



STATE OF CONNECTICUT
OFFICE OF GOVERNMENTAL ACCOUNTABILITY
STATE CONTRACTING STANDARDS BOARD

Minutes

2:00 P.M. Wednesday October 27, 2021 Meeting of the State Contracting Standards Board Sec.
4e-36 Contested Solicitations and Awards Subcommittee Via Microsoft Teams Video
Conference

Members Present:

Robert Rinker

Bruce Buff

Stuart Mahler

David L. Guay, Executive Director - ex-officio Board member

Ryan Chester, Staff – 2021-2022 UConn Graduate Intern

Michael Durham, Donahue Durham & Noonan. P.C. – representing Anthem

Richard Sponzo, Assistant Attorney General – representing the Teachers' Retirement Board

1. Call to order

Chair Robert Rinker called the meeting to order at 2:00 P.M. and briefly reviewed the agenda.

2. Approve the Minutes of the October 22, 2021 Meeting

Bruce Buff moved to approve the minutes of the October 22, 2021 meeting; Stuart Mahler seconded. All voted in favor.

3. Anthem contest of Connecticut Teachers' Retirement Board Retiree Health Request for Proposals

Attorney Richard Sponzo, Assistant Attorney General – representing the Teachers' Retirement Board provided comments on the proposed draft decision distributed to all parties before the meeting.

Attorney Michael Durham, Donahue Durham & Noonan. P.C. – representing Anthem provided comments on the proposed draft decision.

Chair Rinker added comments on issues raised by the complaint.

Bruce Buff added comments on the draft decision.

Stuart Mahler added comments on the draft decision.

Chair Rinker asked for any further comments from Attorney Sponzo or Attorney Durham.

Attorney Durham asked a question and offered comments and Attorney Sponzo had no further comments.

Chair Rinker asked for a motion concerning the draft decision. Bruce Buff motioned to accept the draft decision and Stuart Mahler seconded. All voted in favor.

DRAFT DECISION
Anthem Health Plans, d/b/a Anthem Blue Cross Blue Shield
And
Connecticut Teachers' Retirement Board

INTRODUCTION

Anthem Health Plans, Inc. d/b/a Anthem Blue Cross Blue Shield (Anthem) has filed three contests under C.G.S. Section 4e-36 in regards to a Request for Proposals (RFP) issued by the Connecticut Teachers' Retirement Board (TRB) and the selection of a proposer to negotiate a contract.

The first contest was filed on August 27, 2021. The subcommittee, established under C.G.S. Section 4e-36, dismissed the contest as not being timely, but did not rule on the merits of the contest. The subcommittee issued its decision on September 27, 2021.

The second contest was filed by Anthem on September 22, 2021. Anthem refers to this contest as its "Supplemental Contest." As previously stated at the subcommittee meeting on September 27, 2021 and again at its meeting on October 13, 2021, the subcommittee considers this contest to be a new contest. For clarity, the subcommittee stated that this contest is the second contest or Contest #2, and not the "Supplemental Contest." Contest #2 regards the difference in the cost of the proposals submitted by Anthem and UnitedHealthcare. On October 22, 2021, the subcommittee found the contest without merit and dismissed it.

The third contest or Contest #3 filed by Anthem on September 29, 2021 regards the weights of the criteria; when they were developed; and when they were approved by the head of the TRB. Anthem calls this contest "Second Supplemental Contest." Again, for clarity, the subcommittee considers this to be Contest #3.

As stated in its previous decisions, the subcommittee has a statutory requirement to issue its decision within thirty days of the receipt of a contest from a bidder or a proposer. The subcommittee has no authority to extend the thirty-day timeframe for issuing a decision. The subcommittee does not have the authority to stay its own proceedings.

