



January 22, 2008

D. Rico Munn
Executive Director
Department of Regulatory Agencies
1560 Broadway, Suite 1550
Denver, CO 80202
Sent via mail and e-mail attachment
Rico.Munn@dora.state.co.us

RE: Inappropriate Withdrawal of Award of RFP SJN-0801 and Compromise of Process

Dear Mr. Munn:

I am writing to you on behalf of the Colorado Nurse Health Program (CNHP) to enlist your help in remedying a gross impropriety within DORA, and in reinstating a valid RFP award.

You may recall that, last year, representatives of the Colorado Nurse Health Program (CNHP) met with you, shortly after your appointment, and asked that DORA not support pending legislation that would put the diversion program for nurses out to competitive bid. You chose to support that legislation, which did pass and became law on January 1, 2008. CNHP bid on the program, *and won*. A copy of the award letter and Decision Memorandum is attached as Exhibit A. So, you're probably wondering why we're contacting you yet again.

After a three-person evaluation panel picked CNHP's proposal as the winner on October 22, 2007 and issued an award letter to CNHP (and also posted the award on the Colorado BIDS website), the unsuccessful bidder, Peer Assistance Services (PAS), received a notice as well (also on October 22, 2007) (Exhibit B), which provided that there would be no protest period (which would have run for seven days after award pursuant to Section 1.14 Protest, State of Colorado Solicitation Terms and Conditions).

~~CNHP's winning proposal required that its financial proposal be sealed, and could be made public *only if* CNHP was the successful bidder, per the RFP rules. After CNHP won the bid, the unsuccessful bidder, PAS, went into the DORA offices and obtained a copy of CNHP's proposal *and financials*. Then, 28 days after the award was made, PAS sent a letter of protest to its proponent, a person listed as a reference in the PAS proposal – Rosemary McCool, one of your directors. The reference list submitted by PAS in its proposal is attached as Exhibit C, and the PAS Protest Letter is attached as Exhibit D.~~

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CNHP had no idea that a protest had been made, or entertained, contrary to the "no protest" mandate. Last week (*after* the beginning of the new contract period and months after the award was made), CNHP received notice that its award was to be withdrawn and that Ms. McCool would put the program out to bid again. CNHP staff went to the DORA offices to find out what had happened, and saw the letter from Frederick Yu (PAS counsel) in the file, as well as Ms. McCool's e-mail regarding the failure to include the number of new nurse applicants in the overview section of the RFP.

I. The Withdrawal of the Award by Ms. McCool

The stated basis on which Ms. McCool decided to modify and re-post the RFP was "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." DORA letter dated January 8, 2008. Exhibit E. This determination was apparently based on Ms. McCool's e-mail dated December 27, 2007, which addresses the number of new licensees last year, as well as the fact that this figure was expected to decrease in FY 2008 by an unknown amount. Exhibit F.

A. Failure to Include New Applicant Numbers

PAS, in its protest letter, doesn't even list this as a concern.

And, interestingly, the new statute (C.R.S. 12-38-131 effective 1-1-2008) (attached as Exhibit G) makes no mention of collecting fees from new applicants:

- (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 paragraph (c) of subsection (3) of this section a fee in an amount set by the board, not to exceed twenty-five dollars per year. . .

Maybe the statute should be amended to include new applicants, who are implied ("As a condition of licensure. . ."). ~~CNHP will continue to monitor new applicants, regardless. But,~~ especially in light of the fact that payment from new applicants is not expressly acknowledged in the statutory language, this seems a suspect reason upon which to set aside the entire award.

There is, however, statutory notice of the entire population to be served. This is a fluctuating population, including nurses coming into the workforce and those retiring from it.

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Consequently, five major reasons that the failure to include new applicant numbers is not a legitimate basis on which to withdraw the award to CNHP include the following:

- a. The new statute, C.R.S. 12-38-131, makes no mention of collecting fees from new applicants.
- b. Cost was the *least* important evaluation factor under the terms of this RFP.
- c. The cost bid was not set up to be based on the dollars available; this undermines the basis of competitive bidding. No total dollar amount available was even articulated in the RFP. If a bidder wanted to guesstimate dollars available, it could do so, but those numbers would obviously fluctuate from year to year, in any event. And, again, the RFP sought a price to provide defined services, and not a just-below-the-ceiling bid. Clearly, that's why no price ceiling was included.
- d. The number of new applicants is uncertain and expected to decline, per Ms. McCool's own e-mail, and new nurses would presumably be balanced in some significant part by nurses leaving the profession.
- e. If anyone was prejudiced by the failure to include general numbers for an additional population to be served, it is the successful bidder, whose bid was based on a lower disclosed number of nurses. However, CNHP is happy to honor its proposal, without raising its price, and will continue to provide its services to new licensees.

