



STATE OF CONNECTICUT
OFFICE OF GOVERNMENTAL ACCOUNTABILITY
STATE CONTRACTING STANDARDS BOARD

Final & Approved
Minutes

Monday, September 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, Chair
Bruce Buff
Stuart Mahler

David L. Guay, Executive Director - ex-officio Board member
Ryan Chester, Graduate Intern/Staff

Michael Durham, Donahue Durham & Noonan. P.C. – representing Anthem
Philip Schulz, Associate Attorney General – representing the Teachers’ Retirement Board

1. Call to order

Meeting called to order by Chair Robert Rinker at 10:01 A.M.

2. Approve the Minutes of the April 14, 2021 Meeting

Motion made by Bruce Buff and seconded by Stuart Mahler to approve the minutes of the April 14, 2021 Subcommittee meeting. All voted in favor.

3. Anthem Health Plans, Inc. d/b/a Anthem Blue Cross and Blue Shield’s Notice of Contest in connection with the Connecticut Teachers’ Retirement Board’s Retiree Health Request For proposals

The subcommittee provided both Anthem and the TRB with a copy of the decision on Friday, September 24, 2022.

Draft Decision

Anthem Health Plans, Inc. d/b/a Anthem Blue Cross Blue Shield

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And

Connecticut Teachers' Retirement Board

Introduction

When the General Assembly passed and former Governor Rell signed into law Public Act 07-1 (September Special Session), it provided in part for an expedited process to resolve claims regarding the solicitation or award of a contract by a bidder or a proposer. This process is provided for in C.G.S. Section 4e-36.

The provisions of C.G.S. Section 4e-36 sets out strict timeframes for filing a contest and for the subcommittee to render a decision. For the bidder or the proposer (in this contest it is a proposer), the proposer shall submit in writing not later than fourteen days after such proposer knew or should have known of the facts giving rise to the contest. The subcommittee shall issue a decision, in writing, not later than thirty days after receipt of any such contest. The statute does not provide for any extensions or stays to be granted by the subcommittee.

The subcommittee, if it finds the contest to be timely, shall be limited to the procedural elements of the solicitation or award process, or claims of an unauthorized or unwarranted, noncompetitive selection.

Facts

1. On August 27, 2021, Anthem Health Plans, Inc. d/b/a Anthem Blue Cross Blue Shield (Anthem) filed a contest with the State Contracting Standards Board in regards to a Request for Proposals (RFP) issued by the Connecticut Teachers' Retirement Board (TRB) on February 18, 2021. The contest was received after the close of business on Friday, August 27, 2021. For the purposes of this contest, it will be deemed to have been filed on Monday, August 30, 2021.
2. The TRB's RFP was for retiree health insurance. The incumbent provider of retiree health insurance is Anthem.
3. Anthem claims in its contest that the process was so deficient that it is impossible for Anthem to understand what, if anything, was done to evaluate the proposals, how the proposals were scored or what data, if any, the TRB relied on to support the recommendation that was made.
4. On June 25, 2021, the TRB voted to negotiate a contract with UnitedHealthcare. As of the date of this meeting, September 27, 2021, the subcommittee is not aware that a contract has been finalized with UnitedHealthcare.