FACTS

1. On September 29, 2021, Anthem submitted its Second Supplemental Notice of Contest in connection with the Teachers' Retirement Board's retiree health insurance Request for Proposals released on February 18, 2021. It is Anthem's claim that the weights for the criteria occurred after the release of the RFP on February 18, 2021. The basis of the claim is the response by the TRB administrator, Helen Sullivan, to a question raised by the subcommittee.
2. On September 13, 2021, the subcommittee through David Guay, Executive Director of the State Contracting Standards Board, asked Ms. Sullivan the following question, "It appears that the criteria for the evaluation was provided for in the RFP, but the RFP did not provide the weights for the criteria. Did the Evaluation Committee subsequently develop weights for the criteria in their evaluation of the proposal?" On September 14, 2021, Ms. Sullivan replied, "Yes, weights were subsequently developed but not communicated to the bidders, they are internally weighted. This is standard practice for State RFP's."
3. On September 16, 2021, Mr. Guay transmitted Ms. Sullivan's response of September 13th to Anthem.
4. On October 4, 2021, the TRB responded to Contest #3 through a letter from Attorney Sponzo to the David Guay. A copy of the letter was forwarded to Anthem for their response.
5. On October 12, 2021, Anthem responded to TRB's letter of October 4, 2021 regarding the weights and the OPM Procurement Standards.
6. On October 13, 2021, the subcommittee met and had the following questions regarding the weights:
 - a. Subcommittee – how many members were on the RFP committee at the TRB? TRB- three people and the TRB gave a description of their experience.
 - b. Subcommittee – who put together the weights assigned to the criteria? TRB – Segal
 - c. Subcommittee – when did Segal provide the weights to the committee? TRB - Ms. Sullivan answered that she approves them, and Segal put them together during the RFP process. Ms. Sullivan stated she does not have a specific date.
 - d. Subcommittee - when were the weights approved officially? TRB - Ms. Sullivan answered they were approved during the RFP process.
 - e. Subcommittee – were the weights completed before the RFPs were sent out? TRB - Ms. Sullivan answered she was aware of the weights and was okay with the weights. Ms. Sullivan does not know when the weights were officially approved.
 - f. Subcommittee - why were the weights not sent out with the RFP? TRB - Ms. Sullivan answered we do not release the weights according to OPM guidelines.
 - g. Subcommittee member, Bruce Buff, asked Ms. Sullivan to provide documentation of when the weights were officially approved. Ms. Sullivan stated she would provide that information.
 - h. Mr. Buff asked for Ms. Sullivan to provide the completed score sheets when the contract is signed. Subcommittee member, Stuart Mahler, asked Ms. Sullivan to provide in writing who was on the evaluation team. Ms. Sullivan agreed.

7. On October 14, 2021, Anthem emailed a letter to the subcommittee regarding the meeting of October 13, 2021 and requested the documentation from the TRB of the development and approval of the evaluation criteria weights.
8. On October 18, 2021, the TRB provided the following information to the subcommittee:
 - a. The weights assigned to the evaluation criteria.
 - b. The total scores for the proposers.
 - c. The scoring for each weighted category after the offers were submitted.
 - d. The rating sheets for each of the three evaluators.
 - e. The Best and Final Offers were submitted on June 3, 2021. (It should be noted that initial offers were submitted on April 2, 2021).
9. On October 19, 2021, Anthem responded to the documentation submitted by the TRB on October 18, 2021. Anthem's position was that the documentation of the weighted criteria was developed and approved after the RFP was issued on February 18, 2021.
10. On October 20, 2021, the subcommittee held a meeting relative to Contest #2 (Cost) and Contest #3 (Weights). The following questions were asked regarding weights:
 - a. Chair Rinker asked the TRB – Is it fair to say that the next five categories were given numerical scores by the three evaluators? The scores were weighted and then averaged? And in each of the options offered by the TRB, that UnitedHealthcare was the highest scorer among the three proposers? And was this basis for the recommendation of the subcommittee to the full TRB to choose UnitedHealthcare for the negotiations? Attorney Sponzo answered yes to all questions.
 - b. Chair Rinker asked the TRB - In Mr. Sponzo's response of October 18, 2021, he stated that the weights for the evaluation criteria were assigned before the submission of offers, is that correct? Attorney Sponzo responded yes. Ms. DeMattie stated the weights were discussed and assigned before the RFP's were sent out; the formal documentation was put together on June 2nd.
 - c. Chair Rinker asked the TRB – were the weights for the RFP developed before the RFP was issued? Was there a discussion between Segal and the TRB as to what the weights would be before the RFP was issued? Ms. DeMattie answered yes.
 - d. Mr. Buff asked Ms. DeMattie to provide documentation of these weights existing before this RFP process. Ms. DeMattie stated she would provide that information; the weights were discussed with the TRB before the RFP went out.
 - e. Chair Rinker asked if that discussion or approval was done in writing. Ms. DeMattie said she can provide that information.
 - f. Chair Rinker asked that the documentation concerning the timing of the approval of the weights be provided by October 22, 2021. Ms. DeMattie and Ms. Sullivan agreed to provide that information by October 22, 2021.

