



State of New Jersey

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July 7, 2017

Via Email [MECA@stevenslee.com] and USPS Regular Mail

Maeve E. Cannon, Esq.
Stevens & Lee
100 Lenox Drive, Suite 200
Lawrenceville, NJ 08648

Re: Supplemental Protest of Notice of Intent to Award
Solicitation# 17DPP00144: Employee Benefits: Pharmacy Benefit Management

Dear Ms. Cannon:

This correspondence is in response to your letter of July 6, 2017 filed with the Hearing Unit of the Division of Purchase and Property (hereinafter "Division") on behalf of Express Scripts, Inc. (hereinafter "ESI"). In that letter, ESI supplements its original protest filed on June 30, 2017, which challenged the June 29, 2017, Notice of Intent to Award (hereinafter "NOI") a Master Blanket Purchase Order (Blanket P.O.) {Contract} (hereinafter "Contract") to Optum RX (hereinafter "Optum") for Solicitation# 17DPP00144: Employee Benefits: Pharmacy Benefit Management (PBM) which was issued by the Division's Procurement Bureau (hereinafter "Bureau"). The Division issued its Final Agency Decision in response to ESI's original protest on June 30, 2017.

In consideration of ESI's supplemental protest, I have reviewed the record of this procurement, including the Bid Solicitation {Request for Proposal} (hereinafter "RFP"), the Quotes {Proposals} (hereinafter "Proposal") submitted, the relevant statutes, regulations, and case law. This review of the record has provided me with the information necessary to determine the facts of this matter and to render an informed Supplemental Final Agency Decision on the merits of the supplemental protest submitted by ESI. I set forth herein the Division's Supplemental Final Agency Decision.

BACKGROUND

By way of background, on November 21, 2016, the New Jersey Legislature adopted P.L. 2016, c. 67 requiring the Division to solicit Proposals for the services of a Pharmacy Benefits Manager (PBM) for the State Health Benefits Plan (SHBP) or the School Employees' Health Benefits Plan (SEHBP) in an expedited process. In mandating this expedited process, the legislature stated in part:

1. a. Notwithstanding the provisions of any other law to the contrary, a contract for the services of a Pharmacy Benefits Manager (PBM) for the State Health Benefits Plan (SHBP) or the School Employees'

Health Benefits Plan (SEHBP) shall be procured in an expedited process and in the manner provided by this section.

b. The Division of Purchase and Property in the Department of the Treasury shall procure, without the need for formal advertisement, but through the solicitation of proposals from professional services vendors, from qualified vendors the following three services based upon price and other factors:

- (1) technical assistance to the State to evaluate the qualifications of bidders on a PBM procurement and to provide online automated reverse auction services to support the Department of the Treasury in comparing the pricing for the PBM procurement. The technology platform shall, if possible, utilize a re-pricing of PBM proposals for the SHBP and SEHBP pharmacy spending utilizing code-based classification of drugs from nationally-accepted data sources of comparisons of the costs of PBM proposals;
- (2) real-time, electronic, line-by-line, claim-by-claim review of invoiced PBM pharmacy claims using an automated claims adjudication technology platform that allows for online comparison of PBM invoices and auditing of other aspects of the services provided by the PBM; and
- (3) a PBM and related services.

c. Notwithstanding the provisions of any other law to the contrary, for the purpose of expediting the [pharmacy benefits] procurements, the following provisions shall apply as modifications to law or regulation that may interfere with the expedited award of the above services:

- (1) the timeframes for challenging the specifications shall be modified as determined by the division;
- (2) in lieu of advertising in accordance with sections 2, 3, and 4 of P.L.1954, c. 48 (C.52:34-7, C.52:34-8, and C.52:34-9), the division shall advertise the request for proposals for the above services and any addenda thereto on the division's website;
- (3) the period of time that the State Comptroller has to review the request for proposals for these professional services procurements for compliance with applicable public contracting laws, rules and regulations, pursuant to section 10 of P.L.2007, c.52 (C.52:15C-10), shall be 10 business days or less if practicable, as determined by the State Comptroller;
- (4) the timeframes for submission under section 4 of P.L.2012, c.25 (C.52:32-58) and section 1 of P.L.1977, c.33 (C.52:25-24.2) shall be extended to prior to the issuance of a Notice of Intent to Award;
- (5) the provisions of section 1 of P.L. 2005, c.92 (C.52:34-13.2) shall not apply to technical and support services, under this section, provided by a vendor using a "24/7 follow the-sun model" as long as the contractor is able to provide such services in the United States during the business day; and
- (6) the term "bids" in subparagraph (f) of subsection a. of section 7 of P.L.1954, c.48 (C.52:34-12) shall not include pricing which will be revealed to all responsive bidders during the negotiation process.

d. The division may, to the extent necessary, waive or modify any other law or regulation that may interfere with the expeditious procurement of these services.

As mandated by the law, the Division was required to procure, through the solicitation of Proposals, the following three (3) services from qualified vendors: (1) technical assistance to evaluate the qualifications of Bidders who may submit Proposals in response to a solicitation for a pharmacy benefits manager (PBM) along with a technology platform which will utilize re-pricing for PBM proposals; (2) a real time line-by-line claim review of PBM claims; and, (3) a PBM. See, P.L. 2016, c. 67

To comply with the legislative mandate the Bureau first secured the service of a contractor who could provide technical and professional services in subsequent procurement of a PBM as well as provide a Reverse Auction Tool. Accordingly, on February 15, 2017, the Bureau issued Bid Solicitation {Request for Proposal} #17DPP00106: T3077 Technical Assistance and Reverse Action Services for Selection of a Pharmacy Benefits Manager. Solicitation #17DPP00106 - RFP § 1.1 *Purpose and Intent*. That solicitation sought a contractor to provide technical and professional services in procuring a Pharmacy Benefits Manager (PBM). Ibid. The services provided under T3077 include technical assistance in the evaluation of PBM Vendor {Bidder} Quotes {Proposals} as well as the creation and implementation of an online automated Reverse Auction Tool through the awarded contractor's technology platform. Ibid. The technology platform should have the capability to project SHBP/SEHBP costs based on the PBM Vendor's {Bidder's} proposed pricing terms. Ibid. Such projections should utilize code-based classification of drugs from nationally accepted data sources as further described in Bid Solicitation {RFP} Section 3. Ibid. More specifically, Solicitation #17DPP00106 required that the contractor provide:

The Reverse Auction Tool [which] shall be cloud based; managed by the Vendor {Contractor} on the Vendor's {Contractor's} infrastructure; and capable of accurately executing complex pricing algorithms. The Vendor {Contractor} must develop the pricing algorithms using State-supplied claims history and code-based classification of drugs from nationally-accepted prescription drug data sources. After the conclusion of the Reverse Auction round, the Reverse Auction Tool must tabulate and score submitted auction pricing during the competitive bidding period.

