

DISTRICT COURT, CITY AND COUNTY OF
DENVER, COLORADO
1437 Bannock Street
Denver, Colorado 80202

Plaintiff: IMPAIRED PROFESSIONAL
DIVERSION PROGRAM d/b/a COLORADO
NURSE HEALTH PROGRAM, a Colorado
nonprofit corporation,

v.

Defendant: COLORADO DEPARTMENT OF
REGULATORY AGENCIES

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Case Number: 2008 CV 4924

Div. 2 Ctrm:

**PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION
AND REQUEST FOR PRIORITY SETTING**

COMES NOW the Plaintiff, Impaired Professional Diversion Program d/b/a Colorado Nurse Health Program ("CNHP") and moves this Court for a preliminary mandatory injunction pursuant to Rule 65, C.R.C.P., to require the Defendant, Colorado Department of Regulatory Agencies ("DORA") to reinstate the award of the nurses' diversion program under C.R.S. 12-38-131 to CNHP, to execute the contract for this program with CNHP, and to fund CNHP with the monies collected for it over the past thirteen years and currently collected pursuant to C.R.S. § 12-38-131. In addition, CNHP requests that this matter be given a priority setting in light of

CNHP's imminent dissolution, pursuant to Rule 65, C.R.C.P. As grounds therefor, CNHP states as follows:

I. BACKGROUND

A detailed background of this matter is related in the *Affidavit of Marjorie Derozier, Executive Director of Plaintiff* ("Derozier Aff."), filed in this case on July 3, 2008, which is incorporated herein by reference.

A. CNHP was created as a separate legal entity pursuant to C.R.S. § 12-38-131 as it existed prior to January 1, 2008

CNHP is a Colorado nonprofit corporation, qualified for 501(c) status under the Internal Revenue Code, which was created as a separate corporate entity to be the State of Colorado's diversion program for the nursing profession, pursuant to C.R.S. 12-38-131 as it existed before January 1, 2008. *Derozier Aff.* at ¶ 2. CNHP's primary function is to monitor nurses who have substance abuse or mental health issues, and optimally facilitate these nurses' recovery to the point that they are able to continue to practice nursing, while protecting the public. *Id.* at ¶ 3.

Prior to 1995, Colorado nurses with substance abuse or mental health issues were monitored by the State Board of Nursing ("SBON"), a component of DORA, through the SBON's Rehabilitation and Evaluation Committee (REC). This meant that there was always agency knowledge of the nurses' impairment and recovery status. *Derozier Aff.* at ¶ 4.

C.R.S. § 12-38-131 was amended in 1995 (Former Statute, or Exhibit 1 to *Derozier Aff.*) to require the creation of a separate legal entity to provide the diversion program for nurses, so that there would be no agency knowledge of impairment or recovery unless or until the nurse

was terminated from CNHP for specifically listed reasons and referred back to the SBON. The Former Statute sought to give nurses the incentive of confidentiality in return for compliance.¹

B. CNHP provided services to DORA and the SBON in excess of the statutory mandate, including the monitoring of new nurse applicants

CNHP was structured in a particular manner to comport with the Former Statute, with a board of directors with specific professional backgrounds (“Committee”), to provide the nurses’ diversion program as defined in the statute.

CNHP also provided a significant array of services that were beyond those mandated, whenever requested by the SBON. Examples included the monitoring of nurses sent to CNHP on a Stipulation and Order from the State, “post-referral” monitoring of nurses (that had been terminated from CNHP but that CNHP would still monitor while the SBON was pursuing disciplinary proceedings), “suspension track” nurses, “rule out risk” nurses, and other classes of nurse participants. CNHP provided consultation to the SBON as well as expert testimony as requested, *gratis*. Historically, if the SBON wanted a service, it had only to ask, and CNHP would expand its responsibilities in order to provide it. *Id.* at ¶ 9-11.

Most significantly, CNHP monitored new nurse applicants as part of its regular nurse population throughout the thirteen years of its existence, in addition to its other statutorily defined duties. *Id.* at ¶ 8.

C. Recent legislative history and competitive bidding mandate

In 2002, a competitor which handled other peer assistance programs for the State, Peer Assistance Services (“PAS”), found a legislator to introduce a bill to change C.R.S. § 12-38-131

¹ In fact, the Former Statute provided that, if it was determined that a nurse licensee had “been rehabilitated through the completion of the impaired professional diversion program, the committee shall purge and destroy all records pertaining to the licensee’s participation in the program” in subsection (6)(b)(II). *Id.* at ¶ 5 – 7.

to be awarded on a competitive bid basis. That legislation was defeated. Subsequently, the legislation was introduced, and defeated, three more times, in succeeding years. Two years ago, DORA invested active lobbying effort to get the bill passed and, last year, HB 07-1102 was signed into law. This legislation provided that the Former Statute would be repealed and re-enacted in its current form, to be effective January 1, 2008. *Id.* at ¶ 8-11. (“New Statute” which is Exhibit 3 to *Derozier Aff.*).

The New Statute provides that a competitive bidding process is mandatory for selection of the diversion program which is presently being provided exclusively by CNHP. It states, in section (3)(a), “The board shall select one or more recognized peer health assistance organizations or nurse alternative to discipline programs as designated providers. For purposes of selecting designated providers, the board *shall use a competitive bidding process* that encourages participation from interested vendors.” (emphasis added).

D. Statutorily-mandated “competitive bidding process” as conducted by DORA

1. RFP SJN 0801

On August 7, 2007, the Colorado Department of Regulatory Agencies (DORA) issued RFP SJN 0801 (“RFP SJN 0801” which is Exhibit 4 to *Derozier Aff.*). That RFP solicited proposals from vendors interested in providing the State’s diversion program for nurses. CNHP and PAS were the only two vendors to bid on this RFP.² *Derozier Aff.* at ¶ 10-11.

On October 22, 2007, CNHP received notice that it was the sole successful vendor for RFP SJN 0801, and PAS was notified that it was unsuccessful. *Id.* at ¶ 12 - 13. There was also a decision letter issued by the independent evaluators of the RFP which articulated the reasons that

² The due date for submission of a proposal to the RFP was September 6, 2007. CNHP timely submitted a proposal to RFP SJN 0801 (Exhibit 5 to *Derozier Aff.*). It was later learned that PAS had also submitted a proposal (Exhibit 6 to *Derozier Aff.*).

CNHP's proposal "was the most advantageous to the state based upon the evaluation criteria set forth in the RFP." ("Decision Memorandum" which is Exhibit 8 to *Derozier Aff.*). Besides the fact that CNHP was the lowest bidder, there were two quality aspects of CNHP's program that the evaluators found to be particularly compelling, and on which PAS would be unable to compete – CNHP's staffing (Section 4.1.b of RFP SJN 0801), and the fact that CNHP had no internal conflict of interest (whereas PAS did) (Section 4.1.f of RFP SJN 0801).

