State of New Jersey

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September 10, 2019

Via Electronic Mail [meca@stevenslee.com] and USPS Regular Mail

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

Re: I/M/O Bid Solicitation #19DPP00365 Aetna Life Insurance Company
T2846 – State Health Benefits Program and School Employees Health Benefits Program Plans
Request for a Stay

Dear Ms. Cannon:

This letter is in response to your correspondence of August 30, 2019, on behalf of Aetna Life Insurance Company (Aetna) to the Division of Purchase and Property's (Division) Hearing Unit. In that correspondence, Aetna requests a stay of the award of a Master Blanket Purchase Order (Blanket P.O.) to Horizon Healthcare Services, Inc. (Horizon) pending the outcome of Aetna's appeal of the Division's August 29, 2019, Final Agency Decision.[1]

By way of background, on April 10, 2019, the Division's Procurement Bureau (Bureau) issued Bid Solicitation #19DPP00365 - T2846 – State Health Benefits Program and School Employees Health Benefits Program Plans (Bid Solicitation) on behalf of New Jersey Department of the Treasury, Division of Pensions and Benefits (DPB) as administrator for the State Health Benefits Commission and the School Employees' Health Benefits Commission (Commissions) to solicit Quotes from qualified Vendors {Bidders} to provide Part 1: Network/Claims services and Part 2: Navigation/Advocacy services as specified in the Bid Solicitation for the medical plans of the State Health Benefits Program (SHBP) and the School Employees' Health Benefits Program (SEHBP), for the plan types set forth in Bid Solicitation Section 1.2, below:

- Preferred Provider Organizations (PPO),
- Health Maintenance Organizations (HMO),
- Tiered Network Plans,
- High-Deductible Health Plans (HDHP),
- Medicare Supplement PPO and HMO Plans.

[Bid Solicitation § 1.1 *Purpose and Intent*.]

[1] As of the date of this decision Aetna has not yet filed an appeal of the Division August 29, 2019 Final Agency Decision.

The goal of the Bid Solicitation was to award Blanket P.O.s to Vendors {Contractors} that will drive meaningful changes in the delivery of healthcare, clinical quality improvements and meaningful cost reductions in the SHBP/SEHBP. Ibid. The Bid Solicitation presented a significant departure from the requested scope of services covered in the last procurement of medical plan services for the State Health Benefits Program (SHBP) and School Employees' Health Benefits Program (SEHBP) in 2012. Ibid. The State intends to take bolder actions that focus on mitigating the total cost of care for both the SHBP/SEHBP and its Members, while driving improvements in the overall health of the SHBP/SEHBP population. Ibid. To accomplish these goals, this Bid Solicitation divided the scope of work into two (2) parts. Ibid. Part 1 sought Quotes from qualified Vendors {Contractors} to provide medical claims administration and network management (Network/Claims). Bid Solicitation § 1.1 *Purpose and Intent.* Part 2 sought Quotes from qualified Vendors {Bidders} to provide navigation/advocacy services (Navigation/Advocacy). Ibid. Vendors {Bidders} were given multiple options to respond to the scope of work:

- Part 1 - Stand Alone Network/Claims (Bid Solicitation Section 3.1)
- Part 2 – Stand Alone Navigation/Advocacy (Bid Solicitation Section 3.2)
- Combination of Part 1 and Part 2

[Ibid.]

In accordance with the Bid Solicitation instructions, potential Vendors {Bidders} were instructed to submit questions to the Bureau, using the Division's ***NJSTART*** eProcurement system by April 26, 2019 2:00 pm. See, Bid Solicitation Section 1.3.1 *Electronic Question and Answer Period.* The Bureau received two hundred and forty-two (242) questions. Through the posting of Bid Amendment #1 on May 10, 2019, the Bureau answered all two hundred and forty-two (242) questions it received. On May 10, 2019, based upon the responses posted in Bid Amendment #1, the Bureau posted the Revised Bid Solicitation entitled "T2846 Revised Bid Solicitation 051019" and Revised Price Sheets.

On May 31, 2019, the Division's Proposal Review Unit opened five (5) Quotes received by the submission deadline of 2:00 pm eastern time from the following Vendors {Bidders}:

1. Aetna;
2. Alight Solutions LLC (Alight);
3. Brighton Health Plan Solutions, LLC (Brighton);
4. Horizon Healthcare Services, Inc. (Horizon); and
5. UMR, INC. (UMR).

