

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
450 GOLDEN GATE AVENUE
SAN FRANCISCO, CALIFORNIA 94102

THELTON E. HENDERSON
SENIOR UNITED STATES DISTRICT JUDGE

January 25, 2007

Mr. Eric Flowers
Chief Executive Officer
Public Health Services Bureau, LLC
200 Webster Street, Suite 200
Oakland, California 94607

Dear Mr. Flowers:

The Court has received the motion filed by Public Health Services Bureau (PHSB) to Notify Court of Legal Issues Raised by Recent RFP and to Set Aside the Receiver's Award of the Contract for the Improvement and Management of the California Department of Corrections and Rehabilitation Adult Prison Pharmacy System. While the Court has ruled that PHSB does not have legal standing as a non-party to assert a motion in this action, the Court, in its general oversight capacity, has carefully reviewed your complaints regarding the Receiver's selection of Maxor, Inc. to provide pharmacy management services and provides the following response.

As an initial matter, the Court notes that PHSB fully recognizes the emergency circumstances and thus is not asking that the contract be made subject to California's state bidding requirements (which process can take up to two years). See PHSB's Reply at 5; Court's Oct. 3, 2005 Findings of Fact and Conclusions of Law at ¶ 77. As such, the Court need not address whether the Receiver is required in this instance to follow California state bidding requirements absent a waiver pursuant to this Court's February 14, 2006 Order. The Court notes, however, that even if a waiver were required in this instance that an application for such waiver would appear to have merit. The Receiver is thus directed, by copy of this letter, to address this issue to the Court on a *nunc pro tunc* basis.

Of course, even where it is appropriate to bypass the State's lengthy contracting process, the Receiver has an inherent obligation to conduct his operations in a fair and reasonable manner. PHSB complains, however, that, in this case, the Receiver wholly

ignore[d] notions of fundamental fairness.” *Id.* A review of the record before it, however, satisfies the Court that the Receiver acted in a fair and reasonable manner under the circumstances, and that the Receiver rejected PHSB’s bid “not because he ignored notions of fundamental fairness” but because PHSB was not the best qualified provider.

As PHSB acknowledged at the hearing on this matter, the Receiver is facing a crisis in the delivery of medical care in California prisons, and people are unnecessarily dying as a result. The pharmacy operations are an integral aspect of this dysfunction and require immediate attention. Thus, as PHSB also acknowledged, the Receiver was faced with having to balance the need to act quickly and fulfill his duty to remedy the unconstitutional care as soon as possible against the general public interest favoring openness and process.

While arguments can be made over the exact balance struck by the Receiver, the Court concludes that the overall process chosen was reasonable under the circumstances and was not fundamentally unfair to PHSB. The Court has reached this conclusion after reviewing each of PHSB’s specific complaints.

1. Lack of advertisement of RFP

PHSB complains that the process was fundamentally unfair because the Receiver should have advertised the RFP in a major newspaper or the State Contract Register. The Receiver, however, determined that a more efficient way to obtain bids from companies with direct experience in managing prison pharmacy operations would be to identify such companies and solicit from them directly. Thus, the Receiver undertook an investigation to identify those vendors experienced in providing pharmacy management services in prisons and directly solicited RFPs from such vendors. After undertaking this process (which included research by the Receiver’s staff and review of vendor lists provided by the California Department of Corrections and Rehabilitation (“CDCR”) and the Department of General Services), the Receiver identified seven potential firms and solicited RFPs from all seven. PHSB fails to identify any vendor other than itself that the Receiver purportedly “missed.” Nor is there any indication that the Receiver was engaged in any nefarious effort to “hide the ball.” Any vendor not originally solicited who learned of the RFP was promptly provided the RFP.

The Court also notes that PHSB did not suffer any significant prejudice as a result of the Receiver’s decision not to advertise in a generic publication. PHSB learned of the RFP through an industry consultant only eight days after the RFP was sent out and was promptly provided a copy of the RFP.

The Court is satisfied that the Receiver’s decision not to advertise in a generic publication, and to instead seek a pool of qualified candidates through more targeted

means, was a reasonable approach under the circumstances and did not render the process fundamentally unfair to PHSB.

2. Failure to give PHSB adequate time to respond to the RFP

PHSB also contends that the 30-day time line for responding to the RFP was unreasonably short given the “complexity” of the RFP and that the Receiver should be required to provide additional time. As the Receiver emphasized, however, the RFP did not require bidders to develop complex plans. Rather, the purpose of the RFP was to determine which bidder had the best qualifications to implement the already developed “Road Map” for addressing the serious deficiencies in the pharmacy operations.

The Court also notes that, as a practical matter, PHSB did have additional time to present materials since PHSB was given an opportunity to interview on October 13, 2006, and applicants were permitted to supplement their written responses to the RFP at the interview. Nor has PHSB convincingly explained what additional information it would provide, if given more time, that would materially improve its proposal.

Given all of the above, and taking into account the urgency of the situation, the Court is not convinced that the failure to give PHSB additional time to respond to the RFP, beyond October 13, 2006, rendered the process fundamentally unfair to PHSB.