C.R.S. § 24-103-202.3(4) requires, in part, that "[t]he contract *shall* be awarded with reasonable promptness." (emphasis added). However, despite CNHP's active pursuit of the written contract for its award, a contract was never even tendered by DORA. CNHP was repeatedly assured that the documentation was taking time, but was forthcoming. CNHP continued to provide services for the diversion program in reliance on the award, for almost three months, into January, 2008, after the New Statute became effective. If, instead, CNHP had been notified that it was unsuccessful, it would have had this time to wind up affairs. But, again, CNHP had received notification that it was the successful vendor, in particular for two unassailable reasons as stated by the independent evaluators, and CNHP justifiably relied on this award, especially as the months went by without notice otherwise. *Derozier Aff.* at ¶ 14.

2. DORA gave CNHP's confidential bid information to CNHP's RFP competitor

CNHP was given no notice whatsoever that, while it was waiting for its written contract, DORA had given CNHP's proprietary and confidential bid information to PAS, and that DORA had been holding meetings with PAS in order to set aside the award to CNHP. *Id.* at ¶ 15.

RFP SJN 0801 had provided that information could be designated as confidential. Pursuant to the stated requirements in the RFP, CNHP had included a paragraph at the end of its proposal asserting that its financials were to be held confidential, and CNHP submitted its

financials separately from its proposal in sealed envelopes. CNHP also listed its internally-generated forms as confidential, and included this in its confidentiality paragraph in its proposal, along with the statutory basis for the assertion. *Id.* at ¶ 16. Even if CNHP had not made this additional commitment to designate the confidentiality of its submittal, CNHP’s proposal should have been kept from its competitor as a matter of law, pursuant to C.R.S. § 24-103-203(4)³ and case law in this state.⁴

CNHP was unaware that its entire proposal, including its confidentially-designated forms and financial information, had been compromised by DORA and given, completely, by DORA to PAS, and was also unaware of any meetings between DORA staff and PAS’ counsel during the time that CNHP was being assured that its contract was being finalized. *Id.* at ¶ 17-18.

3. DORA cancelled RFP SJN 0801 and its award to CNHP

CNHP received a letter, dated January 8, 2008, that purported to cancel RFP SJN 0801 and its award because “the RFP failed to include new applicants for registered nursing or licensed practical nursing licenses . . .” and vaguely stated that “the final decision of the evaluation committee was based on incomplete information.” (“Cancellation Letter” which is Exhibit 10 to *Derozier Aff.*). *Id.* at ¶ 19.

This made no sense, as CNHP already provided services to new nurse applicants, and had done so for most of its existence, as the SBON well knew. *Id.* at ¶ 20.

If this was really a concern, DORA should have contacted CNHP to verify that CNHP would continue to provide its services to new nurse applicants under the RFP award, and if this

³ This section specifically requires that “[p]roposals shall be opened so as to avoid disclosure of contents to competing offerors . . .

⁴ Colorado courts have even held that a bid on a contract can be a trade secret. *Ovation Plumbing, Inc. v. Furton*, 33 P.3d 1221 (Colo. App. 2001).

would be included in the cost proposed by CNHP. It didn't. And, the DORA knew that CNHP had not, historically, charged for this additional service. *Id.* at ¶ 21.

In addition, the New Statute, in subsection (1), was clear that fees were only to be collected from renewal licenses – not new nurse applicants. Consequently, it appeared that this basis for canceling the contract was contrived and not even based upon the statute which was the basis for the RFP. *Id.* at ¶ 22.

The Cancellation Letter also did not articulate what new information would be sought in another RFP. Further, CNHP was not asked for any additional new or other information which might have been needed to clarify its proposal. *Id.* at ¶ 23-24.

CNHP had always provided high quality service to the SBON, as verified in its regular internal and external reviews. CNHP's reviews had always been complimentary and positive. There was no conceivable basis for which quality or scope of services could have been an issue. Even the testimony in the legislature was consistent that CNHP had been providing quality service, and the sole basis for the legislative change was to allow for competitive bidding for this program. *Id.* at ¶ 25-26.

Consequently, the two articulated bases for the cancellation of RFP SJN 0801 and its award to CNHP were unfounded.

4. DORA's support of CNHP's competitor

After receiving the Cancellation Letter, CNHP made an appointment to review the State's file on the matter, and learned that its entire bid, even its sealed financials, had been given to PAS shortly after the original CNHP Award Letter had been issued. *Id.* at ¶ 27-28.

In its review of the file, CNHP saw that PAS had submitted an untimely protest of the award of RFP SJN 0801 to CNHP, and that this protest included a discussion of CNHP's

confidential financial information. This PAS Protest was dated November 20, 2007, which was more than seven business days after the award had been made to CNHP (which had occurred on October 22, 2007). *Id.* at ¶ 29.

There was also documentation in the State’s file of a meeting between DORA staff, PAS, and its counsel on December 20, 2007. This documentation was in the form of a “thank you” letter, informing PAS’ counsel that the RFP SJN 0801 and its award to CNHP was being cancelled (Exhibit 13 to *Derozier Aff.*). Interestingly, this “thank you” letter was dated January 8, 2008 – the same date as the Cancellation Letter to CNHP. *Id.* at ¶ 30.

5. CNHP’s Protest of Cancellation of RFP SJN 0801

C.R.S. § 24-103-301 provides that “An invitation for bids, a request for proposals, or any other solicitation may be cancelled or any or all bids or proposals may be rejected in whole or in part as may be specified in the solicitation when it is in the best interests of the state pursuant to rules. The reasons therefor shall be made part of the contract file.” However, the Cancellation Letter received by CNHP did not state how, if at all, the cancellation of RFP was or could be in the state’s best interests. *Id.* at ¶ 31.

Further, there was no practical or conceivable reason that the cancellation could have been in the state’s best interests, as (1) CNHP’s quality and scope of services had never been in issue, (2) there was no legal basis to collect fees from new nurse applicants, (3) a protest had been untimely filed referencing CNHP’s confidential information, among many things.

CNHP wrote to D. Rico Munn, the executive director of DORA, to request his intervention and scrutiny of the cancellation (“CNHP’s Letter Regarding Cancellation” which is Exhibit 15 of *Derozier Aff.*). *Id.* at ¶ 31.

On February 6, 2008, Mr. Munn, on behalf of DORA, summarily denied CNHP relief on its Letter Regarding Cancellation, and insisted the follow-on RFP would be issued (Exhibit 15 to *Derozier Aff.*). This response included no notice of CNHP’s due process or appeal rights regarding the cancellation, or information on whether this was a final agency decision. *Id.* at ¶ 32.

6. RFP SJN 0803

RFP SJN 0803 was also issued on the same date as DORA’s Response to CNHP’s Letter Regarding Cancellation – February 6, 2008 (“RFP SJN 0803” which is Exhibit 16 to *Derozier Aff.*). Consequently, CNHP focused its efforts on responding to this RFP, which was almost identical to RFP SJN 0801. *Id.* at ¶ 33.

Both CNHP and PAS submitted proposals to RFP SJN 0803. PAS’ proposal (Exhibit 17 to *Derozier Aff.*) was significantly different from its first proposal (Exhibit 6 to *Derozier Aff.*), as it had copied substantially from CNHP’s successful proposal to RFP SJN 0801 (Exhibit 5 to *Derozier Aff.*). *Derozier Aff.* at ¶ 34.

