



State of New Jersey

DEPARTMENT OF THE TREASURY
DIVISION OF PURCHASE AND PROPERTY
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June 30, 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: Protest of Notice of Intent to Award
Solicitation# 17DPP00144: Employee Benefits: Pharmacy Benefit Management

Dear Ms. Cannon:

This letter is in response to your correspondence of June 30, 2017, to the Hearing Unit of the Division of Purchase and Property (hereinafter "Division") on behalf of Express Scripts, Inc. (hereinafter "ESI") in which ESI protests the June 29, 2017 Notice of Intent to Award (hereinafter "NOI") issued by the Division's Procurement Bureau (hereinafter "Bureau") indicating an intent to award a contract to Optum RX (hereinafter "Optum") for Solicitation# 17DPP00144: Employee Benefits: Pharmacy Benefit Management (PBM).

In consideration of ESI's protest, I have reviewed the record of this procurement, including the Bid Solicitation {Request for Proposal} (hereinafter "RFP"), the 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 Final Agency Decision on the merits of the protest. I set forth herein the Division's 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 a 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:

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 followthe-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.

Accordingly, the subject Bid Solicitation {Request for Proposal} #17DPP00144: Employee Benefits: Pharmacy Benefit Management (hereinafter "RFP") was issued on May 16, 2017, by the Bureau on behalf of the Department of the Treasury Division of Pensions and Benefits (hereinafter "DPB").¹ 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 Proposals in response to the RFP, Bidders would be pre-qualified to submit Proposal pricing utilizing the Reverse Auction Tool in accordance with Solicitation #17DPP00106 - Technical Assistance and Reverse Auction Services, for Selection of a Pharmacy Benefits Manager.² RFP § 1.1 *Purpose and Intent*. The intent of this RFP was to award a Master Blanket Purchase Order (Blanket P.O.) {Contract} (hereinafter "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;

¹ This is a procurement of the services provided under the Employee Benefits: Pharmacy Benefit Management Contract.

² On April 27, 2017, the Division awarded a Contract to Truveris, Inc. (hereinafter "Truveris") for T3077 Technical Assistance and Reverse Action Services for Selection of a Pharmacy Benefits Manager - which provides for technical assistance in the evaluation of the Proposals received in response to Solicitation #17DPP00144 and provides for the online automated reverse auction services.

- 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 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 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 performing review of the technical proposals received using the criteria set forth in RFP § 6.7.1 *Technical Evaluation Criteria* as follows to confirm that all bidders were qualified to provide pharmacy benefit management services:

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 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*. All three (3) Bidders were pre-qualified to attend the mandatory training on how to utilize the reverse auction tool to submit proposal pricing and be potentially awarded the contract if successful in the Reverse Auction Process. RFP § 4.4.5.2 *Price Sheet/Schedule Attachment Instructions*.³

The Reverse Auction 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 Reverse Auction Tool, Truveris was provided claims data for the time period of 01/01/2016 –12/31/2016. Specific cost and utilization trend factors were applied by drug classification, i.e. Brand, Generic, and Specialty, to project a 3-year forecast against which the submitted bids would be compared.⁴ Evaluation Committee Report, p. 6. All bidders were subject to the exact same factors.

On June 14-19, 2017, all three (3) Bidders participated in the first round of the online automated reverse auction tool.⁵ 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 on 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 the Notice of Intent to Award (hereinafter "NOI") advising all bidders that it was the State's intent to award a contract to OptumRx (hereinafter "Optum"). All Bidders were advised that the protest period would close on June 30, 2017 at noon.⁶

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 action. No other requests for documents or other information was submitted Division prior to the close of business. On the morning of June 30, 2017, the Division received

³ 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.

⁴ Truveris' inflation assumptions are proprietary and confidential.

⁵ The Reverse Auction Tool which has the capability to project SHBP/SEHBP costs based on the Bidders' proposed pricing terms. RFP § 1.1 *Purpose and Intent*.

⁶ 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. See, Exhibit A.

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.

DISCUSSION

A. ESI Has Not Established That It Is Entitled To Stay Under The Law.

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).]

In its request for stay, ESI did not address the individual Crowe factors. Rather, in a footnote in its protest letter, ESI states:

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.]

