

**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION**

CIGNA HEALTH AND LIFE INSURANCE)
COMPANY,)
Plaintiff,)
v.)
THE ILLINOIS DEPARTMENT OF CENTRAL)
MANAGEMENT SERVICES, a Public Body;)
MICHAEL M. HOFFMAN, Acting Director of)
the Illinois Department of Central Management)
Services; ELLEN H. DALEY, Illinois Chief)
Procurement Officer for General Services;)
ADAM ALSTOTT, Protest Review Officer.)
Defendants.)

No. _____

2017CH04291
CALENDAR/ROOM 14
TIME 00:00
Injunction

VERIFIED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiff, Cigna Health and Life Insurance Company ("Cigna"), by its attorneys, Hinshaw & Culbertson LLP, for its Complaint for Declaratory and Injunctive Relief against Defendants, alleges and states:

NATURE OF THIS ACTION

1. Cigna brings this action against Defendants Illinois Department of Central Management Services and its Acting Director, Michael M. Hoffman, (collectively "CMS") under § 11 of the Freedom of Information Act ("FOIA"), 5 ILCS § 140/11, to enjoin CMS from withholding certain public records as described herein and to order the production of those records.
2. The records at issue relate to a procurement by CMS for an administrator of CMS' self-insured medical benefit plans, a contract valued in excess of \$160,000,000.00.

3. Cigna was one of two offerors for the procurement, the other being Aetna Life Insurance Company ("Aetna").

4. After CMS posted notice of a recommendation to award the contract to Aetna, Cigna protested the proposed award pursuant to § 20-75 of the Illinois Procurement Code, 30 ILCS § 500/20-75, and the rules promulgated thereunder.

5. The Illinois Procurement Code mandates that CMS "make available for public inspection ... all ... documents relating to that particular contract." 30 ILCS § 500/20-155(c). In violation of this mandate, CMS has refused to produce the complete procurement file to Cigna, which has prevented Cigna from discovering all facts relevant to its protest. Specifically, CMS has withheld information showing the assumptions and methodology underlying key components of Aetna's proposal, including Aetna's provider network discount guarantee (RFP, § E.1.3), Aetna's repricing of claims for fiscal year 2014 (RFP, § E.1.5), and Aetna's reported discounts by provider type and zip code (RFP, § E.1.6).

6. Cigna believes that production of the withheld materials will yield further evidence that these critical features of Aetna's proposal were inconsistent with the specifications of the RFP. In particular, the State's plan designs cover services rendered by both in- and out-of-network medical providers, and they offer plan members access to a nationwide network of participating providers. Aetna's proposal, however, contemplates that a quarter of covered persons will be enrolled in an HMO-style plan (the Aetna Select ACO Plan) that covers only in-network services and that features a provider network confined to Northeastern Illinois. Based on this nonconforming plan design, Aetna projected provider network discounts and reductions in medical claims spend that will not actually be realized given the design of the State's plans.

7. The unrealistic provider network discounts in turn led CMS to recommend awarding the contract to Aetna although Aetna's quoted administrative fees were a significant 19.7% higher than Cigna's over the four-year contract term. In other words, CMS has proposed spending millions more in vendor fees in the hope that these increased costs will be offset by Aetna's projected provider network discounts, but those discounts are likely to prove chimerical because the State's plan designs offer both in- and out-of-network benefits and access to a nationwide provider network, while Aetna's projected discounts are based on an HMO-style plan design that offers neither.

8. Although CMS has not produced the complete procurement file as required, the procurement materials it has disclosed demonstrate that the proposal submitted by Aetna deviated from the RFP and that the proposed award to Aetna should accordingly be vacated. Cigna's existing protest demonstrates that Aetna's proposal was nonresponsive to the RFP criteria based on the material produced to date. Cigna, however, faces the risk of irreparable harm for which there is no adequate legal remedy because the Protest Review Office may decide the protest before Cigna has had the opportunity to review, and develop additional arguments based on, the withheld materials, which, as stated, will provide further evidence that Aetna's proposal did not conform to the RFP specifications.