As noted in the Bureau's Recommendation Report, after conducting a preliminary review of the Quotes for compliance with mandatory elements of Quote submission, the Bureau found the following:

1. Alight's Quote was non-responsive based on material deviations to the requirements of the Bid Solicitation for failing to provide mandatory Bid Solicitation information;
2. Brighton's Quote was non-responsive based on modifications to the Price Sheet/Workbook and failure to provide the information required by Bid Solicitation Sections 4.4.5.2 and 1.2;
3. UMR's Quote was non-responsive based on material deviations to the requirements of the Bid Solicitation.

The Bureau found that Quotes submitted by Aetna and Horizon met all mandatory requirements of the Bid Solicitation and were forwarded to the Evaluation Committee for review and evaluation consistent with the requirements of Bid Solicitation Section 6.7 *Evaluation Criteria.* The Evaluation Committee met to review and score the technical Quotes submitted by Aetna and Horizon on June 18, 2019.

Subsequently, the Evaluation Committee met on July 8, 2019 to review the results of the Vendors' {Bidders'} original pricing submissions. Based upon that review, on July 9, 2019, the Bureau sent Horizon a Request for Clarification as follows:

> Pursuant to Section 4.4.5.2, State-Supplied Price Sheet Instructions, a Vendor {Bidder} responding to Part 1 services alone, and Part 1 and Part 2 services bundled, must complete the Recovery Services Tab in the State-Supplied Price Sheet. Further, the instructions in the Recovery Services Tab in the State-Supplied Price Sheet requires the Vendor {Bidder} to submit a Per Employee Per Year (PEPY) price cap for 2020, 2021, and 2022.
>
> The document submitted by Horizon titled "Vol 3 Section 4- Self-Insured Pricing Sheets," "Recovery Services" tab, Row 26, Columns A-D (hereinafter Horizon Price Sheet), indicates a "Recovery Services Cap (PEPY)" of $7.50 (2020), $8.50 (2021), and $8.50 (2022) respectively. However, the document submitted by Horizon titled "Vol 2 Section 3A – Exhibit 12 – Recovery Services," Page 5 (hereinafter Horizon Exhibit 12), indicates Projected Fees for 2020 of $18,835,500. It appears to the Division that there is an ambiguity in pricing between the per employee per year price cap for 2020 in the Horizon Price Sheet and the estimated annual fees for Recovery Services in Horizon Exhibit 12.
>
> To assist the Director in ascertaining the true intent of Horizon's proposal, please clarify the connection, if any, between the Horizon Price Sheet Recovery Services Per Employee Per Year price cap submission and the Horizon Exhibit 12 Projected 2020 Fees.

On July 10, 2019, Horizon provided the Bureau with the following response via e-mail:

> The instructions for the Recovery Services tab indicated employee months rather than average employee months. Horizon populated its Price Sheet with a fee cap to be multiplied by the annual employee months. Therefore, the Horizon Price Sheet reflects a PEPY, or per employee per year, cap. This methodology is consistent with existing pricing arrangements with the SHBP and SEHBP under the 2019 extension agreement. Additionally, Horizon calculated the Projected Fees in Exhibit 12 based on the amounts noted in the Recovery Services tab multiplied by the estimated annual employee months. If the projected savings in Exhibit 12 are achieved, the $18.8 million in fees would apply.

On July 11, 2019, in accordance with Bid Solicitation Section 6.8 *Negotiation and Best and Final Offer (BAFO)*, the Bureau requested a BAFO from Aetna and Horizon, stating:

> If your company chooses to submit a BAFO response, please use the State-Supplied BAFO Price Sheet and BAFO Attachment D Workbook to submit BAFO pricing and send the response via email to the undersigned Procurement Bureau representative. Please use an email subject line stating "BAFO – Bid Solicitation 19DPP00365". The State-Supplied BAFO Price Sheet contains only the pages relevant to the BAFO process,

and does not contain all of the pages provided in the original Price Sheet submitted with your Quote.

The relevant items on each tab have been highlighted green on the following documents:

- 19DPP00365 BAFO Attachment D-Performance Standards Workbook
- 19DPP00365 BAFO Price Sheets

Please fill in only the green boxes. If modifications are made to the Price Sheets, or additional information is provided outside the highlighted green boxes, then the BAFO response will be ignored and the original Quote submission will prevail. If you do not respond to the request for a Best and Final Offer or assert that your last price is firm, your most recent prior offer will be considered to be your Best and Final Offer.