However, 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. ESI submitted a protest, as it was permitted to do, and the Division substantively ruled on the basis of the protest as set forth below. Furthermore, ESI will continue to reap the economic benefits of its current contract with the State until a new contract is awarded and effective.

Undoubtedly, ESI who is the incumbent contractor, will lose business from the State when the contract resulting from this RFP is awarded. 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. The fact that ESI expended time and resources to fulfill its contractual obligations to the State under the current contract, for which it was compensated by the State, is insufficient to justify staying the contract award for the instant solicitation.

Even “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). The Division does not find that ESI has suffered irreparable injury. The public interest however is greatly affected as the award of this contract will bring about more than \$1.6 billion in savings for these services, which inure to the benefit of the public. However, even if ESI would suffer irreparable harm, 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.

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 above in response to ESI’s substantive protest points, via 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. As the Division acted as directed by the statutory requirements, ESI has not shown a reasonable likelihood of ultimate success in challenging the exercise of that authority. Further, as set forth in detail below, ESI’s challenges to the substantive procurement are without merit. 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 awarding the new contract 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. Failure to award the contract to the new vendor by June 30, 2017 could jeopardize the State's ability to meet these varying deadlines and milestones.

Further, as to ESI'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.

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. The Division Considered the Technical Proposals Submitted Consistent with the Requirements of the RFP.⁷

ESI alleges that the Division failed to consider the technical proposals submitted by the bidders. To the contrary, on June 13, 2017 the Committee met to review and consider the proposals submitted by the Bidders. Citing N.J.S.A. 52:34-12(g), ESI argues the Division failed to select the most advantageous offer to the State, price and other factors considered. ESI contends that the strengths and advantages of its

⁷ In its substantive protest, ESI raises four protest points, with subparts, however for ease of review, those points have been consolidated and reorganized in this Final Agency Decision.

technical proposal outweighed the “minor 1.3% difference between it and Optum’s financial proposal.” However, the technical evaluation criteria included in the RFP had a limited purpose.

RFP § 6.7.1 *Technical Evaluation Criteria*, states:

Each criterion will be scored and each score multiplied by a predetermined weight to develop the Technical Evaluation Score.

- 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 above criteria will be utilized to develop a pre-qualified pool of Vendors {Bidders} who will then participate in the Reverse Auction. All pre-qualified Vendors {Bidders} will be required to participate in a mandatory training provided by the Reverse Auction Vendor {Contractor}.

In reviewing the proposals submitted, the Committee evaluated each proposal against the requirements of the RFP utilizing the criteria identified in RFP § 6.7.1 *Technical Evaluation Criteria*. In this solicitation, the technical proposals were used to develop a pre-qualified pool of Bidders who will then participate in the Reverse Auction. *Ibid.* A review of the proposals submitted reveals that all Bidders submitted proposals which conformed to the requests and requirements of the RFP. Therefore all Bidders who submitted technical proposals were prequalified to participate in the reverse action.

Following prequalification, price was the only factor to consider as the purpose of a Reverse Auction is to benefit from the bidders reducing their pricing over rounds bidding. This is to the State’s benefit. Further, while ESI characterizes its price proposal as a “minor 1.3%” higher than the proposal submitted by Optum, ESI’s three-year overall bid was projected to be more than \$88,000,000 higher than the bid submitted by Optum, which is projected to represent savings of more than \$1.6 billion of the current plan’s projected cost.

Accordingly, the Bureau properly utilized price in determining the bid from Optum represented the offer most advantageous to the State, price and other factors considered.

C. ESI Should Have Raised Issues regarding the “Assumptions” during the Question and Answer Period or filed a Protest to the Specifications.

ESI alleges that Truveris’ assumptions in creating 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.” ESI Protest, p. 4. Further, ESI claims that Truveris’ calculations “misstate the true cost of the proposals” submitted.

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 Specific cost and utilization trend factors were applied by drug classification, i.e. Brand, Generic, and Specialty, to project a 3-year forecast against which the submitted bids would be compared. Evaluation Committee Report, p. 6.

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, ESI did not avail itself of the opportunity to do so.

I note that the subject RFP is to solicit proposals for the services of a Pharmacy Benefits Manager. The Reverse Auction Tool, 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*.]

