

STATE OF MAINE  
APPEAL COMMITTEE

CELTIC INSURANCE COMPANY'S	)	
	)	<b>FINDINGS OF FACT</b>
Appeal of Health Insurance Services	)	<b>AND</b>
Contract Award Under	)	<b>CONCLUSIONS OF LAW</b>
RFP 200909526	)	

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On February 8, 2010, an Appeal Committee consisting of Betty M. Lamoreau, Richard B. Thompson, and Gilbert M. Bilodeau convened in Room 400 of the Cross Office Building for the purpose of hearing an appeal of a contract award issued by the Dirigo Health Agency. Mark Randlett served as the Hearing Officer.

The Appeal Committee hereby makes the following Findings of Fact and Conclusions of Law.

The Dirigo Health Agency (the "Agency") is an agency of the State of Maine created, in part, for the purpose of providing health insurance products to the uninsured and under-insured populations in Maine. The Agency has done this since its inception by offering the DirigoChoice product. Since January, 2008, the Agency has contracted with Harvard Pilgrim Health Care ("Harvard Pilgrim") to administer DirigoChoice. **Celtic Exhibit 14 and Testimony of Karynlee Harrington.**

The Agency issued a Request for Proposal for Health Insurance Services on October 5, 2009 that sought a proposal for administering the current DirigoChoice product (the "Status Quo") and a proposal for an "Alternate Plan" (the "RFP"). **Celtic Exhibit 1.**

A Bidder's Conference was held on October 16, 2009 and was attended in person by Celtic Insurance Company ("Celtic") and Anthem and was attended telephonically by Harvard Pilgrim. **Testimony of Karynlee Harrington.**

The Agency responded to written questions from potential bidders on October 22, 2009. **Celtic Exhibit 53.**

Proposals were submitted prior to the November 16, 2009 submission deadline by Harvard Pilgrim and by Celtic. **Celtic Exhibits 17 and 22.**

On December 3, 2009, Celtic responded to clarification questions posed by the Agency. **Celtic Exhibit 50.**

On December 7, 2009 the Agency conducted an interview with Celtic. Celtic had in-house actuaries present at the interview and informed the Agency that Craig Keizur, the Milliman Actuary, was available by phone from Seattle. **Testimony of Karynlee Harrington and Blake Westerfield.**

It was not until the last 10 minutes of a two hour interview that the Agency raised the questions or concerns regarding Celtic's Actuarial Value. **Testimony of Blake Westerfield.**

On December 16, 2009, the Agency notified bidders that the contract was being awarded to Harvard Pilgrim. On December, 23, 2009, Celtic filed an appeal of the Contract Award. **Celtic Appeal Letter filed on December 23, 2009.**

The evaluation scoring table contained in the RFP gives 15 of a possible 100 points based upon "Actuarial Value" of the Alternate Plan submitted by bidders. **Celtic Exhibit 1, page 9.**

Celtic was given zero points out of a possible fifteen points for the Actuarial Value of the Alternate Plan it submitted in its bid and Harvard Pilgrim was given 15 points. **Celtic Exhibit 15.**

Celtic received 73.51 total points, scoring better than Harvard Pilgrim on cost of both the Status Quo and the Alternate Plan and on Administration. **Celtic Exhibit 15.**

Harvard Pilgrim received 65.54 points plus 15 points for Actuarial Value for a total of 80.54. **Celtic Exhibit 15.**

#### **CONCLUSION OF LAW #1**

**Celtic's appeal was timely filed and Celtic is an "Aggrieved Party" as that term is defined in the State's Rules Governing Appeals of Contract and Grant Awards. Chapter 120 Rules for Appeal of Contract and Grant Awards, Bureau of General Services, Division of Purchases, Department of Administrative and Financial Services ("Chapter 120").**

The RFP issued by the Agency references "Actuarial Value" in only two places: in the evaluation table found on page 9 and in the list of Plan Principles found at page 16. **Celtic Exhibit 1.**

