SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In the Matter of the Application of AETNA LIFE INSURANCE COMPANY, Petitioner For Judgment Pursuant to CPLR Article 78 -against- RENEE CAMPION, as Commissioner of the City of New York Office of Labor Relations, CITY OF NEW YORK OFFICE OF LABOR RELATIONS, the CITY OF NEW YORK, Respondents. THE ALLIANCE, a purported joint venture, Nominal Respondent.	Index No. **VERIFIED PETITION**

Petitioners Aetna Life Insurance Company ("Aetna" or "Petitioner") by its undersigned attorney, for its verified petition, alleges as follows:

NATURE OF THE PROCEEDING

1. Aetna has brought this proceeding to challenge a decision, dated August 18, 2021 (the "Decision") of Respondent Renee Campion, Commissioner of Respondent New York City Office of Labor Relations ("OLR"), denying the Aetna's procurement protest dated July 19, 2021 (the "First Protest"). Ex. 1 at 15-25 (Aetna's Third Protest with Exhibits.) Aetna's First Protest challenged OLR's decision to award a Medicare Advantage contract to something referenced as "the Alliance," named here as a Nominal Respondent. Ex. 2 (Aetna's First Protest with Exhibits.) The Alliance is supposedly a joint venture between EmblemHealth Inc. ("Emblem") and what the

City describes, incorrectly, as "Empire Blue Cross Blue Shield." Ex. 1 at 21. According to OLR, it selected the Alliance through a type of procurement known as a Negotiated Acquisition ("NA") for "Health Benefit Services In The Form Of A Medicare Advantage Plan Under Medicare Part C For City Of New York Retirees, And Their Dependents" (PIN: 0021N002) (the "Solicitation"). Ex. 2 at 18-58. OLR's Decision is irrational, arbitrary and capricious, and unlawful, and should be set aside.

2. At stake in this case is access to health care for 250,000 New York City government retirees. In selecting the Alliance to provide a Medicare Advantage plan for City of New York retirees, OLR has selected an inexperienced and unqualified bidder through a procurement process that violated New York Procurement law, lacked transparency, and violated principles of public trust and fairness for a procurement that could last up to a minimum of five or as many as eleven years and generate $34 billion dollars in claims revenue. The Alliance failed to meet any of the City's minimum requirements of the Solicitation and, much worse, misrepresented to the City that it met the minimum requirement that a bidder have a current Medicare Advantage customer with 50,000 Medicare Advantage members and supplied grossly inaccurate enrolled member counts. Moreover, an arbitrator that weighed in on the procurement process acknowledged concerns about the Alliance's ability to deliver a quality program. This lack of experience, coupled with retirees having very limited opt out rights from the City's selected Medicare Advantage plan, could significantly impact the health and wellbeing of retirees when they need care most. As the largest provider of group Medicare Advantage plans in New York with extensive success and experience delivering transitions to Medicare Advantage plans for large cities and states with substantial savings, Aetna submits that those who have served the City and are now retired deserve a transparent and lawful procurement process, which enables the most qualified bidder to win.

3. Notably, during the procurement process, OLR determined that the best way to ensure that these 250,000 retirees would get quality care, at minimum cost, was to award a group Medicare Advantage contract to Aetna, a market leader that already provides group Medicare Advantage plans to close to 200,000 retirees for the State of New Jersey. Ex. 1 at 40-41. Upon initial evaluation of the bids, Aetna received the highest scores overall, but the City and municipal union evaluators were evenly split (4-4) in trying to determine a winner. Ex. 1 at 81. Although the tie was irrelevant—since, according to the procurement documents, the evaluations were dispositive—lawyers for the City and the unions met with a labor arbitrator to attempt to resolve the tie. The Stroock & Stroock & Lavan law firm ("Stroock"), which represents the unions (and, conveniently for the Alliance, also represents Emblem), argued that the arbitrator should recommend the Alliance based on "familiarity" (the extent to which the retirees know the bidder and the bidder knows the retirees). Ex. 1 at 37-40. The arbitrator said that "familiarity," which is a new criterion not referenced in the Solicitation and is an irrational measure on which to judge a public procurement of this size, was "dispositive" and accepted Stroock's unsubstantiated representation that the 250,000 City retirees were more familiar with the Alliance than with Aetna. Ex. 1 at 44-45. After this proceeding, the City and union evaluators rescored the Alliance and Aetna. The evaluators remained tied (with all City evaluators preferring Aetna) but OLR selected the Alliance based on a claim that the Alliance now outscored Aetna by less than two points. Ex. 1 at 83. Each of the evaluators that chose the Alliance did so based, at least in part, upon the new criterion adopted by Scheinman.

4. The result of this procurement process will be highly detrimental to the City's 250,000 retirees. At the outset, retirees will be confused as to which plan is the true insurer for both Medicare Part C coverage and Medicare Part D coverage, as well as the identity of the insurer that

is enrolling and processing claims. For the most part, the retirees will be automatically enrolled in a Medicare Advantage plan under a contract awarded to a new, purported joint venture comprised of competing health care companies, neither of which has significant experience with group Medicare Advantage plans. Retirees will be forced to pay more for their prescription drug plans and a less generous Medicare Advantage plan than they would if Aetna were selected. Aetna offered a more generous Medicare Advantage (medical) plan and standalone Medicare prescription drug plan (PDP). (Please note that the PDP is offered by SilverScript Insurance Company (SilverScript), an Aetna affiliate.) Aetna estimates, depending on utilization, that City retirees will have more than $900 of out of pocket costs per year under the Alliance plans versus the Aetna/SilverScript plans. For example, the SilverScript PDP that was offered had a more generous drug benefit that included certain generic drugs at no cost and a plan premium that was $366 lower per year than the advertised Alliance PDP rate. Ultimately, the Alliance will force their premiums up, and many fixed-income seniors will be hard-pressed to pay for their health care. Ex. 3.

