

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

EFILED Document
CO Denver County District Court 2nd JD
Filing Date: Jun 9 2008 11:43PM MDT
Filing ID: 20162444
Review Clerk: MaryAnn S Muro

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

v.

Defendant: COLORADO DEPARTMENT OF
REGULATORY AGENCIES

Counsel for Plaintiff:
LESLIE J. RANNIGER, P.C.
Leslie J. Ranniger
Attorney Registration No. 15202
Post Office Box 15, Boulder, CO 80306
Phone: (303) 449-0200, Fax: (303) 449-0949
Email: lranniger@frii.com

▲ COURT USE ONLY ▲

Case Number:

Div. Ctrm:

VERIFIED COMPLAINT

Plaintiff, the Impaired Professional Diversion Program d/b/a Colorado Nurse Health Program (“CNHP”), through undersigned counsel, hereby submits its verified complaint against the Colorado Department of Regulatory Agencies (the “Department”), pursuant to C.R.S. § 24-109-205, C.R.S. § 24-4-106, C.R.S. § 24-4-106(a), and as required by other causes of action, as follows:

Jurisdiction and Venue

1. The Department is an agency of Colorado’s state government.
2. CNHP was created pursuant to C.R.S. § 12-38-131 (as it existed prior to January 1, 2008) as a Colorado nonprofit corporation which was, for the past twelve years, statutorily-dedicated to provide diversion services for nurses of Colorado with addictions or mental health issues. CNHP’s principal offices are located in Jefferson County at 44 Union Blvd., Ste. 505, Lakewood, Colorado.

3. This complaint includes an appeal of a decision by the executive director of the Department rendered pursuant to C.R.S. § 24-109-107 and/or C.R.S. 24-109-201 which is required, pursuant to C.R.S. § 24-109-205, to be filed with the district court for the City and County of Denver, which has been statutorily designated to have exclusive jurisdiction to hear such appeals. Judicial action under this statute is to be de novo (the provisions of C.R.S. § 24-4-106 do not apply pursuant to C.R.S. § 24-109-205).

4. In addition, (as the Department has asserted that the State procurement code does not apply), this is an action for judicial review of a final administrative agency decision, in which case the Department is a resident of the City and County of Denver for purposes of jurisdiction and venue.

6. Finally, this complaint includes claims for injunctive relief and damages for violations of C.R.S. 7-74-101 *et seq.* (Uniform Trade Secrets Act). A notice of claim was filed pursuant to C.R.S. 24-10-109 on June 5, 2008. Pursuant to C.R.S. 24-10-109(6), CNHP has already received notice of denial of its claim.

7. Consequently, for all causes of action asserted in this complaint, jurisdiction and venue are proper in the City and County of Denver.

GENERAL ALLEGATIONS

8. CNHP was created as a Colorado nonprofit corporation on September 8, 1995 pursuant to C.R.S. § 12-38-131 (as it then existed) to handle the nurses' diversion program (the "Program") for the State Board of Nursing, a division of the Department. CNHP is a dedicated program that has no other source of income.

9. Legislation was enacted which repealed and re-enacted C.R.S. § 12-38-131, which was to be effective on January 1, 2008. This legislation was promulgated to put the Program out to competitive bid, *inter alia*. C.R.S. § 12-38-131(3)(a) provides, in part: "For purposes of selecting designated providers, *the board shall use a competitive bidding process* that encourages participation from interested vendors. . ." (emphasis added).

10. On August 7, 2007, the Department issued RFP SJN 0801 to solicit proposals for the Program. Two proposals were submitted – one by CNHP, and another by Peer Assistance Services (PAS), the entity that was a proponent of the legislative change requiring competitive bidding for the Program.

11. Pursuant to Section 1.12 of RFP SJN 0801, CNHP requested that certain information, including but not limited to its monetary bid proposed, be kept confidential. That section provided that "[t]he Purchasing Office [of the Department] will make a written determination as to the apparent validity of any written request for confidentiality. In the event the Purchasing Office does not concur with the offeror's request for confidentiality, the written determination will be sent to the offeror. . ."

12. CNHP received no written determination that its request for confidentiality was denied.

13. It is also established in Colorado law that a bid can be a trade secret.

14. On October 22, 2007, CNHP received a letter from the Department of a “Notice of Intent to Award Contract” which stated that CNHP was the successful vendor upon recommendation of the evaluation committee.

15. CNHP requested the contract numerous times in the months that followed, and was repeatedly assured that it had won the Program and that the contract was just taking time to draft.

16. CNHP continued to receive funds for the Program through the Department for CNHP’s handling of the Program into 2008 (after the effective date of the repealed and re-enacted statute).

