



STATE OF CONNECTICUT
OFFICE OF GOVERNMENTAL ACCOUNTABILITY
STATE CONTRACTING STANDARDS BOARD

Final & Approved Minutes
Friday, December 13, 2019 Meeting of the State Contracting Standards Board
5th Floor Conference Room
18-20 Trinity Street, Hartford, Connecticut

Members Present:

Lawrence Fox, Chair
Alfred Bertoline
Bruce Buff
Charles Casella, Jr.
Albert Ilg
Salvatore Luciano
Jean Morningstar
Stuart Mahler
Robert Rinker
Brenda Sisco

David L. Guay, Executive Director - ex-officio board member
Lauren Gauthier, UConn Graduate Intern

1. Call to order

Meeting called to order by Chair Lawrence Fox at 10:00 A.M.

2. Approve the Minutes of the November 8, 2019 Meeting

Motion made by Salvatore Luciano and seconded by Alfred Bertoline to approve the minutes of the November 8, 2019 Board meeting. All voted in favor, with Bruce Buff abstaining due to his absence from the November 8, 2019 meeting.

3. Report of the Privatization Contract Committee

Chair Fox did not have a report due to the Committee not meeting in November.

4. Report from the Sec. 4e-36 Contested Solicitations and Awards Subcommittee

Subcommittee Chair Robert Rinker reported on the latest contest received from Oxford Health Plans LLC concerning the Notice of Pre-Award in connection with a Medical Request for Proposal issued by the Office of the State Comptroller. Subcommittee Chair Rinker provided a copy of the Subcommittee's decision.

Decision

State Contracting Standards Board
4e-36 Contested Solicitations and Awards
Subcommittee

Oxford Health Plans, LLC
-and-
State of Connecticut, Office of the State Comptroller

BACKGROUND

1. On September 24, 2019, the Office of the State Comptroller, State of Connecticut (the "State"), acting through the Health Care Cost Containment Committee ("HCCCC"), released a Request for Proposal ("RFP") to administer its current self-insured medical plans for active employees and non-Medicare eligible retirees, and their eligible dependents.
2. The two current carriers are Anthem BCBS and Oxford LLC ("Oxford").
3. The current medical plan contract for the two carriers expires on June 30, 2020.
4. The consultant for the State is The Segal Group, Inc. ("Segal").
5. By September 30, 2019, interested vendors had to submit their Intent to Bid Form and the Non-Disclosures Agreements ("NDA") to Segal. Upon receipt of the Intent to Bid Form and a fully-executed NDA, Segal provided potential vendors, through a file download, with detailed claims data and other information to be used to respond to the RFP.
6. The original date to respond to the RFP was October 16, 2019, for electronic posting and October 18, 2019, for hard copy proposals. The State subsequently extended the response date by four days to October 22, 2019.
7. On November 4, 2019, in a letter to David Guay, Executive Director, State Contracting Standards Board (the "Board"), Oxford filed a notice of a pre-award contest. Oxford claimed that Segal disclosed Oxford's proprietary pricing information to other bidders. Oxford claimed that Segal failed to redact the "Discount Charges" field from the file released to other bidders.

According to Oxford, Segal confirmed the disclosure of the proprietary pricing information on October 22, 2019. Oxford believes that the solicitation process is now fundamentally and irreversibly flawed as a result of the inadvertent disclosure of its discount charges to all of the vendors participating in the RFP. Oxford requests that the solicitation process under the RFP be stayed until such time as a written decision is issued on the contest. Oxford seeks to have the Board cancel the solicitation process. On November 5, 2019, Mr. Guay transmitted Oxford's contest to the State for its response.