B. Vague Reference to Incomplete Information

The second articulated basis ("a determination that the final decision of the evaluation committee was based on incomplete information") is a vague pretext to attempt to set aside the award in order to give Ms. McCool's protégé (PAS) an unfair opportunity and advantage in rebidding, now that PAS has been given CNHP's proposal and all of its confidential information. It would be foolhardy to pretend that this "determination" was not based on the letter from PAS' counsel, Frederick Yu, dated November 20, 2007 (almost a month after the award was made, and far in excess of the seven day protest period, had it even been allowed). In fact, the notice that the award would be withdrawn and the RFP re-submitted was sent directly to Mr. Yu (see Exhibit E), and not PAS. Consequently, an analysis of that protest letter (PAS Protest Letter) would be productive to establish that it also does not provide a basis on which to set aside the award.

II. The PAS Protest Letter Submitted 28 Days After the Award

The PAS Protest Letter makes a vague threat of litigation if relief is not granted; however, there is a wealth of case law in Colorado which holds that the unsuccessful bidder does

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not have standing to bring suit. In Intermountain Systems, Inc. v. Gore Valley/Big Horn Water Districts, 654 P.2d 872 (Colo. App. 1982), the Court of Appeals upheld a trial court's dismissal of the suit of an unsuccessful bidder that asserted it was the lowest bidder and that defendants acted negligently and unlawfully in awarding the contract to a contractor whose bid was higher. Regardless of the merits of these allegations, the Court found that the unsuccessful bidder has no standing to dispute the award of a public contract. See also L. & M Enterprises v. City of Golden, 852 P.2d 1337 (1993); Jackson v. Metro Denver Sewage Disposal Dist. No. 1, 687 P.2d 494 (Colo. App. 1984)(cert. denied Sept. 4, 1984); Colorado Paving Co. v. Murphy, 78 F. 28 (8th Cir.1897) (cited in Intermountain Systems, Inc., supra).

It may seem hard to believe that DORA would have capitulated to this threat. However, remember, Ms. McCool was a listed reference in the PAS proposal, and Ms. McCool was the individual to whom PAS sent their protest. This is the ultimate conflict of interest.

On the other hand, CNHP and its personnel have made commitments and otherwise justifiably relied on the award; there have been myriad meetings with Board of Nursing (BON) personnel, and CNHP is continuing to protect the public by monitoring impaired nurses into the new contract period. CNHP has hired new staff, made lease commitments, changed policies and bylaws as required by the new legislation, and otherwise proceeded in good faith in the months since the award was posted on the Colorado BIDS website. Further, CNHP's bid and confidential financial information has been compromised by DORA personnel – this information has been already been handed over to PAS (since DORA personnel also apparently relied on the award). By putting the RFP out to bid again, Ms. McCool has completely undermined the ability of CNHP to rebid, and given PAS an unfair advantage. CNHP will have no choice but to seek recompense for its damages in light of Ms. McCool's actions. But, again, if you will objectively evaluate this matter, we believe you will uphold the award and put a stop to this mess.

The PAS Protest Letter includes a litany of perceived grievances but, upon analysis, that there is not one assertion that would justify the withdrawal of this award. To establish this fact, each point raised in the PAS Protest Letter will be addressed in turn.

A. Competitive Bidding Process

The PAS letter expresses "surprise" that the RFP had prefatory language that, in its words, "disavows" competition. However, although the RFP states that it isn't required to follow the procurement code, it then goes on to do so. The RFP was posted on BIDS. The procurement code was followed, voluntarily.

In fact, this is the *only* diversion program RFP that *has* had competition – the other RFPs for the diversion programs for the dental, pharmacy, and medical programs had only one bidder.

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And, for the dental and pharmacy programs, that sole bidder was PAS. For RFPs which PAS won, it had no such concerns, even though they were handled in the same manner.

And, for the subject RFP SJN-0801, PAS also had no such concern – until it lost. PAS submitted many written questions on this RFP while it was pending. These questions are documented in DORA's REP file. There was a time frame, clearly stated, for all questions. However, no question about "disavowing competition" was timely raised. In truth, it wasn't a concern – until PAS lost. It's too late to raise the issue now, and certainly it's ridiculous to assign such importance to a phrase after the fact.