17. CNHP added services for the Program as requested by the State Board of Nursing (SBON), the entity under the Department for which CNHP directly handled the Program.

18. CNHP hired additional staff for the Program to meet the mandates of the SBON after the award letter was issued.

19. CNHP leased additional space for the Program to accommodate the services required by the SBON after the award letter was issued.

20. Shortly after CNHP received the notice of intent to award the contract to CNHP, unbeknownst to CNHP, PAS was given CNHP’s confidential and trade secret bid information by the Department.

21. Although the terms of RFP SJN 0801 stated that no protest of the award was allowed (if one had been allowed, it would have been statutorily limited to seven business days after the award letter of October 22, 2007), PAS filed a protest with the Department on November 20, 2007. CNHP was not notified of this protest.

22. The protest filed by PAS referenced specific sections of CNHP’s confidential and trade secret bid, including its monetary bid for the Program.

23. On December 20, 2007, the Department met with PAS and its counsel regarding its protest. CNHP was not notified of this meeting.

24. On January 8, 2008, the Department wrote to counsel for PAS about the meeting and notified PAS’ counsel that the Department was going to cancel the original RFP and issue a new RFP for the Program.

25. CNHP also received a letter from the Department dated January 8, 2008 (“Cancellation Letter”), in which it first learned that that the RFP was being cancelled. This was also the first that CNHP became aware that there was any problem whatsoever with the award, or that an untimely protest had been entertained. CNHP had been handling every aspect of the Program to date, under the new statute.

24. The Cancellation Letter stated the sole basis of the cancellation of the first RFP and award to be “the failure of the RFP to include new applicants for registered nursing and practical licensed nursing licenses as a part of the RFP and a determination that the final decision of the evaluation committee was based on incomplete information.”

25. C.R.S. 12-38-131 does not allow for the RFP “to include new applicants for registered nursing and practical licensed nursing licenses. . .” The first sentence of C.R.S. 12-38-131(a) specifically states: “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 . . .” (emphasis added). The first RFP (SJN 0801) appropriately included fees only from renewal applicants. Fees for the Program are not allowed to be collected from *new* applicants pursuant to the plain language of the statute.

26. The Department issued RFP SJN 0803 on March 10, 2008.

27. RFP SJN 0803 did not solicit more complete information; in fact, in sections, it evaluated less than its predecessor. However, for the most part, RFP SJN 0803 was almost identical to RFP SJN 0801, with some renumbering.

28. CNHP and PAS both submitted proposals for RFP SJN 0803.

29. Although the basis for cancellation of RFP SJN 0801 and issuance of RFP SJN 0803 was to allow for receipt of revenues from, and provision of services to, new nurse applicants, PAS bid less than its first monetary bid – and less than CNHP’s first monetary bid as well, since it had been given this confidential and trade secret information by the Department.

30. PAS also copied large sections from CNHP’s first confidential bid and submitted those sections in its proposal to RFP SJN 0803.

31. But for the release and compromise of CNHP’s confidential and trade secret information to PAS by the Department, PAS would not have been able to use this information to win the award of RFP SJN 0803.

32. CNHP timely filed its protest of the award of RFP SJN 0803, and also raised the new information relating to the cancellation of the first RFP SJN 0801 and its award, including the fact that no new information was sought or obtained in the second RFP SJN 0803, which was the premise for its issuance.

33. CNHP received notice of the final Department determination denying its protest on May 23, 2008.

34. As CNHP has previously been the statutorily-dedicated entity to provide the Program, and as this determination will discontinue its sole revenue source, this Department is effectively forcing CNHP to close its doors, as it now has no ability to continue to sustain operations.

35. During the twelve years of CNHP's existence, the Department has been collecting fees which have been statutorily-dedicated to CNHP, and which have not been wholly disbursed to CNHP or accounted for to CNHP. Upon information and belief, these undisbursed funds total more than \$50,000, and should be more than sufficient to cover the amount of any bond which may be required by this Court while injunctive relief is pending.

FIRST CLAIM FOR RELIEF
(Appeal from Final Determination of Executive Director)

36. CNHP realleges and reincorporates its allegations in all previous paragraphs.

37. CNHP has met all requirements of C.R.S. 24-109-101 *et seq.* precedent to filing this action in the district court.

38. The decision on RFP SJN 0803 was based on fundamentally flawed and tainted.

39. The scoring of the management section, which accounted for 40% of the overall score, failed to evaluate three of four required.