Based on the BAFO responses received on July 15, 2019, the Evaluation Committee reconvened on July 19, 2019 to review the BAFO results. Horizon did not change any of the prices that it submitted in its original Quote for Recovery Services. After completing its pricing review, the Evaluation Committee provided financial scores to the Vendors {Bidders} as follows[2]:

The following chart shows the Overall Financial Scorecard for Parts 1 and 2 after BAFO:

Single Vendor Approach – PPO	AETNA	HORIZON
Part 1	925	1,000
Part 2	341	1,000
Total (75% Part 1 + 25% Part 2)	779	1,000
Single Vendor Approach – HMO	**AETNA**	**HORIZON**
Part 1	927	1,000
Part 2	341	1,000
Total (75% Part 1 + 25% Part 2)	780	1,000

Split Vendor Approach – PPO	AETNA	HORIZON
Part 1	925	1,000
Part 2	344	1,000
Total (75% Part 1 + 25% Part 2)	780	1,000
Split Vendor Approach – HMO	**AETNA**	**HORIZON**
Part 1	910	1,000
Part 2	307	1,000
Total (75% Part 1 + 25% Part 2)	759	1,000

After completing its review and evaluation of the Quotes received, on July 29, 2019 the Evaluation Committee issued its report. Thereafter, on August 1, 2019, consistent with the recommendation contained in the Evaluation Committee Report, the Bureau issued a Recommendation Report which recommended a Blanket P.O. award to Horizon as it was the Vendor {Bidder} whose Quote, conforming to the Bid

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[2] The scores in the chart were generated by the Evaluation Committee and summarized in the July 26, 2019 "SHBP/SEHBP Self Insured Medical RFP Financial Evaluation Summary" (Evaluation Summary). According to Slide 10 of the Evaluation Summary, "the Bidder with the most competitive cost structure will receive the maximum score of 1,000 points. The remaining Bidder(s) will receive a reduced score based on the relativity of their cost structure to the most competitive Bidder."

Solicitation, was most advantageous to the State, price and other factors considered. The Recommendation Report notes that Horizon's Quote demonstrated that it had the experience necessary to complete the work sought by the Bid Solicitation as evidenced by Horizon's receipt of the highest technical score of the Quotes received. The Bureau also determined that based on financial evaluation, Horizon provided the most competitive cost structure with their submission for both Part 1 Network/Claims and Part 2 Navigation/Advocacy. Recommendation Report, p. 7.

On August 5, 2019, the Bureau issued a Notice of Intent to Award letter (NOI) indicating an intent to award a Blanket P.O. as follows:

Part 1 Network/Claims: Horizon Healthcare Services, Inc.
Part 2 Navigation/Advocacy: Horizon Healthcare Services, Inc.

On August 20, 2019, Aetna wrote to the Division's Acting Director, protesting the NOI for the following reasons:

1. Horizon impermissibly modified its Bid in the guise of a clarification, and has submitted a materially nonconforming bid that must be rejected;
2. The Division failed to properly conduct the Best and Final Offer process by not permitting Best and Final Offers on all cost factors, resulting in diminished opportunity for lower cost to the State;
3. The criteria utilized for computing the savings credit in the Financial Evaluation, Part 2, Vendor are undefined, speculative and unrealistic. The use of this criteria at weight of 80% of the total score results in a fictionalized award, gives credit for illusory savings and risk and is a disservice to the health care beneficiaries of this State. Its use does not result in an award to that proposal which is most advantageous to the State, price and others factors considered; nor does it constitute the proper exercise of business judgement mandated of the Director.

[See Aetna's August 20, 2019 Protest Letter.]

On August 29, 2019, the Division issued its Final Agency Decision upholding the Bureau's NOI. That decision, however, noted that Horizon's award was subject to the amounts as written on Horizon's original Price Sheet submitted with its Quote for Part 1 Recovery Services Cap PEPY for Plan Year 2020, Plan Year 2021, and Plan Year 2022.

On August 30, 2019, Aetna requested a stay of the Blanket P.O. award from the Division.

In consideration of Aetna's request for a stay, I have reviewed the record of this procurement, including the Bid Solicitation, the Quotes received, the protest, the Division's August 29, 2019 Final Agency Decision, the request for a stay, the relevant statutes, regulations, and case law. This review has provided me with the information necessary to determine the facts of this matter and to render an informed decision with respect to Aetna's request for a stay.

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

New Jersey courts have consistently held that a movant must clearly and convincingly demonstrate the right to a stay. Waste Mgmt. of N.J., Inc. v. Union County Utilities Auth., 399 N.J. Super. 508, 520 (App. Div. 2008). As discussed in detail below, in reviewing each of the Crowe factors with respect to this request, Aetna has not demonstrated that it is entitled to a stay.

