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DEPARTMENT OF ADMINISTRATIVE & FINANCIAL SERVICES
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February 25, 2010

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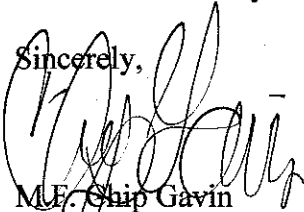
Re: Appeal of Award by the Dirigo Health Agency
Health Insurance Services, RFP #200909526

Dear Attorneys Mahoney, Witham and Laubenstein:

I am forwarding the Final Decision of the Appeal Panel in the above-referenced matter. The Panel validates the award for the reasons set forth in the attached decision.

This represents final agency action in this matter and as such may be eligible for judicial review. Any person aggrieved by this decision may appeal to Maine's Superior Court in the manner provided in 5 M.R.S.A. 1101, et seq, and M.R. Civ. P. 80C. A party must file a petition for review within thirty days after receipt of notice of the decision.

Sincerely,


M.F. Chip Gavin
Director, Bureau of General Services

cc: Mark Randlett, AAG
Karynlee Harrington, Dirigo Health Agency
Appeal Panelists

Attachment: Decision of the Appeal Panel

**MAINE DEPARTMENT OF ADMINISTRATIVE
AND FINANCIAL SERVICES
BUREAU OF GENERAL SERVICES**

In Re: Celtic Insurance Company)
Appeal of Award by Dirigo Health Agency for)
Health Insurance Services)
RFP #200909526)

Decision of Appeal Panel

INTRODUCTION AND BACKGROUND

This is an appeal by Celtic Insurance Company (“Celtic”) from a decision of the Dirigo Health Agency (Dirigo) to award a contract for Health Insurance services to Harvard Pilgrim Health Care (“Harvard”). The appeal is brought pursuant to 5 M.R.S. § 1825-E and Chapter 120 of the Rules of the Bureau of General Services of the Department of Administrative and Financial Services (“Rules”). Harvard timely requested and was granted intervenor status. The Bureau granted Celtic’s request for a hearing.

An Appeal Panel (“Panel”) was comprised of three members chosen from State service. An evidentiary hearing was held on February 8, 2010, at which testimony of witnesses and documentary evidence was presented. After a review of all the arguments and evidence presented by the parties, the Panel makes the following findings of fact.

FINDINGS OF FACT

On October 5, 2009, Dirigo issued a competitive Request for Proposals (“RFP”), the purpose of which was to obtain bids for fully insured health insurance proposals in conjunction with a state sponsored health insurance subsidy program. Bidders were required to submit two proposals: one “status quo” proposal that contained rates and benefits that met the current

DirigoChoice plan design; and an “alternate plan” that met a target revenue PMPM (per member per month) and which corresponded to a set of principles established by the Dirigo Board of Directors. The RFP included detailed specifications and bid sheets with specific instructions for the preparation of the proposals.

The RFP established the following weighted criteria for evaluating the bids: Cost – Status Quo (20 points); Cost – Alternative Plan (20 points); Administration (15 points) and Value – Alternative Plan (45 points). The scoring for Value – Alternative Plan was broken down into two scoring components: Actuarial Value (15 points); and Adherence to Principles (30 points). Adherence to Principles was further broken down into two scoring components: Network (10 points); and All Others (20 points). The scoring of the Actuarial Value (“AV”) is the crux of the issue in this appeal.

Actuarial Value (“AV”) is the cost of insurance coverage paid by the insurer compared to the cost paid by the insured, usually expressed as a percentage. For the purposes of this RFP, Dirigo specified that the AV for the Alternative Plan needed to be at least 65%. Scoring AV for the submitted bids was the responsibility of Ms. Bela Gorman, a health actuary retained by Dirigo.

A Bidder’s Conference was held on October 16, 2009. Ms. Gorman was present at the Bidder’s Conference as was available to answer questions. On October 22, 2009, Dirigo provided written responses to questions submitted by prospective bidders. Two (2) bids, one from Celtic and the other from Harvard, were received by the Division of Purchases on or before the November 6, 2009 deadline.