5. On July 1, 2021, Anthem received a letter from Helen Sullivan, TRB Administrator, stating that the TRB was to pursue contract negotiations with a competitor and that a contract had not yet been awarded.
6. Anthem claims the letter of July 1, 2021 from Ms. Sullivan did not include whether any protest or review process was available to Anthem.
7. In its contest, Anthem cites the Office of Policy and Management, Procurement Standards: For Personal Service Agreements and Purchase of Service Contracts (Revised December 5, 2014).
8. Anthem claims that one of the procedural elements relates to best and final offers (BAFO). Initially, the TRB stated that there would be no BAFO. On June 7, 2021, the TRB requested BAFO of Anthem and we assume the other finalists including UnitedHealthcare.
9. On August 30, 2021, David Guay, Executive Director of the State Contracting Standards Board wrote to Anthem's attorney, Matthew Geelan, and acknowledged receipt of the contest on August 30, 2021 and inquired about the timeliness of the contest.
10. On September 2, 2021, Attorney Geelan responded, "As described in more detail in Anthem's contest, given the lack of procedure provided by the TRB regarding the award process and given that Anthem has never been provided with a direct answer as to whether a contract has actually been "awarded," which information would trigger the 14-day contest period, Anthem's contest is timely or at least is premature because the contract may not have been formally awarded at this time. Due to the lack of information and procedure provided by the TRB, Anthem feels as though it must file the contest now, in an abundance of caution, to preserve its rights. We hope this information is sufficient to resolve your question as to the timeliness of the contest."
11. On September 13, 2021, Mr. Guay sent an email to Anthem on behalf of the subcommittee asking the following questions: 1. What transpired in the fourteen-day period prior to August 27, 2021 that gave rise to the filing of the contest by Anthem? 2. After being informed by Helen Sullivan, the TRB Administrator, on July 1, 2021, that the TRB decided to pursue contract negotiations with a competitor, did Anthem exercise their right for a debriefing and appeal process as provided for in the Office of Policy and Management's, Procurement Standards for Personal Services Agreements and Purchase of Service Contracts, (Revised December 5, 2014)? If so, did Anthem receive a debriefing and on what date did the debriefing take place? If not, why did Anthem not elect the opportunity to be debriefed and file an appeal? Please respond to these questions no later than the close of business on September 17, 2021.
12. On September 13, 2021, Mr. Guay sent an email on behalf of the subcommittee to the TRB stating, "On August 30, 2021, the State Contracting Standards Board received the attached contest from Anthem Health Plans, Inc. with regards to the Teachers' Retirement Board's Retiree Health Request for Proposal released on February 18, 2021. The C.G.S. 4e-36 subcommittee requests a written response to Anthem's contest by the TRB by the close of business on September 17, 2021. The subcommittee has a statutory deadline of September 28, 2021 to issue a decision. In addition to TRB's response to the Anthem's contest, the subcommittee has the following questions: 1. Did Anthem exercise their right for a debriefing

and an appeal process as provided for in the Office of Policy and Management's, Procurement Standards for Personal Services Agreements and Purchase of Service Contracts, (Revised December 5, 2014)? If so, did Anthem receive a debriefing and on what date did the debriefing take place? 2. In questions posed by prospective proposers, a question was asked if there would be last best and final offers. The answer was "no." Subsequently, it appears that a decision was made to request from the proposers their last best and final offers? When was this decision made and how was it communicated to the proposers? Was this decision made after the receipt of the initial responses from the proposers? 3. It appears that the criteria for evaluation were 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 proposals? Thank you for your time and we look forward to your response."

13. On September 14, 2021, Ms. Sullivan replied to Mr. Guay's email of September 13, 2021 that Anthem did not exercise their right for a debriefing and appeal as provide for in Office of Policy and Management, Procurement Standards: For Personal Service Agreements and Purchase of Service Contracts (Revised December 5, 2014). With regards to BAFO, Ms. Sullivan points out that the TRB has the right to issue multiple awards, no award, cancel or alter the procurement at any time. With regards to development of weights for the criteria stated, "Yes, weights were subsequently developed but not communicated to the bidders, they are internally weighted. This is standard practice for State RFP's."
14. On September 16, 2021, Assistant Attorney General, Richard Sponzo, submitted, on behalf of the TRB, a letter in response to the Anthem Contest.
15. On September 17, 2021, the TRB response was also transmitted to Attorney Geelan asking for a response by the close of business on September 23, 2021.
16. On September 17, 2021, Attorney Geelan respond on behalf of Anthem to Mr. Guay's emailed questions of September 13, 2022. With regards to what transpired in the fourteen-day period that triggered the contest, Anthem stated that it was the TRB's request for transition data. Anthem would proceed with the contest even if it was premature. In its contest filed on August 27, 2022, it reference doing so out of abundance of caution related to the timeline for filing a contest. With regarding to a debriefing and an appeal process, Anthem believes the debriefing and appeal process as described in the OPM policy was premature since a contract had not be finalized and Anthem was still eligible and in line for an award. The other point made by Anthem is that an agency must give adequate notice of the right to appeal in order to trigger the appeal.
17. On September 22, 2021, Attorney Geelan responded by letter and attachments to the TRB's response of September 16, 2021. In its response, Anthem provides a supplement to its contest filed on August 27, 2021 based upon information it claims to have learned on September 8, 2021. Mr. Guay forwarded the Anthem response to the TRB on September 23, 2021 noting that a response is not required. Mr. Guay inquired about whether there was a signed contract with UnitedHealthcare.
18. On September 22, 2021, the TRB issued its written rebuttal regarding Anthem's response.