On May 5, 2008, CNHP was notified that it was not the successful vendor for RFP SJN 0803. The program had been awarded to PAS. *Id.* at ¶ 35.

7. CNHP’s protest of award of RFP SJN 0803

CNHP submitted a protest of the award of RFP SJN 0803 within seven business days as required by statute and the RFP itself. The protest addressed the fact that RFP SJN 0803 and its evaluation was fundamentally tainted and must either be rescored to remedy the tainting, in which case the award would go to CNHP, or must be cancelled as in the state’s best interests. (“CNHP Protest” which is Exhibit 20 to *Derozier Aff.* and incorporated by reference herein).

There were substantial and pervasive instances of copying of CNHP's first bid in the bid for RFP SJN 0803 submitted by PAS, CNHP's competitor. Specific examples were listed in the CNHP Protest. In particular, PAS' financial bid, which would intuitively have been higher to address the additional new nurse applicant population to be served, was instead was lower – not only lower than its first bid on RFP SJN 0801, but lower than CNHP's first bid on RFP SJN 0801, since it had CNHP's confidential financial information from its first bid. *Derozier Aff.* at ¶ 39.

The CNHP Protest also listed other fundamental scoring errors, including the inappropriate weighting and consideration of certain components, and the failure to consider other RFP components, under the “Management” section of RFP SJN 0803. *Id.* at ¶ 40.

In addition, CNHP noted significant advantages given by DORA to PAS in RFP SJN 0803. For instance, in the Decision Memorandum on RFP SJN 0801 (Exhibit 8 to *Derozier Aff.*), the evaluators stated: “[T]he deciding rationale for selection was contained in the Technical section. With respect to the technical requirements, the most important factor, the proposal from Peer Assistance Services, Inc. had two areas of concern for the committee. They were sections 4.1.b and 4.1.f.” *Id.* at ¶ 36.

In RFP SJN 0803, although item 4.1.b (Staff) was still included, the scoring template given to the evaluators (Exhibit 19 – Scoring Template) specifically directed that 4.1(b) “should not be considered in your overall scoring of technical . . .” *Id.* at ¶ 37.

The other important area listed in the Decision Memorandum on RFP SJN 0801 was 4.1(f), because, according to the evaluators, “CNHP met the standards of reporting and offered solutions to develop weighted guidelines with the Board. PSA [*sic*] agreed to meet the proposal standards, however stated that ‘regardless of non-compliance, the licensee will continue to be monitored and not terminated from the program.’” The evaluators felt that PAS had an internal

conflict of interest. In RFP SJN 0803, the requirement of 4.1(f) was omitted (a different requirement was put in this section instead). *Id.* at ¶ 38.

In addition, CNHP’s Protest Letter listed other clear advantages written into RFP SJN 0803 to benefit PAS. *Id.* at ¶ 41.

There was no significant new information sought in RFP SJN 0803 over that requested in RFP SJN 0801. In fact, less information was evaluated, since the two sections deemed significant to the evaluators of RFP SJN 0801 were either not graded in RFP SJN 0803 or omitted from RFP SJN 0803. *Id.* at ¶ 42.

CNHP’s Protest Letter asserted that RFP SJN 0803 should be reevaluated and correctly scored, and awarded to CNHP; in the alternative, RFP SJN 0803 should be cancelled in the best interests of the state, and the previous RFP SJN 0801 and its award to CNHP reinstated. *Id.* at ¶ 43.

8. DORA’s decision on CNHP’s protest of award of RFP SJN 0803

CNHP received a decision from D. Rico Munn on its protest, dated May 23, 2008, which denied all relief requested by CNHP (“Decision Letter” which is Exhibit 21 to *Derozier Aff.*). That response did not meet certain statutory requirements, so a follow-up e-mail was sent by CNHP to Mr. Munn requesting a response on same (Exhibit 22 to *Derozier Aff.*). For instance, the Decision Letter gave no notice of rights to administrative or judicial relief as required by C.R.S. § 24-109-107(1),⁵ among other things. *Id.* at ¶ 44.

⁵ This section provides as follows: “The head of a purchasing agency or a designee shall promptly issue a written decision regarding any protest . . . The decision shall state the reasons for the action taken *and give notice to the protestor, prospective contractor, or contractor of his or her right to administrative and judicial reviews as provided for in this article.*” (emphasis added).

Mr. Munn responded by e-mail on June 4, 2008 with another letter which still failed to give notice of rights to administrative or judicial relief as required, and instead asserted that DORA's actions were exempt from statutory provisions (Exhibit 23 to *Derozier Aff.*) *Id.* at ¶ 45.

In the interim, CNHP received an e-mail from Mark Merrill, executive director of the SBON, on May 30, 2008 that a contract had already been signed for the diversion program with PAS. *Id.* at ¶ 46.

CNHP timely filed this action for relief in the District Court of the City and County of Denver on June 9, 2008.

II. A PRELIMINARY INJUNCTION IS MERITED

In considering a motion for a preliminary injunction, the trial court must determine whether the moving party has demonstrated (1) a reasonable probability of success on the merits; (2) a danger of real, immediate, and irreparable injury which may be prevented by injunctive relief; (3) that there is no plain, speedy, and adequate remedy at law; (4) that the granting of a preliminary injunction will not disserve the public interest; (5) that the balance of equities favor of the injunction; and (6) that the injunction will preserve the status quo pending a trial on the merits. *Rathke v. MacFarlane*, 648 P.2d 648, 653-54 (Colo. 1982).

A. CNHP has a reasonable probability of success on the merits

In fact, CNHP has a substantial likelihood of success on the merits of each of its claims.

CNHP has alleged two causes of action in its complaint. In its first claim for relief, CNHP appeals from the final determination of DORA's Executive Director. In its second claim for relief, CNHP seeks redress for DORA's violation of the State Administrative Procedures Act, C.R.S. § 24-4-101 *et seq.* Both claims seek the same result – the reinstatement of the award of

the nurses' diversion program under C.R.S. 12-38-131 to CNHP and consequent execution of the contract for this program with CNHP, and funding of CNHP with the monies collected for it over the past thirteen years and currently collected pursuant to C.R.S. § 12-38-131. Each claim will be addressed in turn.

1. CNHP's First Claim for Relief for Appeal from the Final Determination of the Executive Director

DORA's decision to award the diversion program to PAS, instead of to CNHP, is contrary to law. Pursuant to C.R.S. § 24-109-205, CNHP is entitled to a de novo review by this Court.⁶

DORA failed to comply with statutory requirements. It was required to use a competitive bidding process to determine the award of the program pursuant to the New Statute. DORA had no legal right to ignore the State's procurement code, C.R.S. § 24-101-101 *et seq.*, and its cancellation of RFP SJN 0801 and the legitimate award to CNHP was contrary to law.⁷ DORA also did not provide a contract to CNHP after award as required by statute.⁸

Due to its actions, material concealments, and representations to CNHP, DORA is estopped to cancel the award of the diversion program to CNHP pursuant to its successful proposal to RFP SJN 0801.