[Solicitation #17DPP00106, §3.0 *Scope of Work*.]

Proposals in response to Solicitation #17DPP00106 were received by the Bureau on March 17, 2017. On April 20, 2017 the Bureau issued the Notice of Intent to award indicating that a Contract would be awarded to Truveris, Inc. (hereinafter "Truveris"). The protest period for that solicitation expired on April 25, 2017.¹ No protests were received. Accordingly on April 27, 2017, the Division awarded a Contract (T3077) to Truveris.

Shortly thereafter, on May 16, 2017, the Bureau issued the subject Bid Solicitation {Request for Proposal} #17DPP00144: Employee Benefits: Pharmacy Benefit Management (hereinafter "RFP") on behalf of the Department of the Treasury, Division of Pensions and Benefits (hereinafter "DPB"). The purpose of the RFP was to solicit Quotes {Proposals} (hereinafter "Proposals") for Pharmacy Benefit Management Services for the active employees and retirees participating in the State Health Benefits Program/School Employees' Health Benefits Program (hereinafter "SHBP/SEHBP"). By submitting

¹ As permitted by P.L. 2016, c. 67 and the Division's governing regulations, a shortened protest period was implemented. See, N.J.A.C. 17:12-3.3(e).

Proposals in response to the RFP, Bidders would first be pre-qualified, through the review and evaluation of the technical proposals, to submit Proposal pricing utilizing the Reverse Auction Tool created in accordance with the Division's contract with Truveris awarded pursuant to Solicitation #17DPP00106 - Technical Assistance and Reverse Auction Services, for Selection of a Pharmacy Benefits Manager. RFP § 1.1 *Purpose and Intent*. The intent of this RFP was to award a Contract to that responsible Bidder whose Proposal, conforming to this RFP is most advantageous to the State, price and other factors considered. Ibid. Specifically, the Division seeks a Vendor {Contractor} (hereinafter "Contractor") that:

- A. Can provide integrated Retail, 90-day Retail, Specialty and Mail Order Drug management;
- B. Has a Pharmacy Network, Retail Pharmacy 90-Day Network, Mail Order Pharmacy and Specialty Drug Pharmacy Network availability that will be sufficiently accessible to Plan Members;
- C. Has a technologically-advanced, state-of-the-art pharmacy management process;
- D. Focuses on quality improvement, clinical outcomes and customer satisfaction;
- E. Has financial capabilities and contractual arrangements with Participating Pharmacies and Pharmaceutical Manufacturers to support a commitment to deliver quality and lowest net cost pharmacy services;
- F. Will integrate its Pharmacy Benefit Management process effectively and seamlessly with SHBP/SEHBP Contractors; and
- G. Can administer a self-insured Employer Group Waiver Plan and Wraparound Benefit.

Moreover, the successful Contractor should be:

- A. Focused on service by providing a superior level of service and attention to the State during the implementation process, as well as on an on-going basis;
- B. Cost effective and transparent by quoting competitive, guaranteed Ingredient Cost Discounts, Administrative Fees and Rebates, practicing effective Pharmacy Benefits Management, and agreeing to be held accountable through Performance Standards and Financial Guarantees;
- C. Quality-focused by demonstrating high levels of quality, clinical programs and customer satisfaction; and
- D. Able to provide Pharmacy Network access to the vast majority of current employees and retirees.

[Ibid.]

On June 12, 2017, the Division's Proposal Review Unit opened the three (3) Proposals received by the submission deadline of 2:00 pm and forwarded the same to the Bureau. All of the Proposals received were forwarded to the Evaluation Committee (Committee) for review and consideration. The Committee was comprised of five (5) voting members which included representatives from the Division of Pensions and Benefits, the New Jersey Education Association, and the Division.

The Committee was responsible for first performing review of the technical Proposals received using the criteria set forth in RFP § 6.7.1 *Technical Evaluation Criteria* which are as follows:

6.7.1 EVALUATION CRITERIA

- A. Personnel: The qualifications and experience of the Vendor's {Bidder's} management, supervisory, and key personnel assigned to the Blanket P.O. {Contract}, including the candidates recommended for each of the positions/roles required;
- B. Experience of firm: The Vendor's {Bidder's} documented experience in successfully completing Blanket P.O. {Contracts} of a similar size and scope in relation to the work required by this Bid Solicitation {RFP}; and
- C. Ability of firm to complete the Scope of Work based on its Technical Quote {Proposal}: The Vendor's {Bidder's} demonstration in the Quote {Proposal} that the Vendor {Bidder} understands the requirements of the Scope of Work and presents an approach that would permit successful performance of the technical requirements of the Blanket P.O. {Contract}.

The Committee's review of the technical proposals was to confirm that the Bidders were qualified to provide pharmacy benefit management services as set forth in the RFP. In other words, the evaluation criteria were used to develop a pre-qualified pool of Bidders who then participated in a mandatory training on the use of the Reverse Auction Tool. RFP § 1.1 *Purpose and Intent* and RFP § 6.7.1 *Evaluation Criteria*. At the conclusion of the Committee's evaluation of the technical proposals received, all three (3) Bidders were pre-qualified to attend the mandatory training on how to utilize the Reverse Auction Tool to submit Proposal pricing. RFP § 4.4.5.2 *Price Sheet/Schedule Attachment Instructions*.²

Consistent with the scope of work of Solicitation #17DPP00106, the Reverse Auction Tool utilizes a re-pricing of claims to determine the projected cost of Proposals received from pre-qualified Bidders by utilizing code-based classification of drugs from nationally-accepted prescription drug data sources such as MediSpan or First DataBank. Ibid. The integrity and confidentiality of the online price Proposals is protected by blinding the identity of the pre-qualified Bidders. Ibid.

For the creation of Reverse Auction Tool, Truveris was provided claims data for the time period of 01/01/2016 –12/31/2016. In addition, Truveris implemented the following assumptions provided by the DPB into the Reverse Auction Tool:

Generic Utilization: 1.5 %
Brand Utilization: 1.5%
Specialty Utilization: 8%

Generic Inflation: 2.75%
Brand Inflation: 12%
Specialty Inflation: 13%

² The pricing will be completed in accordance with Bid Solicitation {RFP} 17DPP00106, Technical Assistance and Reverse Auction Services for Selection of a Pharmacy Benefits Manager. The pricing submitted in the Reverse Auction shall be used in calculation for pricing guarantees.

These assumptions were applied to all Bidders' inputted data. All other data, specialty, brand, generic classifications, utilized by the Reverse Auction Tool in projecting the proposed proposal pricing was input by the Bidder. The assumptions, along with the inputted data were used to project a 3-year forecast of SHBP/SEHBP costs based on the Bidders' submitted pricing terms. RFP § 1.1 *Purpose and Intent*.