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19. On September 23, 2021, the TRB stated it was working with an AG team and UnitedHealthcare to get the contract executed. The TRB further stated that there were no substantial issues for either party.

Discussion

In Anthem's contest, it describes certain procedural elements that occurred during the RFP process. For example, the issue whether or not BAFOs would be required was asked by one of the proposers prior to submittal of proposals. The answer from the TRB was "no." Subsequently, the TRB requested BAFOs. If Anthem believed this to be procedural change, it had a right to file a contest at that time. The subcommittee has decided procedural issues in the past during the RFP process. In a contest involving UnitedHealthcare and the Office of the State Comptroller, the consultant for the State Comptroller's Office released UnitedHealthcare's proprietary information to other proposers. The subcommittee found the contest to be timely. (Ironically, one of the proposers that received the proprietary information was Anthem.) The Comptroller received attestations from the other proposers that the data had been destroyed. The subcommittee dismissed the contest in that it found that the harm was a perceived harm and not actual harm. This left the door open for UnitedHealthcare to file a contest if they found actual harm had come to them if the proprietary data had been used by the other proposers to the RFP.

With regards to criteria and weights, Anthem knew the criteria, but the weights were kept confidential by the TRB. Anthem knew of this potential procedural claim long before the fourteen-day period ending on August 27, 2021. Again, if Anthem believes a contest was warranted based upon this procedural element, it should have filed its contest at that time. While the State Contracting Standards Board has taken the position that weights of criteria should be disclosed in a RFP, this is not a position held by the Office of Policy and Management or Department of Administrative Services. When an award is made regarding this RFP, Anthem will have the right to review all material except proprietary information including evaluations and weights and to make its decision on whether or not the facts give rise to a contest based upon the procedural elements, or claims of an unauthorized or unwarranted, noncompetitive selection process.

The subcommittee inquired as to whether or not Anthem requested a debriefing and possible appeal following the notice of Ms. Sullivan that another proposer was selected for negotiations. Ms. Sullivan's response was "No." Anthem believes that a debriefing and appeal occurs after an award is made and that as of the date of their contest such award had not been made. The subcommittee finds the OPM policy to be clear on this point. It states as follows:

Within ten (10) days of receiving notification from the agency about the proposer selection, unsuccessful proposers may contact the official state contact and request additional information about the evaluation and proposer selection process. The e-mail sent date or the postmark date on the notification envelope

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shall be considered “day one” of the ten (10) days. If unsuccessful proposers still have questions after receiving this additional information, they may contact the official state contact and request a meeting with the agency to discuss the evaluation process and their proposals. If held, the debriefing meeting must not include any comparisons of unsuccessful proposals with the other proposals. The agency must schedule and hold the debriefing meeting within fifteen (15) days of the request. The agency must not change, alter, or modify the outcome of the evaluation or selection process as a result of any debriefing meeting. Within ten (10) days of the debriefing meeting, unsuccessful proposers may appeal the State agency’s procurement process in writing, to the agency head. The proposer must set forth facts or evidence in sufficient and convincing detail for the agency head to determine whether the agency’s process failed to comply with the State’s statutes, regulations, or standards (established herein) concerning competitive procurement or the provisions of the RFP. An agency head must issue a decision, in writing, not later than thirty (30) days after receipt of any such appeal. The filing of an appeal shall not constitute sufficient reason for an agency to delay, suspend, cancel or terminate the procurement process or execution of a contract. In the event that an agency head determines that a process violation has occurred and that the violation had a substantial effect on the procurement, an agency head shall take corrective action not later than thirty (30) days after the date of such a determination. In addition, a proposer has the right of appeal, under certain circumstances, to the State Contracting Standards Board, which is statutorily charged with considering and acting upon appeals (See CGS 4e-35, 4e-36, 4e-37).