9. As a result, the failure of CMS to turn over all procurement-related materials that are subject to disclosure has impaired Cigna's ability to show that Aetna's proposal deviated from the specifications in the RFP and that the proposed award to Aetna thus violates Illinois procurement law, which requires that proposals be evaluated in accordance with the "requirements set forth in the invitation for bids." 30 ILCS § 500/20-10(e); 44 Ill. Admin. Code § 1.2015(f)(3).

10. In this action, Cigna seeks production of the procurement-related materials that have been improperly withheld. Cigna also seeks to temporarily, preliminarily, and permanently enjoin officials of the State of Illinois from considering and adjudicating its protest and from finalizing the contract with Aetna until such time as the records at issue are produced to and analyzed by Cigna for purposes of its protest.

JURISDICTION AND VENUE

11. This Court has subject matter jurisdiction over the activities complained of herein pursuant to § 9 of Article VI of the Illinois Constitution and § 11(d) of FOIA ("The Circuit Court shall have jurisdiction to enjoin the public body from withholding public records and to order the production of public records improperly withheld from the person seeking access").

12. The State Lawsuit Immunity Act, 745 ILCS § 5/0.01 *et seq.*, does not deprive this Court of jurisdiction in that this suit seeks prospective relief designed to compel Defendants to act in accordance with their statutory duties and to prevent the taking of action in derogation of Cigna's rights.

13. Venue is appropriate in Cook County pursuant to § 11(b) of FOIA and § 2-102 and § 2-103 of the Code of Civil Procedure, 735 ILCS § 5/2-102, 2-103, in that CMS has a principal office in Cook County.

THE PARTIES

14. Cigna is in the business, *inter alia*, of providing health insurance and services related to health insurance plans. Cigna is the incumbent administrator of the State's self-insured medical benefit plans and has been for a period in excess of ten years.

15. The Illinois Department of Central Management Services is an agency of the State of Illinois created pursuant to § 5-15 of the Civil Administrative Code of Illinois, 20 ILCS § 5/5-15, and, as such, is a public body under § 2(a) of FOIA, 5 ILCS § 140/2(a). Among other things,

CMS has the statutory duty to provide health care benefits for specific public employees and their dependents, and the power to enter into contracts for the provision of such health care benefits. *See* 5 ILCS § 375/5.

16. Defendant Michael M. Hoffman ("Hoffman") is the Acting Director of the Department of Central Management Services and, as such, is the administrative head of that Department. 20 ILCS § 5/5-20. Among other things, he is charged with the duty of administering the provision of such health care benefits. 5 ILCS § 375/5. Hoffman is joined in that capacity.

17. Defendant Ellen M. Daley ("Daley") is the Chief Procurement Officer for General Services ("CPO") in the State of Illinois. As such, she has been given procurement authority for the procurement at issue. CMS' State Purchasing Officers act under the direction of the CPO. *See* 30 ILCS § 500/10-5. Daley is joined in that capacity.

18. Defendant Adam Alstott ("Alstott") is the Deputy General Counsel to the Illinois Executive Ethics Commission. On information and belief, Alstott has been named to be the Protest Review Officer regarding the procurement at issue. Alstott is joined in that capacity.

THE PROCUREMENT

19. On or about August 17, 2016, by Request for Proposal, IPB #22038660 ("RFP"), CMS solicited proposals for an organization to administer five of the State's self-insured medical plans ("the Plans"). A copy of the RFP is attached as Exhibit A.

20. The Plans provide medical benefits to various categories of public employees and their dependents.

21. The RFP required offerors to submit proposals to "[a]dminister benefits in accordance with the Plan Design[s] for each Plan." (RFP § D.2.31). The RFP referred to CMS' website, www.benefitschoice.il.gov, for the "current plan designs." (RFP, p. 1).

22. The Plan Designs cover both services by health care providers that are in a Plan's network and services by out-of-network providers.

23. Since each Plan affords enrollees with access to a nationwide network of health care providers, the RFP directed offerors to establish and maintain "a comprehensive nationwide provider network." (RFP § D.2.3.6).