From June 14-19, 2017, all three (3) Bidders participated in the first round of the online automated proposal price submission using the Reverse Auction Tool.³ RFP § 1.1 *Purpose and Intent*. After a review of the cost analysis was completed, all Bidders were provided with a tabulation of the results of the round one submitted pricing. All three (3) Bidders advanced to the second round of pricing submission which was conducted from June 22-25, 2017. Evaluation Committee Report, p. 6.

Based upon the results of the Reverse Auction, on June 29, 2017 (11:32 a.m. eastern time) the Bureau issued, via email, the Notice of Intent to Award (hereinafter "NOI") advising all Bidders that it was the State's intent to award a Contract to Optum. All Bidders were advised that the protest period would close on June 30, 2017 at noon.⁴ As permitted by P.L. 2016, c. 67 and the Division's governing regulations, a shortened protest period was implemented. See, N.J.A.C. 17:12-3.3(e). Here, the protest period was shortened because DPB informed the Division that the Contract had to be awarded no later than July 1, 2017, so that the pharmacy benefits manager would be in place in time for the SHBP and SEHBP open enrollment period beginning October 1, 2017. Prior to open enrollment, the Contractor must prepare informational and other materials for potential enrollees. Additionally, the Contractor must submit and obtain the approval of the Centers for Medicare & Medicaid Services for its Employer Group Waiver Plan for Medicare-eligible participants. Further, the pricing under the new Contract is a factor in determining the premium charges for prescription drug coverage under the SHBP and SEHBP Plans and DPB's actuaries are required to calculate these premiums for approval at the July 2017 SHBP and SEHBP Commission meetings. Accordingly a shortened protest period was necessary in order to expedite the award to ensure that the State is able to meet these deadlines in accordance with the statutory requirements.

Shortly after the issuance of the NOI, ESI requested the "final scoring/round 2 results" of the Reverse Auction. The Bureau immediately provided ESI with a bar chart indicating the relative position of the Bidders after round 2 of the Reverse Auction. No other requests for documents or other information was submitted to the Division prior to the close of business. On the morning of June 30, 2017, the Division received Ms. Cannon's letter requesting an extension of the protest period and certain documents related to the subject procurement. Between 9:10 am – 9:33 am, the Bureau responded to Ms. Cannon providing her with the requested documents. Additionally, at 9:26 am the Division denied ESI's request for an extension of the protest period.

On June 30, 2017, ESI filed a substantive protest which included a request for a "stay of any implementation of the Contract award pending the Division's provision of the requested information and an opportunity to file a supplemental protest based on the entire record and within a reasonable timeframe." See, ESI June 30, 2017 Protest and Stay Request. On that day, the Division issued its Final Agency Decision denying ESI's request for stay and sustaining the June 29, 2017 NOI.

³ In response to a question posed by a potential Bidder during the question and answer period, all Bidders were advised that the Auction Round 1 would take place from June 14, 2017 through June 19, 2017 and Auction Round 2 would take place from June 22, 2017 through June 25, 2017. See, Bid Amendment #2, Question 3.

⁴ That original NOI advised all Bidders that the protest period would end at 9:00 am on June 30, 2017. Thereafter, the Division received a phone call from Ms. Cannon regarding the subject solicitation and the shortened protest period. In response to the phone call, the Division issued an amended NOI extending the protest to noon on June 30, 2017.

On July 4, 2017, a State holiday, ESI submitted a request to the Division for additional documents, specifically, Optum's Mobilization and Implementation Plan and copies of the forms submitted by the Bidders. That additional information was provided to ESI on July 5, 2017 at 9:34 am. The Division also provided ESI with copies of the correspondence between the Division and the Bidders and with the assumptions utilized in the Reverse Auction Tool. Based upon the additional information provided, the Division granted ESI the opportunity to file a supplemental protest. However, the Division noted that the Contract award would not be stayed during the Division's review of ESI's supplemental protest should one be filed.

On July 5, 2017, ESI filed an Application for Permission to File Emergent Motion with the Appellate Division.⁵ On July 6, 2017 ESI filed a supplemental protest with the Division.

DISCUSSION

In the supplemental protest, ESI alleges: (1) Optum's proposal should have been rejected because Optum took a material exception to the RFP terms; (2) Optum failed to provide the State with the required Security, Disaster Recovery and Contingency Plans; and, (3) the State applied arbitrary, capricious and unreasonable assumptions to calculate the estimated proposal prices. In addition, ESI renewed its request for a stay of the Contract award.

A. ESI has not established that the Contract award should be stayed pending the Division's review of the supplemental protest.

ESI has not established that the Contract award should be stayed pending the outcome of the Division's review of ESI's supplemental protest.

As noted in the Division's June 30, 2016 Final Agency Decision, a stay is an extraordinary remedy and a party who seeks a stay must satisfy a particularly heavy burden [to] demonstrate by clear and convincing evidence that the party is entitled to the relief sought. Zoning Bd. v. Service Elec. Cable Television, 198 N.J. Super. 370, 279 (App. Div. 1985); Gauman v. Velez, 421 N.J. Super. 239, 247-48 (App. Div. 2011) (internal citations omitted); see also, McKenzie v. Corzine, 396 N.J. Super. 405, 414 (App. Div. 2007) (stating that plaintiff must prove each of the Crowe factors and establish each by clear and convincing evidence). In exercising discretion to grant a request for stay, an agency must be guided by certain fundamental principles:

- (1) A preliminary injunction should not issue except when necessary to prevent irreparable harm...
- (2) Temporary relief should be withheld when the legal right underlying plaintiff's claim is unsettled...
- (3) Preliminary injunction should not issue where all material facts are controverted. Thus, to prevail on an application for temporary relief, a plaintiff must make a preliminary showing of a reasonable probability of ultimate success on the merits...
- (4) The final test in considering the granting of a preliminary injunction is the relative hardship to the parties in granting or denying the relief...

[Crowe v. De Gioia, 90 N.J. 126, 132-34 (1982).]

⁵ On July 6, 2017 ESI withdrew its Application for Permission to File Emergent Motion.

In its renewed request for stay, ESI addressed the individual Crowe factors in a summary fashion.⁶ For the sake of completeness, I will address each of the factors here.

1. ESI will not suffer an irreparable harm if the stay of the Contract award is denied.

ESI will not suffer irreparable harm if the stay of the Contract award is denied. On June 30, 2017 after the receipt of the procurement documents requested, ESI submitted its protest. On June 30, 2017 the Division issued its Final Agency Decision ruling on each of ESI's substantive protest points. After receipt of the additional documents and information requested, the Division permitted ESI to submit a supplemental protest. The Division is ruling on each of those supplemental protest points below.

