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November 20, 2007

**BY TELECOPIER/ORIGINAL BY MAIL
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Rosemary McCool
Division Director
Division of Registrations
Colorado Department of Regulatory
Agencies
1560 Broadway, Suite 1350
Denver, CO 80202

Re: Colorado State Board of Nursing
RFP # SJN-0801

Dear Ms. McCool:

We are counsel to Peer Assistance Services, Inc. ("PAS"). The purpose of this letter is to call your attention to certain deficiencies and irregularities in the issuance of RFP # SJN-0801 ("RFP"), and to solicit a meeting with you, as the Division Director, to discuss whether a remedy, short of litigation, is available under the circumstances. DORA has determined to award the contract to the Colorado Nurse Health Program ("CNHP"); PAS's proposal was rejected.

The RFP was issued by the DORA Procurement Office, instead of the State Department of Purchasing. The goal of the RFP was to solicit interested proposals to establish a peer assistance program, pursuant to C.R.S. § 12-38-131, as amended recently by H.B. 1102 (2007).

H.B. 1102 amended the Colorado Nurse Practice Act. C.R.S. § 12-38-131, which had authorized the Board to create a corporate entity for the purposes of administering an Impaired Professional Diversion Program with a Board-appointed committee, was repealed. H.B. 1102 directed the Board to select, using a competitive bidding process, one or more recognized peer health assistance organizations as designated providers of peer assistance services.

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H.B. 1102 also broadened the goals of the nurse peer health assistance program: the prior Impaired Professional Program was to identify licensees with alcohol or drug abuse or psychiatric, psychological or emotional problems, evaluate licensees requesting admittance to the programs, and develop methods to rehabilitate program participants. H.B. 1102 expanded the goals of the peer assistance program to be both broader and more ambitious:

(1) assistance and education to licensees concerning the recognition, identification and prevention of physical, emotional, psychiatric, psychological, drug abuse or alcohol abuse problems;

(2) intervention;

(3) evaluation of problems

(4) referral of licensees for treatment;

(5) monitoring licensee status;

(5) counseling and support for the licensee and the family;

(6) receive referrals from the Board;

(7) make services available to all licensees statewide.

The inclusion of prevention and early intervention, in particular, were substantial expansions of service from the prior diversion statute.

H.B. 1102 also directed the Board to use "a competitive bidding process that encourages participation from interested vendors" to select designated providers of peer assistance services.

The phrase "competitive bidding process" indicates that the legislature intended the Board to use the State Procurement Code, C.R.S. § 24-101-101, et seq. . The State Procurement Code applies to "all publicly funded contracts entered into by all governmental bodies of the executive branch of the state" C.R.S. § 24-101-105(1). In this regard, it is noteworthy that PAS, which also has contracts to administer the diversion programs for the Colorado State Board of Dentistry and the Colorado State Board of Pharmacy, was awarded those contracts through a competitive bidding process administered under the Procurement Code.

To the surprise of PAS, RFP #SJN-0801 begins by disavowing the Procurement Code. In the words of the RFP:

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This solicitation is exempt from the State of Colorado Procurement Rules/Code per R-24-101-105(01)(a). On the basis that "no State dollars are expended." [sic]. In summary, this solicitation does not require competition and does not need to be posted on Colorado BIDS or otherwise announced. (emphasis added)

The Board's disavowal of competition in the process of securing contract bids was directly contrary to H.B. 1102 and was certainly not calculated to "encourage participation from interested vendors." C.R.S. § 12-38-131(3)(a), as amended. In addition, it is hard to see how the use of license fee revenues pursuant to legislative direction is not the use of "State dollars." Reliance on this rule is not an adequate legal basis for DORA to depart from the use of the State Procurement Code for this RFP, particularly after the Department has followed the Procurement Code for similar peer assistance contracts and programs for the dental and pharmacy boards.

The process used by the Department to reject PAS and award the contract to the CNHP, the same entity which the Board itself had set up under the prior statute, was riddled with conflict of interest and error:

1. Mr. Mark Merrill participated on the Evaluation Committee which scored and ranked the proposals. Mr. Merrill is the Program Director for the Board of Nursing. As such, he works directly with CNHP. CNHP also listed Mr. Merrill as a reference in its proposal (CNHP Proposal, page 38). To have a professional reference evaluating one of the proposals and working daily with that proponent does not "encourage interested vendors;" it also belies any illusion that a true competitive bid process is under way.