The RFP references to Actuarial Value on pages 9 and 16 are not accompanied by any definition, requirement, instruction or other specific information other than that 15 points will be awarded for Actuarial Value and that the Actuarial Value must be at least 65%. **Celtic Exhibit 1, page 9 and 16.**

The Appendices to the RFP do not discuss, nor provide instruction, definition or requirements relating to Actuarial Value. **Celtic Exhibits 2-7.**

The Bid Forms attached to the RFP do not discuss, nor provide instruction, definition or requirements relating to Actuarial Value. **Celtic Exhibits 9-11.**

Consistent with the requirement of Bid Form 2, Celtic provided a Benefits Checklist that included deductible and co-pay information for its Alternate Plan. **Celtic Exhibit 18.**

General instructions, **not specific to Actuarial Valuation**, on the Instruction for Bid Sheets state as follows: *“Please follow the instructions below, which provide step by step guidance for filling out each row of the bid sheet. In addition, please submit a methodology write-up that corresponds to the bid form. The write-up should include sources of data, populations used to develop rates, nature of each adjustment and methodology for calculating them. Also, please fill out the worksheet titled “Additional Tables.”* **Celtic Exhibits 19A and 20A.**

Celtic provided “Additional Tables” for the Status Quo option and the Alternate Plan option. **Celtic Exhibit 19AB and 20I.**

Celtic provided sources of data in databooks. **Celtic Exhibit 19AC and 20J.**

For each of its 25 Status Quo bid sheets and each of its 6 Alternate Plan bid sheets, Celtic provided the following write-up: *The “Base Medical Claims” and “Base Pharmacy Claims” are based on the CY 2008 supplemental databook. Our pricing was based on manual pricing, relying on the Milliman Health Cost Guidelines, consistent with trended claims experience for both CY 2008 and YTD 2009 claims (from the databook), and other industry research. However, since the bid form required a starting “experience” base, we input the CY 2008 claims and made an adjustment (Adjustment 2) to get back to our manual pricing. Adjustment 1 represents the adjustment for re-sloping the premium rates by income group.”* **Celtic Exhibit 20C.**

The Instruction for Bid Sheets attached to the RFP for both the Status Quo option and the Alternate Plan option provides the following instruction **specific to Actuarial Value** at Step 6: *“Please enter Actuarial Value of Option. Actuarial Value should be in relation to a health benefit plan with no cost sharing.”* **Celtic Exhibits 19A and 20A.**

Celtic entered an Actuarial Value as instructed at Step 6 in each of its 25 bid sheets for the Status Quo option and for each of its 6 bid sheets for the Alternate Plan option. **Celtic Exhibits 19C-19AA and Celtic Exhibits 20C-20H.**

The Agency accepted Celtic's Actuarial Value as submitted for the Status Quo option.  
**Testimony of Bela Gorman.**

The Actuarial Value entered by Celtic in its bid sheets was "in relation to a health benefit plan with no cost sharing." **Testimony of Craig Keizur.**

Prior to the bid submission deadline, two questions were answered by the Agency relating to Actuarial Value. One question posed: *Please provide information on the base plan to be used for determining whether the proposed plan has a minimum actuarial value of 65%.* The Agency answered: *Please use DirigoChoice's current covered services with no member cost sharing as the base plan when determining an actuarial value. The actuarial value should reflect the percentage of medical expenses estimated to be paid by the insurer.* **Celtic Exhibit 53, Question 3.**

Celtic used DirigoChoice's current covered services with no member cost sharing as the base plan when determining its actuarial value and produced an actuarial value that reflected the percentage of medical expenses estimated to be paid by the insurer.  
**Testimony of Craig Keizur.**

The second question relating to Actuarial Value answered by the Agency prior to the bid submission deadline posed: *Please confirm whether that minimum actuarial value to test is to be applied to each plan design or on an aggregate basis.* The Agency answered: *The minimum actuarial value to test will be on an aggregate basis.* **Celtic Exhibit 53, Question 4.**