The Division does not find that ESI has or will suffer irreparable injury. Undoubtedly, ESI who is the incumbent Contractor, will lose business from the State when the Contract resulting from this RFP becomes effective. However, no vendor, regardless of the time and resources expended to provide services to the State, is entitled to a contract in perpetuity. When considering a stay, "harm is generally considered irreparable in equity if it cannot be redressed adequately by monetary damages." Crowe, supra, 90 N.J. at 132-33. While monetary damages are never available for the failure to award a public Contract, Ibid, not every request for stay that concerns a public Contract award is granted. See, e.g., In re Challenge of Contract Award Solicitation No. 13-X-22694 Lottery Growth Mgmt. Servs., 436 N.J. Super. 350, 358 (App. Div. 2014) (denying stay of award of Contract). This is one of the pillars underlying the public bidding law.

Further, "in some cases, such as when the public interest is greatly affected, a court may withhold relief despite a substantial showing of irreparable injury to the applicant." Waste Management of New Jersey, Inc. v. Union County Utilities Authority, 399 N.J. Super. 508, 520 (App. Div. 2008). Here, the public interest favors not staying the Contract award as the award of this Contract will bring about more than \$1.6 billion in savings for the PBM services sought, which inure to the benefit of the public.

Finally, despite the fact that the Contract award will not be stayed, ESI will continue to reap the economic benefits of its current Contract with the State as the effective date of the new Contract is January 1, 2018. Not only does ESI fail to demonstrate that it will suffer an irreparable harm, I note that a finding of irreparable harm alone is not sufficient to permit the court to grant injunctive relief as the movant has the burden to establish all of the Crowe factors.

⁶ In its original protest, ESI did not address each of the individual Crowe factors. Rather, in a footnote ESI stated:

Once the Contract is awarded, ESI will suffer irreparable, uncompensated harm by the loss of the contract; given the case law that ESI has cited in support of its [substantive protest] arguments herein, it has a likelihood of success on the merits; the *status quo* will benefit all parties, especially given the arguments that the pricing analysis is flawed and will result in the least favorable award to the State, and finally, given the importance of this contract to the State, the many state and local employees who use it, and the vendors, the public interest weighs in favor of a stay pending a full review based on all of the information.

[ESI, June 30, 2017, Protest and Stay Letter.]

2. ESI has the legal right to request a stay of the Contract award.

The Division acknowledges that it is well settled that a Bidder claiming to be entitled to an award of a Contract has standing to challenge the award of a Contract to another. M.A. Stephen Construc. Co., Inc. v. Borough of Rumson, 125 N.J. Super. 67, 74 (App. Div. 1973).

3. ESI has not demonstrated a reasonable probability of ultimate success on the merits.

ESI has not established a reasonable probability of success on the merits. The purpose of the public bidding process is to “secure for the public the benefits of unfettered competition.” Meadowbrook Carting Co. v. Borough of Island Heights, 138 N.J. 307, 313 (1994). To that end, the “public bidding statutes exist for the benefit of the taxpayers, not bidders, and should be construed with sole reference to the public good.” Borough of Princeton v. Board of Chosen Freeholders, 169 N.J. 135, 159-60 (1997).

As set forth in detail below in response to ESI’s supplemental substantive protest points, ESI has not shown a reasonable likelihood of ultimate success on the merits. Further, through P.L. 2016, c. 67, the Legislature directed the Division to procure, “in an expedited process and in the manner provided” the services of a PBM. In doing so, the Legislature directed a number of changes to the public bidding requirements set forth in statute and regulation as it applies to this procurement. The validity of P.L. 2016, c. 67 has not been challenged.

Accordingly, ESI has not shown a reasonable likelihood of success on the merits of its challenge to the award of the Contract to Optum.

4. The balance of the relative hardship weighs in favor of denying the request for a stay.

Lastly, ESI has not established that the balance of equities weighs in favor of granting of a stay. The current Contract for which ESI is the incumbent vendor will be in effect until January 1, 2018. ESI will not lose anything to which it is entitled if the Contract is awarded in accordance with the NOI. Conversely, the public will benefit from significant projected savings of over \$1.6 billion over the life of the new Contract. Failure to award the new Contract by June 30, 2017, will prevent the State from implementing the new Contract in a timely manner and require the State to pay an additional \$1.6 billion over this time period.

While ESI’s current Contract continues in effect until the new Contract effective date, the new contractor must have all requirements in place to ensure that it can handle open enrollment of members in October 2017 or the \$1.6 billion in savings over the life of the new Contract will be jeopardized as the open enrollment requirements will not be met. Member education regarding open enrollment and changes to the plan is critical before that time. The State will need time to design and issue new prescription cards to distribute to members before the coverage effective date, and the DPB needs to work closely with the State’s Office of Information Technology and the new Contract vendor to test file interfaces, data transfers, account structures, and reporting formats before the effective date. Importantly, the new contractor will also need to get its Medicare Part D plan approved by the Centers for Medicare and Medicaid Services (hereinafter “CMS”), which can require significant lead time. Staying the Contract award, and preventing the Contract from moving forward could jeopardize the State’s ability to meet these various deadlines and milestones.

As to ESI’s argument that the Crowe factors should be relaxed for its stay request, while the Court in Waste Mgmt. of New Jersey, Inc. v. Morris County Mun. Util. Auth., stated that “a court may take a less rigid view of the Crowe factors...when the interlocutory injunction is merely designed to preserve the status quo,” the Court limited that less rigid view to circumstances where “a balancing of the relative hardships substantially favors the movant, or the irreparable injury to be suffered by the movant in the absence of the

injunction would be imminent and grave, or the subject matter of the suit would be impaired or destroyed.” 433 N.J. Super. 445, 453-54 (App. Div. 2013). The circumstances of this matter do not justify the relaxation of the Crowe factors.

ESI has not established that the balance of the hardship weighs in its favor, that it will suffer irreparable harm or that the subject matter of the suit will be destroyed if the stay is not granted.

Moreover, the Court in Waste Mgmt. recognized “the important role the public interest plays when implicated, as here, and have held that courts, in the exercise of their equitable powers, may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved.” Ibid. citing, Union County, supra, 399 N.J. Super. at 520-21. The State’s and the public’s interest in moving forward with the protest period, in order to satisfy the public purposes of procurement, outweighs any of ESI’s legally cognizable interests. ESI will not lose anything to which it is entitled if the stay request is denied. Conversely, the public will suffer hardship if the procurement process does not continue.

B. Optum’s Proposal was responsive to the requirements of the RFP and there is no material deviation.

Optum’s proposal is responsive to the requirements of the RFP and there is no material deviation. In its supplemental protest, ESI alleges that Optum’s proposal should have been rejected for taking a material exception to the certain mandatory terms of the RFP. Specifically ESI refers to RFP § 5.18 *Change in Plan Design* which states:

During the term of the Blanket P.O. {Contract}, the State shall have the right to make any change to any Plan, including, without limitation, changes in Deductibles, Copayments, Plan maximums, and similar variables.