2. CNHP's proposed budget was not submitted as requested by the RFP. CNHP provided two budgets for incorrect fiscal years. The budget proposal for fiscal year 07-08 at \$698,479, exceeded the stated available funds by \$107,784. By contrast, the PAS budget showed total program costs funded by the State Board of Nursing of \$590,695. Thus, on the budget criterion, the PAS proposal was more advantageous.

3. The rationale for the Committee's evaluation decision was also suspect. A copy of the evaluation is attached hereto as Exhibit A. The Evaluation Committee characterized both proposals as "equal in terms of management and budget," but cited two factors which were areas of concern for the Committee. It noted that PAS has qualified staff "with an emphasis on employee assistance programs which is not the goal of the proposal." In fact, the RFP specifically sought assistance and education to recipients concerning the recognition, identification and prevention of physical, emotional, psychiatric, psychological, drug abuse or alcohol abuse problems, and provide intervention when necessary. Section 4.2(a) of the RFP. Since this is exactly what EAPs do, the EAP experience offered by PAS should have been a clear advantage.

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4. The Evaluation Committee asserted that because PAS would continue to monitor nurses regardless of noncompliance and not terminate such persons from the program, this was an "internal conflict of interest." Putting aside the fact that Evaluation Committee could not recognize a true conflict of interest in its own midst, the RFP asked proponents to address a different standard for conflict of interest. Section 4.1(k) of the RFP, "Avoidance of Conflict of Interest," requires that the "[a]warded contractor must ensure that, to the extent practicable, the licensed professionals involved in the evaluation of recipients entering the program shall not also provide treatment of the same recipients. The awarded contractor must also ensure that such professionals hold an unrestricted license from their respective board."

Consistent with the RFP, PAS assured the Board that licensed professionals who are involved in the evaluation of licensees for the new peer assistance program will not also provide treatment to those licensees. PAS's response was clear that program staff would conduct a comprehensive assessment for all licensees seeking services; those licensees would then be referred to other professionals as determined by the case manager.

By contrast, CNHP waffled: "with the exception of customary evaluations in conjunction with f [sic] treatment, CNHP makes every effort to discourage licensees from entering treatment with the same individual who initially evaluated them. This has been challenged throughout the history of CNHP, particularly in rural areas, however those nurses who chose to go to the therapist who evaluated them must provide a written statement regarding the decision to go to the evaluator. Evaluators will sign a conflict of interest statement which discourages/prohibits nurses from pursuing treatment from them." This half-hearted hedge fell well short of the assurance against conflict of interest for which the RFP calls.

PAS believes strongly in the value of continuing to monitor noncompliant licensees as a measure of public safety. PAS would offer nurses who cease to be eligible for services under the Board program an opportunity to continue with PAS services on a fee for service basis, i.e., not funded by the license fee revenue under H.B. 1102. In fact, PAS noted that it provides services to nurses not eligible for the current SBON program and asked DORA if referral of these nurses to its own program would be permitted. DORA advised that "Referral to the program will be permitted to any eligible licensed nurse who meets the guidelines of the Nursing Peer Health Assistance or Nurse Alternative to Discipline Program (12-38-131)." Not only is the continuation of services to ineligible nurses in the public interest and not a conflict of interest under the RFP, but for the Evaluation Committee to stand the conflict of interest criterion on its head and turn it against PAS in favor in CNHP is perverse indeed.

5. CNHP's proposal identified staff as available to the program; many of these staff are no longer employed by CNHP.

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6. CNHP has no proven experience with prevention and intervention. This is because in the current program, neither of these services is called for, and CNHP does not offer them. Certainly, CNHP cannot offer the same level of experience and proven track record of PAS in these areas, which are critical under H.B. 1102.

There are other points of comparison, and PAS would be happy to discuss its proposal and its comparative advantages in greater detail.

In conclusion, the Board of Nursing has ignored key statutory mandates with respect to the scope of services and the use of a truly competitive bidding process; the evaluation process of the proposals has been riddled with conflict of interest and bias, as well as a failure to follow the factors described in the RFP. Finally, the bid which was less advantageous to the State of Colorado and the Board of Nursing was selected.

We would appreciate an opportunity to discuss this state of affairs and how the Division of Registrations might rectify the situation with the least disruption to the Board and to licensed nurses in this state.

Sincerely,



Frederick Y. Yu

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cc: Elizabeth M. Pao, R.N., MSM, CEAP