

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.)

BLUE CROSS NC'S REPLY IN
SUPPORT OF MOTION TO COMPEL
DISCOVERY FROM AETNA

A central issue in this case is whether the North Carolina State Health Plan for Teachers and State Employees gathered the information needed to make an informed choice on its next third-party administrator. Blue Cross NC's petition alleges that the Plan did not do so. The Plan's 2022 request for proposals did not require—or even allow—bidders to explain how they would meet the RFP's technical requirements. The RFP also did not require bidders to submit the contracts and letters of intent that were the basis for the bidders' projected networks of health care providers. Nor did the RFP require any bidder to substantiate the pricing and discounts that the bidder promised to deliver.

In this motion to compel, the document requests in question bear directly on the above issues. Aetna does not seriously contest this point.

Aetna instead opposes this discovery by previewing its arguments on the merits. That preview, however, cannot change the fact that the requested discovery is reasonably calculated to lead to the discovery of admissible evidence. As Blue Cross NC's motion to compel and this reply show, all of the requested documents are related to a claim in Blue Cross NC's petition.

Aetna (joined by the Plan) also argues that the only documents that must be produced in discovery are the limited documents that the Plan reviewed when it chose the winning bidder. No North Carolina court, however, has ever accepted this argument in a procurement case.

Aetna's and the Plan's resistance to discovery clashes with the liberal standards that govern civil discovery. Adhering to those standards is especially vital in a case like this one, which involves a \$9 billion contract that will determine the health care of over 500,000 Plan members. Neither Aetna nor the Plan disputes that Blue Cross NC's proposal offered the lowest cost and broadest provider network offered by any bidder. *See Mot. to Compel* 1-2. Despite these points—and despite the fact that Aetna voluntarily asked to become a party to this case—Aetna has produced only 285 documents.

The document requests at issue are reasonably calculated to lead to the discovery of admissible evidence on the claims in the petition. Aetna does not argue that producing the requested documents would pose an undue burden. The fact-

discovery deadline in this case is only two months away. These points call for Aetna to produce documents in response to Blue Cross NC's requests.

ARGUMENT

Through its motion to compel, Blue Cross NC seeks (1) documents that formed the basis for Aetna's proposal and (2) documents related to Aetna's implementation of the TPA contract to date. As the motion to compel shows, these materials are directly relevant to Blue Cross NC's claims. Aetna's and the Plan's contrary arguments fail.

A. Discovery is not limited to documents that the Plan expressly considered in evaluating RFP submissions.

Aetna and the Plan argue that discovery in a bid protest is limited to information reviewed by the agency before the challenged decision. Aetna Br. 13; Plan Br. 9.

As Aetna concedes, however, no North Carolina court has accepted that argument. In fact, no North Carolina court has even held that *evidence* in a bid protest is limited to the materials that the agency reviewed in making its award, much less held that *discovery* is limited to those materials. *See* Aetna Br. 13.

Aetna therefore relies largely on federal procurement cases. *See id.* at 13-15. Those cases, however, focus on admissibility, not discovery, and are not controlling here in any event. *See id.*

Aetna's position also clashes with its prior representations to this Tribunal. When it asked to become a party to this case, Aetna told the Tribunal that Aetna

“may be able to provide relevant information that the Government does not possess.” Aetna Mot. to Intervene ¶ 17 (quoting *Mgmt. Sols. & Sys., Inc. v. United States*, 75 Fed. Cl. 820, 827 (Fed. Cl. 2007)). No law supports Aetna’s newfound refusal to produce that relevant information.

B. Aetna and the Plan cannot avoid discovery obligations by making arguments on the merits.

Aetna has also resisted Blue Cross NC’s discovery requests by previewing defenses on the merits. Those merits arguments do not change the controlling standards for discovery.