5. The City's retirees are being played by the so-called Alliance. While the City has not disclosed the Alliance's entire submission to the City, the pages that the City has disclosed are rife with misleading inaccuracies. First, the Alliance has misdescribed its membership. It is not, as the Decision assumes, a joint venture between "EmblemHealth and Empire BlueCross BlueShield." Anthem Insurance Companies, Inc., ("Anthem")—a company that emerged from, and is headquartered in, Indiana, and is relatively unknown to New Yorkers—is the wizard behind the curtain. The Alliance is using the "Empire" name to mislead retirees. Make no mistake, Anthem is not the "Empire" that the City says New Yorkers know—it is only masquerading as such. Second, and perhaps worse, the Alliance reported to the City that it had the requisite experience to respond to the bid. This was simply not true. The Solicitation required that any

vendor that bid have a current Medicare Advantage customer with at least 50,000 members, and the Alliance said that it met that requirement by citing the Colorado Public Employees Retirement Association ("Colorado PERA") and providing inaccurate enrolled member counts. Ex. 1 at 59. Neither EmblemHealth nor Empire BlueCross BlueShield had Colorado PERA as a client. Rather, a non-bidding party, Anthem, had the Colorado PERA contract. But even if the Alliance were able to use the client of a non-bidding party to meet the minimum requirements of the Solicitation, Colorado PERA ***never*** had anywhere close to 50,000 Medicare Advantage members, and Colorado PERA has decided to end its relationship with Anthem by switching carriers effective January 1, 2022. Ex. 1 at 63-66 and Ex. 4 (Supplemental Protest to Aetna's Third Protest) at 4-5.

6. While the Alliance was unable to even meet the Solicitation's minimum requirements, Aetna's bid was rock solid. Aetna has a wealth of experience administering Medicare Advantage plans for employers and unions with large membership. Aetna currently serves the state of New Jersey (196,577 members), United Auto Workers Retiree Medical Benefits Trust (140,305 members), State Teachers Retirement System of Ohio (96,106 members), Pennsylvania Employees Benefit Trust Fund (75,369 members), Verizon (73,176 members), 1199SEIU National Benefit Fund for Health (44,680 members), ExxonMobil (44,645 members), School Employees Retirement System of Ohio (36,817 members), BP Corporation North America Inc. (26,984 members), United States Steel and Carnegie Pension (26,577 members), and many others. Aetna recognized the importance of keeping the City retirees as informed about the new plan and the transition process as possible, so it included in its bid a straight-forward messaging strategy. Perhaps most importantly, Aetna made sure that its Medicare Advantage plan was affordable, for both the City ***and*** the retirees. Indeed, its prescription drug plan was at least $30 less expensive per month than the Alliance's plan and offered free prescriptions for certain generic medications.

7. Upon learning who the true Medicare Part C and Part D plans were and how it could not be the Alliance, Aetna protested the contract award stressing that that the retirees were being duped and would be irreparably harmed if the Alliance became the City's Medicare Advantage provider. Ex. 2. Aetna explained that the Alliance was not qualified because it was a brand new venture that had ***zero*** experience. The Alliance had no Medicare Advantage contract, it had no licensing in any state, and Aetna could find no evidence of its existence—it was a complete unknown. Aetna further asserted that even if OLR looked at the Alliance's "parts," the Alliance still did not meet the qualifications. Aetna also protested that selecting the Alliance, and not Aetna, was irrational because Aetna far exceeded all of OLR's requirements, while the Alliance, even accepting its misrepresentations, did not.

8. On August 18, 2021, the City rejected Aetna's July 19, 2021 protest. Its Decision, which was full of strawman arguments, only cursorily addressed Aetna's ten protest grounds. Ex. 1 at 21-25. It argued that the Alliance was qualified because "Empire" met the minimum requirements, and that the decision to select the Alliance was rational because it followed the process outlined in the Solicitation. But this was not accurate.

9. In fact, the solicitation process had been tainted. First, Aetna marked "confidential" certain portions of its bid pursuant to standard procurement rules. That confidentiality was breached by a member of the bid Evaluation Committee when she remarked that a bidder (Aetna) was not going to charge a premium. It was also breached by OLR when it requested a best and final offer by referencing the fact that Aetna had supplied pricing above and beyond the requested time period. Second, the process was tainted by the City's decision to involve Martin F. Scheinman, a labor law arbitrator. Upon concluding that an impasse was reached regarding which

bidder should be selected, OLR agreed with the Municipal Labor Committee ("MLC")[1] to submit the question to Arbitrator Scheinman and then report his decision to the Evaluation Committee. Needless to say, the Solicitation and applicable procurement law did not provide for this action. Worse, Aetna learned that the Alliance was permitted to communicate with Arbitrator Scheinman while Aetna was not given that same opportunity, and Arbitrator Scheinman's recommendation was based on a new criterion mentioned nowhere in the procurement documents.

10. On August 23, 2021, Aetna submitted a second protest to the City based on information that Aetna received from OLR on August 13, 2021. Ex. 5 (Aetna's Second Protest with Exhibits.) On August 27, 2021, Aetna submitted a third protest to the City based on information that OLR provided to Aetna in connection with its issuance of the Decision on August 18, 2021. Ex. 1. The City's responses to these protests are still pending.

11. Aetna has brought this action to overturn the City's irrational, arbitrary, and unlawful decisions, challenge the City's refusal to comply with applicable laws, and enjoin the City from attempting to do business with the Alliance unlawfully. If OLR's Decision in favor of the so-called Alliance is permitted to stand, the City's 250,000 retirees will lose.

THE PARTIES

12. Aetna Life Insurance Company is a corporation incorporated in Connecticut. It is part of a group of companies ultimately owned by CVS Health Corporation, one of the largest businesses in the world by market cap.