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

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.

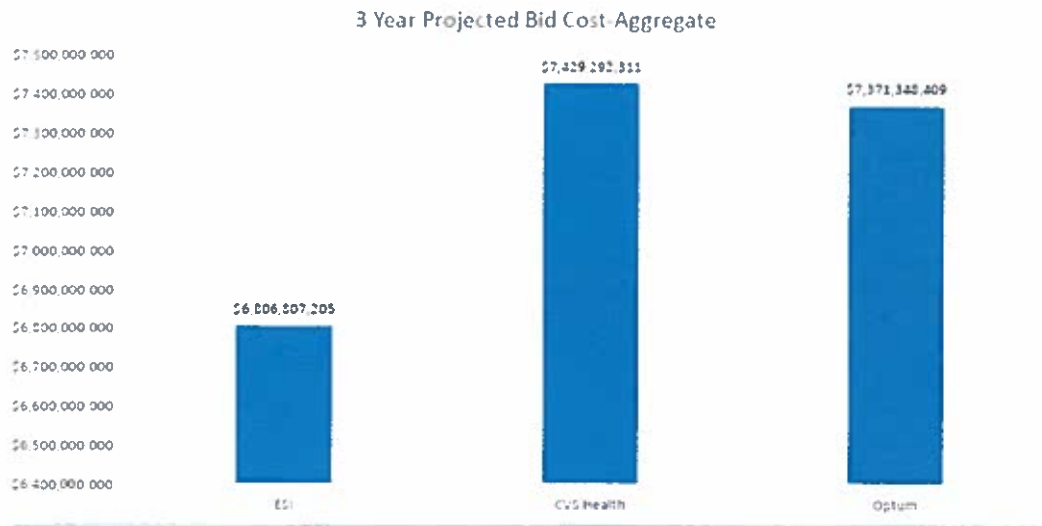
3.2.2 PRICING METHODOLOGY

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 in this subject solicitation (Solicitation# 17DPP00144).

That being said, there is no evidence that the assumptions and methodology to be used by Truveris in the Reverse Auction Tool to project cost was skewed and resulted in an inaccurate depiction of the Bidder's proposals.

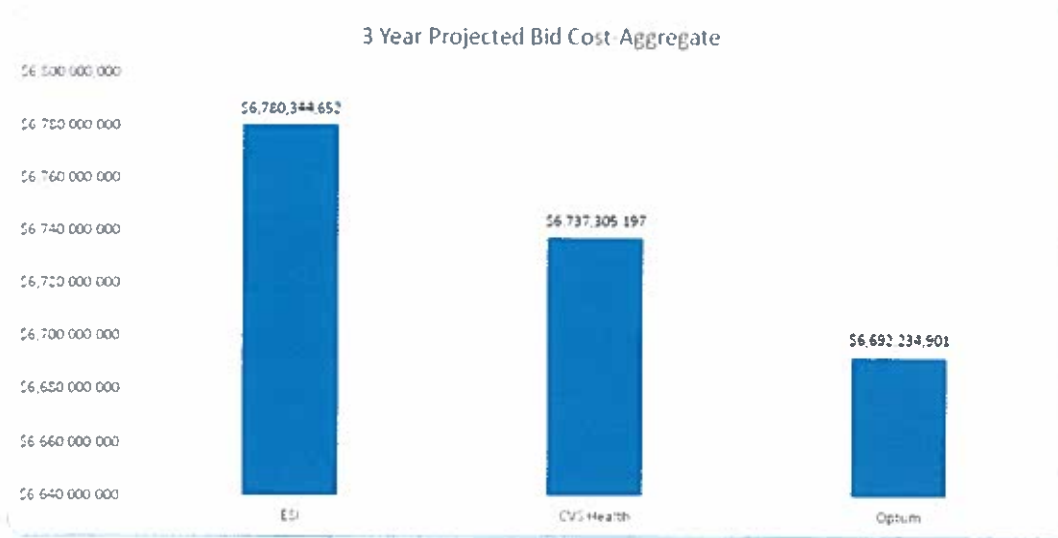
At the conclusion of Round 1 of the pricing submission, Bidders were provided with a summary of pricing submitted by all Bidders. The summary results from the Round 1 pricing submission were as follows:⁹