The reality here is that there was competition. PAS submitted a bid. There's no injury. There's no issue. And, if there was one, it's time-barred.

Also, as an aside, it's interesting that PAS would argue now that there were "state dollars" involved. In order to get the legislation passed, PAS and other bill proponents argued that there was NO fiscal impact. The legislation has no fiscal note, as a result. Apparently, PAS has forgotten that all those legislative hearings were recorded.

The RFP was handled appropriately. It was handled the same as the two diversion program RFPs that PAS won – the dental and the pharmacy programs. PAS didn't timely question this while the RFP was active, because it isn't an issue. PAS was able to compete, and did so, by submitting a proposal. The fact that PAS lost doesn't mean there wasn't competition – it means there WAS competition, for the first time, on a diversion program.

B. PAS Letter Point #1 – Asserted Conflict of Interest Because Ultimate Customer was on Panel

First, it is wholly appropriate, and necessary, for the ultimate customer to be represented as one person on the three-person evaluation panel for its own solicitation for services. In fact, the executive director of the board of pharmacy was on the evaluation committee when its diversion program was put out to bid, and ultimately awarded to PAS. PAS had no concerns about that award. And, the executive director of the board of dentistry was also on the evaluation committee when its diversion program was put out to bid, and ultimately awarded to PAS. Again, PAS had no concerns about that award.

So, clearly, it IS appropriate for the executive director of the ultimate customer to be on the evaluation committee.

What, then, is PAS arguing as the conflict? Apparently, PAS argues that the conflict is that CNHP listed the executive director of the Board of Nursing as a reference in its proposal.

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However, since CNHP felt it had been doing a great job as the previous provider of similar services, it makes sense that it felt this could be considered. Certainly, if CNHP had done an abysmal job, this would be considered whether or not the executive director was listed as a reference.

The only conflict, in fact, is that PAS listed Rosemary McCool, Division Director of the Division of Regulations of DORA, as a reference, then sent this protest letter to Ms. McCool after losing the bid, to request that the award be set aside! The words used in the PAS letter, "could not recognize a true conflict of interest in its own midst," would certainly seem to apply here. This is the only conflict of interest – the personal appeal of the unsuccessful bidder to its proposal reference, Ms. McCool, to use her position at DORA to set the award aside. And to then get the relief sought, without legal basis therefor!

Conflict of interest is not a basis for setting aside this award. It is a basis for setting aside DORA's decision to rebid this contract, however.

C. PAS Letter Point #2 – Takes Issue with CNHP's Budget

It's hard to imagine anything more inappropriate than PAS illicitly obtaining CNHP's confidential budget, then complaining about it in its protest.

However, the RFP clearly states that cost was the *least* important factor in the RFP evaluation. CNHP scored more highly than PAS on the criteria that were valued more highly. These criteria were clearly stated in the RFP, including order of importance.

Competition can happen on factors other than cost, and that was the case in this RFP. Again, the case law in this state has myriad examples where an unsuccessful bidder complained because its proposal cost less – and those cases were dismissed for lack of standing. In dicta, it is reiterated that cost is not always the determining factor. Clearly, by the express terms of this RFP, it was not to be the determining factor in this RFP, either.

D. PAS Letter Point #3 – EAP Experience

Now, the PAS letter digresses to dispute the three-person evaluation panel's assessment on one item – EAP experience. Does this mean that it agrees with the assessment on 27 other items that were evaluated?

It's important to understand that the evaluation was not just one person's decision. Three independent members evaluated the proposals separately, then met to discuss their assessments.

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When there was disparity in assessments, the panel discussed the bases for their individual determinations, before making final assignments.

But, again, the unsuccessful bidder does not have standing to go through the successful bidder's proposal and take issue with individual items. The panel addressed the basis for its decision on this item, and PAS disagrees – no surprise there. That's certainly no reason to set aside the award.

E. PAS Letter Point #4 – CNHP's Conflict of Interest Response to 4.1(k)

The PAS proposal said, too simply, that it would not allow internal conflicts of interest. It did not address the manner in which this practical concern would be addressed in rural communities with limited providers from which to choose. The CNHP proposal went further in discussing this concern.

The entity with the shortest answer doesn't win. In fact, giving short shrift to an important concern begs the question of how seriously that entity considers the problem. The panel clearly looked at the PAS practices, and found that its short answer didn't hold true in light of the way that entity undisputedly operated.