13. Aetna has named, as the "City Respondents," Renee Campion, the Commissioner of the City of New York Office of Labor Relations, the City's Office of Labor Relations, and the

[1] MLC is an umbrella organization that represents all of the City's municipal unions. Pursuant to a long-standing collective bargaining agreement, the MLC and City work together to negotiate any and all changes to healthcare for city employees.

City itself.

14. Aetna has named the Alliance as a Nominal Respondent, because OLR stated in its Decision that the Alliance will receive a contract from the procurement. According to OLR, the Alliance is a *bona fide* business entity, a joint venture of Emblem and "Empire BlueCross BlueShield." However, Anthem has disclosed, in fine print, that it, Anthem, will be the actual Medicare Advantage insurer. The 250,000 retirees will not be enrolled in a Medicare Advantage plan of an entity called the "Alliance," nor of Emblem Health, nor of "Empire BlueCross BlueShield" (the trade name of Empire HealthChoice Assurance, Inc. – "Empire"). Anthem is relatively unknown to New Yorkers, so it has been carefully wrapped to dupe the retirees. Anthem is doubly-concealed. It masquerades as Empire, and it masquerades as part of an alliance with Emblem. While Empire is an "Anthem company," meaning that the companies are part of the same conglomeration, Empire will not be a member of the Alliance. The Alliance will consist of Anthem (which will provide the Medicare Advantage coverage) and Emblem (which will provide a standalone Medicare prescription plan for a steep premium, a neighborhood care center, and handle some customer service). Empire is not a member of the supposed joint venture. To make it appear that the Alliance is a venture of New York based firms, Anthem will operate under a misleading trade name "Empire BlueCross BlueShield Retiree Solutions," which OLR conflates with Empire.

VENUE

15. This Court is a proper venue for this proceeding because this is the County where the City Respondents made the determinations complained of, refused to perform the duties

specifically enjoined upon them by law, and where the City Respondents' Principal Offices are located.

FACTUAL BACKGROUND

New York City's Soaring Healthcare Costs and Its Efforts to Generate Savings

16. Prior to 2015, healthcare costs in the City were among the highest in the nation. The New York State Health Foundation reported that in 2014, health care expenditures in New York were the second highest in the country, totaling $193 billion. The per person health care expenditure was 20 percent higher than the national average. In April 2015, Robert Linn, then-Commissioner of OLR, noted in his City Council testimony that "[f]or the last two decades, while health care costs skyrocketed and employers all over the country adapted their programs, NYC did little to modernize its programs."[2] Then-Commissioner Linn also noted that since 2005, the cost of providing health benefits to the New York City workforce had doubled.

17. Recognizing these soaring healthcare costs, in 2014, Mayor Bill de Blasio and then-Commissioner Bob Linn committed, through a "Health Savings Agreement," to generating cumulative healthcare savings of at least $3.4 billion over the fiscal years 2015 to 2018.[3] The agreement did not specify the method by which the City and MLC could generate the savings, but empowered them each to develop strategies to do so.

18. The City and MLC consistently met their savings goals each year. The City and the MLC met their savings goals for fiscal years 2015 and 2016, saving $400 million and $700 million, respectively. In fiscal years 2017 and 2018, the City's savings goals were exceeded. The City saved $51 million over and above their goal of $1 billion in fiscal year 2017, and saved $35

[2] https://www1.nyc.gov/assets/olr/downloads/pdf/collectivebargaining/testimony-city-council-with-exhibits.pdf
[3] https://www1.nyc.gov/site/olr/labor/labor-health-savings.page

million over their goal of $1.3 billion in fiscal year 2018. As a result, the City accomplished its goal of saving $3.4 billion over the four fiscal years, and even exceeded their goal by $86 million.[4]

19. On June 26, 2018, Mayor de Blasio and the MLC announced a second health savings agreement. This time, the savings goal was $1.1 billion over fiscal years 2019 to 2021, of which $600 million were to recur annually beyond fiscal year 2021.[5]

20. In connection with the second health savings agreement, the City and MLC established a "Tripartite Committee." The Tripartite Committee is comprised of City representatives, union representatives, and an arbitrator. The Tripartite Committee was tasked with researching and analyzing appropriate data to present recommendations to the City and the MLC for how to modify the healthcare system for City employees, retirees, and their dependents, so as to reduce costs. The Tripartite Committee determined that the City should adopt a Medicare Advantage benchmark plan for retirees to generate health care savings to the City.[6]

The Relevant Procurement Laws and Rules

21. New York City procurements, such as the OLR negotiated acquisition, must comply with, among other things, New York State's General Municipal Law ("GML"), the New York City Charter ("Charter"), the New York City Administrative Code, and the New York City Procurement Policy Board ("PPB") Rules, which are designed to ensure that such procurements are transparent, fair, and competitive. To that end, the Charter says that "[a]ll purchases shall be based upon specifications which are definite and certain" (Charter § 331), and the PPB Rules say that "[v]endors must at all times avoid conduct that is in restraint of competition" (PPB Rules 1-03(a)(3)).

[4] *Id.*
[5] *Id.*
[6] https://www1.nyc.gov/assets/olr/downloads/pdf/collectivebargaining/health-benefits-agreement-fiscal-years-2019-2021.pdf.

22. A "negotiated acquisition" is an "alternative procurement" method of "source selection" (selection of a vendor) under the PPB Rules. PPB Rules 1-01(e). It is distinct from other methods of procurement, such as "competitive sealed proposals" (also known as a request for proposals or RFP method) – a more traditional procurement method that solicits proposals and best and final offers ("BAFOs").