40. Because the Department compromised and released CNHP's confidential proposal information submitted to RFP SJN 801 to PAS, the scoring of the technical section of RFP SJN 0803, which accounted for 40% of the overall score, was tainted by wholesale copying by PAS of CNHP's confidential proposal .

41. Because the Department compromised and released CNHP's confidential monetary bid information submitted to RFP SJN 0801, the scoring of the cost section of RFP SJN 0803 was also tainted and CNHP was consequently prejudiced.

42. RFP SJN 0803 failed to evaluate substantive information.

43. RFP SJN 0803 was drafted to give PAS an unfair advantage over CNHP.

44. RFP SJN 0803 did not effectuate the purported basis for its issuance.

SECOND CLAIM FOR RELIEF

(Violation of the State Administrative Procedures Act, C.R.S. § 24-4-101 *et seq.*)

45. CNHP realleges and reincorporates its allegations in all previous paragraphs.

46. The Department's cancellation of RFP SJN 0801 and its award was 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 are clearly erroneous on the whole record, unsupported by substantial evidence when the record is considered as a whole, and otherwise contrary to law, in, *inter alia*:

a. Stating that the failure to include "the failure of the RFP to include new applicants for registered nursing and practical licensed nursing licenses as a part of the RFP" was a sufficient basis for canceling the RFP and award, when C.R.S. § 12-38-131 specifically mandated that only renewal fees (not new applicant fees) would be contributed toward the program; and

b. Stating that "the final decision of the evaluation committee was based on incomplete information" was a basis for canceling the RFP and award, when the follow-on RFP SJN 0803 did not request new information and evaluation criteria for RFP SJN 0803 scored less substantive information than was scored in the first RFP SJN 0801.

c. Awarding the follow-on RFP SJN 0803 to CNHP's competitor when the only new information presented by the competitor was the incorporation of CNHP's bid information from the first RFP SJN 0801; and

d. Failing to meet the requirements of C.R.S. § 24-103-301 when canceling the RFP SJN 0801 and its award.

THIRD CLAIM FOR RELIEF

(Misappropriation of Trade Secrets)

47. CNHP realleges and reincorporates its allegations in all previous paragraphs.

48. Pursuant to C.R.S. § 7-72-101 *et seq.* and case law in Colorado, a trade secret may include a bid on a contract.

49. Pursuant to C.R.S. § 7-74-102, the Department misappropriated CNHP's trade secrets, in that it disclosed CNHP's trade secrets to PAS without CNHP's consent, and at the time of the disclosure knew, or had reason to know, that the Department's knowledge of the trade secret was acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use.

50. The Department not only gave CNHP's trade secret bid to its competitor, PAS, but it then gave PAS the opportunity to use this trade secret information by canceling the first RFP SJN 0801 and award and reissuing it in substantially the same form.

51. As a direct result of the Department's actions, CNHP has incurred damages including both the actual loss caused by misappropriation of its trade secrets and the unjust enrichment caused by misappropriation, and may be entitled to exemplary damages as well under certain findings. C.R.S. § 7-72-104.

52. Pursuant to C.R.S. § 7-72-103, CNHP is entitled to temporary and final injunctions including affirmative acts to be granted on such equitable terms as this Court deems reasonable.

WHEREFORE, CNHP prays for judgment, alternatively and collectively, as follows:

1. Injunctive relief barring the Department from awarding the contract for the Program to PAS;
2. Relief for the Department's violations of the State Administrative Procedures Action, including but not limited to reinstatement of RFP SJN 0801 and its award to CNHP, and cancellation of RFP SJN 0803;
3. Upon de novo review, relief for the inappropriate scoring and tainting of evaluation of RFP SJN 0803 and consequent award of RFP SJN 0803 to CNHP;
4. Damages, including attorneys fees and costs and exemplary damages as provided by statute if deemed appropriate;
5. Such other and further relief as this Court deems just.

DATED this 9th day of June, 2008.

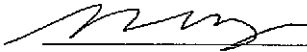
Respectfully submitted,
LESLIE J. RANNIGER, P.C.

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

VERIFICATION

I hereby verify and affirm that the factual statements in this pleading are true and correct to the best of my information and belief.

Dated: June 9, 2008.



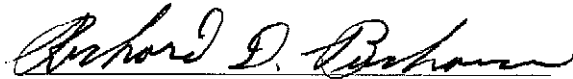
Margie Derozier, as Executive Director
of the Impaired Professional Diversion
Program, doing business as the Colorado
Nurse Health Program

State of Colorado)
County of Jefferson) ss.

Subscribed and sworn to before me this 9th day of June, 2008, by Margie Derozier.

Witness my hand and official seal.

My commission expires: 9-15-08



Notary Public