⁶ Appeals to district court. An appeal of a decision by the executive director or a designee rendered pursuant to section 24-109-201 or by the head of a purchasing agency or a designee rendered pursuant to section 24-109-107 shall be filed with the district court for the city and county of Denver, which shall have exclusive jurisdiction to hear such appeals. Any judicial action under this part 2 shall be de novo . . .

⁷ C.R.S. § 24-103-301 provides as follows: "An invitation for bids, a request for proposals, or any other solicitation may be cancelled or any or all bids or proposals may be rejected in whole or in part as may be specified in the solicitation when it is in the best interests of the state pursuant to rules. The reasons therefor shall be made part of the contract file."

⁸ C.R.S. § 24-103-202(7) and C.R.S. § 24-103-202.3(4) both provide that "[t]he contract shall be awarded with reasonable promptness . . ." Although CNHP received its award letter for RFP SJN 0801 on October 22, 2007 and provided services afterward and into the next calendar year under the New Statute, a contract was never tendered by DORA, although DORA paid CNHP for providing the services encompassed by the contract.

Finally, the evaluation and scoring of the reposted RFP SJN 0803 was fundamentally flawed and tainted by DORA's compromise of CNHP's bidding information and by DORA's misdirection of the evaluation process. Contrary to the assertions for the cancellation of RFP SJN 0801, less substantive information was evaluated in RFP SJN 0803. And, the reposting of the RFP to include new nurse applicants was not merited by law or practice.

a. DORA failed to comply with statutory requirements

The New Statute states, in subsection (3)(a): "The board shall select one or more recognized peer health assistance organizations or nurse alternative to discipline programs as designated providers. For purposes of selecting designated providers, the board *shall* use a *competitive bidding process* that encourages participation from interested vendors." (emphasis added).

DORA unilaterally decided that it would only selectively comply with the State Procurement Code. Upon information and belief, DORA's decision was based on the fact that the monies for the diversion program were to come from nurse licensure and not from the general taxpayer base. However, as the New Statute expressly mandated that a competitive bidding process be used, it was not within DORA's discretion to waive or modify this requirement. DORA's decision to only selectively apply the State Procurement Code was arbitrary, capricious, and contrary to law.

In DORA's attempt at *partial* compliance with this mandatory statutory requirement, DORA elected to use competitive sealed proposals⁹ to determine the award of the diversion program pursuant to the New Statute, instead of competitive sealed bidding.¹⁰ Both of these

⁹ C.R.S. § 24-103-203.

¹⁰ C.R.S. § 24-103-202.

avenues are subject to the purposes of the State Procurement Code¹¹ and a clear requirement to operate in good faith.¹²

CNHP won the award of RFP SJN 0801 on October 22, 2007. CNHP actively requested the contract to document the award, which was, by statute, required to be awarded “with reasonable promptness.”¹³ (See *Derozier Aff.* at ¶ 14). Although CNHP received its award letter for RFP SJN 0801 on October 22, 2007 and provided services afterward and into the next calendar year under the New Statute, a contract was *never* tendered by DORA, even though DORA was paying CNHP to provide the services encompassed by the contract *after* its own enabling statute was repealed and reenacted on January 1, 2008. (*Id.* at ¶ 14).

The Cancellation Letter (Exhibit 10 to *Derozier Aff.*), issued by DORA as justification for the cancellation of RFP SJN 0801, stated its basis as follows: “A post review of the RFP by the Department of Regulatory Agencies (“DORA”) revealed that the RFP failed to include new applicants for registered nursing and practical nursing licenses. In addition, the final decision of the evaluation committee was based on incomplete information. After consultation with the State Attorney General’s Office, DORA has decided to modify the RFP and re-post again as soon as possible. . .” C.R.S. § 24-103-301, the provision under the State Procurement Code that governs cancellations, provides as follows: “An invitation for bids, a request for proposals, or any other solicitation may be cancelled or any or all bids or proposals may be rejected in whole

¹¹ C.R.S. § 24-101-102, which includes the following significant purposes: “(b) To provide for increased public confidence in the procedures followed in public procurement; (c) To ensure the fair and equitable treatment of all persons who deal with the procurement system of the state of Colorado; . . . (e) To foster effective broad-based competition within the free enterprise system; and (f) To provide safeguards for the maintenance of a procurement system of quality and integrity. . . .”

¹² C.R.S. § 24-101-104 provides: “Requirement of good faith. This code requires all parties involved in the negotiation, performance, or administration of state contracts to act in good faith.”

¹³ C.R.S. § 24-103-202(7) and C.R.S. § 24-103-202.3(4) both provide that “[t]he contract shall be awarded with reasonable promptness . . .” Although CNHP received its award letter for RFP SJN 0801 on October 22, 2007 and provided services afterward and into the next calendar year under the New Statute, a contract was never tendered by DORA, although DORA paid CNHP for providing the services encompassed by the contract.

or in part as may be specified in the solicitation *when it is in the best interests of the state* pursuant to rules. The reasons therefor shall be made part of the contract file.” (emphasis added).¹⁴

As stated in the *Derozier Aff.* at ¶ 31-32 and 36-38 and as more particularly detailed in CNHP’s Letter Regarding Cancellation (Exhibit 14 of *Derozier Aff.*) and the CNHP Protest (Exhibit 20 to *Derozier Aff.*), the articulated reasons for cancellation of RFP SJN 0803 do not meet the standard of C.R.S. § 24-103-301 – the reasons listed are not “in the best interests of the state.” Further, these reasons did not even bear true – CNHP had already been monitoring new nurse licensees for the past thirteen years at no additional charge (see *Derozier Aff.* at ¶ 8), the new statute specifically did not include revenues from new licensees, no new information was requested in the reposted RFP, and even less substantive information was evaluated the second time around (see Section II (A) (1) (c) (ii), *infra*, for specific examples).

Another example of DORA’s failure to follow statutory mandates involves the statutory section dealing with competitive sealed proposals, which specifically requires that “[p]roposals shall be opened so as to avoid disclosure of contents to competing offerors . . .”¹⁵ By handing CNHP’s first confidential bid over to PAS in order to allow PAS to copy it in responding to the reposted RFP, DORA completely undermined the intent and mandate of this provision (see Section II (A) (1) (c) (i), *infra*, for specific examples of the results of this compromise of CNHP’s information). Colorado courts have even held that a bid on a contract can be a trade secret. *Ovation Plumbing, Inc. v. Furton*, 33 P.3d 1221 (Colo. App. 2001). Clearly, it is an abuse of discretion and contrary to law to share a bid with a competitor while the bidding process

¹⁴ It is not clear whether a cancellation can even occur after a valid award is made.

¹⁵ C.R.S. § 24-103-203(4).

is still active, especially when the procuring agency is withholding the contract to the award winner pending a protest or reconsideration of the RFP.