23. A "negotiated acquisition" is defined as a "method of source selection under which procurements can be made through negotiation due to circumstances and subject to conditions, as specified in these Rules, in which it is not practicable and/or advantageous to the City to make the procurement through competitive sealed bidding or competitive sealed proposals. The use of negotiated acquisition requires [City Chief Procurement Officer] approval." *Id.* "Negotiation" under the Rules means "[t]he deliberation and discussion of the terms of a proposed agreement; the act of settling or arranging the terms and conditions of a bargain, sale, or business transaction." *Id.*

24. The Rules contain many conditions restricting City use of "negotiated acquisition." For example, the Rules say that "[t]he agency shall negotiate with all qualified vendors that have expressed interest unless the ACCO [Agency Chief Contracting Officer] determines for a particular procurement or for a particular type of procurement that it is in the City's best interest to negotiate with fewer vendors, and the CCPO approves such determination," the "ACCO or designee shall maintain a written record of the conduct of negotiations and the basis for every determination to continue or suspend negotiations with each vendor, and "the "ACCO shall make a determination that award of the contract is in the best interest of the City and the basis thereof." PPB Rules 3-04(b).

25. The law also contains procedural mandates for such procurements. For example,

the procurement must be announced in a *City Record* notice that includes a "summary of the basis of the determination to use negotiated acquisition" (OLR's notice was defective in this respect). PPB Rules 3-04(d)(1)(2)(F). Moreover, under the Charter, a proposed contract must be considered at a public hearing (Charter § 326), accompanied by approvals, including a certificate of procedural requisites (Charter § 327), and registration by the New York City Comptroller (Charter § 328).

Issuance of the Negotiated Acquisition Solicitation and its Requirements

26. On November 9, 2020, the *City Record* published the public notice for the NA. Ex. 2 at 12-16. OLR released the Solicitation requesting Expression of Interest ("EOI") documents from bidders on the same day. Ex. 2 at 18-32.

27. The Solicitation listed stringent and objective minimum requirements that companies had to meet in order to be eligible to respond to the Solicitation. These minimum requirements and assumptions included: (i) that "[a]s of April 2020, the Proposer had at least five (5) years of experience providing health benefit services in the form of a Medicare advantage plan under Medicare Part C;" (ii) that "the Proposer should have experience in providing a Medicare advantage plan under Medicare Part C of similar size and scale to the Senior Care plan;" (iii) that the vendor has "[m]aximized [its] CMS Star quality rating;" (iv) that the Proposer can "[e]nsure sufficient breadth of network(s) to provide coverage across specialties and services that meet the City's geographic access requirements;" (v) that the Proposer can "[p]rovide [the] ability to implement and transition members seamlessly (if applicable) and manage the ongoing administration of the account with excellence." Ex. 2 at 21, 28.

28. OLR released a "Medicare Advantage Technical Questionnaire" along with the Solicitation that required bidders to attest to their ability to meet the minimum requirements. These minimum requirements further specified that a bidding organization must serve "at least one employer Medicare Advantage Custom[er] with 50,000 members. In addition, the Solicitation

sought enrollment group membership numbers for 2019 and 2020. Ex. 2 at 66.

29. The Solicitation advised that an "Evaluation Committee" would review all bids. The Evaluation Committee was "comprised of a minimum of eight (8) persons including, but not limited to, employees of the Office of Labor Relations, Office of Management and Budget and members of the Municipal Labor Committee." Ex. 2 at 32. The contract was to be awarded to the bidder "whose offer [was] determined to be the most advantageous to the City, taking into consideration technical expertise/Program Requirements, price, contract terms and the other factors set forth in this solicitation." *Id.*

30. When determining whether a bid was qualified, the Evaluation Committee was to consider "experience," "organization capability," and "Program Approach," with each factor given 20 percent, 20 percent, and 60 percent weight respectively. *Id.* OLR was to "enter into negotiations with the vendors determined to be the best qualified at the time of evaluation[.]" *Id.* While the Solicitation allowed for subcontracting, with OLR approval, joint bidding was not authorized.

The Solicitation Process and Aetna's Bid

31. On November 30, 2020, Aetna responded to the Solicitation, and identified some aspects of its submission as "Confidential" so that OLR would understand which portions of those materials could not be disclosed to competitors. On the same date, the Alliance, Humana, and United Healthcare also responded.

32. Aetna submitted a bid because it was confident that it could provide the best service to the City's retirees. It outlined how it easily met the Solicitation's requirements because it has years of complex experience offering group Medicare Advantage plans to large public and private sector clients with a significant number of Medicare-eligible retirees, including the State of New Jersey, United Auto Workers, and even unions in New York City. Aetna, among other things,

provides a group Medicare Advantage plan, a standalone Medicare prescription drug plan ("PDP") or Medicare Advantage plan with Part D benefits to 50,000 members of DC 37; 20,000 members of the Uniformed Firefighters Association; 6,000 members on the City of New York plan including many members of the Sergeants Benevolent Association (SBA); and 45,000 members of SEIU Local 1199 (a former multi-decade Emblem client). Aetna also provides group Medicare plans for the MTA, International Association of Fire Fighters, and Fraternal Order of Police. Aetna also knew that cost was going to be a factor, so its bid was highly competitive in that regard.

33. The Alliance, on the other hand, was a completely new venture at the time it submitted its bid, which is rife with inaccuracies. According to OLR, the Alliance is a joint venture between Emblem and Empire. Ex. 1 at 21. In reality, the Alliance is simply Anthem, dressed up as Empire, further dressed up as an alliance with Emblem. Anthem is trading on the "Empire" name to create a misimpression of continuity. In fact, the Medicare Advantage contract that the Alliance reported to OLR is not the Alliance's contract, it is Anthem's, and Anthem is based in Indiana, not New York. In addition, the Alliance reported that it had a Medicare Advantage customer with 50,000 or more members. In reality, the Alliance's largest listed Medicare Advantage customer, Colorado PERA (which is not even a customer of the Alliance), never came close to having the 50,000 Medicare Advantage members required by the Solicitation. Ex. 1 at 63-66 and Ex. 4 at 4-5.