For example, Aetna argues that the Plan’s award is entitled to deference. *See* Aetna Br. 12. Whether the Plan’s RFP decision strayed from the controlling standards, however, is the ultimate merits question here. Blue Cross NC’s motion to compel does not ask the Tribunal to decide that question now. It simply asks for documents that will create a proper record for the Tribunal to decide that question.¹

Aetna also argues that Blue Cross NC has waived its arguments in this case.² *See id.* at 5-10. Aetna, however, cites no North Carolina case for the proposition

¹ The suggestion that the Plan is afforded near-absolute deference is incorrect. *See, e.g., Keefe Commissary Network, LLC v. N.C. Dep’t of Pub. Safety*, No. 21 CPS 04633, 2023 WL 3335618 (N.C. Ofc. Admin. Hrgs. Mar. 13, 2023) (holding that agency acted arbitrarily and capriciously in awarding contract for packaging services); *eDealer Servs. LLC v. N.C. Dep’t of Transp.*, No. 20 DOA 04356, 2021 WL 6752477 (N.C. Ofc. Admin. Hrgs. Dec. 29, 2021) (Lassiter, J.) (holding that agency procurement decision was arbitrary and capricious because agency engaged in a mere counting exercise on compliance with technical specifications and inappropriately focused on only seven of the 107 specifications at issue).

² The briefs filed by Aetna and the Plan both apply the mistaken premise that

that an affirmative defense on the merits can shield a party from producing documents that are relevant to a petitioner’s claim.³ Aetna instead leans again on non-controlling federal-procurement decisions. *See* Aetna Br. 7, n.1.

In any event, Aetna’s waiver argument is wrong. Aetna pins its argument on sections 2.3 and 2.5 of the RFP. *See id.* at 7. Those sections, however, merely allowed bidders to ask questions to *clarify the RFP’s requirements*. They do not say anything to preclude a later challenge to how the Plan *evaluated* the actual bids submitted.

It is telling that the Plan—the author of the RFP provisions that Aetna’s waiver argument invokes—does not join Aetna’s waiver argument. In fact, the affidavit of the Plan’s former executive director, Dorothy Jones, undermines Aetna’s waiver argument. In that affidavit, Ms. Jones testifies that by March 2022—five months before this RFP—“Plan leadership had reached consensus to implement a two-choice format for minimum requirements and technical requirements.” Ex. A to

Blue Cross NC has objected only to the design of the RFP. Blue Cross NC also alleges that the Plan’s implementation of the RFP and scoring of proposals were flawed and resulted in an arbitrary and capricious award. *See, e.g.*, Pet. ¶¶ 53-59 (discussing the Plan’s decision not to validate bidders’ network pricing proposals); *id.* ¶¶ 65-73 (discussing the Plan’s flawed scoring of pricing guarantees).

³ Neither case that Aetna has cited supports its novel waiver theory. Instead, they interpret the standard a petitioner must show to establish substantial prejudice on the merits. *See* Aetna Br. 7 n.1; *Long Term Care Mgmt. Servs. LLC v. N.C. Dep’t of Admin.*, No. 21 DOA 4990, 2023 WL 2424088, Conclusions of Law ¶ 32 (N.C. Ofc. Admin. Hrgs. Jan. 13, 2023); *EDS Info. Servs., LLC v. Ofc. of Info. Tech. Servs. & N.C. Dep’t of Health & Human Servs.*, No. 04 DHR 1066, 2005 WL 1413576, Conclusions of Law ¶ 4 (N.C. Ofc. Admin. Hrgs. Jan. 11, 2005).

Plan Br. (Jones Aff.) ¶ 15. As this testimony shows, the Plan had locked in its approach before the RFP went out; any objection to that approach would have been futile.

Aetna's waiver argument, moreover, would lead to untenable results. Under the theory Aetna argues here, a North Carolina agency could use *any* procedure in an RFP—no matter how arbitrary—and insulate that RFP from review by requiring bidders to ask about the agency's willingness to change the RFP's procedures during the bidding process, even if the agency had no willingness to make any changes. As Ms. Jones's testimony shows, that was the case for the Plan's decision not to allow narrative responses on the RFP's technical requirements.

At best for Aetna, then, the interpretation of sections 2.3 and 2.5 of the RFP, and the futility of any request to change the RFP's scoring, are fact questions to be decided based on discovery—not a basis for barring discovery.

Finally, Aetna has waived its waiver argument as a discovery objection by not including it in its discovery responses. *See* Ex. 2 to Mot. to Compel (Aetna's responses); *RPAC Racing, LLC v. JSG Partners, LLC*, No. 16 CVS 12896, 2017 WL 11506734, at *2 (N.C. Super. Ct. June 19, 2017) (holding that failure to make a timely objection to a request for production results in waiver of that objection).

The Plan, for its part, objects to discovery by making a different argument on the merits. It argues that “[n]othing in the record suggests that the Plan's design was arbitrary and capricious.” Plan Br. 10. But this case has little or no record yet. Document discovery has not been completed, and no depositions have been taken.