24. In response to the RFP, both Cigna and Aetna submitted proposals by the due date, September 28, 2016. (RFP§ A.6.1).

25. After the review and rating of the two proposals by CMS and its consultant, The Segal Company, Inc., (*see* RFP, p. 4; §§ B.4 and B.5), CMS awarded the contract to Aetna and published the award on January 19, 2017. A copy of the Notice of Award is attached as Exhibit B.

26. CMS awarded the contract to Aetna because it "received the highest number of combined points assigned for Total Responsiveness and Total Price (consisting of provider discounts, claims re-pricing, administrative fees, provider network discount guarantees and implementation guarantees) (Notice of Award, p. 1).

CIGNA'S PROTEST

27. In accordance with the RFP and the Standard Procurement Rules, a rejected offeror may protest the award within fourteen days of the award's publication by submitting a written protest to the "Chief Procurement Office, Attn: Protest Review Office." (RFP § A.20; 30 ILCS § 500/20-75; 44 Ill.Admin.Code § 1.5550(c)(2)(B), and (C)(3)).

28. On February 2, 2017, *i.e.*, within fourteen days of the publication of the Notice of Award, Cigna submitted its Protest. A copy of the Protest is attached as Exhibit C.

29. Cigna identified the reasons for its protest as follows:

1. the Evaluation did not comply with the requirements of 44 Ill. Admin. Code § 1.2015, including the composition of the Evaluation Committee and the evaluation process;
2. the Evaluation Committee did not make a fair, accurate, or reasonable evaluation of the heavily-weighted "Provider Network and Contracting" factor set forth in the Responsiveness Elements of the solicitation and therefore violated the terms of the solicitation and/or 44 Ill. Admin. Code § 1.2015;
3. the Evaluation Committee did not make a fair, accurate, or reasonable evaluation of the Price factor of the solicitation and therefore violated the terms of the solicitation and/or 44 Ill. Admin. Code § 1.2015; and
4. the Evaluation Committee considered factors beyond the factors set forth in the solicitation and therefore violated the terms of the solicitation and/or 44 Ill. Admin. Code § 1.2015.

30. In its February 2 Protest, Cigna noted that it had "requested a copy of the procurement file and other relevant documents" from CMS, but that a response had not been received and that it would supplement the Protest upon receipt of the procurement file.

31. CMS produced two batches of records as described herein, but failed, *inter alia*, to produce the entire procurement file.

32. After several communications with the Protest Review Office, Alstott extended the time to submit a Supplemental Protest to the close of business on March 1, 2017.

33. On March 1, 2017, at around 3:00 p.m., CMS produced another 167 pages of documents. The entire procurement file, as statutorily defined, still had not been produced.

34. On March 1, 2017, Cigna submitted its Supplemental Protest, a copy of which (not including exhibits thereto) is attached as Exhibit D.

35. In the Supplemental Protest, Cigna noted that CMS had "refused to produce the complete procurement file to Cigna. This has prevented Cigna from discovering all facts relevant to its protest." (Supplemental Protest, p. 1).

36. Notwithstanding the incomplete production of the procurement file by CMS, Cigna identified several issues as the basis for its protest and reasons for disqualifying Aetna's proposal as nonresponsive to the RFP:

a. Aetna's proposal provided that 25% of enrollees would migrate to the Aetna Select ACO Plan [accountable care organization], which, contrary to existing Plan Designs, does not cover services by out-of-network providers;

b. the provider network under the Aetna Select ACO Plan is confined to Cook and the collar counties rather than a nationwide network;

c. Aetna's assumption of 25% migration to its Aetna Select ACO Plan resulted in projections of provider network discounts and reduced medical claims spend that will not be realized given the existing Plan Designs; and

d. Aetna's claimed provider network discount guarantee was merely "illustrative," rather than a true guarantee as required by the RFP. (*See* RFP §§ E.1.2.1, E.1.3; RFP, p. 79).

37. Due to the production of records by CMS two hours before the deadline for submission of the Supplemental Protest, on March 2, 2017, Alstott, as Protest Review Officer, authorized further supplementation by the close of business on March 7, 2017.