In the event of such a change, the parties shall meet to discuss the change and discuss the needed Change Orders {Contract Amendments} to the Blanket P.O. {Contract}. For any such Change Order {Contract Amendment}, there shall be no change in the Administrative Fee when the Vendor {Contractor} need only make changes in its Claim administration and other related systems, such as changes in Deductible, Copayment, Plan maximum or similar variable. Similarly, there shall be no change in the Administrative Fee for a change in Plan that requires a change to the open enrollment period, a special open or limited enrollment period, additional communications with Network Providers or reissuance of an Identification Card to some or all Members.

If more substantial changes are made to a Plan or Plans, such that the Vendor {Contractor} must make more substantial changes to its systems, or undertake more work than set forth in the prior paragraph, the parties shall engage in negotiations for a change to the Administrative Fee for a period of 30 calendar days. If no agreement is reached at the conclusion of the negotiations period, the change in the Plan Design will be treated as a change in law and addressed pursuant to section 5.5 of the Standard Terms and Conditions.

State reserves the right to separately procure services from another Vendor(s) {Contractor(s)} where the Plan Design changes involve substantial change to the current Plans or the creation of new Plans.

[*Emphasis in the original.*]

ESI alleges that Optum’s proposal takes an exception to the RFP’s mandatory requirement regarding the State’s reservation of its right to make changes to the plan, and the requirement to negotiate a change to the Administrative Fee for substantial change(s) to the plan.

In its proposal, Optum stated:

OptumRx accepts all terms and conditions of this bid with the following additional language:

- Section 5.18 – Agree, as it applies to changes that impact administrative fees as outlined in this provision, provided that Vendor reserves the right to modify Financial Contracted Terms based on changes by the State in formulary or any carve out of services set forth in the Agreement, including but not limited to Specialty Pharmacy services.

During the solicitation period, Bidders were permitted to submit questions to the Bureau for review and consideration. Specifically, the RFP mandated that “Questions regarding the SSTC and exceptions to mandatory requirements must be posed during this Electronic Question and Answer period and shall contain the Vendor’s {Bidder’s} suggested changes and the reason(s) for the suggested changes.” RFP § 1.3.1.1 *Exceptions to the State of NJ Standard Terms and Conditions (SSTC)*. During the Question and Answer period, the Bureau received and answered four (4) questions related to RFP § 5.18 as follows:

#	Page #	RFP Section Reference	Question (Bolded) and Answer
115	127	Section 5.18 (Change in Plan Design)	<p>Can DPB provide historical information on the frequency of Plan Design changes and, of such changes, how frequently have they been significant enough to justify a change in the Administrative Fee?</p> <p>Historically, Plan Design changes have generally occurred on an annual basis. They have rarely been significant enough to justify a change in the Administrative Fee.</p>
116	128	Section 5.18 (Change in Plan Design)	<p>In the PBM industry, some changes made by clients such as DPB only affect a handful of medications but could have large impacts on rebates. For example, if DPB decided to exclude all brand medications in a certain therapeutic category which were heavily rebated, rebate guarantees would need to be modified. Can the State confirm that in a situation like described here, the State would engage in negotiations on an item like rebate guarantees?</p> <p>The State acknowledges that Plan Design changes that exclude certain Brand Drugs will impact Rebate Guarantees. It is expected that the Contractor and the State would discuss any needed amendments to any Financial Guarantees prior to any Plan Design change.</p>

117	128	Section 5.18 (Change in Plan Design)	<p>In addition to plan design changes, regulatory changes or marketplace events could impact the PBM's ability to achieve the guarantees. Will the State agree, subject to the PBM's obligation to provide an appropriate justification for any change, that in such a case, pricing terms may be negotiated if a regulatory change or marketplace event has such an impact?</p> <p>Please refer to RFP Section 3.7.1 (H) and Section 5.5 of the New Jersey Standard Terms and Conditions.</p>
174	127	5.18 Change in Plan Design	<p>Will the State consider adding the following provision: Vendor may change the pricing (a) any time State-initiated changes are made to the plan specifications, including the benefit plan, formulary, network, or a utilization management program, that adversely impact Vendor's compensation, cost to provide services or ability to satisfy a guarantee under this Agreement; (b) when there are changes in laws or regulations; (c) when the State asks and Vendor agrees to perform any service in addition to the Services; Vendor will provide DPB with notice 30 days prior to implementation of the change describing the change.</p> <p>The State does not agree to this modification. See "T2679 PBM Revised RFP 53017".</p>

With the posting of Bid Amendment {Addendum} #2, all potential Bidders were advised that State fully expects to negotiate all pricing and financial guarantees prior to the implementation of any plan design changes. Specifically, the State rejected the proposed modification to the RFP which would permit a Contractor to change pricing any time there is State initiated change to the plan specifications, including the benefit plan, formulary, network etc.

Here, Optum's proposed reservation was addressed and rejected during the Questions and Answer Period.

Importantly, the RFP addresses the situation where a Bidder's proposed language may not conform to the specified requirements of the solicitation. Specifically the RFP advises Bidders that if a proposed term or condition conflicts with the RFP, or diminishes the State's rights under any Contract, that term will be considered null and void.

4.0 QUOTE {PROPOSAL} PREPARATION AND SUBMISSION

4.1 GENERAL

Quotes {Proposals} including Vendor {Bidder} proposed terms and conditions may be accepted, but Vendor {Bidder} proposed terms or conditions that conflict with those contained in the Bid Solicitation {RFP} as defined in Section 2.0 of this Bid Solicitation {RFP}, or that diminish the State's rights under any Blanket P.O. {Contract} resulting from the Bid Solicitation {RFP}, will be considered null and void. The State is not responsible for identifying conflicting Vendor {Bidder} proposed terms and conditions before issuing a Blanket P.O. {Contract} award. It is incumbent upon the Vendor {Bidder} to identify and remove its conflicting proposed terms and conditions prior to Quote {Proposal} submission. In the event that a Vendor {Bidder} intends to propose terms and conditions contrary to the Bid Solicitation {RFP}, these Vendor {Bidder} proposed terms and conditions shall only be considered

if submitted pursuant to the procedure set forth in Section 1.3.1 of this Bid Solicitation {RFP}. Vendors {Bidders} shall not submit exceptions on the "Terms and Conditions" Tab through *NJSTART*. Under no circumstance is the State required to accept a Vendor's {Bidder's} exception to the Bid Solicitation {RFP}.

In the event that prior to Notice of Intent to Award, the Division notifies the Vendor {Bidder} of any such conflicting Vendor {Bidder} proposed term or condition and the conflict it poses, the Division may require the Vendor {Bidder} to either withdraw it or withdraw its Quote {Proposal}.