At this point in the case, the Plan cannot just assert that it will ultimately win on the merits and use that assertion as a basis to limit discovery.

The Plan concedes that “if Blue Cross could demonstrate that the design of the RFP was arbitrary and capricious, the discovery sought might be relevant.” Plan Br. 11 n.5. That statement shows the fallacy of the Plan’s argument: Blue Cross NC is seeking this discovery in part *to demonstrate how* the design of the RFP produced arbitrary and capricious results. Blue Cross NC’s petition alleges in detail how the RFP’s design was arbitrary and capricious. Pet. ¶¶ 45-114. The Plan cannot prevent discovery by helping itself to the conclusion that those allegations are false.

Finally, the Plan argues that “as long as the approach it chose [to the RFP] was reasonable,” Blue Cross NC cannot object to that approach. Plan Br. 9. That argument highlights why the discovery sought here is relevant. The discovery goes directly to whether the Plan’s decisions in designing, implementing, and scoring the RFP *were* reasonable.⁴ For example, the discovery will show the reasonable or unreasonable results of the Plan’s decision to accept the bidders’ promised networks on faith. That decision has created a risk that Plan members will not have enough high-quality doctors and other providers to care for them.

⁴ The Plan’s assertion that Blue Cross NC seeks to have this Tribunal substitute its judgment for the Plan’s is a variation of this same argument and fails for the same reasons. *See* Plan Br. 5.

In sum, the purpose of discovery is to ensure a proper record for the Tribunal to decide this case. Aetna and the Plan cannot prevent the development of that record by arguing that they will win on the merits.

C. The discovery sought from Aetna involves relevant and important issues.

Aetna and the Plan spend little time in their briefs on the actual categories of documents that Blue Cross NC has requested from Aetna. As shown below and in Blue Cross NC's motion to compel, these categories concern critical issues in this case.

1. The discovery will expose the problems with the Plan's decision not to consider detailed responses on technical requirements.

Aetna does not deny that Blue Cross NC was the low bidder here by \$44,000,000. As Aetna also admits, the Plan awarded the bid to Aetna largely because Blue Cross NC did not confirm seven of the 310 technical requirements in the RFP. Aetna Br. 2 (calling Blue Cross NC's answers "fatal").

Those admissions highlight two key fact issues in this case:

1. Why did the Plan refuse to accept any information from Blue Cross NC—its forty-year incumbent and the low-cost bidder—on these seven technical requirements?
2. What would the Plan have learned about Aetna's capabilities on these requirements if the Plan had looked into the details?

The petition in this case explains that some of these seven requirements appear to be impossible, while others clash with the interests of the Plan and its members. Documents that show Aetna's ability or inability to deliver on these seven technical requirements are directly relevant to those issues.

Aetna's efforts to rebut these points fail.

First, Aetna argues that because Blue Cross NC did not produce documents *to Aetna* on why Aetna cannot meet the seven technical requirements at issue, Aetna is excused from producing any documents on this topic. Aetna Br. 19-20. Aetna cites no authority in support of this novel theory of discovery. As far as Blue Cross NC is aware, none exists.

Next, Aetna argues that discovery on this issue is not allowed because nothing *on the face of Aetna's "yes" answers* raised questions on whether Aetna could or would comply with those requirements. *See* Aetna Br. 17. That argument, however, assumes away the fundamental problem with the Plan's evaluation of the RFP submissions. The Plan could have engaged in discussions with each bidder on the bidder's ability to comply with these requirements. *See* RFP § 3.3 (attached as Exhibit 1 to Blue Cross NC's Contested Case Petition). Instead, the Plan took Aetna's "yes" answers on faith. Discovery on the effects of that decision will show one reason why the decision was arbitrary and capricious.

2. The discovery will show the effects of the Plan's failure to verify the bidders' networks.

Discovery on the letters of intent that Aetna relied on as the basis for its proposal is likewise relevant.

Aetna's proposal relied on letters of intent with thousands of healthcare providers. Under the terms of the RFP, Aetna could only do so if those letters of intent were "legally-binding." Attachment A to RFP § 1.1.1.

Despite imposing that requirement, the Plan did not review any letters of intent when it scored the RFP and chose a winning bidder. In fact, the Plan did not even require the bidders to provide the letters of intent with their proposals. The Plan has thus never evaluated whether Aetna's letters of intent are legally binding.

