State of New Jersey

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August 29, 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
Protest of Notice of Intent to Award
T2846 – State Health Benefits Program and School Employees Health Benefits Program Plans

Dear Ms. Cannon:

This letter is in response to your correspondence, on behalf of Aetna Life Insurance Company (Aetna), to the Acting Director of the Division of Purchase and Property (Division), dated August 20, 2019, protesting the Notice of Intent to Award letter (NOI) issued by the Division's Procurement Bureau (Bureau) for Bid Solicitation #19DPP00365 T2846 – State Health Benefits Program and School Employees' Health Benefits Program Plans (Bid Solicitation) to Horizon Healthcare Services, Inc. (Horizon).

By way of background, on April 10, 2019, the Bureau issued Bid Solicitation #19DPP00365 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 this 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.*]

The goal of this Bid Solicitation is to award Master Blanket Purchase Orders (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. 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. Ibid. 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. Ibid. To accomplish these goals, this Bid Solicitation has 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). Part 2 sought Quotes from qualified Vendors {Bidders} to provide navigation/advocacy services (Navigation/Advocacy). 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 Vendor(s) {Bidder(s)} were permitted 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 forty-two (242) questions. Through the posting of Bid Amendment #1 on May 10, 2019, the Bureau answered all two hundred forty-two (242) questions received.

In addition, 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 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[1]:

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 Quote received, on July 29, 2019 the Evaluation Committee issued its report. Thereafter, on August 1, 2019, the Bureau issued a Recommendation Report which recommended a Blanket P.O. award to Horizon as the Vendor {Bidder} whose Quote, conforming to the Bid Solicitation was most advantageous to the State, price and other factors considered. The Bureau

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[1] The scores in the chart on this page were created and given by the Evaluation Committee, 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."

determined that Horizon demonstrated the required experience and also had the highest technical score. 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. On August 5, 2019, the Bureau issued a NOI to award a Master Blanket Purchase Order (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.]

In consideration of Aetna's protest, I have reviewed the record of this procurement, including the Bid Solicitation, the Quotes received, the protest, 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 final agency decision on the merits of the protest submitted by Aetna. I set forth herein my final agency decision.

Aetna's first protest point is that Horizon impermissibly modified its Bid under the guise of a clarification, and has submitted a materially nonconforming bid that must be rejected. In the Recovery Services tab of Volume 3, Section 4 – Self-Insured Pricing Sheets.xlsx, Horizon indicated Recovery Services Cap amounts as follows:

T-2846 - State Health Benefits Program and School Employees' Health Benefits Program Plans
Bid Solicitation Revised Price Sheet - 19DPP00365
Recovery Services Savings Programs - Part 1: Network Claims

THIS IS APPLICABLE TO VENDOR (BIDDER) FOR PART 1

Vendor (Bidder) Name	Horizon Healthcare Services, Inc.

Instructions: Vendor (Bidder) should complete all gold shaded areas above and below, as applicable. All potential programs where the Vendor (Bidder) anticipates charging the State based on percentage of savings/recovery **MUST** be disclosed below. Such programs include, but are not limited to, Recovery Services and Audits (such as Hospital, DRG validation, etc.). Each of the Price Sheet tabs are intended be reviewed in conjunction with each of the corresponding sections of the Bid Solicitation.

NOTE: Vendor (Bidder) is not permitted to retain any Recovery Services savings fees (excluding workers compensation and subrogation) for the listed programs after the annual PEPY cap is satisfied. Once the cap is satisfied, it does not relieve the Vendor's (Bidder's) obligation to perform with the same diligence. Vendor (Bidder) shall list any additional mandatory recovery programs included in their savings program in the "Other" rows.

Recovery Services

Please describe your Recovery Services programs in detail (if applicable). Provide additional attachments if necessary.

Note that the State does not currently pay variable fees associated with these programs.

These services (excluding workers compensation and subrogation) must ultimately be billed as a percentage of the savings not to exceed 15% of the amount of the recovery; and provide a maximum amount (i.e., cap) limiting the annual amount the State would be required to pay on a per employee per year (PEPY) basis based on employee months.

Any and all recoveries received for workers compensation or third party subrogation shall be paid to the State by the Vendor (Contractor). Third party Subcontractor fees for workers compensation and third party subrogation may be charged to the State with no additional fees assessed by the Vendor (Contractor).

The State reserves the right to adjust the shared savings arrangement for years two and beyond, including but not limited to adjusting the methodology, if desired.