The RFP required the bidders to complete and submit Bid Form 2 – Benefits Checklist. Dirigo included this form in the RFP because it wanted to be able to do an “apples to apples”

comparison of the plans contained in the bid submissions. Although there is no part of Bid Form 2 that specifically asks for the identification of out of pocket (OOP) costs, the form requests that bidders describe any plan limitations. OOP is a plan limitation and was essential information for Ms. Gorman to independently test the AV and, thus, determine the true cost of Celtic's proposal.¹ In addition to lacking OOP, Celtic's proposal included plans that had identical deductibles but different AVs. Dirigo Exhibit 15, pages 4, 5 and 6. This created further confusion in that the AVs should have been the same for those plans, which contained the same plan design. Celtic did not submit a written explanation of the methodology it used in calculating AV with its initial bid submission.

Dirigo sent clarifying questions to Celtic, asking that it, inter alia, submit plan descriptions for the alternative plan proposals that included OOP structure, deductibles and co-insurance. Dirigo Exhibit 18. The clarifying questions also asked Celtic to supply an actuarial memorandum that supported the rate buildup quoted in the proposal. Celtic responded, supplying the requested information. However, Celtic's response created further confusion because it contained inconsistencies with Celtic's initial submission. For example, one summary of benefits (SOB) included in the response showed a \$1,200 deductible plan that Dirigo assumed corresponded with the initial bid sheet deductible of \$1,250 for small groups. Another SOB showed a \$1,750 deductible plan, which was not in the initial bid sheets. A third SOB showed a \$2,500 deductible plan that Dirigo assumed corresponded with its initial bid sheets. Finally,

¹ That AV would be independently tested by Dirigo as part of the proposal review was predictable. In fact, Dirigo's response to a question posed by prospective bidders indicated that the AV would be tested:

Q. Please confirm whether the minimum actuarial value to test is to be applied to each plan design or on an aggregate basis.

A. The minimum actuarial value to test will be on an aggregate basis.

Question and Response #4, Dirigo Exhibit 4. Moreover, Ms. Gorman provided undisputed testimony that it is standard practice in the industry for there to be an independent evaluation of AV in insurance bids.

Celtic did not submit a SOB for the \$5,000 deductible plan for small groups that was included in its initial submission. While it was still not clear exactly what was being offered, Ms. Gorman believed she could conduct an analysis of the AV in Celtic's proposal using the assumption that Celtic intended to offer the plan designs shown in the SOB's submitted in response to the clarifying questions.

However, Dirigo subsequently conducted a finalist interview with Celtic. On the basis of the interview, Ms. Gorman concluded that an assumption that Celtic intended to offer the plan designs shown in the SOB's submitted in response to the clarifying questions was wrong. As a result, Ms. Gorman could not determine what products Celtic was offering and was still unable to evaluate the AV of Celtic's proposal. Celtic was ultimately assigned 0 out of the 15 possible points for AV.

As a result of the review and scoring process, the evaluation team determined that Harvard was the best value bidder. Notice of the award decision was mailed on December 16, 2009.

GOVERNING LAW AND STANDARD OF REVIEW

The issue in this case is whether Celtic has met its burden of proving by clear and convincing evidence that Dirigo's award of the contract (1) was in violation of law, (2) contained irregularities that created a fundamental unfairness, or (3) was arbitrary or capricious. This standard is contained in the law at 5 M.R.S. §§ 1825-D and 1825-E and in the Bureau of General Services' Rule, Chapter 120 – Rules for Appeal of Contract and Grant Awards. The clear and convincing standard requires that the Panel be convinced that the truth of the assertions of the appeal are highly probable, as opposed to more probable than not. *Pine Tree Legal Assistance, Inc. v. Department of Human Services*, 655 A.2d 1260, 1264 (Me. 1995). The Panel may only

decide whether to validate or invalidate the contract award decision under appeal. *See*, 5 M.R.S. § 1825-E(3) and Chapter 120(4)(1) of the rules.

In determining whether an award is arbitrary or capricious, the Panel must not substitute its judgment for that of the review team. *International Paper Co. v. Board of Environmental Protection*, 1999 ME 135, ¶ 29, 737 A.2d 1047, 1054. There is a presumption that the agency's actions were not arbitrary or capricious. *Central Maine Power Co. v. Waterville Urban Renewal Authority*, 281 A.2d 233, 242 (Me. 1971).

DECISION

The Panel determines that Celtic has not met its burden of proving that any of the statutory criteria have been met so as to invalidate the contract award to Harvard.

There is no evidence of a violation of law in connection with Dirigo's award to Harvard in this RFP; and the panel finds that no such violation of law occurred. Further, under the circumstances of this case, the panel does not find the existence of any irregularity creating a fundamental unfairness or that the contract award by Dirigo was arbitrary or capricious.