38. On March 7, 2017, Cigna filed a Second Supplemental Protest, a copy of which is attached as Exhibit E.

39. When the State uses competitive sealed proposals in a procurement, the award is made to the offeror "whose proposal is determined to be the most advantageous to the State, taking into consideration price and the *evaluation factors set forth in the request for proposals*. The contract file shall contain the basis on which the award is made." 30 ILCS § 500/20-15 (emphasis added). "The evaluation shall be based solely on the evaluation factors set forth in the RFP...." 44 Ill. Admin. Code § 1.2015(f)(3).

40. As part of any State procurement, the purchasing agency must maintain a procurement file:

... The procurement file shall contain the basis on which the award is made, all submitted bids and proposals, all evaluation materials, score sheets and all other documentation related to or prepared in conjunction with evaluation, negotiation, and the award process. The procurement file shall contain a written determination, signed by the chief procurement officer or State purchasing officer, setting forth the reasoning for the contract award decision. The procurement file shall not include trade secrets or other competitively sensitive, confidential, or proprietary information. The procurement file shall be open to public inspection within 7 calendar days following award of the contract.

30 ILCS § 500/20-155(c); *see also* 44 Ill. Admin. Code § 1.2080.

41. Notwithstanding the statutory requirements of a procurement file, the procurement rules purport to exempt additional information from the public procurement file:

All information ... *less information exempt from disclosure under the Freedom of Information Act* [5 ILCS 140] ... shall be prepared and available for inspection and copying....

44 Ill. Admin. Code § 1.2080(c)(9).

CIGNA'S FOIA REQUESTS AND THE RESPONSES

42. By letter dated January 25, 2017, to Kelly Weston, CMS' Freedom of Information Officer, Cigna submitted a FOIA request for "a complete copy of the procurement file for Self-Insured Medical Plan Administrator RFP 22038660" as well as twenty specific items, including

records relating to Aetna's financial guarantees, discounts, claims repricing, and administrative fees. That request, a copy of which is attached as Exhibit F, is referred to herein as "Request 1."

43. By email dated February 1, 2017, a copy of which is attached as Exhibit G, CMS extended the time to respond to Request 1 to February 8, 2017.

44. On February 2, 2017, Cigna submitted another FOIA request to CMS, referred to herein as "Request 2," demanding the production of "[a]ll documents and communications in the possession of The Segal Company, Inc. concerning RFP 22038660." A copy of Request 2 is attached as Exhibit H.

45. Also on February 2, 2017, Cigna submitted another FOIA request to CMS, referred to herein as "Request 3," demanding the production of "[a]ll scoring sheets of Cigna Health and Life Insurance Company in response to RFP for Self-Insured Medical Plan #2013-05-002." A copy of Request 3 is attached as Exhibit I.

46. Also on February 2, 2017, Cigna submitted another FOIA request to CMS, referred to herein as "Request 4," demanding the production of "[a]ll written communication, (including electronic and other written communication) concerning RFP 22038660 between or among any of the following: The State of Illinois Department of Central Management Services, any member of Evaluation Committee for the RFP, and The Segal Company, Inc." A copy of Request 4 is attached as Exhibit J.

47. By email dated February 8, 2017, CMS responded to Cigna's Request 1 by producing some records but withholding some of the portions of the procurement file, such as evaluator scoring documents as records protected under the deliberative process exemption (5 ILCS § 140/7(1)(f)) and records protected as trade secrets and confidential or proprietary

information (5 ILCS § 140/7(1)(g)). A copy of CMS response, referred to herein as "Response to Request 1," is attached as Exhibit K.

48. By email dated February 10, 2017, CMS responded to Cigna's Requests 2, 3, and 4, a copy of which is attached as Exhibit L and referred to herein as "Response to Requests 2, 3, and 4." Again, CMS produced certain records but withheld others because:

- a. the request was unduly burdensome requiring "the review and redaction of more than 1000 pages";
- b. evaluators' scoring sheets were exempt under the deliberative process exemption; and;
- c. CMS did not maintain any records of its consultant, The Segal Company, Inc.