DORA's failure to comply with statutory requirements was an abuse of discretion, in excess of statutory jurisdiction, authority, purposes, and limitations, and clearly contrary to law.

b. DORA is estopped to rescind the award of RFP SJN 0801 to CNHP

In addition to the fact that the statutory threshold necessary to cancel RFP SJN 0801 and its award to CNHP was not met (Section II (A) (1) (a), *supra*), DORA was estopped to cancel the award. All of the elements necessary for estoppel are met:¹⁶

(a) There was a representation and a concealment of material facts. DORA represented that CNHP had been awarded RFP SJN 0801 (See *Derozier Aff.* at ¶ 12, 14 and Exhibit 8 thereto). DORA concealed its entertainment of an untimely protest by PAS and meetings it was holding with PAS to strategize how it might set aside the award to CNHP. (See *Derozier Aff.* at ¶ and Exhibit * thereto).

(b) DORA was well aware that its repeated assertions to CNHP that the contract was forthcoming were false.

(c) CNHP was completely unaware of DORA's meetings with PAS and its counsel (*Derozier Aff.* at ¶ 18 and Exhibit 13 thereto), and its intent to find a basis on which to set aside the award to CNHP. In fact, CNHP expanded its services to the SBON further in reliance on the forthcoming contract.

(d) DORA intentionally misled CNHP about the pending contract so that CNHP would continue to provide services while DORA was strategizing how it would be set aside.

(e) CNHP was induced to rely on the contract pursuant to the award letter and representations of DORA staff, and did rely on that commitment. In fact, CNHP hired additional staff in reliance on this commitment. Further, CNHP has been severely compromised by DORA's actions (See *Derozier Aff.* at ¶ 14, *inter alia*).

The doctrine of estoppel has been applied, and upheld, against governmental entities.¹⁷ It

is hard to imagine a more compelling case for its application than the one at hand.

¹⁶ *Griffith v. Wright*, 6 Colo. 248 (1882).

c. RFP SJN 0803 was fundamentally flawed and tainted by DORA's compromise of CNHP's bidding information and by DORA's misdirection of the evaluation process

RFP SJN 0803, and its consequent award, was fundamentally flawed and tainted in a number of respects:

i. The scoring of RFP SJN 0803 was profoundly flawed.

Technical Requirements (40%) responses of PAS were copied from CNHP's first confidential bid response.

Management (40%) scoring failed to evaluate three of four sections required.

Cost (15%) bid by PAS was contrived to bid lower than CNHP's confidential financial bid on first RFP.

ii. RFP SJN 0803 sought less substantive information than its predecessor.

iii. The reposting of the RFP to include new nurse applicants was not merited in law or practice.

As a result, it would be in the best interests of the state to cancel RFP SJN 0803, and reinstate RFP SJN 0801 and its legitimate award to CNHP.

i. Scoring

The scoring of 95% of RFP SJN 0803 was fundamentally flawed in the Technical Requirements (40% of total score), Management (40% of total score) and Cost (15% of total score) sections.

Technical Requirements (40%)

Although both PAS and CNHP scored almost equally in this section, this was due to the fact that PAS copied CNHP's bid to RFP SJN 0801 in significant part after it was given this bid by DORA. If these sections were revised to remove the language pirated from CNHP's first bid, PAS would have scored substantially lower than CNHP in this section. Sections that were copied included:

¹⁷ *Jones v. City of Aurora*, 772 P.2d 645 (Colo.App. 1988) (*cert. den.*, April 10, 1989).

- 4.1.a (same section number in both RFPs) – Prior Experience
- 4.1.b (same section number in both RFPs) – Staffing (not scored in RFP SJN 0803 as discussed below)
- 4.1.c (same section number in both RFPs) – Availability of Services Statewide
- 4.1.d (same section number in both RFPs) – Coordination of Statewide Treatment Resource Network
- 4.1.i (in SJN 0801)/4.1.f (in SJN 0803) - Testimony
- 4.2.b (in SJN 0801)/4.1.h (in SJN 0803) - Evaluation
- 4.4 & 4.5 (in SJN 0801)/4.1.s (in SJN 0803)-Legal Compliance (by combining these sections in SJN 0803, the new RFP also effectively halved the points previous gained by CNHP by excelling in both)

By giving CNHP’s bid to PAS, DORA effectively took away CNHP’s advantage in all of these areas. If CNHP’s competitive advantage had not been compromised by DORA, CNHP would have had a large point advantage in this section – more than enough for it to win the award of the program again.

Management Component (40%)

The rating form for the evaluators of RFP SJN 0803 was set up inappropriately, resulting in a loss of consideration of significant RFP components

Under Section 5.3 of RFP SJN 0803, the Response Format for the Management Component, which comprises 40% of the overall proposal score, was to be as follows:

5.1.1 Management and Experience Component

- A. Describe how you will meet the requirements set forth in Section 4.2.
- B. Describe how your company will manage this project.
- C. Indicate key personnel who will be assigned to the project and describe their experience. Explain how you will ensure that equally qualified persons are assigned to the project if these individuals leave the project. The State expects that the awarded Offeror will continue to make the key project personnel available through the life of the contract as long as they remain in offeror’s employ. The State reserves the right to approve any replacement personnel.
- D. Describe your firm’s experience with similar projects.

However, upon review of the evaluators’ rating forms, the Management section is listed as having a through e subcomponents. There should only be A through D.

The problem is that the rating forms actually OMIT Sections 5.1.1 B through D. Section 5.1.1 A asks how the vendor will meet the requirements in Section 4.2. It is Section 4.2 that has subsections a through e. This is verified when reading each subcomponent on the rating sheet – the description corresponds to 4.2 a, b, etc. However, Section 4.2 is just the *first* of the four Management evaluation components; the scoring sheet makes 5.1.1 A the *entire* Management score. There is no provision whatsoever on the rating sheet for an evaluator to enter scores for 5.1.1. B through D. And, if scores were somehow entered for these sections under 5.1.1.A, there is still an extra possible four points in the overall scoring, which undermines appropriate weighting of the four sections that were to be evaluated.

Consequently, the entire weighting of this 40% of the scoring is wrong, incorrect subcomponents of the section were listed, and the evaluations are totally erroneous under the structure as set up by DORA.

Cost Component (15%)

The cost component was irretrievably tainted by DORA’s inappropriate disclosure of CNHP’s sealed financials.

For RFP SJN 0801, the Total Program Costs were bid as follows:

CNHP	\$ 677,122
PAS	\$ 680,765

However, for RFP SJN 0803, PAS’ bid was \$668,047 – lower not only than PAS’ first bid, but lower than CNHP’s first, confidential, sealed bid.

The entire cost bid was artificial; as CNHP will be put out of business if it doesn’t prevail on this suit, PAS will be able to charge whatever it wants in following years. Consequently, it was able to use CNHP’s confidential, sealed financial information given to it by DORA in order to underbid CNHP on RFP SJN 0803, even though the purported basis for this RFP was to

include more work (new nurse licensees), and more revenues, in the contract. DORA not only gave PAS the confidential bid information from CNHP's first bid, but also gave PAS the opportunity to use it, by canceling the award of RFP SJN 0801 to CNHP and reposting the RFP as SJN 0803.