11. On October 21, 2021, the TRB sent the subcommittee an email between Ms. Sullivan and Ms. DeMattie dated April 28, 2021. The email also contained a copy of the OPM Procurement Standards dated December 5, 2014.
12. On October 21, 2021, the TRB sent calendar entries from Ms. DeMattie regarding virtual meetings with the TRB concerning the RFP.
13. At the subcommittee meeting on October 22, 2021 regarding Contest #2, Attorney Sponzo stated there may have been procedural errors, the OPM procedures are guidelines/recommendations and the actions of the TRB are *de minimis*. Mr. Sponzo did not clearly state when the weights were developed but were done so before the Best and Final Offers were evaluated by the subcommittee of the TRB. Mr. Sponzo also pointed out in the evaluations that UnitedHealthcare was rated higher by each evaluator on each of the weighted criteria.
14. On October 25, 2021, Anthem requested that the subcommittee request sworn affidavits regarding four points related to the development and approval of the weights and whether the weights were changed after the issuance of the RFP.
15. On October 25, 2021, Attorney Sponzo emailed David Guay that he cannot respond to the Anthem letter referenced above until Thursday, October 28, 2021.
16. On October 26, 2021, Anthem objected to the requested delay by the TRB in response to the Anthem letter of October 25, 2021.

DISCUSSION

Connecticut General Statutes and public sector procurement best practices require that procurement be conducted in a fair, open, and transparent manner. The stated mission of the State Contracting Standards Board is to require that state contracting, and procurement are understood and carried out in a manner that is open, cost effective, and consistent with State and Federal statutes, rules, and regulations. This is not only to ensure that the procurement of goods and services are in the best interests of the state, but also to remove even the implication that procurement was conducted in anything other than an honest and fair process.

The subcommittee cannot make a determination based upon the information provided to us when the weights were established and approved by the TRB. There is no written documentation before the subcommittee that definitively answers that question.

The TRB has provided the subcommittee with notices of virtual meetings between the TRB and Segal. The subcommittee has also been provided with emails that implies agreement on the RFP between the TRB and Segal prior to the issuance of the RFP; however, the emails are absent any specific discussion regarding the weights, if the approval of the weights were reduced to writing and approved by the TRB administrator, and on what date. If the virtual meetings were recorded between the TRB and Segal then that would be a record of such discussion and/or agreements. The subcommittee has not been provided with any such record.

There are some indications that the weights may have been developed after the RFP was issued by the TRB. On September 13, 2021, the subcommittee through Mr. Guay asked Ms. Sullivan the following question, “It appears that the criteria for the evaluation was provided for in the RFP, but the RFP did not provide the weights for the criteria. Did the Evaluation Committee subsequently develop weights for the criteria in their evaluation of the proposal?” On September 14, 2021, Ms. Sullivan replied, “Yes, weights were subsequently developed but not communicated to the bidders, they are internally weighted. This is standard practice for State RFP’s.” This was the basis for the Anthem contest after Mr. Guay communicated the TRB response to Anthem on September 16, 2021. Anthem filed contest #3 on September 29, 2021 after learning of Ms. Sullivan’s response to the subcommittee’s question and claims that Ms. Sullivan’s response indicates that the weights were developed following the release of the RFP on February 18, 2021 and contrary to the OPM Procurement Standards.

On October 13, 2021 and October 20, 2021, the subcommittee again inquired as to when the weights were developed and approved by Ms. Sullivan as the TRB administrator. Ms. Sullivan and Ms. DeMattie stated that they had conversations before the issuing of the RFP regarding the weights and their approval, but again there is no written documentation of the discussion and/or approval by Ms. Sullivan.

On October 22, 2021, Mr. Sponzo, Assistant Attorney General representing the TRB, stated that there may have been procedural errors, that the OPM procedures are guidelines/recommendations, and the actions of the TRB are *de minimis*. Mr. Sponzo did not clearly state when the weights were developed but were done so before the Best and Final Offers were evaluated by the subcommittee of the TRB. Mr. Sponzo also pointed out in the evaluations that UnitedHealthcare was rated higher by each evaluator on each of the weighted criteria. To answer the question of when the weights were developed and approved, we credit the statements of Attorney Sponzo on October 22, 2021.

Attorney Sponzo states that there may have been procedural errors. The subcommittee agrees that there may have been procedural errors as it relates to the agreed weights by the TRB administrator.

Attorney Sponzo states that the OPM Procurement Standards are guidelines/recommendations. The subcommittee disagrees that they are merely guidelines/recommendations. If this were to be so, could a state contracting agency develop weights for criteria after the evaluations? We think not. The OPM Procurement Standards emanates from its statutory authority under C.G.S Sec. 4-217. C.G.S Sec. 4-217 states in part, “*the standards shall include, but not be limited to, provisions for: (1) Evaluating the need to use a personal service agreement, (2) developing a request for proposals, (3) advertising for personal service contractors, (4) evaluating submitted proposals, (5) selecting a personal service contractor, including compliance with section 4a-60g, (6) systematically monitoring and evaluating personal service contractor performance, (7) documenting the entire process for selecting and managing personal service contractors and (8) carrying out any other aspect of such process.*” The statute continues by saying “*each state agency shall: (1) Establish written procedures for implementing the standards established by the secretary under subsection (a) of this section, and (2) submit such procedures to the secretary for his approval. If the secretary disapproves an agency’s procedures he shall return the procedures to the agency with recommendations for revisions. On and after July 1, 1994, no state agency may execute a*

personal service agreement unless the secretary has approved procedures established by the agency under this section.”

