights and scoring methods for the other two cost-proposal sections—administrative fees and network-pricing guarantees—were equally infirm.

For example, the RFP assigned the same scoring weight to the proposals for administrative fees and network-pricing guarantees. Administrative fees are actual costs to the Plan. Network-pricing guarantees, in contrast, are conditional rebates that are part of a TPA vendor’s administrative fees—rebates that would be paid to the Plan only if a vendor did not meet its pricing commitments.

There is no rational basis for the RFP to assign the same number of points to partial, conditional rebates (network-pricing guarantees) that it assigns to actual costs (administrative fees). A network-pricing guarantee is relevant only if the Plan’s TPA does not meet its promised pricing. Under Blue Cross NC’s existing

TPA contract with the Plan, Blue Cross NC has consistently met its contracted discount levels.

Had the administrative-fee element received more weight than the network-pricing-guarantee element, Blue Cross NC's overall cost proposal would have been ranked highest of any vendor. Blue Cross NC was the only vendor to receive the full number of points available for administrative fees, but Blue Cross NC and Aetna received the same total cost points. Thus, if the RFP had weighted administrative fees more heavily than network-pricing guarantees, Blue Cross NC would have received more total cost points than any other vendor.

The RFP compounded the problems from its illogical scoring method by using vague standards to score the administrative-fee proposals and network-pricing guarantees. On administrative fees, the RFP stated that the proposals that did not rank the highest "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." The RFP did not explain how the Plan would decide whether to award one or zero points to a given proposal.

On network-pricing guarantees, the RFP stated that the "proposal that offers the network pricing guarantees with the greatest value will be ranked the highest" and will receive two points. In this statement, the crucial term "greatest value" is undefined. The RFP also stated that a vendor that does not provide the "greatest value" through its network-pricing guarantee "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.” In this statement, the term “value” is undefined. Further, the RFP does not say how the Plan would decide whether to award one or zero points to a given proposal.

These vague standards had pivotal consequences. The Plan awarded Blue Cross NC zero points for its network-pricing guarantees. Blue Cross NC received the highest possible score for its network pricing and its administrative fees. Thus, if the Plan had awarded Blue Cross NC even one point on network-pricing guarantees, Blue Cross NC’s overall cost proposal would have been ranked the highest.

As these points show, the RFP’s weights and scoring methods for administrative fees and network-pricing guarantees were an improper procedure. Those weights and scoring methods led to an arbitrary, capricious, and erroneous award.

#### 4. Scoring of technical proposals

The scoring system for technical requirements presumed that all of the 310 technical requirements deserve equal weight. Technical requirements central to the proper functioning of the Plan’s TPA, however, are more important than minor administrative matters. The RFP’s scoring method did not take these differences into account.

In addition, the RFP did not ask any vendor about its capabilities, ideas, conditions, or limitations on any technical issue. The RFP stated that “[u]nder no circumstances will narrative or text from Vendor be accepted as a response.”

The Plan compounded the lack of technical information from vendors by declining to meet with any vendor to discuss the details of its proposal, even though the RFP allowed the Plan to do so.

The Plan scored the vendors' technical proposals by assigning one point to each "yes" answer and assigning zero points to each "no" answer. Through this scoring method, the RFP prioritized nominal adherence to the Plan's demands, even if those demands were impossible or counterproductive.

The Plan made no effort to validate or confirm whether any vendor can actually meet the technical requirements. Instead, it relied on untested "yes" responses. When it rejected Blue Cross NC's request for a protest meeting, the Plan stated that "[i]f Aetna was untruthful when it confirmed its ability to meet all the Plan's requirements, then the Plan will discover this during the next two years of implementation and during the term of the third-party administrative services contract." Through this statement, the Plan has conceded that it was willing to accept "yes" answers on faith and to sort out implementation issues and failures down the road, after the contract has already been awarded.

When Blue Cross NC made its technical proposal, it paid careful attention to the wording of each technical requirement. Blue Cross NC did not confirm the seven requirements that it could not confirm without additional discussion. The RFP penalized this attention to detail. Blue Cross NC received zero points for these seven responses. During a debriefing meeting two days after the award to Aetna

was announced, Plan officials told Blue Cross NC that it did not win the award because of those seven responses.

That scoring and decision-making method has no sound basis. By refusing to consider any explanation for Blue Cross NC's responses, the Plan made an uninformed decision—one at odds with the due diligence required in a decision of this magnitude. Had the RFP allowed Blue Cross NC to submit narrative explanations with its answers, those explanations would have shown the legitimate reasons why Blue Cross NC did not confirm seven technical requirements.