This entire 15% of the cost component was obviously tainted. It is nonsensical that PAS could, in good faith, bid *less* in order to provide services to *more* nurses.

ii. Less substantive information was evaluated in RFP SJN 0803 than in RFP SJN 0801

Although RFP SJN 0803 was purportedly posted to obtain *more* information, the fact is that less information was requested, and even less was evaluated, than that requested in RFP SJN 0801. Not surprisingly, the informational requests that were omitted were those that would give an advantage to CNHP over PAS (*Derozier Aff.* ¶ 36-38).

For instance, in the Decision Memorandum on RFP SJN 0801 (Exhibit 8 to *Derozier Aff.*), the evaluators stated: “[T]he deciding rationale for selection was contained in the Technical section. With respect to the technical requirements, the most important factor, the proposal from Peer Assistance Services, Inc. had two areas of concern for the committee. They were sections 4.1.b and 4.1.f.”

In RFP SJN 0803, although item 4.1.b (Staff) was still included as a response item, the scoring template given to the evaluators (Exhibit 19 – Scoring Template) specifically directed that 4.1(b) “should not be considered in your overall scoring of technical . . .” There was no forewarning in the RFP that this item would not be evaluated; indeed, it would seem that staffing would be a critical issue of consideration, and the evaluators on RFP SJN 0801 certainly deemed it so. The decision that this item would not be evaluated is not memorialized anywhere save in the direction given by DORA to the RFP evaluators that this section should not be scored.

The other important area listed in the Decision Memorandum on RFP SJN 0801 was 4.1(f), because, according to the evaluators, “CNHP met the standards of reporting and offered solutions to develop weighted guidelines with the Board. PSA [*sic*] agreed to meet the proposal standards, however stated that ‘regardless of non-compliance, the licensee will continue to be monitored and not terminated from the program.’” The evaluators of RFP SJN 0801 indicated that PAS had an internal conflict of interest with its current N.U.R.S.E.S. program, *inter alia*. In RFP SJN 0803, the requirement of 4.1(f) was omitted (a different requirement was put in this section instead).

There were other modifications made in RFP SJN 0803 by DORA to favor PAS. For instance, RFP SJN 0801 had two sections specifically addressing aspects of legal compliance, on which CNHP had scored higher than PAS. In RFP SJN 0803, these legal compliance sections were shortened, requested less information, and were scored as only one item. And, because DORA had given CNHP’s forms (copyrighted and marked as confidential in its RFP response to SJN 0801) to PAS, the proposal by PAS to RFP SJN 0803 also included copies of CNHP’s forms using PAS’ letterhead and/or name (*Exhibit 20 to Derozier Aff.*).

The bottom line is that the DORA’s decision to evaluate less substantive information on an RFP which was reposted ostensibly to obtain more information was clearly arbitrary and capricious and contrary to its own asserted basis for the reposting of the RFP.

iii. The reposting of the RFP to include new nurse applicants was not merited by law or practice

There was no reason to cancel RFP SJN 0801 and repost it as RFP SJN 0803 to include new nurse applicants.

CNHP had been monitoring the new nurse applicants already over the thirteen years of its existence, over and above its statutory requirements (*Derozier Aff.* ¶ 8); a simple phone call

would have verified that CNHP continued to monitor this population, but DORA never sought this verification. Further, it would appear that there was no cost to monitor this additional population, as CNHP's competitor (armed with CNHP's first confidential bid information from DORA) bid *less* on RFP SJN 0803 to cover this group of nurses.

In addition, contrary to the assertions in RFP SJN 0803 regarding the potential of revenue from new nurse applicants, the New Statute was very specific that new nurse applicants would not contribute revenues to the program as a matter of law. The New Statute states:

“(1) As a condition of licensure and for the purpose of supporting a nursing peer health assistance program or a nurse alternative to discipline program, every *renewal* applicant shall pay to the administering entity designated pursuant to . . . a fee in an amount set by the board, not to exceed twenty five dollars per year . . .”

(emphasis added). *New* nurse applicants don't pay into the fund; only *renewal* applicants pay. So, there was no valid basis on which to cancel the first RFP and issue a new RFP; in fact, the misleading representations in RFP SJN 0803 regarding the potential of revenue from this population were in conflict with the plain language of the New Statute, constituting another reason that DORA's issuance of RFP SJN 0803 was arbitrary, capricious, and contrary to law.

2. CNHP's Second Claim for Relief for Violation of the State Administrative Procedures Act, C.R.S. § 24-4-101 et seq

DORA's decision to cancel the award of the diversion program to CNHP, and to instead award the program to PAS, and the machinations it employed to do so, were arbitrary and capricious, not supported by substantial evidence, and an abuse of discretion, in excess of statutory jurisdiction, authority, purposes, or limitations, not in accord with the procedures or procedural limitations as otherwise required by law, an abuse or clearly unwarranted exercise of discretion, based upon findings of fact that were clearly erroneous on the whole record, unsupported by substantial evidence when the record is considered as a whole, and otherwise

contrary to law.¹⁸ CNHP's second claim for relief seeks judicial review of all of the foregoing actions and decisions by DORA related in Section II (A) (1) above. In particular:

a. DORA failed to comply with statutory requirements

DORA failed to comply with the statutory mandates specifically listed in Section II (A) (1) (a) above. DORA's arbitrary and capricious application of some statutory provisions, while ignoring others, and its failure to relate due process avenues to CNHP to allow it to pursue its rights, was an abuse of discretion, in excess of statutory jurisdiction, authority, purposes, or limitations, and not in accord with the procedures or procedural limitations as otherwise required by law. CNHP has filed written protests for each action taken by DORA, but DORA has refused to objectively evaluate these protests or to inform CNHP of its due process rights in light of decisions made by DORA.

When CNHP was given notice of cancellation of its award on January 8, 2008 and immediately filed its protests of same to exhaust administrative remedies, CNHP was given no due process avenue in DORA's rejection of its protest; in fact, DORA posted RFP SJN 0803 on the same day that it rejected CNHP's protest of the cancellation of RFP SJN 0801. In addition, DORA has sought to undermine CNHP's due process rights in this present action by purporting to sign a contract with PAS just weeks after announcing the award of RFP SJN 0803, and then filing motions in two different divisions of this Court to try to control CNHP's files and work