Anthem could have requested a debriefing following the July 1, 2021 email from Ms. Sullivan. In a contest regarding Conduent State Healthcare, LLC and the Department of Social Services, Conduent State Healthcare, LLC sought and received a debriefing with the Department of Social Services and as a result filed a contest regarding the scoring related to its reported references. This debriefing and contest happened prior to an award. The subcommittee in this case issued a decision that allowed the proposers to update their references and to have the proposals evaluated by a new evaluation team.

The subcommittee accepts “the documentation of procurement process” as provided for in OPM’s policies previously cited and stated in the Anthem contest of August 27, 2021. The question is when is that file available to the public and the proposers. It is the subcommittee’s position that such file is made available at the time an award is made, i.e. a contract is made between a state contracting agency and a vendor.

In summary, there are two times that a proposer is entitled to certain information. The first time a proposer is entitled to information is during a debriefing and possible appeal when the notification is made by the state contracting agency that the proposer is an unsuccessful proposer. The reason is in the description of the OPM policy regarding debriefing and appeals relates only to the proposer’s own proposal. The second time is when an award is made, or contract is entered into with a vendor. These are two distinct events.

In response to the subcommittee's inquiry about what triggered the contest, Anthem stated that certain transition information should be provided by Anthem to TRB/Segal. This transition information was requested by TRB/Segal on August 24, 2021. The subcommittee does not find the requested information to be related to the procedural elements of the solicitation and award process, but to the transition from Anthem to UnitedHealthcare. As to whether Anthem provides such information is an issue between the TRB and Anthem's contract with the TRB. Assume that the transition data is related to the RFP and the basis for Anthem's contest, the request from the TRB was not referenced in the detailed contest filed by Anthem on August 27, 2021 and a contest on that basis would now fall out of the fourteen-day period for filing a contest.

Anthem states that the TRB should have noticed them about their appeal rights. The subcommittee finds that while it would have been helpful to have included such rights in the RFP and in the July 1, 2021 notice by Ms. Sullivan to Anthem, but this is not Anthem's first RFP with the State of Connecticut. Along with UnitedHealthcare, Anthem is major player in responding to RFPs. As stated earlier, Anthem and UnitedHealthcare competed for the active Connecticut State employees. The fact that Anthem quotes extensively from state procurement polices makes it clear they know the rules.

The subcommittee views the notice of the supplemental contest as a new contest. The subcommittee will not issue a decision on the supplemental contest but will consider it with regards to its statutory mandate to issue a decision within thirty days.

Decision

The subcommittee finds the Anthem contest filed on August 27, 2021 not to be timely filed by Anthem. Consequently, the subcommittee will not render a decision on the merits of the contest and no inference on the merits should be drawn by Anthem or the TRB. The subcommittee finds the supplemental contest filed by Anthem on September 22, 2021 to be a new contest and will apply the thirty-day requirement for issuing its decision from the September 22, 2021 date. In the event new and additional facts come to light, Anthem is free to file a contest regarding those facts and the application of those facts to the statutory mandate of the subcommittee.

Chair Rinker asked for comments from Anthem and the Teachers' Retirement Board about the draft decision.

Attorney Michael Durham, representing Anthem provided comments.

Attorney Philip Schulz, representing the TRB provided comments

Motion made by Bruce Buff and seconded by Stuart Mahler to accept the draft decision in the matter of Anthem Health Plans, Inc. d/b/a Anthem Blue Cross and Blue Shield's Notice of Contest in connection with the Connecticut Teachers' Retirement Board's Retiree Health Request For proposals. With no discussion from the Subcommittee members, the decision in the matter of Anthem Health Plans, Inc. d/b/a Anthem Blue Cross and Blue Shield's Notice of Contest in connection with the Connecticut Teachers' Retirement Board's Retiree Health Request For proposals was approved.

4. Motion made by Bruce Buff and seconded by Stuart Mahler to adjourn. All voted in favor, the motion passed, and the meeting adjourned at 11:06 A.M.

Respectfully submitted: David Guay