8. On November 12, 2019, the State responded to Oxford's contest. The State requested that the Board deny Oxford's request for relief because (1) it is in the best interest of the State to complete the RFP in a timely manner; (2) Oxford's contest is untimely; (3) the State and Segal have engaged in remedial efforts to mitigate the harm to Oxford caused by the disclosure and to ensure that all parties are on equal footing for the purposes of the RFP process; and (4) the release of Oxford's proprietary pricing information does not disadvantage Oxford in the RFP process.
9. On November 15, 2019, Assistant Attorney General Gary W. Hawes of the Office of the Attorney General transmitted the State's response to Oxford for their reply.
10. On November 22, 2019, Oxford replied that (1) Segal breached existing non-disclosure agreements and violated the core principle of government procurement – fair and equal treatment of bidders; (2) the harm caused by the breach could be ameliorated by canceling the RFP and starting it again after a period of one or two years; (3) the contest was timely filed because it was only when Segal confirmed on October 22, 2019, that proprietary pricing information had been disclosed to the participating vendors that Oxford knew or should have known of the facts giving rise to the contest; (4) remedial efforts can only mitigate, not eliminate, the harm to Oxford (Oxford, however, did express its appreciation of the efforts taken by the State and Segal to mitigate the harm), and one of the bidders modified the "agreed upon" attestation form; (5) the best and final offer step in the solicitation process would not put Oxford on an equal footing with the other bidders; and (6) Oxford is clearly disadvantaged relative to other bidders in that it has a risk of harm by the disclosure even though there is currently no direct evidence of actual harm.
11. Oxford continues to seek (1) a stay of the RFP until such time as the 4e-36 Contest Solicitations and Awards Subcommittee ("Subcommittee") issues a written decision; (2) the issuance of a written decision upholding the grounds for the contest asserted; and (3) the cancellation of the solicitation process under the current RFP and the initiation

- of a new RFP within a one or two year period to ameliorate the harm.
12. On November 26, 2019, the Subcommittee held a meeting on the contest filed by Oxford. The Subcommittee members present were Robert Rinker, Chair, Bruce Buff, and Stu Mahler. The staff present were Gary W. Hawes, Assistant Attorney General, and Lauren Gauthier, Graduate Intern. Oxford was represented by Attorney John Edwards. The State was represented by Attorney Natalie Braswell.
 13. The Subcommittee offered the parties the opportunity to meet and discuss a possible resolution of the contest. The State declined the opportunity because of the ongoing RFP process. Oxford concurred that a mediated resolution was not probable at this time.
 14. Pre-award contests must be submitted to the Subcommittee “in writing, not later than fourteen days after such bidder or proposer knew or should have known of the facts giving rise to such contest and shall be limited to the procedural elements of the solicitation or award process, or claims of an unauthorized or unwarranted, noncompetitive selection process.” Conn. Gen. Stat. § 4e-36(a).
 15. The issue of timeliness of the contest was discussed by the Subcommittee. Oxford stated that it first became aware of the possible disclosure of its proprietary pricing information on October 17, 2019. Oxford then had internal discussions regarding the possible disclosure of its proprietary pricing information. Oxford contacted Segal on October 22, 2019, to confirm that Oxford’s proprietary pricing information had been disclosed to other bidders. Oxford claims that they did not know that other bidders had their proprietary pricing information until it was confirmed by Segal. The State’s position at the meeting was that the fourteen day time period to file a contest should have begun at least on October 17, 2019, when Oxford learned of the inadvertent disclosure. In addition, the State argues that the proprietary pricing information was in the file that was downloaded by all bidders on September 30, 2019, so Oxford should have known at that point that its confidential information had been inadvertently distributed. Oxford replied that there was a tremendous amount of data in the downloaded files that had to be addressed first, and it was not until later on when it went to insert its discount charges that it became aware that its proprietary pricing information might have been released to the other participating vendors.
 16. The next issue discussed by the Subcommittee was the efforts taken to mitigate the disclosure of the proprietary pricing information. Segal sought attestations from all participating vendors to certify that they had destroyed all of Oxford’s proprietary pricing data. The attestations were developed by Segal and the State with significant

input from Oxford. The executed attestations were signed by all bidders with some exceptions. More specifically, ConnectiCare, a medical insurance company, modified the attestation, and two non-medical bidders did not have the attestations signed by a person with authority as required by the attestation. The State stated that while it was working on resolving the outstanding issues with the attestations, they had not been resolved at the time of the meeting. Oxford acknowledged the efforts of the State and Segal, but maintained that the mitigation efforts do not ensure fair competition.