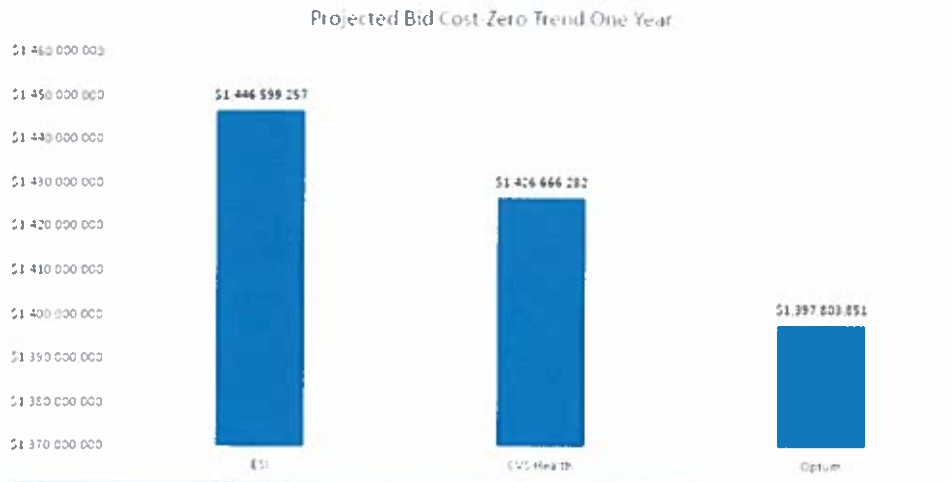
The results of the second round of proposal pricing resulted in the following:¹⁰

⁹ This information was originally provided to the three Bidders with the Bidders identified as PBM1, PBM2 or PBM3. However, for the sake of this protest, each of the bidders is being identified. PBM1 is ESI, PBM2 is CVS/Caremark, and PBM3 is Optum.

¹⁰ On page 14 of its protest, ESI alleges that there was only one round of bidding, with a response by the remaining bidders to its original pricing. ESI claims that it was not given the opportunity to submit a counter offer. Contrary to ESI claims, at the end of Round 1, all bidders were provided with the blind tabulated data. Thereafter, ALL bidders were provided with an opportunity to submit new pricing during Round 2. As the chart indicate, ESI availed itself of the opportunity to lower it proposal pricing, but only did so by a small amount, contrary to the other bidders who significantly lowered their respective proposal pricing.



However, Truveris indicates that even if the market trend assumptions were removed from the analysis, the price proposal would have resulted in the same price rankings.¹¹



Accordingly, Truveris' assumptions in creating the Reverse Auction Tool do not result in a skewing of the respective position of the bidders as even without assumption as all bidder were subject to the same assumptions. 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 assumption, ESI's projected proposal price was higher than that submitted by both CVS and Optum as shown in the table above.

¹¹ Note that this table only reflects a one year projection but represent the pricing of the three Bidders.

D. The Division Followed the Authorizing Legislation and the Specifications in the Conduct of the Auction.

Citing P.L. 2016, c. 67, ESI asserts the Division failed to conduct a reverse auction as contemplated by the Legislature and the RFP because the Division only held “one round of bidding with a response by the remaining bidders to the low pricing proposed by ESI.” ESI, July 30, 2017, Protest and Stay Letter. Rather, ESI argues, the Division used a “hybrid BAFO process in which vendors simply submitted a best and final offer, rather than an active auction in which ESI would have had an opportunity to counter offer any lower price submitted in response to its own low price.” Ibid. This statement by ESI is inaccurate as all bidders submitted pricing for both the initial reverse action round and pricing for the second reverse auction round

P.L. 2016, c. 67 (b)(1) required the Division to procure “online automated reverse auction services to support the Department of the Treasury in comparing the pricing for the PBM procurement.” “Reverse auction” was defined as “an automated bidding process conducted online that starts with an opening price and allows qualified bidders to counter offer a lower price, for as many rounds of bidding as determined by the division.” P.L. 2016, c 67 (1)(e). The technology platform was required to utilize re-pricing of PBM proposals using code-based classifications of drugs from nationally-accepted data sources. P.L. 2016, c. 67 (b)(1). Further, in conducting the auction, the Division was permitted to reveal “pricing . . . to all responsive bidders during the negotiation process.” P.L. 2016, c. 67 (c)(6).