34. On December 14, 2020, the Evaluation Committee discussed Aetna's, the Alliance's and other responses, considered a report from the Milliman management consulting company, and scored each bid. Each member of the Evaluation Committee completed a score sheet that sought scores from 1 to 5 on experience, organization capability, and program approach. Aetna received 28 points, the highest score of the group. The Alliance received 26.2 points, United

Healthcare received 27.4 points, and Humana received 23.2 points. Ex. 1 at 79.

35. On December 24, 2020, OLR advised all four insurance companies that they had been selected to enter into negotiations, and posted another solicitation ("Second Solicitation") with similar technical requirements and an identical evaluation process.

36. On January 15, 2021, Aetna, the Alliance, United Healthcare, and Humana responded to the Second Solicitation. The Evaluation Committee posed questions to each company, and received responses.

37. On February 1, 2021, OLR notified each bidder that they were requested to make oral presentations to the Evaluation Committee. One week later, Aetna made its oral presentation to the Committee. The Alliance made its oral presentation the following day.

38. On February 11, 2021, OLR sent a request for a Best and Final Offer ("BAFO") to each bidder. The BAFO stated that "a contract will be awarded to the responsible vendor whose offer is determined to be the most advantageous to the City, taking into consideration technical expertise/Program requirements, price, contract terms and the other factors set forth in this solicitation." Ex. 2 at 138-150.

39. On February 22, 2021, the Evaluation Committee reviewed the BAFO responses as well as a consultant report generated by Milliman. Each member of the Committee completed a score sheet that asked for scores from one to five in the following categories: Program Capabilities, Pricing, Implementation Credits, and Performance Guarantees. Ex. 1 at 108-109. Consistent with the Second Solicitation, "Pricing" had the highest weight, with 50 percent, "Program Capabilities" had a weight of 30 percent, and "Implementation Credits" and "Performance Guarantees" each had a weight of 10 percent. *Id.* Aetna prevailed again with a score of 34.3. The Alliance received a score of 33.4, United Healthcare received a 19.5, and

Humana received a 26.3. With Aetna and the Alliance receiving the highest scores, the Evaluation Committee selected them as finalists. Ex. 1 at 81.

40. On February 26, 2021, OLR advised Aetna and the Alliance that they were finalists and submitted a second request for a Best and Final Offer ("Second BAFO"). The Second BAFO stated that "a contract will be awarded to the responsible vendor whose offer is determined to be the most advantageous to the City, taking into consideration technical expertise/Program requirements, price, contract terms and other factors set forth in this solicitation." Ex. 6.

41. On March 3, 2021, OLR requested that Aetna and the Alliance each provide another presentation to be held the following day. After the presentations, the Evaluation Committee submitted questions to each company, and received responses.

42. On April 5, 2021, while the Solicitation process was ongoing, the Professional Staff Congress, a union representing City University of New York faculty, held a retiree meeting at which Donna Costa presented information about the City's intent to switch to Medicare Advantage. Ms. Costa, who was a member of the Evaluation Committee, advised retirees that "one of [the bidders] will be charging a premium for the first two years and the other will not." Ex. 2 at 9. This was a clear reference to Aetna's bid, which unfairly gave the Alliance the ability to adjust its own bid to make it more favorable.

43. On April 9, 2021, OLR submitted yet another request for a Best and Final Offer ("Third BAFO"), and requested a response on April 13, 2021. The Third BAFO request also stated that "a contract will be awarded to the responsible vendor whose offer is determined to be the most advantageous to the City, taking into consideration technical expertise/ Program requirements, price, contract terms and the other factors set forth in this solicitation." Ex. 7. Both Aetna and the Alliance responded on that date, but two days later, the Alliance was permitted to submit an

updated response. The Evaluation Committee again submitted questions to Aetna and the Alliance, and each company responded.

44. On May 20, 2021, OLR permitted Aetna and the Alliance to update their responses to the Third BAFO no later than the following date. Both Aetna and the Alliance did so.

45. On May 28, 2021, OLR and MLC deviated from the Solicitation seemingly as a result of the fact that despite Aetna's receiving the highest scores in the previous rounds of evaluations, there was an apparent 4-4 tie in the Evaluation Committee. To resolve this purported tie, MLC and OLR agreed to enlist an arbitrator, Martin F. Scheinman, "for an analysis of the proposals and a written recommendation regarding the evaluation criteria set forth in the Negotiated Acquisition." Ex. 1 at 54. Nowhere in any of the Solicitations or other bid documents did OLR state that an arbitrator would be involved in the solicitation process. Still, OLR and MLC agreed that "Arbitrator Scheinman's Report and Recommendation … will be taken into account by each committee member in formulating their final scores." *Id.*

46. Arbitrator Scheinman transmitted his report and recommendation, complete with a case caption and appearances, on June 28, 2021. The MLC was represented by Strook, which also represents Emblem. Arbitrator Scheinman's report stated that the "basic issue presented for recommendation is … which of the two (2) final bids for the provision of a Medicare Advantage plan received from Aetna and the Alliance do I recommend." Ex. 1 at 36. Despite the Solicitation not providing for any sort of arbitration or mediation process and the parties' letter agreement not providing for it, OLR and MLC were permitted to present their position on which company should be selected either orally or via written submission or both.

47. The City argued to Arbitrator Scheinman that Aetna should be selected because "its experts and consultants believe thorough analysis of the final bids demonstrates … the Aetna bid

is superior[] based upon its "market share and track record in administering Medicare Advantage plans." Ex. 1 at 40. The City further argued that Aetna "has serviced large clients such as the United Auto Workers ("UAW") Trust and the State of New Jersey, which are comparable in size to the City." Ex. 1 at 41. The City further asserted that "Anthem, Empire and Emblem have no large Medicare Advantage clients." *Id.* The City also expressed concern about the Alliance's ability to offer a four-star plan because although Anthem's Medicare Advantage contract—based in Wisconsin, not New York—was a four-star plan, it would be administered by Empire Blue Cross "which has a three and a half (3.5) star rating and Emblem Health which has a three (3) star rating." *Id.*

48. MLC's position was that the Alliance should be selected, based solely on its purported "experience[] in dealing with the retirees, their welfare funds and unions." Ex. 1 at 37. The MLC believed that "only the Alliance" could garner trust from the City's retirees because those retirees are "demanding and vociferous" and "the Alliance has served the New York City retiree population for a long time." Ex. 1 at 37-38. Of course, this is not correct because the Alliance had not existed before November 2020, when it was purportedly created to respond to OLR's Solicitation.