After award of Blanket P.O. {Contract}:

- A. **if conflict arises between a Vendor {Bidder} proposed term or condition included in the Quote {Proposal} and a term or condition of the Bid Solicitation {RFP}, the term or condition of the Bid Solicitation {RFP} will prevail; and**
- B. if the result of the application of a Vendor {Bidder} proposed term or condition included in the Quote {Proposal} would diminish the State's rights, the Vendor {Bidder} proposed term or condition will be considered null and void.

[Emphasis added.]

Here, to the extent that Optum's proposed reservation in response to RFP § 5.18 conflicts with a term of the RFP, the RFP terms prevail. RFP § 4.1 *General*.

Moreover, the RFP § *Special Contractual Terms and Conditions Applicable to the Blanket P.O. {Contract}* advises Bidders of the order of precedence noting:

5.1 PRECEDENCE OF SPECIAL CONTRACTUAL TERMS AND CONDITIONS

This Blanket P.O. {Contract} awarded, and the entire agreement between the parties, as a result of this Bid Solicitation {RFP} shall consist of this Bid Solicitation {RFP}, SSTC, Bid Amendment {Addendum} to this Bid Solicitation {RFP}, the Vendor's {Contractor's} Quote {Proposal}, any Best and Final Offer, and the Division's Notice of Award.

In the event of a conflict in the terms and conditions among the documents comprising this Blanket P.O. {Contract}, the order of precedence, for purposes of interpretation thereof, listed from highest ranking to lowest ranking, shall be:

- A. Executed Offer and Acceptance Page {Signatory Page};
- B. Bid Solicitation {RFP} Section 5, as may be amended by Bid Amendment {Addendum};
- C. The State of NJ Standard Terms and Conditions (SSTC) accompanying this Bid Solicitation {RFP};

- D. All remaining sections of the Bid Solicitation {RFP}, as may be amended by Bid Amendment {Addendum};
- E. The Vendor's {Contractor's} final submitted Best and Final Offer; and
- F. The Vendor's {Contractor's} Quote {Proposal} as accepted by the State.

Note: In the event of conflicting information between the Bid Solicitation {RFP} and fields contained in *NJSTART*, the Bid Solicitation {RFP} will govern and *NJSTART* will be updated via Bid Amendment {Addenda} or Change Order {Contract Amendment}.

Here, based upon the order of precedence, the RFP, as amended by Bid Amendment prevail over the Optum's submitted technical proposal.

Optum did not have an advantage over other Bidders by taking an exception to the mandatory terms of the RFP as those terms are not entitled to any effect. As such, there is no material deviation.

C. Optum provided the State with a Security, Disaster Recovery and Contingency Plans as required by the RFP.

In the supplemental protest, ESI alleges that Optum failed to provide the State with the mandatory Security, Disaster Recovery and Contingency Plan as required by the RFP.

RFP § 3.12 *Security Plan and Standards* requires that “[t]he Vendor {Contractor} must provide a detailed system design document showing Security Plan, Disaster Recovery Plan, Contingency Plan and Backup Plan. Logical and physical diagrams are required.”⁷ RFP §§ 3.12.1, 3.12.2 and 3.12.3 go on to detail the requirements of the Security Plan, the Disaster Recovery Plan and the Contingency Plan respectively. As noted above, potential bidders were permitted to submit questions regarding the requirements of the RFP during the Questions and Answer Period. RFP § 1.3.1.1 *Exceptions to the State of NJ Standard Terms and Conditions (SSTC)*. On May 30, 2017, the Bureau posted the following in response to question posed by a potential bidder regarding the required security plan:

#	Page #	RFP Section Reference	Question (Bolded) and Answer
100	82	Section 3.12 (Security Plans and Standards).	<p>Due to the sensitive nature of Disaster Recovery Plans, Disaster Recovery and Contingency Plans have historically always been reviewed onsite at Bidder's facilities. Due to the highly sensitive nature of these plans, will the State agree that these plans would be reviewed at Bidder's facility or through some other secure delivery system permitting review, but not retention of the plans?</p> <p>Yes.</p>

⁷ RFP § 2.2 *General Definitions* defines a Vendor {Contractor} as {the Vendor {Bidder} awarded a Blanket P.O. {Contract} resulting from this Bid Solicitation {RFP}}, compare with Vendor {Bidder} defined as “An entity offering a Quote {Proposal} in response to the Division's Bid Solicitation {RFP}.”

With respect to the submission of proposals, RFP § 4.4.3.3.4 *Plans Required by Bid Solicitation {RFP} Section 3.12* required that

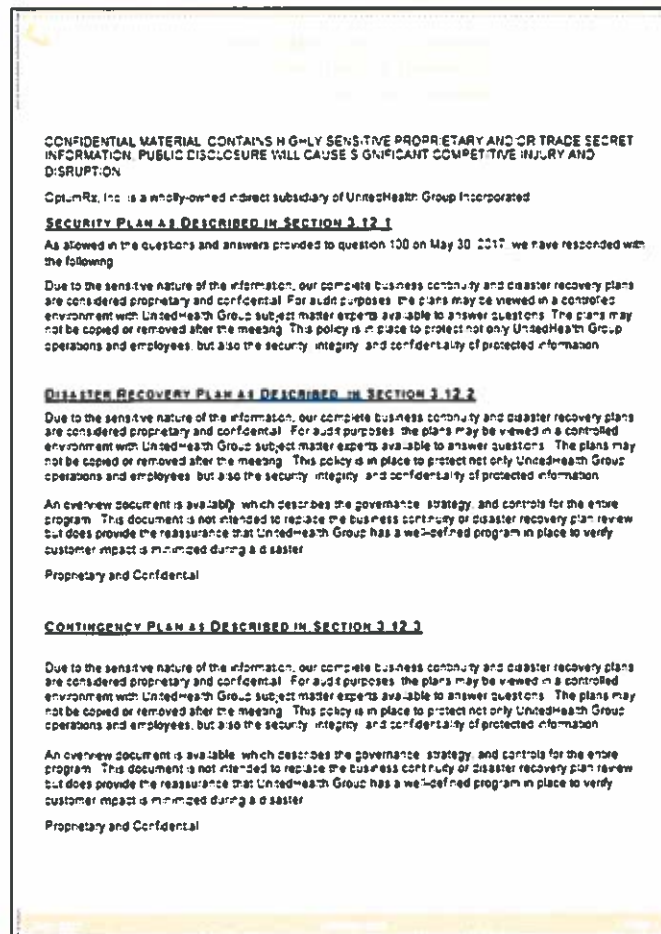
The Vendor {Bidder} shall provide its draft plans required by Section 3.12. The plans shall include:

- a. Security Plan as described in Section 3.12.1.
- b. Disaster Recovery Plan as described in Section 3.12.2;
- c. Contingency Plan as described in Section 3.12.3; and
- d. Backup Plan as described in Section 3.12.4.