The aggregate Actuarial Value of the Alternate Plan as submitted by Celtic was 83.9% and the aggregate Actuarial Value of the Alternate Plan as submitted by Harvard Pilgrim was 78.9%. **Celtic Exhibit 15.**

Based upon Celtic's Actuarial Value of 83.9% and Harvard Pilgrim's Actuarial Value of 78.9%, and pursuant to the scoring algorithm in the Agency's scoring sheet, Celtic should have received 15 points and Harvard Pilgrim 10 points. Celtic Exhibit 15.

Neither of the two answers provided by the Agency indicated that the Agency would be calculating its own Actuarial Value of the plans of the bidders, nor did the answers provide any instruction or requirement that the bidders were to do anything other than that specifically required in the RFP. **Celtic Exhibit 53, Questions 3 and 4.**

Post-submission deadline the Agency posed several clarifying questions to Celtic which were answered by Celtic. The Agency asked for "plan design descriptions for your alternative plan proposals, including: a. Out-of-pocket structure, b. Deductibles, c. Coinsurance. **Celtic Exhibit 50, Question 3.**

Celtic answered with attachment A to Exhibit 50 showing calendar year deductibles, calendar year out-of-pocket limits and coinsurance for its Alternate Plan. **Celtic Exhibit 50, Attachment A.**

The post-submission clarification questions posed by the Agency also asked for “*an actuarial memorandum that supports the quoted rate build-up in detail? Also please give more detail supporting the adjustments and conversion factor calculations used in the quoted rates.*” This question specified the “quoted rate build-up” and “quoted rates,” not the quoted Actuarial Value. **Celtic Exhibit 50, Question 8.**

Celtic provided an Actuarial Memorandum that states that the “*Status Quo benefits consist of 25 premium rate groups (five income categories for two Individual and three Small Group PPO plan designs) whereas the Alternative benefits consist of six groups (one Individual plan design for three income category groupings and three Small Group plan designs for all income categories), although we have shown the details for all 20 income and population combinations (five income categories for one Individual and three Small Group PPO plan designs).*” **Celtic Exhibit 21, page 1.**

Exhibit 1b of the Actuarial Memorandum shows the “Alternative Option Plan Design” including details for all 20 income and population combinations as well as the “Proposed Bids” consisting of 6 plans. **Celtic Exhibit 21, Exhibit 1b.**

Section 3.5.3 of the RFP called for 6 plans: a high deductible, low deductible and HSA in the Small Group segment, and a plan for target income group B, C and D (and above) in the Non-Group segment. **Celtic Exhibit 1.**

The Agency cited as a source of confusion that Celtic provided the details for all twenty income and population combinations in addition to the details for its six proposed bids in Exhibit 1b to the Actuarial Memorandum. **Testimony of Bela Gorman.**

The Agency also cited as a source of confusion the fact that plans proposed by Celtic in the Alternate Plan had the same deductibles but varying Actuarial Values and the Agency testified that if the deductibles were the same the Actuarial Value should have been the same. However, the plan entries in the Status Quo bid sheets supplied by the Agency show the same base deductibles yet each bid sheet has a different Actuarial Value. **Testimony of Bela Gorman and Exhibits 19C-19AA**

Exhibit 3b of the Actuarial Memorandum shows the “Summary of Deductibles and Out-of-Pocket Maximums” of the Alternative Plan. **Celtic Exhibit 21, Exhibit 3b.**

Neither question #3 nor question # 8 (nor any of the other clarifying questions posed in the post-submission clarification document prepared by the Agency) specifically questioned the Actuarial Value provided by Celtic. **Celtic Exhibit 50.**

There is no instruction in the RFP, Appendices, Bid Forms, Bid sheets, pre-submission or post-submission Questions and Answers that the Agency would calculate its own Actuarial Valuation of the options submitted by bidders. **Exhibits 1, 2-7, 9-11, 19, 20, 53 and 50**