49. Arbitrator Scheinman sided with the MLC and recommended the Alliance. He found that "both bidders would do an admirable job" and that "if experience was the sole criterion, [he] would recommend Aetna." Ex. 1 at 44. Still, he determined that the Alliance should receive the contract because "familiarity" – a factor that has never once been listed as criteria in any solicitation—was "dispositive." Ex. 1 at 44-45.

50. On June 29, 2021, the Evaluation Committee reviewed the BAFOs and Arbitrator Scheinman's report and recommendation, and completed their score sheets. Again, each member

was asked to score Aetna and the Alliance from one to five in the following categories: Experience (8% weight), Program Approach (10% weight), Program Capabilities (10% weight), Voluntary MWBE Utilization Plan (2% weight), Pricing (20% weight), Medicare Part D Opt. Drug Rider and 365 Day Hospital Rider (10% weight), Implementation Credits (10% weight), and Performance Guarantees (10% weight). Ex. 1 at 87-105. The Alliance prevailed, after outscoring Aetna by 1.88 points. Ex. 1 at 83. Although "familiarity" was not a criterion on which the evaluators could score, each evaluator that chose the Alliance over Aetna, did so, at least in part, based on that factor. Ex. 1 at 87-105.

51. On July 13, 2021, the City informed Aetna that it was not selected as the bid winner despite Aetna being the clear choice based on the City's requirements.

Aetna's First Protest

52. On July 19, 2021, Aetna timely submitted a procurement protest (the "Protest") in response to OLR's letter, along with eleven exhibits. Aetna protested on ten grounds, but discusses only those that are relevant here. Ex. 2.

53. First, Aetna protested that OLR did not follow the selection process described in the Solicitation. Aetna argued that the selection was supposed to be made based on the Evaluation Committee's review of the submissions against the criteria set forth in the Solicitation, and that there was no mention of the involvement of a third-party arbitrator or mediator or the vendors' ability to communicate with that arbitrator or mediator. Aetna's concern was that the arbitrator did not hear from Aetna, did not follow the evaluation criteria, and did not have the technical background to review Aetna's bid.

54. Second, Aetna protested that the Alliance was not eligible for an award under the procurement because it was a completely new entity. Because the Alliance had been formed for

the purposes of responding to the Solicitation, there was no evidence that it existed, had the appropriately licensed Medicare Advantage plan, or that it filed any government-required forms. Under those circumstances, it could not meet the Solicitation's requirement that the bidder have substantial experience administering Medicare Advantage programs the same size or greater than the City's program. Aetna also asserted that even if OLR looked to the Alliance's parts, the requirements were not met because neither company comprising the Alliance had the requisite experience.

55. Third, Aetna protested the purported collaboration between Anthem and Emblem, two horizontal competitors in the market for New York healthcare violated state and federal antitrust laws. Aetna argued that the Alliance was a restraint of trade between two companies that would otherwise be competing against each other for business in the marketplace, and that vendors must at all times avoid conduct that is in restraint of competition.

56. Fourth, Aetna protested that confidential information regarding Aetna's bid was shared with the Alliance. Aetna asserted that it submitted a confidential proposal that included no premium charge for the duration of the contract, and guaranteed rates even beyond the five-year period requested in the Solicitation. Aetna asserted that Donna Costa's sharing that "one [bidder] will be charging a premium for the first two years" revealed Aetna's bid because it was a direct reference to Aetna's bid. Aetna further asserted that the Third BAFO referenced Aetna's rate increase limitation and trend guarantee beyond the five-year period and encouraged the Alliance to include similar limitations and trend guarantees.

57. Fifth, Aetna asserted that OLR failed to disclose information that it represented it did not have, despite the Alliance having access to the information. Aetna requested member-level claims data, which it believed that Emblem should have been able to provide. OLR stated

that it did not have access to the information. Later, Aetna determined that Emblem did in fact have the requested data and that it provided that information only to the Alliance. Had Aetna been given access to the data, Aetna could have further demonstrated that its plan was better for retirees, in part, because they would not have had to change doctors—a concern that the retirees had.

58. Finally, Aetna asserted that it was irrational for OLR not to select Aetna. Aetna asserted that it was overwhelmingly more qualified than the Alliance given Aetna's demonstrated experience administering Medicare Advantage plans for large entities like the State of New Jersey, UAW, and others. The Alliance, on the other hand, was completely new and untried. It was irrational to trust a new entity with a Medicare Advantage plan of this size.

The City's Denial of Aetna's Protest

59. On August 18, 2021, Aetna received the City's denial of Aetna's protest (the "Protest Denial"). The Protest Denial rejected each of Aetna's grounds of protest on various grounds. Ex. 1 at 21-25.

60. First, OLR asserted that Aetna's assertion that OLR did not follow the selection process described in the Solicitation was unfounded and without merit. OLR argued that Arbitrator Scheinman's involvement was not unusual, and that he acted as a consultant, not an arbitrator. OLR further argued that consideration of consultant reports was consistent with past practice, and that after his and other consultant reports were considered, the Alliance won. Notably, OLR did not respond to Aetna's assertion that the Alliance was given the opportunity to present directly to Arbitrator Scheinman while Aetna was not given the same opportunity.