The discovery Blue Cross NC is seeking here will show the effects of the Plan's decision to not verify this central feature of Aetna's proposal. If Aetna cannot provide the network of providers it has promised, the Plan's members will be harmed. As the Tribunal considers this case, it is entitled to assess that harm and the role of the Plan's lack of due diligence in causing the harm.

Finally, Aetna argues that Blue Cross NC has not alleged that Aetna's letters of intent are unenforceable. *See* Aetna Br. 20. On this point, Aetna is mistaken. The petition in this case expressly alleges that the Plan failed to verify the accuracy of Aetna's self-reported pricing and discounts. Pet. ¶¶ 55-56. Part of that lack of verification was the Plan's failure to verify the enforceability and terms of Aetna's letters of intent with providers.

3. The discovery will show the effects of the Plan's failure to validate Aetna's proposed network pricing.

As the petition discusses, publicly available information shows that Aetna's network pricing in North Carolina is higher than Blue Cross NC's. By accepting Aetna's network-pricing proposal at face value and making no effort to test its accuracy, the Plan wrongly awarded Aetna the same number of points on this cost element that it awarded Blue Cross NC. *See* Pet. ¶¶ 53-59. By discovering the terms of Aetna's letters of intent with providers, Blue Cross NC will show the harmful effects—and the magnitude of the effects—of those decisions by the Plan.

Aetna scarcely addresses this issue, and what it does say is incorrect. Aetna argues that it served a discovery request that asked Blue Cross NC to produce the publicly available pricing data referred to in its petition. Aetna Br. 20. Aetna claims that Blue Cross NC “produced no documents in response” to this request and therefore should not be entitled to take discovery on this topic. *Id.*

Aetna misstates Blue Cross NC's response. In response to Aetna's discovery request, Blue Cross NC specifically identified Uniform Data Submission (UDS) data on network pricing. *See* Aetna Br., Exhibit I, Response to Request for Production No. 7. UDS is a third party that collects data on providers' prices to health plans. If it chose to, the Plan could have used UDS data to verify the pricing in Aetna's proposal.

In sum, Blue Cross NC has alleged here that Aetna's claimed pricing lacks a basis in provider contracts. Aetna cannot prevent discovery on that allegation by misstating Blue Cross NC's discovery responses.

When Aetna asked to become a party to this case, it promised this Tribunal that it would offer evidence on “the size and scope of Aetna’s network, the accuracy of Aetna’s self-reported network pricing, and the feasibility of the technical requirements in the RFP.” *See* Aetna Mot. to Intervene ¶ 21. Having promised the Tribunal evidence on these topics, Aetna cannot now refuse to respond to discovery requests on them.

4. The Plan cannot prevent discovery from Aetna by arguing that the problems in Aetna’s proposal do not matter.

The Plan argues that even if Aetna did not have a basis for the promises in its proposal, that lack of a basis is irrelevant because the Plan could later pursue contractual remedies against Aetna. *See* Plan Br. 12. These remedies, the Plan says, include partial recovery of administrative fees paid to Aetna and the ability to terminate Aetna’s contract. *Id.* That argument misses the mark for several reasons.

First, the administrative fees that the Plan would pay to Aetna are a tiny fraction of the billions of dollars of claims that the Plan and its members will pay over the life of the TPA contract. If the Plan’s TPA vendor underperforms by even a small amount on the discounts it has promised, the Plan and its members will lose far more than they could ever recover in recouped administrative fees.

Second, the Plan cannot insulate its RFP process from review by arguing that the Plan can terminate its chosen vendor if that vendor cannot meet its commitments. If the Plan were correct on this point, it could use any RFP process—

no matter how deficient—and avoid review of that process simply by including a termination provision in the resulting contract.

In any event, the Plan’s discussion of these contract remedies ignores the harm here to Blue Cross NC and the members of the Plan. By accepting Aetna’s proposal on faith, the Plan has ousted the third-party administrator—and the network of providers—that has served Plan members since the 1980s. By the time the Plan could invoke any of the remedies it touts here, the damage to Blue Cross NC and the Plan’s members would already be done.

D. The controlling standards support the requested discovery.

Aetna’s and the Plan’s arguments also stray from the principles that govern civil discovery in North Carolina.

Aetna and the Plan argue that Blue Cross NC has not “cit[ed] any specific facts justifying” its claims, and they call the requested discovery an improper fishing expedition. Plan Br. 12; *see* Aetna Br. 18-19.