¹⁸ C.R.S. § 24-4-106(7) provides: "If the court finds no error, it shall affirm the agency action. If it finds that the agency action is arbitrary or capricious, a denial of statutory right, contrary to constitutional right, power, privilege, or immunity, in excess of statutory jurisdiction, authority, purposes, or limitations, not in accord with the procedures or procedural limitations of this article or as otherwise required by law, an abuse or clearly unwarranted exercise of discretion, based upon findings of fact that are clearly erroneous on the whole record, unsupported by substantial evidence when the record is considered as a whole, or otherwise contrary to law, then the court shall hold unlawful and set aside the agency action and shall restrain the enforcement of the order or rule under review, compel any agency action to be taken which has been unlawfully withheld or unduly delayed, remand the case for further proceedings, and afford such other relief as may be appropriate. In making the foregoing determinations, the court shall review the whole record or such portions thereof as may be cited by any party. In all cases under review, the

product (in a pleading filed in Case No. 2008 CV 5592, Denver District Court, *Colorado Department of Regulatory Agencies v. Impaired Professional Diversion Program d/b/a Colorado Nurse Health Program* (“2008 CV 5592”) DORA actually requests, in a motion for an *ex parte* TRO, that the Court order that CNHP’s files be given directly to PAS!).¹⁹

b. DORA is estopped to rescind the award of RFP SJN 0801 to CNHP

CNHP incorporates the assertions and law set out in Section II (A) (1) (b) above. In particular, DORA’s failure to tender the contract for RFP SJN 0801 with reasonable promptness after CNHP was given the award on October 22, 2007 was contrary to law, and its deliberate actions to induce CNHP to continue to provide the program for months, into the new calendar year and under the New Statute, while holding secret meetings with CNHP’s competitor to determine how to set aside the award to CNHP, were clearly an abuse of discretion, at best. CNHP first learned that it would not be awarded RFP SJN 0803 in May, 2008, and at that point had been providing the program in justifiable reliance on the award for seven months. DORA’s actions were an abuse of discretion, and it is now estopped to deny the award of the program to CNHP.

c. RFP SJN 0803 was fundamentally flawed and tainted by DORA’s compromise of CNHP’s bidding information and by DORA’s misdirection of the evaluation process

DORA’s secret meetings with PAS after CNHP was awarded RFP SJN 0801, and its wholesale compromise of CNHP’s confidential bid and cost information while secretly negotiating with PAS on its protest, was an abuse of discretion and clearly contrary to law. DORA’s restructuring of RFP SJN 0803 to omit sections on which CNHP clearly had an

court shall determine all questions of law and interpret the statutory and constitutional provisions involved and shall apply such interpretation to the facts duly found or established.”

¹⁹ The paragraph, in its entirety, states as follows: “Wherefore, the Department moves this Court to enter a mandatory preliminary injunction ordering the Defendant to release the records of existing nurse clients to PAS.”

advantage over PAS, and which had nothing to do with its stated reason for the canceling of RFP SJN 0801, was also arbitrary and capricious and clearly contrary to its stated objective of obtaining *more* information in this reposted RFP.²⁰ In particular, DORA's unilateral direction that the evaluators of RFP SJN 0803 should not score Section 4.1(b) on staffing²¹ was clearly arbitrary and capricious. Likewise, DORA's omission of Section 4.1(f)²² of RFP SJN 0801 in the reposted RFP SJN 0803 was arbitrary, capricious, and contrary to the stated objective of obtaining more information through this RFP.

As less substantive information was evaluated in RFP SJN 0803 than in RFP SJN 0801, and as the inclusion of new nurse applicants in RFP SJN 0803 was unnecessary (as CNHP, the award winner of RFP SJN 0801 already provided this service at no additional cost to DORA and as the New Statute did not allow for revenues for the program to be generated from new nurse applicants), this was not a valid basis for the reposting of the RFP, and the decision to cancel RFP SJN 0801 for the reasons stated is clearly unsupported by substantial evidence when the record is considered as a whole. Even more, in practical application, DORA's actions allowed an opportunity for PAS to use CNHP's confidential bid information to submit a lower cost bid for RFP SJN 0803 than CNHP had submitted for RFP SJN 0801. As CNHP had been created thirteen years ago solely to provide this program, once CNHP was put out of business, the competitor could charge whatever it wanted in subsequent years. DORA's actions in providing the confidential information and the opportunity to use it by a competitor were arbitrary,

²⁰ CNHP received a letter, dated January 8, 2008, that purported to cancel RFP SJN 0801 and its award because "the RFP failed to include new applicants for registered nursing or licensed practical nursing licenses . . ." and vaguely stated that "the final decision of the evaluation committee was based on incomplete information." ("Cancellation Letter" which is Exhibit 10 to *Derozier Aff.*).

²¹ One of two sections in the Decision Memorandum which is Exhibit 8 to *Derozier Aff.*, on which the evaluators of RFP SJN 0801 found CNHP to be undeniably superior to PAS.

²² Section 4.1.f was the second section in which the evaluators found CNHP to be undeniably superior to PAS in the Decision Memorandum, in significant part because it elicited an inherent conflict of interest in PAS' setup due to

capricious, contrary to law, and contrary to the legislative declaration of C.R.S. § 24-4-101.5.²³

The chilling effect on competition is especially evident in this case, since *PAS already has the contracts for all but one of DORA's other professional diversion programs.*²⁴

B. A danger of real, immediate, and irreparable injury may be prevented by injunctive relief

DORA has cut off CNHP's funding after June 30, 2008. After thirteen years of serving the State and the nurses of Colorado, CNHP is being precipitously shut down by DORA, less than two months after first learning of the decision on the second RFP and during the pendency of its protest of same.

DORA has alleged, in a pleading filed in Case No. 2008 CV 5592, Denver District Court, *Colorado Department of Regulatory Agencies v. Impaired Professional Diversion Program d/b/a Colorado Nurse Health Program* ("2008 CV 5592"), in part, as follows: "It is obvious that existing nurse clients will suffer irreparable harm if [their] records are destroyed." (DORA's Motion for Temporary Restraining Order and Preliminary Injunction filed in Case No. 2008 CV 5592, ¶8, p. 3). If CNHP is forced to discontinue operations, then it is required to purge and destroy records pursuant to 42 C.F.R. § 2.19 which states, in part:

Disposition of records by discontinued programs. (a) General. If a program discontinues operations or is taken over or acquired by another program, it must purge patient identifying information from its records or destroy the records unless--

(1) The patient who is the subject of the records gives written consent (meeting the requirements of § 2.31) to a transfer of the records

which PAS would not refer noncompliant participants for disciplinary action – a fundamental tenet of protection of the public that is the cornerstone of CNHP's program.

²³ C.R.S. §24-4-101.5 of the APA provides, in significant part: "The general assembly further recognizes that agency action taken without evaluation of its economic impact may have unintended effects, which may include barriers to competition, reduced economic efficiency, reduced consumer choice, increased producer and consumer costs, and restrictions on employment. . . Accordingly, it is the continuing responsibility of agencies to analyze the economic impact of agency actions and reevaluate the economic impact of continuing agency actions to determine whether the actions promote the public interest."

²⁴ This is a matter of public record, and is not in dispute. The only State professional diversion program for which PAS does not now have a contract with DORA is the physicians' program.

As CNHP has no funds from DORA to allow it to operate after June 30, 2008, dissolution is imminent – and, CNHP obviously has no ability to maintain records after it is dissolved. Consequently, it will have no choice but to destroy records at that time for which it does not have consents which meet the requirements of 42 C.F.R. § 2.31 .

However, if the Court grants this preliminary injunction and requires that DORA pay to CNHP the funds which have been collected for the alternative to discipline program to allow CNHP to continue to operate, then this danger of real, immediate, and irreparable injury as articulated by DORA in Case No. 2008 CV 5592 can be avoided.