Refer to Exhibit 12

	Plan Year 2020	Plan Year 2021	Plan Year 2022
Recovery Services Cap (PEPY)	$7.50	$8.50	$8.50

	Definition of Program
Mandatory Recovery	N/A
Hospital Bill Review (for not contracted claims)	Refer to Exhibit 12
Professional Fee negotiation	Refer to Exhibit 12
Hospital/Professional Bill Audit	Refer to Exhibit 12
Diagnosis Related Group (DRG) Validation and Appeals	Refer to Exhibit 12
Inpatient Admission Retrospective Review	N/A
Medical Implant Device Audits	N/A
COB Vendor Recovery	N/A
Secondary Vendor Recovery	N/A
Provider Credit Balance Recovery	Refer to Exhibit 12
Class Action Recovery	N/A
Eligibility Overpayment Recovery	N/A
Fraud and Abuse Management	Refer to Exhibit 12
Facility Reasonable & Customary Bill Management	N/A
Facility Fee Negotiation	Refer to Exhibit 12
Other (specify)	
Other (specify)	
Other (specify)	
Other (specify)	

With respect to recovery services, in several areas of the price sheet, Horizon referred to Exhibit 12. With its submitted Quote, Horizon's included a document entitled "Volume 2, Section 3A – Exhibit 12 Recovery Services.pdf", which contained projected 2020 Fees at a total of $18,835,500.

On July 9, 2019, the Bureau sent Horizon a clarification letter in order to help the State to better ascertain the relationship, if any, between these two sets of figures, pursuant to N.J.A.C. 17:12-2.11(d) and Bid Solicitation Section 6.4, *Clarification of Quote {Proposal}/State's Right to Request Further Information,* which states in part:

> After the Quotes are reviewed, one (1), some or all of the Vendors {Bidders} may be asked to clarify certain aspects of its Quote. A request for clarification may be made in order to resolve minor ambiguities, irregularities, informalities or clerical errors. Clarifications cannot correct any deficiencies or material omissions, or revise or modify a Quote.

The instructions on the T-2846 - State Health Benefits Program and School Employees' Health Benefits Program Plans, Bid Solicitation Revised Price Shet-19DPP00365, Recovery Services Savings Programs-Part 1: Network Claims, provided as follows:

> Please describe your Recovery Services programs in detail (if applicable). Provide additional attachments if necessary.
>
> Note that the State does not currently pay variable fees associated with these programs.
>
> These services (excluding workers compensation and subrogation) must ultimately be billed as a percentage of the savings not to exceed 15% of the amount of the recovery; and provide a maximum amount (i.e., cap) limiting the annual amount the State would be required to pay on a per employee per year (PEPY) basis based on employee months.
>
> Any and all recoveries received for workers compensation or third party subrogation shall be paid to the State by the Vendor {Contactor}. Third party Subcontractor fees for workers compensation and third party subrogation may be charged to the State with no additional fees assessed by the Vendor {Contractor}.

The State reserves the right to adjust the shared savings arrangement for years two and beyond, including but not limited to adjusting the methodology, if desired. In its July 10, 2019 email to the Bureau, Horizon, as related to its submission of Recovery Services tab of Volume 3, Section 4 – Self-Insured Pricing Sheets.xlsx, stated that:

> 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.

Based upon the response, it appears that Horizon expected the PEPY figure that it provided on its price sheet to be multiplied by 12 months which would represent its maximum amount (i.e., cap) as required by the price sheet. In addition, Horizon's July 10, 2019 email clarified that there was, in fact, no direct connection between Horizon 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, rather than bearing any connection to its Price Sheet.

In I/M/O Protest of Award of On-Line Games Prod. & Operation Svs. Contract, Bid No. 95-X-20175, the court held that a post-opening commitment to supply an essential missing element for a bid is not a clarification but rather is an "impermissible supplementation ... and flies in the face of our public bidding scheme." 279 N.J. Super. 566, 598 (App. Div. 1995). By contrast, clarification is permissible. "In clarifying or elaborating on a proposal, a bidder explains or amplifies what is already there. In supplementing, changing or correcting a proposal, the bidder alters what is already there." Id. at 597.

Based upon my review of Horizon's July 10, 2019 response email, along with the discussion of the limits of clarification discussed in On-Line Games, it would be incorrect for the Bureau to multiply the $7.50 number on Horizon's Price Sheet by a presumed number or the average number of annual employee months, and in essence substitute the PEPY number of $90.00 for the $7.50 that Horizon put on the price sheet. To the extent that Horizon's response to the Request for Clarification suggested that is what should be done, that would constitute an "impermissible supplement, change or correction" to, rather than a clarification, explanation or elaboration of, what Horizon put on its Quote.

It is clear from the Price Sheet instructions that the Vendors {Bidders} were required to submit a maximum amount (cap) that the State would be required to pay on a per employee per year (PEPY) basis based on employee months. The row heading for the Recovery Services Cap specifies that the amount given be "(PEPY)", and the corresponding column heading indicates "Plan Year 2020." Nowhere in the Recovery Services Savings Programs-Part 1: Network Claims Price Sheet were Vendors {Bidders} instructed to enter the cap rate using a monthly rather than a yearly rate.