1. Aetna will not suffer irreparable harm.

Aetna will not suffer irreparable harm if the stay of the Blanket P.O. award is denied. In support of its position, Aetna states that:

> Aetna will be harmed by the loss of the Contract award as well as by the loss of its existing contract should a rebid be ordered, as it will be transitioned to Horizon in the absence of a stay. Aetna's existing members will be disrupted and forced to reenroll with Horizon. Aetna's current New Jersey support structure will be displaced, some of its employees reassigned, as well as other effects. In the event the award is overturned consistent with well-settled New Jersey law, Aetna and Aetna-enrolled members will have already been displaced, for which no compensation or remedy will then exist.
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> [Aetna's Request for a Stay, p. 8.]

When considering a stay request, "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, 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 laws. Moreover, the fact that Aetna may have previously provided services to the State does not entitle it to a contract in perpetuity. In re Motor Vehicle Comm'n Surcharge Sys. Accounting and Billing Servs., No. A-3136-16, at *13 (App. Div. Feb. 8, 2018). No bidder is entitled to award of a public contract. Comm'l Cleaning Corp. v. Sullivan, 47 N.J. 539, 546 (1966).

With respect to Aetna's claim that members will be disrupted and forced to reenroll with Horizon, Bid Solicitation Section 3.1.18 *Start-Up/Conversion* requires, among other things, that the Vendor {Contractor} to work with DPB to convert member and employer information from the previous Vendor {Contractor} and to ensure that all new members are properly enrolled with Horizon before the Benefit Effective Date. Thus, the Evaluation Committee "determined that there would not be significant member disruption if Horizon were to become the sole administrator of the self-insured population." (Recommendation Report, pg. 7).

Finally, while Aetna could suffer harm from not being awarded a Blanket P.O. pursuant to this Bid Solicitation, this is a risk that a company routinely accepts when it participates in a public bidding process. Thus, Aetna has not demonstrated by clear and convincing evidence that it will suffer irreparable harm if the Blanket P.O. award is not stayed.

2. Aetna 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. Aetna has not demonstrated a reasonable probability of ultimate success on the merits.

Aetna has not established by clear and convincing evidence that it has a reasonable probability of success on the merits.

In support of its request for a stay, Aetna states that "Horizon submitted a materially non-conforming bid that contained two different prices for the cost of Recovery Services." (Aetna's Request for a Stay, pg. 3). Aetna's reading of the August 29, 2019, Final Agency Decision incorrectly assumes that the Division had the option to choose between two distinct dollar amounts with respect to the Per Employee Per Year (PEPY) Recovery Cap that was required as part of Horizon's Quote, and that the Division simply chose between the lesser of those two dollar amounts.

A review of the Final Agency Decision reveals that the Division acknowledged that it was proper for the Bureau to send a clarification to Horizon to resolve an ambiguity between the PEPY amount listed on Horizon's Recovery Service tab of Volume 3, Section 4 – Self-Insured Pricing Sheets.xlsx and Horizon's Exhibit 12 Recovery Services.pdf. However, the Final Agency Decision found that Horizon provided an amount of $7.50 PEPY on it Price Sheet as was required by RFP Section 4.4.5.2 *State-Supplied Price Sheet Instructions*. This was the amount that Horizon put on its price sheet and therefore the price quoted for the services sought for Part 1. Horizon's Exhibit 12, which contained the projected fee figure of $18,835,500, was not a PEPY amount as required by the Bid Solicitation. As noted in Horizon's July 10, 2019 response to the clarification, there was no direct connection between Horizon's Exhibit 12 Recovery Services.pdf, which contained projected 2020 Fees, and information provided in the Recovery Services tab of Volume 3, Section 4 – Self-Insured Pricing Sheets.xlsx. Rather, Horizon's Exhibit 12 represented projected (potential) fees and recovery amounts. (August 29, 2019 Final Agency Decision, pp. 7-8).

The August 29, 2019 Final Agency Decision sustained the NOI to award to Horizon pursuant to "the amounts as written on Horizon's original Price Sheet that was submitted with its Quote for Part 1 Recovery Services Cap PEPY for Plan Year 2020, Plan Year 2021, and Plan Year 2022." (August 29, 2019 Final Agency Decision, p. 11). Thus, Horizon cannot seek to enforce a higher rate during the term of this Blanket P.O., as Aetna contends.