Consistent with these requirements, the RFP explained:

It is anticipated there will be at minimum two (2) rounds of bidding. Specific instructions for the Reverse Auction Tool and mandatory training will be provided by the Vendor {Contractor} of Bid Solicitation {RFP} 17DPP0106 for all pre-qualified Vendors {Bidders}.

The Reverse Auction allows the State and the Vendors {Bidders} to view pricing results in real-time or after each round of bidding.

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

The integrity and confidentiality of the online Price Quotes {Proposals} is protected by blinding the identity of the pre-qualified PBM Vendors {Bidders} and the proprietary details of the online Price Quotes {Proposals} are protected from being accessible to other PBM Vendors {Bidders}.

The Reverse Auction Tool will be updated regularly to show pre-qualified PBM Vendors {Bidders} (on a Blinded basis) the projected value of the PBM Blanket P.O. {Contract}.

[RFP § 4.4.5.2 *Price Sheet/Schedule Attachment Instructions*.]

Contrary to ESI’s arguments, the Reverse Auction Tool allowed for the initial and one additional round of bidding in which pre-qualified Bidders were permitted to revise/submit their pricing information.

Following round one, all three bidders were provided with blinded information revealing the pricing submitted, along with a blind summary of bids submitted by the other Bidders. In round two, all three Bidders were able to adjust the previously submitted pricing information with the benefit of having seen the initial blind bids from the other Bidders. This process is exactly as contemplated by P.L. 2016, c. 67 and RFP § 4.4.5.2 *Price Sheet/Schedule Attachment Instructions*. Accordingly, this protest point is rejected.

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 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: REG

c: P. Michaels
L. Spildener
M. Tagliaferri
S. Fletcher



State of New Jersey

DEPARTMENT OF THE TREASURY
DIVISION OF PURCHASE AND PROPERTY
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CHRIS CHRISTIE
Governor

FORD M. SCUDDER
State Treasurer

KIM GUADAGNO
Lt. Governor

MAURICE GRIFFIN
Acting Director

June 29, 2017

Eric Ruebenacker
Express Scripts, Inc.
One Express Way
St. Louis, MO 63121
Phone: 314.996.0900
Email: Eric_ruebenacker@express-scripts.com

Re: **Revised Notice of Intent to Award**
Solicitation#: 17DPP00144
Contract Title: T2679 Employee Benefits: Pharmacy Benefit Management
Via E-Mail

Dear Mr. Ruebenacker:

It is the intent of the Director of the Division of Purchase and Property (Division) to make a Master Blanket Purchase Order (Blanket P.O.) {Contract} (hereinafter contract) award to the following Vendor {Contractor} pursuant to the proposal {quote} submitted in response to the referenced Bid Solicitation {Request for Proposal} (hereinafter RFP).

OptumRx, Inc.

This award is being made in accordance with the procedure set forth in New Jersey Administrative Code 17:12-2.2. The Blanket P.O. {Contract} award identified herein is contingent upon the availability of funds. Note that in accordance with the Division's administrative regulations, N.J.A.C. 17:12-3.3 Protest Procedures, the protest period ends at 12:00 pm EST on June 30, 2017. Letters of Protest must be received by the protest period end date and may be submitted to the following three addresses ONLY: (1) email at dpp_protest@treas.nj.gov; (2) facsimile at 609-984-2575; or (3) mail or courier to: Attn: Hearing Unit, Division of Purchase and Property, 33 West State St., P.O. Box 039, Trenton, NJ 08625-0039.

All documentation pertinent to this award is available for review by making an appointment with the undersigned individual at the email address indicated below. Note: A requester is prohibited from removing any procurement documents and/or making any modifications, e.g., markings, adding/removing pages, etc., to procurement documents.

Thank you for the time and effort expended by your firm in the preparation of your Quote {Proposal}. The Division welcomes your continued interest in future bidding opportunities.

Sincerely,

Shana Fletcher, MBA
Procurement Specialist
Email: shana.fletcher@treas.nj.gov