In its Price Sheet, Horizon entered an amount of $7.50 for the Part 1 Recovery Services Cap PEPY for Plan Year 2020. Nowhere on its Price Sheet did Horizon indicate that this figure was a monthly amount that needed to be multiplied by the number of annual employee months. The Bureau and the Evaluation Committee, however, used the modified computation method provided in Horizon's July 10, 2019 email as a basis for Horizon's final pricing evaluation and the NOI letter. Allowing Horizon to multiply the $7.50 figure by the annual employee months, would raise the cap up to which Horizon could bill the State for Recovery Services. Doing so would be an up to 1200% change in the cap and as such would be a material change to the Price Sheet/Quote.

In Meadowbrook Carting Co. v. Borough of Island Heights, the court espoused a two-part test for determining if a change is material:

> [F]irst, whether the effect of a waiver [of the Bid Solicitation's terms] would be to deprive the [contracting party] of its assurance that the contract will be ... performed ... according to its specified requirements, and second, whether ... its waiver would adversely affect competitive bidding by placing a bidder in a position of advantage over other bidders or by otherwise undermining the necessary common standards of competition.
>
> [138 N.J. 307, 315 (1994).]

Here, raising the maximum that the State could pay for Recovery Services is clearly a material change. Accepting this change after bid opening would deprive the State of the assurance that the contract will be entered into and guaranteed as specified in the contract.[2] Further, doing so would give an advantage to Horizon to "correct" its bid when no other Vendor {Bidder}, including those three disqualified Vendors {Bidders} had that opportunity.

Rather, to the extent that the Horizon's response can be read as attempting to change what was submitted on the Price sheet, the Bureau should have rejected Horizon's response to the clarification letter. Instead, the correct course of action is for the Bureau to evaluate Horizon's Quote, including the Price Sheet, as it was submitted. That is, it should have evaluated price based on the $7.50 PEPY entered into its Price Sheet for Recovery Services Savings Program – Part 1: Network Claims. While typically in this situation, the matter would be remanded to the Procurement Bureau to do the evaluation as indicated above, doing so here, would not change the result. With the $7.50 per person per year cap on Recovery Services, Horizon's Quote, and in particular, the cost to the State, is even more advantageous to the State, price and other factors considered. Since the Evaluation Committee made its recommendation based on the higher price cap for Recovery Services, and because even with the higher cap, Horizon's proposal was more advantageous, remand to determine how much more advantageous is not necessary.[3]

Aetna's second protest point is that the Division failed to properly conduct the BAFO process by not permitting Bidders to BAFO on all cost factors, resulting in a diminished opportunity for lower cost to the State.

Bid Solicitation Section 6.8 *Negotiation and Best and Final Offer (BAFO),* <u>allows</u> the Bureau to:

> [I]nvite one (1) Vendor {Bidder} or multiple Vendors {Bidders} to submit a Best and Final Offer (BAFO). Any BAFO that does not result in more advantageous pricing to the State will not be considered, and the State will evaluate the Vendor's {Bidder's} most advantageous previously submitted pricing.
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> More importantly, the Bid Solicitation advises Vendors {Bidders} that they should submit their best pricing with the submitted Quote as the Bureau may award Blanket P.O.s based upon the original Quote pricing. Negotiations will be conducted only in those circumstances where it is deemed by the Bureau or Director to be in the State's best interests and to maximize the State's ability to get the best value. **Therefore, the Vendor {Bidder} is advised to submit its best technical and price Quote in response to this Bid Solicitation since the State may, after evaluation, make a Blanket P.O. award based on the content of the initial submission, without further negotiation and/or BAFO with any Vendor {Bidder}.**
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> [Bid Solicitation Section 6.8, *emphasis added.*]

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[2] Per Section, 5.1 *Precedence of Special Contractual Terms and Conditions* of Bid Solicitation, the Blanket P.O. awarded, and the entire agreement between the parties, as a result of this Bid Solicitation shall consist of this Bid Solicitation, State of New Jersey Standard Terms and Conditions (SSTC), Bid Amendment to this Bid Solicitation, the Vendor's {Contractor's} Quote, any Best and Final Offer, and the Division's Notice of Award. So for this contract provision the State would be paying up to 1200% more for Recovery Services.
[3] This is consistent with the State's need to award this contract in time for implementation for the 2020 plan year, since remand to determine just how much more advantageous Horizon's Quote will not change the award determination. This time consideration does not factor into my analysis above, but only into the decision not to remand to the Purchase Bureau.