The RFP was sufficiently detailed to enable bidders to prepare bids for submission. In addition to the instructions in the RFP, Dirigo held a bidder's conference and issued written answers to questions propounded by prospective bidders. In addition, Dirigo provided clarifying questions and conducted a finalist interview with Celtic. At no time did Celtic raise any question with Dirigo about required information or seek clarification with regard to benefit design or actuarial valuation. In any event, Celtic should have expected that Dirigo would conduct its own analysis of the actuarial values in Celtic's proposal. Testimony in this case shows that it is standard industry practice for contracting parties to test the actuarial values of insurance proposals in competitive bids; and Dirigo's written response to prospective bidders' questions

fairly suggested the Dirigo would test the actuarial values in its evaluation of the proposals. An independent evaluation of actuarial values by Dirigo was reasonable in order to understand what it would be buying under the proposals. It was not error for Dirigo to require bidders to submit information that would allow it to conduct its own analysis of the actuarial value of the insurance proposals in this RFP.

Further, Dirigo did not err in determining that Celtic failed to provide sufficient information for it to independently test the actuarial values of Celtic's proposal. Celtic failed to include out of pocket costs for the plans in its original proposal. The out of pocket costs was essential information for Dirigo to independently test actuarial value and, thus, determine the true cost of Celtic's proposal. While Bid Sheet 2 did not specifically provide that such costs should be identified, the bid sheet did ask for plan limitations; and it is commonly understood in the insurance industry that out of pocket costs is a plan limitation. Celtic should have known to include those costs in its original proposal. When Dirigo provided Celtic with clarifying questions to better understand its proposal, Celtic submitted information that contradicted with its original submission. Finally, information received from Celtic during its finalist interview caused Dirigo's actuary, Ms. Gorman, to conclude that there was insufficient information to determine the actuarial values of Celtic's proposal. Celtic did not exercise due diligence in preparing its proposal or in responding to Dirigo's request for clarifying information.

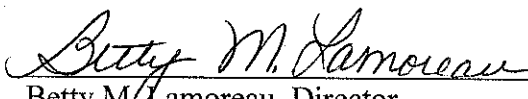
Nor was it error for Dirigo to give no points to Celtic for actuarial value. It was reasonable for Dirigo to determine that it could not achieve a reliable score in that category given the lack of adequate information. Therefore, there was a basis for Dirigo to assign a zero score to Celtic.

Finally, the panel does not find on the basis of this record that Harvard was any better situated to understand what was expected under the RFP by virtue of its existing contractual relationship with Dirigo. Rather, Celtic should have expected that Dirigo would conduct its own analysis of actuarial values; should have understood that Dirigo expected an identification of the out of pocket costs as part of the plan limitations; and should have exercised greater caution to submit supplemental clarifying information to Dirigo that didn't contain inconsistencies with its original submission. The panel does not find any error in this regard.


Accordingly, the Panel validates the contract award to Harvard.

APPEAL PANEL ON CONTRACT AWARD

Dated: 2/25/10


Betty M. Lamoreau, Director
Division of Purchases

Dated: 2/25/10


Richard B. Thompson, Director
Office of Information Technology

Dated: _____

Gilbert M. Bilodeau
Natural Resources Service Center

Finally, the panel does not find on the basis of this record that Harvard was any better situated to understand what was expected under the RFP by virtue of its existing contractual relationship with Dirigo. Rather, Celtic should have expected that Dirigo would conduct its own analysis of actuarial values; should have understood that Dirigo expected an identification of the out of pocket costs as part of the plan limitations; and should have exercised greater caution to submit supplemental clarifying information to Dirigo that didn't contain inconsistencies with its original submission. The panel does not find any error in this regard.

Accordingly, the Panel validates the contract award to Harvard.

APPEAL PANEL ON CONTRACT AWARD

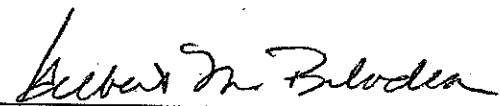
Dated: _____

Betty M. Lamoreau, Director
Division of Purchases

Dated: _____

Richard B. Thompson, Director
Office of Information Technology

Dated: 2/25/10



Gilbert M. Bilodeau
Natural Resources Service Center

STATEMENT OF APPEAL RIGHTS

This decision constitutes a final agency action. Any aggrieved party may appeal this decision by filing a petition for review in Superior Court for the County where one or more of the parties reside or have their principal place of business, where the agency has its principal office, or where activity which is the subject of this proceeding is located. Any such appeal must be filed within 30 days of the receipt of this decision.