3. Failure to answer PHSB’s questions regarding the RFP

PHSB also complains that it requested that the Receiver answer certain questions regarding the CDCR pharmacy system and that the Receiver failed to do so. The questions PHSB refers to were submitted to the Receiver by an industry consultant, Dr. Robert Chan, on behalf of ScriptPRO Pharmacy Automation (“ScriptPRO”), not PHSB. *See* Goldman Dec. at ¶¶ 9-10 and Ex. 3. It is clear, moreover, that the questions would have imposed an extreme burden on the Receiver and the CDCR. The questions, which when broken down into their individual subparts, numbered almost 3,000 queries, sought very detailed information for each of 33 California state prisons, much of which was not available and would have required manual collection. “This would have taken weeks of staff time to accomplish, and there was no staff available to do so.” Goldman Dec. at ¶ 10. At the hearing PHSB agreed that obtaining information not already compiled would be oppressive. Equally important, PHSB fails to explain why the information sought was truly necessary to respond to the RFP.

Given all of the above, the Court is satisfied that the Receiver’s decision not to provide answers to the detailed questionnaire submitted by Dr. Chan was not unreasonable under the circumstances and did not render the process fundamentally

unfair to PHSB.

4. The Interview Committee's conclusion that PHSB was not qualified

PHSB's qualifications were evaluated by an interview committee consisting of (1) Dr. Peter Farber-Szekrenyi, Director of Correctional Health Care Services for the CDCR, (2) Narinder Singh, Director of Pharmacy for the Santa Clara County Health and Hospital System, and (3) Jared Goldman, an attorney for the Receiver overseeing the RFP process with experience in public sector health care delivery systems. Following the interviews, each panelist independently submitted a recommendation to the Receiver. The panelists unanimously recommended Maxor.

PHSB complains that its qualifications for the task were not fairly evaluated. This Court has no reason to doubt that PHSB is a well-respected pharmacy benefits administration organization. *See* PHSB's Special Mot. at 3; Flowers Dec. at ¶ 2 (PHSB is a pharmacy benefits administration organization). It is clear, however, and PHSB conceded this point at the hearing, that PHSB does not have expertise in the specific area sought by the Receiver: direct management of pharmacy operations inside prisons. As a member of the interview committee emphasized, "This is a particularly severe shortcoming" since managing pharmacy operations in a correctional context raises unique issues, including security. *See* Singh Dec. ¶ 5. Rather, PHSB's expertise lies with benefits administration – e.g., filling and processing prescriptions. *See* Flowers Reply Dec. at ¶ 4 ("In calendar year 2006, PHSB filled and processed over approximately 23,579 prescriptions for approximately 1,634 patients in 29 California county correctional facilities."). At the hearing PHSB said that it could "adapt" its services to the needs of the Receiver. Given the urgency of the situation, however, each member of the interview committee was fully justified in concluding that it better served the needs of the class members to utilize a company that did not need to "adapt" but already had expertise in providing the exact services required by the Receiver.

Notably, PHSB does not dispute that Maxor has substantial experience managing pharmacy operations in a correctional context. Accordingly, the Court is not persuaded that the fact that Maxor was awarded the contract in favor of PHSB indicates in any way that the process was fundamentally unfair to PHSB.

5. Maxor's access to CDCR information

Finally, PHSB argues that Maxor had access to information in preparing its RFP that PHSB did not because Maxor conducted an audit of the CDCR pharmacy system and prepared the Road Map which informed the scope of work for the RFP. Setting aside the contract and starting over, however, would not change this fact. Notably, PHSB does not

suggest that the Receiver should not have obtained an updated audit of CDCR pharmacy operations or that Maxor should be precluded from responding to the RFP. Indeed, precluding a company with extensive experience in pharmacy management in corrections from bidding on the RFP would only reduce competition and not be in the best interests of the State of California. Accordingly, this factor neither warrants setting aside the contract nor demonstrates that the process was fundamentally unfair.

Finally, the Court finds no support for PHSB's charge of "cronyism." *See* PHSB's Special Mot. at 6. There is nothing before the Court indicating that, prior to his appointment, the Receiver had any pre-existing contacts or relationship with Maxor or that Maxor obtained the contract for any reason other than its experience and qualifications.

The Court understands that PHSB is disappointed that it did not obtain the contract at issue. It may also be that "from the outside" it did not appear to PHSB that it received a fair process. However, once all the relevant facts are examined, it is clear that the Receiver's selection of Maxor was not fundamentally unfair to PHSB in any way. Rather, given the Receiver's need to balance exigent circumstances with an appropriate process, the Receiver undertook a reasonable process designed to obtain the most qualified firm for the task at hand on an expedited basis, and selected at the close of this process a firm far more qualified than PHSB. Accordingly, the Court declines PHSB's request that it require the Receiver to undertake the expense and time required to re-bid the contract.

Sincerely,

Thelton E. Henderson

cc: Robert Sillen, Receiver