The plans should demonstrate to the Evaluation Committee that the Vendor {Bidder} understands the scope of work required for a successful implementation of the system, its operations and maintenance and support.

The Vendor's {Bidder's} plans should set forth a summary of any and all problems that the Vendor {Bidder} anticipates during the term of the Blanket P.O. {Contract}. For each problem identified, the Vendor {Bidder} should provide its proposed solution.

Consistent the requirements of the RFP and the answer provided in Bid Amendment #2, in its Proposal Optum responded as follows:



As noted above, RFP § 4.4.3.3.4 required Bidders to provide draft plans required by RFP § 3.12, including a Security Plan, Disaster Recovery Plan, Contingency Plan, and a Backup Plan. The RFP explained that the purpose of requesting draft plans was to “demonstrate to the Evaluation Committee that the Vendor {Bidder} understands the scope of work required for a successful implementation of the system, its operations and maintenance and support.” Further, in its response to a Bidder question, the Bureau acknowledged the confidential and proprietary nature of the documents, agreeing that the documents did not need to be physically provided to the State. Rather, the specific plan could be reviewed at the Contractor’s location to ensure the confidentiality and integrity of the documents is maintained.

Here, while Optum may not have included a detailed security plan within its Proposal, it did include a “Data Storage and Tape Management Overview” document. That document discussed the steps taken to ensure security, data protection, other controls, data center facilities, and encryption. This document was marked as confidential and proprietary information by Optum, and it was redacted in whole at Optum’s request in accordance with N.J.S.A. 47:1A-1. Accordingly, while the document was not produced to ESI, it was reviewed by the Evaluation Committee during its prequalification review of Optum’s Proposal. The Committee concluded that the information disclosed demonstrated that Optum understood the security requirements of the RFP required for a successful implementation of the system.

Contrary to ESI’s assertion, Optum complied with the RFP requirement that the Bidder submit a draft plan that demonstrates to the Committee that the Bidder understands the scope of work required for a successful implementation of the system, its operations and maintenance and support. RFP § 4.4.3.3.4 *Plans Required by Bid Solicitation {RFP} Section 3.12*.

Accordingly, there was no deviation from the requirements of the RFP.

D. The assumptions applied to all Bidder submitted pricing was not arbitrary, capricious or unreasonable.

In its original protest ESI alleged that assumptions utilized in the Reverse Auction Tool, “resulted in an inaccurate and skewed pricing evaluation that misstated ESI’s actual pricing and that the pricing as calculated by Truveris does not accurately reflect the position of the bidders” and that Truveris’ calculations “misstate the true cost of the proposals” submitted. ESI June 30, 2017 Protest, p. 4.

Now in its supplemental protest ESI alleges that “the assumptions have the ability to change the relative position of the bidders based upon how they bid various categories of pricing. Increasing one assumption and reducing another can change the relative positions of the bidders depending on how they bid in each of the affected categories. The assumptions are not neutral factors that affect all bids proportionately in the same way. One bid may be disproportionately impacted by the choice of assumptions and the relative positions of the different bidders can be manipulated based upon the choice of assumptions.” ESI July 6, 2017 Protest, p. 11.

First, as stated in the Division’s June 30, 2017, Final Agency Decision in response to ESI’s original protest, the subject RFP was to solicit proposals for the services of a Pharmacy Benefits Manager. The Reverse Auction Tool however was the subject of a prior solicitation, 17DPP00106, Technical Assistance and Reverse Auction Services for Selection of a Pharmacy Benefits Manager (T3077) which was advertised on February 15, 2017 and awarded on April 27, 2017. That solicitation sought the services of a Contractor to provide “online automated reverse auction services through the Vendor’s {Bidder’s} technology platform. The technology platform should have the capability to project SHBP/SEHBP costs based on the PBM Vendor’s {Bidder’s} proposed pricing terms. Such projections should utilize code-based classification of drugs from nationally accepted data sources as further described in Bid Solicitation {RFP}

Section 3.” Solicitation #17DPP00106, §1.1 *Purpose and Intent*. More specifically, Solicitation #17DPP00106 required that the contractor provide:

The Reverse Auction Tool [which] shall be cloud based; managed by the Vendor {Contractor} on the Vendor’s {Contractor’s} infrastructure; and capable of accurately executing complex pricing algorithms. The Vendor {Contractor} must develop the pricing algorithms using State-supplied claims history and code-based classification of drugs from nationally-accepted prescription drug data sources. After the conclusion of the Reverse Auction round, the Reverse Auction Tool must tabulate and score submitted auction pricing during the competitive bidding period.

[Solicitation #17DPP00106, §3.0 *Scope of Work*.]

Moreover, the Scope of Work for Solicitation #17DPP00106 specifically required the awarded Contractor, Truveris to complete the following:

3.2 REVERSE AUCTION PROCESS AND COST EVALUATION OF PBM VENDORS {BIDDERS}

3.2.1 ONLINE REVERSE AUCTION TOOL

The Vendor {Contractor} shall provide a private, safe and secure Reverse Auction Tool that allows the State and the PBM Vendor {Bidder}s to view pricing results in real-time or after each Round of Bidding. Vendor {Contractor} shall provide assistance to the Department of the Treasury within this Scope of Work as needed.

The Reverse Auction Tool shall, if possible, utilize a re-pricing of claims to determine the projected cost of Price Quotes {Proposals} received from PBM Vendors {Bidders} by utilizing code-based classification of drugs from nationally-accepted prescription drug data sources such as MediSpan or First DataBank.

The Vendor {Contractor} shall sign a Non-Disclosure Agreement prior to receipt of any State data. Said agreement shall be submitted within five (5) Business Days after award of the Blanket P.O. {Contract}. Claims utilization data will be provided to the Vendor {Contractor} within five (5) Business Days of receipt of the Non-Disclosure Agreement.

The Vendor {Contractor} must protect the integrity and confidentiality of the online Price Quotes {Proposals}, including Blinding the identity of the PBM Vendor {Bidder}s and protecting the proprietary details of the online Price Quotes {Proposals}, from being accessible to other PBM Vendors {Bidders}.

The Reverse Auction Tool shall, if possible be updated regularly to show PBM Vendors {Bidders} (on a Blinded basis) the projected value of the PBM Blanket P.O. {Contract}.

The Vendor {Contractor} shall ensure that the Reverse Auction Tool provides full required functionality for at least 90.0% of the time during the Reverse Auction Period.

3.2.2 PRICING METHODOLOGY

The Vendor {Contractor} must evaluate, analyze and quantify the Price Quotes {Proposals} submitted during the Reverse Auction, and prepare a quantitative summary of the responses. The Vendor {Contractor} shall project the costs and savings of the Price Quote {Proposal} over the term of the contract for each Price Quote {Proposal} submitted. The cost and savings projections must be provided to the SHBP and SEHBP at the end of each Round of Bidding.