17. The Subcommittee discussed that the pricing for services is based upon the pricing the bidders had in place as of September 1, 2019, prior to the disclosure of Oxford's proprietary pricing information. Oxford believes that it is possible for the other participating vendors to manipulate their submissions, including their best and final offers (best and final offers are due on December 9, 2019), in other areas including non- pricing aspects of other bidders' responses. It is the State's position that the rank order position process will allow the State to assess if such manipulation has taken place.
18. Oxford's position is that the risk of harm itself should result in the nullification of the RFP and an extension of the existing contract by one or two years to mitigate the damage.
19. Oxford stated that it believed the disclosure of its proprietary pricing information was inadvertent, and that there was not any fraud, corruption, or favoritism by the State or Segal in this matter.

REMEDIES REQUESTED BY OXFORD

20. Oxford requests a stay until the Subcommittee issues its decision. It is the Subcommittee's position that it does not have the statutory authority to issue such a stay.
21. Oxford requested a decision to uphold the grounds for the contest it asserts. The subcommittee will issue a decision forthwith.
22. Oxford requested the cancellation of the solicitation under the current RFP to allow the passage of time to ameliorate the damage from the disclosure. The Subcommittee does not have that authority to cancel the solicitation. Such authority is vested with the full Board under Conn. Gen. Stat. §§ 4e-39 and 4e-40.

DISCUSSION OF THE SUBCOMMITTEE

The State issued a RFP to secure the best medical insurance vendor at the lowest

price. In fact, and the State agrees, more than one medical insurance vendor may secure a contract to offer medical plans for active employees and non-Medicare eligible retirees, and their eligible dependents. The bidding process should to be fair to the bidders, but more importantly, it must be competitive so it will benefit the taxpayers of Connecticut.

Although there has been a claim of timeliness by the State, and although the Subcommittee believes greater due diligence should have been exerted by Oxford, Oxford would not have expected the State and its consultant, Segal, to disclose Oxford's proprietary pricing information, and therefore, Oxford would not have had a reason to look for it in the downloaded data. As discussed at the meeting, the Subcommittee is not going to bifurcate the contest between procedural grounds (timeliness) and the merits (noncompetitive selection process). Oxford immediately brought forth its contest upon confirmation from Segal of the disclosure of its proprietary pricing information.

With respect to the merits, the risk of harm from the inadvertent disclosure does not outweigh proof of actual harm of a noncompetitive selection process. Clearly, a mistake was made in the RFP process. As noted above, however, steps have been taken to mitigate the harm of the inadvertent disclosure. Given the currently unknown effects of the mitigation efforts, the Subcommittee believes that the inadvertent disclosure does not translate into a fatally flawed process at this time. The disclosure of Oxford proprietary pricing information does not in itself make this a non-competitive process. The Board has taken a strong position on competition when the State seeks to procure goods and services. Only at the conclusion of the RFP process when such information becomes available (SCSB has a statutory right to all information from a state contracting agency) can one assess if actual harm has come to Oxford and, more importantly, to the State and its taxpayers through a noncompetitive process.

The Subcommittee therefore concludes that at this time it is in the public interest to continue the RFP process.

DECISION

By unanimous vote, the Subcommittee dismisses Oxford's contest without prejudice. Oxford may reapply to the Subcommittee at a later time with evidence that the selection process was noncompetitive.

Issued: December 2, 2019

5. Work Group Reports

a. Report from Audit Work Group

Executive Director Guay stated that the Audit Work Group did not meet earlier today and that he had nothing new to report.

6. Preliminary Report of 2019 Legislation affecting the Board

Alfred Bertoline reported that the group tasked with reviewing the 2019 Legislation affecting the Board was unable to arrange a meeting with the Office of Policy and Management (OPM) in late November and early December. By consensus, the Board assigned the matter of reviewing the data and reports filed with the OPM as required by the 2019 Legislation to the Data Analysis Work Group, Chaired by Alfred Bertoline.

8. Report of the Special Committee on Dillon Stadium Contracts

Chair Fox reported that the Committee now has the material that Lauren Gauthier and Robert Rinker have compiled and are currently reviewing. Chair Fox reiterated that the matter is very important, but it is not urgent.

7. Other business

No other business.

8. Public comment.

Alyssa Peterson addressed the Board.

Ned Statchen addressed the Board.

9. Adjournment

Motion made by Alfred Bertoline and seconded by Brenda Sisco to adjourn. All voted in favor, the motion passed and the meeting was adjourned at 11:32 A.M.

Respectfully submitted: David Guay