61. While Aetna does not dispute that the Evaluation Committee can consider consultant reports from consultants that are qualified to evaluate bids, Aetna disagrees with OLR's assertion that Arbitrator Scheinman's involvement in the process was "not unusual." Notably, OLR and MLC had to come to a separate agreement to have him consider the issue at all, an action

that was not required for the other consultants that provided reports. Additionally, the ability for one bidder to communicate directly with the arbitrator while preventing the other from doing the same, is fundamentally unfair. Finally, none of this is mentioned at all in the Solicitation. OLR deviated from their process, and that deviation tainted the contract award.

62. Second, OLR asserted that the Alliance is eligible for the award because "[t]here is no indication in the Solicitation that joint ventures would not be accepted and that a specific corporate structure is required." They further asserted that the Alliance is a joint venture between two established and experienced companies who together offered the most advantageous combination of technical experience and pricing. They also asserted that Empire met all of the minimum requirements in the NA. Finally, they asserted that the name "Alliance" is for "promotional and advertising purposes only" and it is a valid business entity.

63. OLR's response mischaracterized Aetna's ground for protest and is otherwise arbitrary. Rather than a protest against the selection of a joint venture, Aetna protested the selection of a *new* entity that had *never* administered a Medicare Advantage plan, let alone a Medicare Advantage plan of this size. OLR never addressed this argument. OLR's assertion that Empire met the NA's requirements was incorrect because they have never had a Medicare Advantage customer with 50,000 members as the NA required. Finally, the City's assertion that Empire and EmblemHealth are well-known insurance companies is misleading. While the Empire name is known, the City's retirees will be working with a brand new company—Anthem. Anthem is simply using Empire's name, and is masquerading as Empire and Emblem. The retirees and the City have never worked with this entity, and OLR's assertion otherwise is wrong.

64. Third, OLR failed to engage with Aetna's argument that the Alliance may be anticompetitive. OLR asserted only that the PBB rules allow joint ventures to bid and that they

are not inherently anticompetitive. OLR also asserted that Aetna's claim was disingenuous because Aetna also tried to work with EmblemHealth.

65. OLR's failure to consider whether or not a joint venture between Empire and Emblem was anticompetitive was arbitrary and unlawful. While Aetna agrees that joint ventures are not inherently anticompetitive, Aetna's argument was that the Alliance was a joint venture entered into by two companies that normally would compete against each other for the contract. They came together solely for the purpose of the contract, and the City had not done any analysis as to whether the arrangement was a restraint of competition.

66. Fourth, OLR asserted Aetna's protest regarding the sharing of confidential information was "speculation," and again failed to acknowledge Aetna's argument. OLR argued that Donna Costa's statement did not matter because she did not mention Aetna specifically. They also argued that it was appropriate for the Third BAFO to reference Aetna's bid because that is consistent with past practice for negotiated acquisitions. They also asserted that the protest was time barred.

67. OLR's response ignores the context in which Donna Costa's statement was made. On April 5, 2021, when Donna Costa revealed the terms of Aetna's bid, it was public knowledge that there were only two finalists, and the Alliance certainly was aware that it was Aetna. The moment the Alliance heard Donna Costa's statement, it knew that it was not the bidder that was providing no premium at all and that it had been outbid. Donna Costa's statement, which likely was inadvertent and solely the result of trying keep retirees apprised of the process, nonetheless gave the Alliance an unfair advantage, and was a violation of the confidentiality agreement OLR asked her to sign. In addition, OLR's assertion that it can share bidders' bid information during a negotiated acquisition is wrong. OLR cannot engage in an auction process whereby it selects the

best terms from each bid and asks others to match it.

68. Fifth, OLR asserted that it provided Aetna the same information that it provided to the Alliance, in another attempt to distort the protest. They even went so far as to claim that the protest was time-barred because in their November 18, 2020 addendum, OLR advised the bidders that it did not have detailed member-level claims data and Aetna did not protest.

69. OLR's rejection misses the point. Aetna's protest was not that OLR provided information to the Alliance that it did not provide to Aetna. Rather, it was that OLR represented it could not obtain that data despite EmblemHealth having access to it and providing it to the Alliance. Moreover, the protest was not time-barred because Aetna did not discover that OLR's representation that it could not provide the member-level data was incorrect until shortly before its First Protest, well under ten days before the submission.

70. Finally, OLR asserted that its decision was rational because the Evaluation Committee followed the process in the Solicitation, and the Alliance outscored Aetna.

71. OLR's response again missed the point. The Alliance was clearly not as qualified as Aetna. Setting aside the fact that the Alliance did not meet the minimum requirements because it is a wholly new entity, the Alliance's "parts" did not come close to Aetna's experience. Aetna's experience is both broad and deep—having been in the Medicare Advantage space for more than five years, as required by the Solicitation, and having multiple clients with thousands, and sometimes hundreds of thousands of members. Moreover, Aetna's pricing was undoubtedly better than the Alliance's. While the two plans may have been of relatively similar cost to the City, Aetna's PDP was at least $366 cheaper per year to each retiree than the Alliance's. Ex. 3. That is a large amount of money when one considers that the membership is composed entirely of retirees. Finally, to the extent the decision was based on "familiarity," that too was irrational. First, the

retirees have worked with EmblemHealth, not the Alliance, so they are working with a new company. Second, the retirees know a different Empire BlueCross BlueShield than the one they will be working with going forward. As explained, Anthem is the true company here and they are putting on Empire's clothes in order to give retirees a false sense of security. The contortionist act to make this bid work for Emblem was completely unnecessary given that the City had a much better option available.

72. Aetna submitted another protest on August 27, 2021 based on The Protest Denial, and expects a response within 30 days. Ex. 1.

The City's Denial of Aetna's Protest Is Arbitrary, Irrational and Without Rational Basis

73. The Decision is arbitrary, irrational, and without rational basis. The Decision can be overturned on numerous independent bases, including the following.