The word “shall” is mandatory and does not suggest that the OPM Procurement Standards developed pursuant to the statues are guidelines or recommendations. It is also the case that OPM Procurement Standards are not in statute or regulation.

Attorney Sponzo asserts that the actions of the TRB are *de minimis*. The subcommittee does not find the actions of the TRB to be too trivial or minor to merit consideration by us. The Anthem contest raises questions regarding the procedural elements of the solicitation or award process.

Attorney Sponzo is correct when he states that UnitedHealthcare received the highest score on all the criteria from each of the evaluators. The subcommittee has reviewed those evaluations and concludes the same.

The subcommittee is troubled by the fact that a contract has not been executed between the TRB and UnitedHealthcare as of October 22, 2021. The TRB has begun its open enrollment to allow the plan participants to choose one of the plan options available to them by UnitedHealthcare Medicare plans. The reason to have an executed agreement is twofold. First, if an agreement cannot be reached with UnitedHealthcare then the TRB would begin negotiations with Anthem. Second, the TRB is so far down the road with its implementation of the UnitedHealthcare plans that the TRB has lost any bargaining leverage that the TRB would have with UnitedHealthcare over the contract.

Assuming that the weights were developed and approved after the issuance of the RFP, did it result in the unauthorized or unwarranted, noncompetitive selection process? Both Anthem and UnitedHealthcare were subjected to the same “flawed” process. There is no information to suggest that UnitedHealthcare was the beneficiary of the procedural elements of the solicitation or awards process, or UnitedHealthcare benefited from an unauthorized or unwarranted, noncompetitive selection process. Conversely, Anthem has not demonstrated that it was harmed by the solicitation or awards process at it relates to the issue of weights or that the process was an unauthorized or unwarranted, noncompetitive process, again as it relates to the weight issue. Both Anthem and UnitedHealthcare were evaluated under this process.

If Anthem believes the law was violated as it relates to its claim that the OPM Procurement Standards has the weight of law, then Anthem could avail themselves of the process under C.G.S. 4e-39 and 4e-40. C.G.S 4e-39 speaks to violations of law before the award of a contract and C.G.S. 4e-40 speaks to violations after an award is made. Anthem stated in its first contest that it was also pursuing this issue in court.

This subcommittee's analysis indicated that, although the facts do not support the position that one bidder had an unfair advantage over another, the process followed by the TRB was not as "open" as is necessary for such a high-profile procurement to avoid accusations of unfairness and favoritism. The very fact that this contest was brought before the subcommittee was evidence that the actions of the TRB lacked the necessary openness and transparency.

The subcommittee believes it is the best practice to disclose the weights of the criteria in the RFP. If this practice had been followed in this procurement, there would be no contest before us. It is this subcommittee's recommendation that the TRB conduct a "lessons learned" session with OPM and the Department of Administrative Services to ensure that future procurements conducted by the TRB complies with OPM Procurement Standards and the recently issued OPM template.

DECISION

The subcommittee finds that it is more likely than not that the RFP for retiree health insurance issued by the TRB on February 18, 2021 did not comply with the OPM Procurement Standards as it relates to the development and approval of weights for criteria before the issuance of the RFP. The subcommittee did not find that the development and approval of the weights, whenever they occurred, resulted in procedural error, or claim of unauthorized, unwarranted, noncompetitive process. Both Anthem and UnitedHealthcare competed under the same process, and the subcommittee does not find that the process favored UnitedHealthcare over Anthem. Both Anthem and UnitedHealthcare were evaluated by the TRB Evaluation team. As stated in our discussion, UnitedHealthcare received higher overall ratings on each of the weighted criteria. The weighting of criteria would have had no impact in this particular case. As described in our discussion, OPM and DAS should conduct a "lessons learned" session with the TRB. The subcommittee recommends that either OPM or DAS provide oversight on a future procurement to make sure that "lessons learned" have actually been learned. The subcommittee dismisses Contest #3 by Anthem.

A copy of this decision has been provided to Anthem.

Decision issued on October 27, 2021.

Chair Rinker stated his appreciation for the professionalism of both Attorney Sponzo and Attorney Durham in representing their clients' interests.

4. Adjournment

Motion by Bruce Buff to adjourn, seconded by Stuart Mahler. All voted in favor.

Meeting adjourned at 2:46 P.M.

Respectfully submitted: David Guay