There is no instruction in the RFP, Appendices, Bid Forms, Bid sheets, pre-submission or post-submission Questions and Answers on the methodology that would be used by the Agency in calculating Actuarial Value. **Exhibits 1, 2-7, 9-11, 19, 20, 53 and 50.**

There is no specification in the RFP, Appendices, Bid Forms, Bid sheets, pre-submission and post-submission Questions and Answers of what data the Agency would desire in order for the Agency to do its own calculation of Actuarial Value. **Exhibits 1, 2-7, 9-11, 19, 20, 53 and 50.**

Section 2.1 of the RFP states that “[p]roposals must conform to the mandatory requirements, instructions and conditions of the RFP.” **Celtic Exhibit 1.**

Section 2.9.2 of the RFP titled Proposal Contents calls for, in addition to a transmittal letter and Executive Summary, completed bid forms and responses to specific questions as the required components of the proposal. **Celtic Exhibit 1.**

Section 4.2 of the RFP states that “Bidders shall not submit information or attachments not explicitly requested in the RFP.” **Celtic Exhibit 1.**

The Agency’s stated basis for awarding Harvard Pilgrim 15 points and Celtic 0 points for Actuarial Value was that the Agency determined that “Celtic did not correctly submit their plan information per the RFP instructions to determine the A[ctuarial] V[alue] of their proposed alternate plan(s)” **Exhibit 15.**

## **CONCLUSION OF LAW #2**

**The Agency erred in concluding that “Celtic did not correctly submit their plan information per the RFP instructions to determine the A[ctuarial] V[alue] of their proposed alternate plan(s).” Celtic submitted its proposal consistent with the specific instructions contained within the RFP. The RFP did not instruct bidders to submit information to the Agency so that the Agency could determine Actuarial Value of the plans proposed. The RFP instructed the bidders to supply the Actuarial Values themselves. By imposing requirements when scoring that were not imposed in the RFP, the Agency erred, acted arbitrarily, and created a fundamental unfairness in violation of Chapter 120 §3(2).**

**CONCLUSION OF LAW #3**

**Notwithstanding the requirements set forth in the RFP calling for the bidder to submit the Actuarial Value of its plans, the Agency substituted its own calculation of Actuarial Value for Celtic and concluded that it could not make its own determination of Actuarial Value of Celtic's plans. Rejecting the Actuarial Value entered by Celtic in accordance with the specific instructions of the RFP was arbitrary and capricious in violation of Chapter 120, §3(2)(C) and constitutes an irregularity creating fundamental unfairness in violation of Chapter 120, §3(2)(B).**

**CONCLUSION OF LAW #4**

**The disconnect between what the RFP required and what the Agency actually wanted is an irregularity in the procurement process creating a fundamental unfairness, especially in the context of a single bidder against an incumbent where the incumbent, by virtue of being the incumbent, had a better basis to infer what the Agency wanted outside of the specific requirements of the RFP.**

**CONCLUSION OF LAW #5**

**Even if it was reasonable of the Agency, notwithstanding the language of the RFP, to expect Celtic to submit the data that would enable the Agency to do its own calculation of the AV, it was arbitrary and capricious of the Agency to deem that Celtic did not**

**submit sufficient data. Celtic provided the required bid sheets, additional tables and databooks required by the RFP. It submitted the required Bid Form 2 Benefits Checklist that included deductible and co-pay information. It submitted benefit plans showing calendar year deductibles, calendar year out-of-pocket limits and coinsurance for its Alternate Plan, and it submitted an actuarial memorandum that showed details of the six alternate plans.**

**ORDER**

Based upon these Findings of Fact and Conclusions of Law, the Appeal Committee hereby invalidates the Agency's award of contract.

Dated: February \_\_\_\_, 2010

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Betty M. Lamoreau

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Richard B. Thompson

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Gilbert M. Bilodeau