The bigger picture, however, is that irreparable harm may occur if the public is not protected as contemplated in the Former Statute and the New Statute. CNHP protects the public by monitoring nurses with substance abuse or mental health issues. By forcing CNHP to shut down precipitously, or funding for a transition and monitoring for these nurses, public safety may clearly be compromised.

C. CNHP has no plain, speedy, and adequate remedy at law

DORA cut off funding to CNHP after June 30, 2008, so CNHP has no ability to continue operations through a full trial on the merits after its final board meeting on July 23, 2008 without the issuance of this preliminary mandatory injunction. Already, CNHP has had to lay off all of its employees save three, and has no funding to continue to employ any of these remaining employees past the end of July, 2008, if even that long. DORA has confiscated the funds earmarked for CNHP under the Former Statute and collected by the administering entity pursuant to the Former Statute. CNHP has no financial ability to survive past the end of this

month, at best, and CNHP has no plain, speedy, and adequate remedy at law; consequently, a preliminary injunction is merited.

D. The granting of a preliminary injunction will not disserve the public interest

The granting of a preliminary injunction will best serve the public. CNHP was created pursuant to the Former Statute which required, in section (1)(a), that protection of public health, safety, and welfare be assured while the licensee is treated and monitored by CNHP.²⁵

Continuity of monitoring of this impaired population, with the work product which CNHP has generated over the past 13 years in order to do so, is absolutely in the best interests of the public, as well as in the best interests of the nurses in the program, as affirmed by the evaluators of RFP SJN 0801 in their Decision Memorandum and award of the RFP to CNHP on October 22, 2007. Public protection has never been an issue during CNHP's entire existence. Conversely, if CNHP is forced to close precipitously by DORA, nurses that choose to have their files destroyed will no longer be monitored, and there will undeniably be a lapse in monitoring of this entire community which could have public consequences.

E. The balance of equities favor of the injunction

It goes without saying that there are clearly personal liaisons that must have prompted this Herculean effort to intentionally compromise CNHP's confidential bid and financial information, hold secret meetings with the PAS and its counsel, rescind a legitimate award, and reimplement the RFP process, just to give the program to PAS. The objective fact that DORA is

²⁵ C.R.S. 12-38-131 (1) (a), as it existed prior to January 1, 2008, provided as follows: "If a person licensed to practice pursuant to this article voluntarily seeks treatment for chemical or alcohol dependency or for psychiatric, psychological, or emotional problems that could lead to formal disciplinary action by the board, the board may abstain from taking formal disciplinary action if the board finds that the protection of public health, safety, and welfare can be assured while the licensee is treated and monitored by the impaired professional diversion committee created in subsection (2) of this section."

withholding funding earmarked for CNHP over the past 13 years and held by the administering entity under the Former Statute, and precipitously cutting off all funding for CNHP to force it to discontinue operations after June 30, 2008, is further evidence that this Court's involvement is necessary. Clearly, the balance of equities favors this injunction.

F. The injunction will preserve the status quo pending a trial on the merits

The status quo is that CNHP has provided this diversion program to a high standard over the past thirteen years. The status quo is that CNHP has generated its own monitoring files which allow it to continue to effectively monitor nurses with substance abuse and mental health issues while protecting the public. The status quo is that CNHP has important and established relationships with the nurses in its program which should not be disturbed or compromised just because DORA wants to give this program to PAS. The status quo is that CNHP was legitimately awarded this program under RFP SJN 0801 and has operated the program in reliance on that award, issued on October 22, 2007, to date. The injunction will preserve the status quo pending a trial on the merits.

III. IT WOULD BE APPROPRIATE TO REQUIRE NO BOND IN LIGHT OF THE MONIES EARMARKED FOR CNHP THAT ARE ALREADY BEING HELD BY DORA

Although Rule 65(c) suggests that CNHP must provide security before the requested injunctive relief may be issued, the amount of security required under the Rule is "discretionary with the court so long as it bears a reasonable relationship to the potential costs and losses occasioned by a preliminary injunction which is later deemed to have been improperly granted." *Apache Village, Inc. v. Coleman Co.*, 766 P.2d 1154, 1155 (Colo. App. 1989). Such discretion permits the Court to require only a nominal bond. *Kaiser v. Market Square Discount Liquors, Inc.*, 992 P.2d 636 (Colo. App. 1999).

In this case, the SBON has exclusive control over approximately \$50,000 to \$100,000 in monies which were collected for, and solely earmarked for, CNHP over the past thirteen years, plus additional monies collected for the alternative to discipline program in 2008. As CNHP is seeking a mandatory injunction to require that the DORA's arbitrary and capricious actions be set aside and that the alternative to discipline program be awarded to CNHP, then the monies collected for this program have no other legitimate application but to be disbursed to CNHP for its continued operations.

As CNHP is likely to succeed on the merits, and because Defendant will suffer little or no harm as a result of the injunction if CNHP is funded to continue to provide services as it has done for the past 13 years, and as CNHP is asking for funds which have been earmarked for it and which DORA has no right to apply elsewhere, it is appropriate to require no further bond of CNHP.

IV. PRIORITY SETTING REQUESTED

Instead of requesting this Court to issue a temporary restraining order pursuant to Rule 65, C.R.C.P., without a bond (since CNHP has no funds to even continue its own operations past its next board meeting, let alone come up with a bond), CNHP is instead requesting that this Court set this preliminary injunction hearing on a priority basis as if a TRO had been issued.²⁶ CNHP's last board meeting is presently scheduled for July 23, 2008. If the Court will set this matter within ten days as if a TRO had been issued, then CNHP will be able to make appropriate decisions at its final board meeting on July 23rd. CNHP has received no funds to cover any

²⁶ Rule 65(b), C.R.C.P. provides, in part: "Every temporary restraining order granted without notice . . . shall expire by its terms within such time after entry not to exceed ten calendar days, as the court fixes . . . In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and take precedence of all matters except older matters of the same character . . ."

operations in July, and consequently has no financial ability to survive without the issuance of a mandatory injunction by this Court.

WHEREFORE, CNHP moves this Court for a preliminary mandatory injunction to require the Defendant, Colorado Department of Regulatory Agencies (“DORA”) to reinstate the award of nurses’ diversion program under C.R.S. 12-38-131 to CNHP, execute the contract for this program with CNHP, and fund CNHP with the monies collected for it over the past thirteen years and currently collected pursuant to C.R.S. § 12-38-131. CNHP further requests that no bond be required in light of the monies earmarked for CNHP which are already being held by DORA. Finally, CNHP requests that this matter be given a priority setting pursuant to Rule 65, C.R.C.P., and in light of CNHP’s imminent dissolution.

DATED this 11th day of July, 2008.

Respectfully submitted,
LESLIE J. RANNIGER, P.C.

/s/ Leslie J. Ranniger
Original signature on file
By: Leslie J. Ranniger, #15202
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that I did, on this 11th day of July, 2008, serve a true and correct copy of the foregoing on the following via LexisNexis:

Linda Comer, Esq.
Senior Litigation Counsel
Office of Attorney General
Counsel for Defendant, Colorado
Department of Regulatory Agencies

/s/ Leslie J. Ranniger
Original signature on file