Further, this procurement is distinguishable from the facts in Meadowbrook Carting Co. v. Borough of Island Heights, 138 N.J. 307, 315 (1994) and In the Matter of Request for Proposals No. 17DPP00144, Employee Benefits: Pharmacy Benefit Management Contract (PBM) and Aetna's attempts to compare this procurement to the those matters is misplaced. (Aetna's Request for a Stay, pp. 3-5). Here, Horizon only provided the State with one PEPY amount, $7.50, which was the basis for Horizon's award. Unlike in PBM, Horizon did not reserve for itself the right to amend its pricing at a future date. Further, the Final Agency Decision properly disregarded Horizon's projected figure listed in Exhibit 12. Horizon's clarification response resolved any ambiguities that may have existed in Horizon's Quote, and there was no material deviation.

Additionally, Aetna argues that the manner in which the Division elected to conduct the BAFO process was improper because "where the State determines to seek BAFO pricing only on certain elements of the contract, and not others, it subjects the process to an after-the-fact possibility of manipulation to favor a particular bidder and is therefore invalid." (Aetna's Request for a Stay, p. 6). As previously articulated in the August 29, 2019 Final Agency Decision,

> Nothing in the relevant portions of the N.J.S.A. 52:34-12(f) or N.J.A.C. 17:12-2-7 prescribes the manner in which the Bureau must carry out a BAFO process. Therefore, the Bid Solicitation controlled the conduct of the BAFO process. The decision to send out a partial BAFO was made by the Evaluation Committee based on the fact that the Part 2: Medical ROI and Claim Target Guarantee provided in the Bidders' responses represented the Bidders' best estimates of program impact, and as such, did not require a BAFO request. The Evaluation Committee determined that a BAFO of the ASO[3] fees for Part 1 and Part 2 was appropriate, as the ASO fees are a tangible figure that a Bidder can adjust, and that the ASO fee amounts can also be tied into invoices or an audit trail. Conversely, the Evaluation Committee determined that because the Medical ROI and Claim Target Guarantee is an assumed figure based off of the Bidders' projections of future activity, and if those figures were included in a BAFO and were changed, the Evaluation Committee would question the validity of the new figures produced, as such a result would indicate that the Bidders' projections may have changed artificially. Thus, the Evaluation Committee determined that Bidders should be given the opportunity to frame their BAFO responses on only hard dollar, fixed fees which can be lowered at a Bidder's discretion.

As discussed in the Final Agency Decision, Aetna and Horizon both received requests for BAFOs of the ASO fees for Part 1 and Part 2. (August 29, 2019 Final Agency Decision, p. 10.) Both vendors were given the same opportunity to provide the State with their BAFOs. Aetna does not point out any portion of the Bid Solicitation or any applicable law that prohibits the manner in which the BAFO process was conducted. While the BAFO of other portions of the procurement may have yielded additional savings, they may not have yielded additional savings. Aetna's Request for a Stay makes no new arguments alleging that any aspect of the BAFO process was fraudulent, arbitrary, or capricious.

Accordingly, Aetna has not established by clear and convincing evidence that it has a reasonable probability of success on the merits.

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[3] Administrative Services Only Fee (ASO Fee) is defined in Bid Solicitation Section 2.3.

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

Lastly, Aetna 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. Aetna argues that, "the balancing of relative hardships of the parties also weighs in favor of imposition of stay where, as here, the maintenance of the status quo merely requires the continuation of the existing contract of both incumbents providing the contract services to the State." (Aetna's Request for a Stay, p. 8). Much like Point 1, above, the fact that Aetna may have previously provided services to the State does not entitle it to a contract in perpetuity. In re Motor Vehicle Comm'n Surcharge Sys. Accounting and Billing Servs., No. A-3136-16, at *13 (App. Div. Feb. 8, 2018). No bidder is entitled to award of a public contract. Comm'l Cleaning Corp. v. Sullivan, 47 N.J. 539, 546 (1966).

Aetna argues that maintaining the status quo for this contract is a more favorable outcome than making a Blanket P.O. award to Horizon, simply because the status quo does not result in a change of Vendor for the State or a change in plans for any members. As stated in Bid Solicitation Section 1.1 *Purpose and Intent*:

> The goal with this Bid Solicitation is to contract with Vendors {Contractors} that will drive meaningful changes in the delivery of healthcare, clinical quality improvements and meaningful cost reductions in the SHBP/SEHBP. This Bid Solicitation presents a significant departure from the requested scope of services covered in the last procurement of medical plan services for the State Health Benefits Program (SHBP) and School Employees' Health Benefits Program (SEHBP) in 2012. The State is intent on taking bolder actions that focus on mitigating the total cost of care for both the SHBP/SEHBP and its Members, while driving improvements in the overall health of the SHBP/SEHBP population.