Here, Aetna and the Plan have turned the rules of discovery upside down. Their argument would require Blue Cross NC to *prove* its claims before it can *take discovery* on those claims.

That theory finds no support in the cases that Aetna and the Plan cite to advance it. In *Dworsky v. Travelers Insurance Co.*, for example, the requests at issue sought the “entire contents of a file maintained by defendant . . . with the sole exception of attorney correspondence.” 49 N.C. App. 446, 448, 271 S.E.2d 522, 524 (1980); *see* Aetna Br. 18-19. The court disallowed the discovery because “the record

in the instant case offers us no clue as to what relevant and material information, if there is any, is sought.” *Id.* Here, the opposite is true: Blue Cross NC has requested specific categories of relevant documents and has articulated the relevance of each. *See* Mot. to Compel 3-4.

Other cases cited by Aetna and the Plan applied discovery standards that no longer apply.

In *Stanback v. Stanback*, the wife in a custody dispute sought a wide range of financial information from her husband. 287 N.C. 448, 461, 215 S.E.2d 30, 39 (1975); *see* Aetna Br. 19, Plan Br. 13. Applying a former version of Rule 34 of the North Carolina Rules of Civil Procedure that imposed a “good cause” requirement on discovery—a requirement that Rule 34 no longer imposes—the court denied the requested discovery. *Id.* The court also noted that the husband had already provided sufficient information through an interrogatory response. *Id.*

In *Patterson v. Southern Railway Co.*, decided in 1941, the court similarly applied discovery standards that are no longer the law. 219 N.C. 23, 24, 12 S.E.2d 652, 653 (1941) (applying discovery rules of section 1823 of the Consolidated Statutes).

None of these cases provide support for Aetna’s refusal to comply with its discovery obligations.

E. The protective order ensures that Aetna will not suffer any competitive harm from producing the requested documents.

Finally, Aetna seeks to shield itself from discovery by referring to the sensitivity of some of the information sought in that discovery. That argument fails.

It is true that this bid protest, like many cases involving competitors, might include sensitive business information. But that is why the Tribunal has entered a protective order on confidentiality.

The Tribunal's protective order contains limits on the disclosure of documents and information produced in discovery. Those limits include the right of each party to designate competitively sensitive information as Attorneys' Eyes Only (AEO). See Order Granting Motion for Protective Order § 6.3. Any materials that Aetna designates as AEO cannot be disclosed to any person at Blue Cross NC, including its in-house lawyers. Instead, AEO materials can be disclosed only to Blue Cross NC's outside counsel and retained expert witnesses. *Id.*

These restrictions provide strong protection for any competitively sensitive information produced by Aetna. Aetna is in no position to argue otherwise, because *it itself demanded* these restrictions. In the parties' competing protective-order motions, Blue Cross NC asked the Tribunal to include a slightly more permissive AEO clause than Aetna proposed. Compare Petitioner Blue Cross and Blue Shield of North Carolina's Motion for Entry of Protective Order ¶¶ 6-14 (proposing that in-house counsel have access to AEO materials) with Respondent and Respondent-Intervenor's Joint Motion for Entry of Protective Order at 2-11 (proposing that only

outside counsel and retained experts have access to AEO materials). In response to these competing motions, the Tribunal adopted Aetna's more-restrictive AEO clause. *See* Order Granting Motion for Protective Order § 6.3.

To try to overcome this history, Aetna now argues that the AEO provision it successfully proposed is not enough protection for Aetna's documents. That argument fails. Aetna cites no support for its claim that "inadvertent disclosures are common," nor does it cite any support for the argument that the hypothetical possibility of an inadvertent disclosure is a basis to avoid discovery obligations.

Aetna Br. 22.

This case involves a sophisticated Tribunal and responsible counsel who take their obligations seriously. In a case like this one, Aetna cannot avoid discovery of relevant documents by arguing that the AEO provision that Aetna drafted might not be strict enough.

CONCLUSION

Blue Cross NC's motion to compel seeks materials that are central to this bid protest. Their production is necessary so this Tribunal can decide this important case based on a proper record. Blue Cross NC respectfully requests that this Tribunal grant this motion and order Aetna to produce the requested materials promptly.

This 29th day of June, 2023.

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CERTIFICATE OF SERVICE

I certify that today, I caused this reply brief 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 29th day of June, 2023.

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