Blue Cross NC's petition explains in detail why Blue Cross NC did not confirm these seven technical requirements. *See* Pet. ¶¶ 85-106. For brevity, Blue Cross NC incorporates those explanations here. If the Plan had allowed Blue Cross NC to explain these points, Blue Cross NC would have done so. Then the Plan would have been able to assess each vendor's capabilities on these points based on complete information.

The Plan's decision to prohibit Blue Cross NC from providing this information prevented the Plan from fully evaluating Blue Cross NC as a vendor and rendered the Plan's decision erroneous, arbitrary, and capricious.

5. The RFP's overall method for ranking and scoring proposals

Finally, the formula that the Plan used to calculate each vendor's overall score and rank was unsound, arbitrary, and capricious.

Under the terms of the RFP, the Plan assigned a final cost score of three to the vendor with the cost proposal that received the highest overall score on the cost

elements of the RFP. The second-place vendor received a final score of two, and the last-place vendor received a final score of one. Under the Plan's scoring method, Blue Cross NC and Aetna tied and received a final cost score of three. As the vendor with the lowest-ranked cost proposal, United received a final cost score of one.

The RFP used the same method for assigning a final score to each vendor's technical proposal. The technical proposal that received the most points was assigned a final technical score of three, the second-place vendor received a final technical score of two, and the lowest-ranked vendor received a technical score of one. Because Aetna and United confirmed each of the 310 technical requirements, each of them received a final technical score of three. Blue Cross NC received a final technical score of one.

On the combination of the cost and technical scores, Aetna received a final score of six, while Blue Cross NC and United received final scores of four.

This scoring system has no rational basis, was an improper procedure, and was arbitrary and capricious. Under this scoring system, 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 confirm a handful of minor technical requirements. That happened here.

This statement of issues is based on the information Blue Cross NC has been able to discover to date. Blue Cross NC respectfully reserves the right to supplement this statement based on facts it learns through discovery or otherwise.

3. STATUTES, RULES, AND LEGAL PRECEDENT

The following statutes, rules, and legal precedents are known to Blue Cross NC to relate to one or more issues in this case:

- Article 3B of Chapter 135 of the North Carolina General Statutes;
- Article 3 of Chapter 150B of the North Carolina General Statutes; and
- Title 26, North Carolina Administrative Code, Chapter 3.

4. PROPOSED WITNESSES

Blue Cross NC identifies the following witnesses and categories of witnesses:

- persons who participated in the development and drafting of the 2022 RFP;
- persons who prepared Blue Cross NC's bid on the 2022 RFP;
- persons who prepared Aetna's bid on the 2022 RFP;
- persons on the committee (including its subcommittees) that the Plan constituted to evaluate bids on the 2022 RFP;
- persons associated with The Segal Company, Inc., who assisted the Plan with the 2022 RFP;
- current and former executive administrators of the Plan during the RFP time period;
- persons on the Plan's board of trustees;
- any other persons who participated in the evaluation and selection process for the 2022 RFP;
- persons who participated in the preparation or drafting of the Plan's response to Blue Cross NC's and United's respective bid-protest letters;
- testifying experts that any party identifies;
- the witnesses that the Plan and Aetna identify in their respective prehearing statements;

- any other witnesses that the Plan and Aetna identify in discovery; and
- any person that does not fall within the above-listed categories who is needed to address any issue that the Plan or Aetna raises at the hearing.

Blue Cross NC submits this list based on the information available to it as of the date of this statement. Blue Cross NC reserves the right to amend this list as discovery progresses.

5. DISCOVERY

The parties' counsel are engaged in discussions on a proposed discovery schedule, which Blue Cross NC anticipates will be submitted to the Tribunal on or before March 24, 2023 in connection with a proposed hearing date. If the parties do not reach agreement on any part of the schedule, the parties will describe the disagreements and provide the parties' competing proposals.

6. SCHEDULING ORDER AND HEARING

Blue Cross NC has not received a scheduling order, hearing date, or hearing location.

7. ATTORNEY REPRESENTATION

Undersigned counsel represent Blue Cross NC.

8. ESTIMATED LENGTH OF HEARING

Blue Cross NC anticipates that the hearing in this case will take one week. Blue Cross NC reserves the right to amend this estimate as discovery progresses.

Blue Cross NC further proposes that, at the close of expert discovery, the parties' counsel confer in good faith on the potential hearing length and submit their joint estimate to the Tribunal.

9. OTHER SPECIAL CONSIDERATIONS

Blue Cross NC plans to confer with the parties' counsel on the preparation and submission of a consent protective order that will govern the treatment in discovery of confidential business information.

Blue Cross NC reserves the right to amend this prehearing statement as discovery progresses.

This the 20th day of March, 2023.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing document was served on the following through the OAH electronic filing system at the electronic mailing addresses shown below:

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This 20th day of March, 2023.

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