Nothing in the relevant portions of 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[4] 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[5] 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. I see nothing in the BAFO process conducted for this procurement that is contrary to what is outlined in the Bid Solicitation or that circumvented New Jersey procurement law. While the BAFO of other portions of the procurement may have yielded additional savings, they may not have. I do not find anything untoward or fraudulent in this BAFO process, and Aetna has not provided any evidence that the BAFO process used was fraudulent, arbitrary or capricious.

Aetna's third protest point is that the State's use of the Calculated Savings Credit, in Part 2 of the Financial Evaluation, is an undefined, speculative, and unrealistic figure. According to Aetna, the use of the Calculated Savings Credit at a weight of 80% of the total score results in an inaccurate award which does not result in an award to the Bidder whose Quote is most advantageous to the State, price and others factors considered. Further, Aetna protests that the award does not constitute the proper exercise of business judgement mandated of the Director.

The State, with the assistance of its consultant, determined both technical evaluation and financial evaluation scoring methodologies. Those methodologies were distributed on April 16, 2019 in a memo entitled "Methodology for Technical and Financial Evaluation of Part 1 and Part 2 Services of Self-Insured Medical RFP", well in advance of Quote opening. The decision to weigh Part 1 at 75% was based upon Part 1's unit cost and discount guarantees for inpatient facilities, outpatient facilities, and physician services. The unit costs and discounts for the Bidders are the largest drivers of State spend. The State thus determined that Part 1 would represent the larger weighted percentage of the evaluation.

Part 2 was weighted 25% due to the comparatively smaller assumed effect that its components would have on State spend. Within the weighting of Part 2, the Calculated Savings Credit was only given an 80% weight[6], which would make the Calculated Savings Credit[7] only 20% of the overall financial breakdown. The State used its professional judgement, experience, and feedback and actuarial guidance from multiple Subject Matter Experts to design the Calculated Savings Credit formula which distinguishes Bidder(s) with higher expected future savings. Even assuming *arguendo* that Aetna is correct in its statement that the financial evaluation formula did not result in an award that maximized the overall savings that the State *could* have received, that does not undermine the fact that, in creating and evaluating this Bid Solicitation, the State sought an innovative approach to obtaining these services, and the State's course in evaluation that was conducted and supported by well-reasoned methodologies, and did not rise to a level of fraud or arbitrary and capricious behavior.

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[4] Return On Investment (ROI) is defined in Bid Solicitation Section 2.3.
[5] Administrative Services Only Fee (ASO Fee) is defined in Bid Solicitation Section 2.3.
[6] Aetna incorrectly asserts that the Calculated Savings Credit was weighted at 80% of the Total Financial Score.
[7] The Calculated Savings Credit is predicated on an actuarial formulaic approach.

Finally, in Aetna's conclusion, it contends that in the event Horizon's Quote is not rejected by the State, that this Bid Solicitation should be re-procured in its entirety. In doing so, Aetna asserts that the State should reconsider its decision to make an award to a single vendor, and instead, should consider the benefits of continuing this contract award in a two vendor model. In its final bullet points, Aetna points to, what it believes, are the benefits that the State is currently receiving in a two Vendor award model.

Pursuant to Bid Solicitation Section 7.2 *Final Blanket P.O. Award*,

> Blanket P.O. award[s] will be made with reasonable promptness by written notice to that responsible Vendor(s) {Bidder(s)}, whose Quote(s), conforming to this Bid Solicitation, is (are) most advantageous to the State, price, and other factors considered. Any or all Quotes may be rejected when the State Treasurer or the Director determines that it is in the public interest to do so.

The use of a single vendor or two vendor model is a determination within the State and Director's discretion. The Division has broad discretion to select among qualified bidders in public contracting matters. See N.J.S.A. 52:34-12(d); In re Jasper Seating Co., Inc.'s Request for Reconsideration Regarding Request for Proposal No. 07-X-37695, 406 N.J. Super. 213, 222-24 (App. Div. 2009). N.J.S.A. 52:34-12(d) makes it clear that the Division's Director has exclusive discretion to determine "which bid will be most advantageous to the State, 'price and other factors considered.'" Commercial Cleaning v. Sullivan, 47 N.J. 529 (1996). In this situation it was determined that it will be most advantageous to the State, price and other factors considered, to make a single award to Horizon.

Based upon the foregoing, I sustain the Bureau's Notice of Intent to Award. However, Horizon's award is made subject 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. This is my final agency decision with respect to the protest submitted by Aetna.

Thank you for registering your company with ***NJSTART*** at www.njstart.gov, the State of New Jersey's eProcurement system. I look forward to your company's continuing interest in doing business with the State of New Jersey.

Sincerely,

Maurice A. Griffin
Acting Director

c: L. Spildener
C. Iversen
D. Perry