The writer of the PAS letter also doesn't understand the referral process, and articulates a concern that is "perverse indeed," from that uninformed perspective. To try to put it simply, the legislators found public safety to be important. If a nurse is non-compliant, public protection is compromised. If a nurse has relapsed, or is not participating in required testing, or is not going to required therapy – that nurse may be dangerous. It will not help to keep monitoring that nurse's noncompliance. Something needs to happen. What happens is that the nurse is referred for discipline. The new statute even seeks to streamline this process (see C.R.S. 12-38-131(4)). PAS prefers to keep the "ineligible" nurse in its program and advocate for them. CNHP sees the need to protect the public and refer the nurse for discipline. The fact that the panel didn't agree with the PAS philosophy only evidences the fact that PAS doesn't see the conflict "in its own midst," to coin its own phrase.

F. PAS Letter Point #5 – CNHP has New Staff

Yes, in reliance on this contract award in October, CNHP did hire new staff. It justifiably relied on the award and its subsequent discussions with the BON, its client, in order to provide even more than required. The staff identified in CNHP's proposal were employed with CNHP at the time the proposal was made, and core staff has remained the same. And, there was turnover subsequent to the proposal submission, since CNHP would cease to exist if it did not win this

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award. While waiting for the award decision, some staff left CNHP for alternate employment, unwilling to wait to hear of the company's future viability. When CNHP won the award, it hired more staff, some of whom have left long-term employment elsewhere. Those individuals are now wondering what their future will be, due to the baseless withdrawal of this award. That, in fact, is just one component of CNHP's damages should this withdrawal stand, and it may also be a basis for individual actions by CNHP employees.

G. PAS Letter Point #6 – CNHP's Experience with Prevention and Intervention

This is the most ludicrous point of all in the protest letter. CNHP has handled this program for a decade. How could PAS possibly have more experience in these areas?

Maybe some vendors do only the line items required in their statute. Maybe this is the way that PAS handles its contracts. However, CNHP has always provided services far in excess of what is specifically required. This is clearly established by its history of external reviews by varied independent, out-of-state reviewers, which have always been glowing. PAS has no such review history; the same in-state person has always evaluated its program.

Education and face-to-face contact are key aspects of CNHP's success in these areas. CNHP has statewide visibility, with staff on the Western Slope as well. CNHP is involved in the nursing schools, prior to licensure, and gives presentations at myriad medical facilities, informing nurses on how to help themselves and their peers. The scope of CNHP's experience in this area is too vast to relate in this missive; suffice it to say that CNHP's success is well documented. PAS has not had the experience, or objective documentation of success – but it doesn't have standing to argue, anyway.

H. Overall PAS Protest Letter Summation

In all, a baseless threat of litigation should not have resulted in a withdrawal of a legitimate award. The fact that the protest was entertained at all, when specifically prohibited, is suspect. If a protest had been allowed, it would have had to have been submitted within seven days; instead, this protest was lodged a month after the award. DORA staff relied on the award when giving CNHP's confidential information to the unsuccessful bidder, PAS. Then, PAS inappropriately sent its protest to its own reference, Ms. McCool, for relief, which has been inexplicably granted – so far. PAS seeks an unfair advantage in having the program put out to bid again, with full knowledge of CNHP's confidential financial information and bid proposal which it obtained from DORA under the premise that the award was final.

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III. Conclusion

Mr. Munn, we hope you will look to the core of this matter. The failure to include one number in an RFP overview is no reason to overturn an award on which there has been justifiable reliance. The new statute took effect on January 1, 2008, and a provider is needed – and has been legitimately selected – for this program. A vague assertion of “incomplete information” is no reason to put this RFP out to bid again – especially when the successful bidder’s confidential information has already been compromised by your office. Please investigate, and rectify this impropriety.

The legislation passed. The program was put out to bid. Both PAS and CNHP bid on the program. CNHP won. Isn’t this enough?

We look forward to your intervention and objectivity. And, in the interim, CNHP will continue to protect the public while providing quality monitoring of impaired nurses. We’ve been working under the award. We’ve hired staff under the award. We’ve made commitments in order to fulfill our obligations under the award. We’re expecting funding under C.R.S. 12-38-131(2) - our funding terminates on December 31, 2007 under the previous statute, so if this RFP is rebid, then who pays? What would be the effective date of the new contract and, if it is after January 1, 2008, how would this be reconciled under the new legislation? None of the present problems have been created by CNHP, yet CNHP will be shouldering the burden if DORA inappropriately reneges on its obligation. We trust you will see to it that the October 22, 2007 award is honored.

Sincerely,



Leslie J. Ranniger
Counsel for CNHP

encl. – Exhibits A-G

cc: Tammy Baca
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