Accordingly, ESI's protest of the assumptions and methodology used in the Reverse Auction Tool is out of time as that protest should have been filed in connection with or in response to Solicitation #17DPP00106 which as noted above was awarded to Truveris on April 27, 2017, and is not what is being procured through the subject RFP (Solicitation# 17DPP00144).

Further, a review Bid Amendment {Addendum} #2 did not reveal any questions regarding the trend assumptions, generic pipelines, formulary utilization shift, etc. which would be used project the three year bid cost. Further, despite having an opportunity to submit a protest of RFP specifications, specifically to request information regarding the Reverse Auction Tool, no potential Bidder availed itself of the opportunity to do so.

Second, with respect to ESI's supplemental protest, as previously noted, the Reverse Auction Tool utilizes a re-pricing of claims to determine the projected cost of Proposals received from pre-qualified Bidders by utilizing code-based classification of drugs from nationally-accepted prescription drug data sources such as MediSpan or First DataBank. RFP § 4.4.5.2.⁸ For the creation of Reverse Auction Tool, Truveris was provided claims data for the time period of 01/01/2016 –12/31/2016. In addition, Truveris implemented the following assumptions provided by the DPB into the Reverse Auction Tool:

Generic Utilization: 1.5 %
Brand Utilization: 1.5%
Specialty Utilization: 8%

Generic Inflation: 2.75%
Brand Inflation: 12%
Specialty Inflation: 13%

These assumptions were the only assumptions utilized in the Reverse Auction Tool, and these assumptions applied to all Bidders' inputted data. All other data, specialty, brand, generic classifications, utilized by the Reverse Auction Tool in projecting the proposed proposal pricing was input by the Bidder. The assumptions, along with the inputted data was used to project a 3-year forecast SHBP/SEHBP costs based on the Bidders' submitted pricing terms. RFP § 1.1 *Purpose and Intent*. The Bidder inputted data had the potential to create many other variables, outside of Truveris' control, which affected the proposed proposal pricing.

⁸ No Bidders challenged Section 4.4.5.2 of the RFP and code-based classification noted therein.

While the assumptions utilized in the Reverse Auction Tool were in place prior to proposal submission and remained consistent throughout the two rounds of proposal price submission by the Bidders, in an effort to prevent Bidders from skewing their inputted data, and to ensure that the State received the most accurate information resulting the best offer, the above assumptions were not provided to Bidders prior to proposal submission.

In support of its position, ESI relies upon the Appellate Division's decision in James Petrozello Company, Inc. v. Township of Chatham, et al., 75 N.J. Super. 173 (App. Div. 1962). However, the matter before me can be distinguished from that before the Appellate Division in Chatham. In Chatham, the township advertised for and received proposals for the collection of garbage and other refuse from the properties within the municipality.

The "Information for Bidders" called for a lump sum bid for the collection and disposal of the garbage and refuse from all structures in existence upon the commencement of the term of the contract, and also for a unit bid per month charge for each of several categories of structures erected in the future during the term of the contract. Prospective bidders were directed to make a careful examination of the properties in the township from which the garbage and refuse would be collected, as well as the municipal zoning ordinance. Information was given as to the present land uses and the approximate number of existing buildings in each classification. The bidders were referred to the land use provisions in the zoning ordinance and were told that "under present zoning no more than 200 individual apartments [units in apartment houses] could be constructed." There was also furnished a guide for the projection of growth in single-family residences in the form of statistics as to the number of building permits issued for single-family residences in each year from 1956 down through August of 1961.

When the bids were received on December 7, 1961, they were referred to the committee dealing with the subject matter, for study and analysis. The committee reported thereafter that in its judgment new development in the municipality during the five-year term of the contract would result in 48 new residences per year (four per month); 60 apartments occupied in April 1964 (ten groups of six individual apartments); 140 apartments occupied in April 1965 (24 groups of six individual apartments); one office building or research laboratory occupied in April 1965; one municipal building occupied in April 1963; one high school opening in September 1962;

[Id. at 175-77.]

The Appellate Division concluded that by changing the basis for evaluation of the proposals, after proposal submission the township committee could favor one bidder over another. Id. at 180. Accordingly, "despite a positive finding of the municipality's good faith, the Appellate Division struck down the award of a garbage contract where the township withheld for its own later determination an estimate of future growth within the municipality during the life of the proposed contract, an estimate which had the capacity, under the formula employed, to establish who would be the lowest bidder. The court pointed out that had this estimate been made before soliciting bids, the opportunity for indulging favoritism would have been removed." Terminal Constr. Corp. v. Atlantic County Sewerage Authority, 67 N.J. 403, 410 (1975).

Here, there was no change in the evaluation methodology or the assumptions used in the Reverse Auction Tool to project the proposal prices. As required, the evaluation methodology and the assumptions were in place prior to the proposal opening date. The evaluation methodology and the assumptions remained consistent throughout the evaluation process and throughout the two rounds of proposal price submission. Therefore, neither Truveris nor the Bureau had the ability to manipulate the data to skew the respective position of the Bidders.

Finally, simply because ESI disagrees with the results of the Reverse Auction is no reason to set aside the Contract award to Optum. As previously noted, the Bidder controlled data which was inputted into the Reverse Auction Tool had the potential to create many variables, outside of Truveris' control, which affected the proposed proposal pricing. Each Bidder had control of its own inputted data. At the conclusion of Round 1 of the pricing submission, Bidders were provided with a summary of pricing submitted by all Bidders. All Bidders were then provided with the opportunity to submit revised/updated data from which the final projected proposal price would be calculated.

The assumptions utilized in the Reverse Auction Tool did not result in a skewing of the respective position of the Bidders nor did it result in an inaccurate depiction of the Bidders' proposals compared to one another as the same assumptions applied to all of the Bidders.⁹

CONCLUSION

Based upon the foregoing, I sustain the June 29, 2017 NOI and deny ESI's request for a stay. This is my final agency decision with respect to the supplemental protest submitted ESI.

Thank you for your company's continuing interest in doing business with the State of New Jersey and for registering your company with [NJSTART](http://www.njstart.gov) at www.njstart.gov, the State of New Jersey's new eProcurement system.

Sincerely,



Maurice A. Griffin
Acting Director

MAG: RUD

c: P. Michaels
L. Spildener
S. Fletcher

⁹ I note that, even if there were errors in the assumptions used by Truveris to create the Reverse Auction Tool, those assumptions affect all Bidders, such that all Bidders remained on a level playing field. Further, even without utilizing these assumptions, ESI's projected proposal price was higher than that submitted by both CVS and Optum as shown in the table above.