The Evaluation Committee concluded that Horizon's Quote offered the State the services in the manner requested by the Bid Solicitation at the most advantageous price to the State. Further, the Evaluation "Committee determined that there would not be significant member disruption if Horizon were to become the sole administrator of the self-insured population." (Recommendation Report, p.7). Aetna will not lose anything to which it is entitled if the Blanket P.O. is awarded in accordance with the NOI. Rather, if the Blanket P.O. award to Horizon were to be stayed, the public interest, and in particular, the interest of the SHBP/SEHBP enrollees to receive meaningful changes in the delivery of healthcare, clinical quality improvements and meaningful cost reductions, as this new contract was designed to do, would be harmed.

While Aetna's current contract continues to be in effect until the effective date of the new Blanket P.O., the new contractor must have all requirements in place to ensure that it can handle open enrollment of members starting on October 1, 2019 for annual open enrollment. Moreover, two additional bargaining groups (International Federation of Professional & Technical Engineers (IFTE) and American Federation of State, County & Municipal Employees (AFSCME)) are poised to begin a special Open Enrollment period beginning September 16, 2019.[4] In an effort to alleviate and avoid member confusion, DPB will utilize the

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[4] IFTE and AFSCME groups fall under the State Health Benefit Program Plan Design Committee Resolution #2019-5. In accordance with their respective contracts with the State, these groups are eligible to enroll in the new PPO plans which will be offered under the new Blanket P.O. The respective contracts each specify that coverage for health benefits have an effective date of November 1, 2019 for those employees on the monthly pay schedule and November 9, 2019 for those employees on the bi-weekly pay

time prior to the commencement of open enrollment to communicate with plan members as member education regarding open enrollment and any changes to the plan is a critical step to a successful contract. Specifically, DPB will provide written educational materials and in-person presentation to plan members. In addition to member education, DPB fields questions and inquiries from local governments and school districts that are either participating in the SHBP/SEHBP or are interested in participation in SHBP/SEHBP.

Further, prior to the Benefit Effective Date[5], December 21, 2019 for those employees on the bi-weekly pay schedule and January 1, 2020 for those employees on the monthly pay schedule, the new Contractor {Vendor} will need to fulfill a number of requirements as referenced in Bid Solicitation {RFP} section 3.1.18 *Start-Up/Conversion*, which includes; for example, working with the Office of Information Technology to test file interfaces, data transfers, account structures, and reporting formats. The testing of file transfers which will include testing data requirements, coding requirements, systems testing and the transfer of files could take up to three months.

Moreover, the State Health Benefits Commission and the School Employees Health Benefits Commission, at an open public meeting, adopted plan rates for the 2020 plan year. These plan rates were based on an assumption of a Blanket P.O. award to a single vendor. If the Blanket P.O. award were stayed, and DPB was unable to move forward with implementation of a single vendor approach, there would be significant financial implications for the rates. The plan rates not only affect the State's budget projections, but also the budgets of local school districts and local government entities. The new Blanket P.O. award is anticipated to result in cost savings to the State, local government employers and school districts of over $100 million dollars in year 1, with potential for even more savings in years 2 and 3.

Further, as to Aetna's argument of relaxing the Crowe factors 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). While the Crowe factors may be relaxed, justification for such relaxation does not exist here.

Aetna 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 award outweighs any of Aetna's legally cognizable interests. Aetna 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.

Aetna cannot show that the balance of equities weighs in favor a stay. Therefore, the balance of the hardship weighs in favor of denying Aetna's request for a stay.

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schedule. This necessitates a September 16, 2019, start date for the special open enrollment period for these groups.

[5] Benefit Effective Date is defined as the "Date on which the Member is eligible for services provided by the Vendor {Contractor}. The Benefit Effective Date for each Member is included in the daily Plan Eligibility File." Bid Solicitation Section 2.3 *Blanket P.O. Specific Definitions/Acronyms*.

Thank you for your company's continuing interest in doing business with the State of New Jersey. However, based upon the foregoing, I sustain the August 5, 2019 NOI and deny Aetna's request for a stay.

Sincerely,

Amy Davis
Associate Deputy Director

c: L. Spildener
C. Iversen
D. Perry