74. First, the Decision had no rational basis for concluding that the Alliance was eligible for an award under the procurement. The Decision asserted that "Empire" met the eligibility requirements. Even if this were relevant, it is wrong. The Solicitation said that a bidding organization (which, here, would have to be the Alliance) would only be eligible if it currently had an employer Medicare Advantage customer with 50,000 members (20% of the City's 250,000). Ex. 2 at 66. This was a low bar. While the Alliance tried to address this by referencing a contract that was won (and then lost) by Anthem in Colorado, it turns out that Anthem only served 43,000 Medicare Advantage members on that contract. Anthem's CMS H contract is different from Empire's, and Anthem and Emblem have different State licenses and CMS contracts. Ex. 1 at 63-66 and Ex. 4 at 4-5. Of course, Anthem's contract should have been irrelevant. Since the Alliance was a new venture, had no customers, and had no track record, it could not possibly be eligible. Because the Alliance had been formed for the purposes of responding to the Solicitation, there was no evidence that it existed or had the appropriately approved and licensed Medicare Advantage

plan. Under those circumstances, it could not meet the Solicitation's requirement that the bidder have substantial experience administering Medicare Advantage programs the same size or greater than the City's program. The Alliance was ineligible to bid, and there was no rational basis for the Decision to conclude otherwise.

75. Second, the Decision's conclusion that OLR followed the selection process described in the Solicitation was irrational. Aetna argued that the selection was supposed to be made based on the Evaluation Committee's review of the submissions against the criteria set forth in the Solicitation, and that there was no mention of the involvement of a third-party arbitrator or mediator or the vendors' ability to communicate with that arbitrator or mediator. Aetna's concern was that the arbitrator did not hear from Aetna, did not follow the evaluation criteria, and did not have the technical background to review Aetna's bid.

76. Third, the Decision had no rational basis to conclude that the purported collaboration between Anthem and Emblem, two horizontal competitors in the market for New York healthcare, complied with state and federal antitrust laws. Aetna argued that the Alliance was a restraint of trade between two companies that would otherwise be competing against each other for business in the marketplace, and that vendors must at all times avoid conduct that is in restraint of competition.

77. Fourth, the Decision had no rational basis to conclude that the process was unaffected by the release of Aetna's confidential information. Aetna cited two independent disclosures. Aetna cited a disclosure by Donna Costa. Aetna explained that Donna Costa's sharing that "one [bidder] will be charging a premium for the first two years" revealed Aetna's bid because it was a direct reference to Aetna's bid. Aetna had submitted a confidential proposal that included no premium charge for the duration of the contract, and guaranteed rates even beyond the five-

year period requested in the Solicitation. Donna Costa's disclosure revealed that information. Aetna further asserted that the Third BAFO request referenced Aetna's rate increase limitation and trend guarantee beyond the five-year period and encouraged the Alliance to include similar limitations and trend guarantees.

78. Fifth, the Decision irrationally rejected Aetna's complaint that the playing field was not even. Aetna explained that OLR failed to disclose information that it represented it did not have, despite the Alliance having access to the information. Aetna requested member-level claims data, which it believed that Emblem should have been able to provide. OLR stated that it did not have access to the information. Later, Aetna determined that Emblem did in fact have the requested data and that it provided that information only to the Alliance. Had Aetna been given access to the data, Aetna could have further demonstrated that its plan was better for retirees, in part, because they would not have had to change doctors—a concern that the retirees had.

79. The City's Decision to ignore the glaring problems that Aetna has identified with the process and the award prejudices Aetna, and most importantly, the retirees. As explained, the Alliance has misrepresented key facts in order to obtain the contract, and their costs are higher for retirees.

CLAIM FOR RELIEF UNDER ARTICLE 78

80. Aetna realleges and repeats the allegations in paragraphs 1 through 79.

81. The decisions of the City Respondents in connection with the NA, the selection of the Alliance, the handling and denial of Aetna's procurement protest, and the Decision should be reversed, vacated, set aside, and enjoined under Article 78 of the CPLR.

82. The Decision was made in violation of lawful procedure, was affected by errors of law, was arbitrary and capricious, and was an abuse of discretion.

83. The City Respondents have failed to perform duties enjoined upon them by law in connection with the Decision.

84. Among other things, the City Respondents failed to comply with the New York City Charter, the New York Procurement Policy Board Rules, N.Y. Comp. Code. R. & Regs., and issued a Decision that is arbitrary and capricious and affected by errors of law.

85. Aetna has no adequate remedy at law.

WHEREFORE, Aetna respectfully requests that the Court enter judgment as follows:

1. Reversing, vacating, setting aside, and enjoining the procurement decisions, including the Decision, of the City Respondents.

2. Specifically, reversing, vacating and setting aside the Decision, and enjoining any action of the City based on the Decision.

3. Declaring any purported contract between the City and the Alliance, and any part of the Alliance, void.

4. Enjoining the City from implementing any of the procurement decisions, including proceeding with any purported contract between the City and the Alliance.

5. Awarding Aetna its attorney's fees and costs.

6. Awarding Aetna any further and other relief as the Court may deem just and appropriate.

Dated: New York, New York
September 2, 2021

KOSTELANETZ & FINK, LLP

By: _____

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Attorney for Aetna Life Insurance Company.

VERIFICATION

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

JORDAN L. WEATHERWAX, being duly sworn, states that he is an attorney for AETNA LIFE INSURANCE COMPANY, a foreign corporation; AETNA LIFE INSURANCE COMPANY cannot verify the petition since it is an entity and can only act through agents; that all of the material allegations of the pleading are within the personal knowledge of said attorney who was personally involved in the procurement protests that are referenced in the petition and was personally involved in the procurement protest that resulted in the agency decision challenged in the petition; that he has read the foregoing Verified Petition and knows the contents thereof; that the same is true to his own knowledge.

X _____

Sworn to before me this
2nd day of September 2021

_____
Notary Public

DOROTHY KARWOWSKI
NOTARY PUBLIC-STATE OF NEW YORK
No. 01KA6202686
Qualified in Kings County
My Commission Expires March 23, 2025