49. By email dated February 16, 2017, Cigna replied to CMS' Response to Request 1, again demanding the production of evaluation material as well as material pertaining to Aetna's provider network discount guarantee (RFP, § E.1.3), Aetna's repricing of claims for fiscal year 2014 (RFP, § E.1.5), and Aetna's reported discounts by provider type and zip code (RFP, § E.1.6). A copy of that email is attached as Exhibit M.

50. In a letter to CMS dated February 21, 2017, Cigna, by its attorneys, Hinshaw & Culbertson LLP, reiterated Cigna's request for the procurement file for RFP 22038660, including scoring sheets and other evaluation material and records pertaining to the work of The Segal Company, Inc., on this RFP, noting that the public interest in assuring the propriety of the award of this contract outweighs any burden CMS had in producing the documents. In order to facilitate the production, Cigna narrowed the request by identifying specific documents to be produced. A copy of that letter is attached as Exhibit N.

51. On February 22, 2017, CMS supplemented its production, but continued to withhold all information required to be in the procurement file.

52. By letter dated February 24, 2017, CMS responded to the Hinshaw letter of February 10, 2017, again asserting, *inter alia*, that Aetna's pricing material was "confidential, proprietary and/or trade secret information." A copy of that letter is attached as Exhibit O.

53. By letter dated February 27, 2017, Cigna, by its attorneys, again requested the entire procurement file, noting that Cigna was "not asking for material that truly constitutes trade secret, protectable information," but for records showing that Aetna included a narrow network to arrive at its guarantees and repricing illustrations and conclusions. A copy of that letter is attached as Exhibit P.

54. By email dated March 1, 2017, CMS produced additional documents but withheld records showing that Aetna included the narrow network in its guarantee and repricing calculations, asserting that the information was a trade secret and confidential. A copy of that email is attached as Exhibit Q.

TRADE SECRETS AND OTHER PROPRIETARY INFORMATION

55. Although not defined in the Illinois Procurement Code, the General Assembly has defined the term "trade secret" in § 2 of Trade Secrets Act, 765 ILCS § 1065/2(d), as:

information, including but not limited to, technical or non-technical data, a formula, pattern, compilation, program, device, method, technique, drawing, process, financial data, or list of actual or potential customers or suppliers, that:

(1) is sufficiently secret to derive economic value, actual or potential, from not being generally known to other persons who can obtain economic value from its disclosure or use; and

(2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy or confidentiality.

56. Section 7(g) of FOIA, 5 ILCS § 140/7(g) exempts from disclosure trade secrets and commercial or financial information when disclosure of that information "would cause competitive harm to the person or business, and only insofar as the claim directly applies to the records requested."

COUNT I

(FOIA)

57. Cigna realleges and incorporates by reference paragraphs 1 through 56 of this Complaint as though fully set forth herein.

58. Records disclosing what network or networks used in calculating Aetna's financial guarantees and pricing conclusions do not constitute trade secrets or other confidential proprietary information under either § 2(d) of the Trade Secrets Act or § 7(g) of FOIA.

59. Cigna is not requesting data, formulae, compilations, programs, devices, methods, techniques, or processes used by Aetna in preparation of its proposal or calculating guarantees and pricing information.

60. Rather, Cigna has narrowed its request to the procurement file, as statutorily defined, and, specifically the portion of Aetna's proposal showing the inclusion of a narrow network, *viz.*, the Aetna ACO, in arriving at its guarantees and pricing determinations.

61. Despite Cigna's efforts to narrow the requests for information, CMS has refused and continues to refuse to produce the requested records.

62. CMS has violated § 20-155(b) of the Procurement Code relating to the public availability of the procurement file and FOIA by refusing to produce the requested records on the basis of inapplicable exemptions.

WHEREFORE, Cigna prays that this Court:

i. in accordance with § 11(f) of FOIA, 5 ILCS § 140/11(f), afford this case precedence on the Court's docket except as to causes the Court considers to be of greater importance, assign this case for hearing and trial at the earliest practicable date, and expedite this case in every way;

ii. in accordance with § 11(e) of FOIA, 5 ILCS § 140/11(e), order CMS to provide an index of the records which have been denied to Cigna;

iii. declare that CMS have violated § 20-155(b) of the Procurement Code and FOIA;

iv. order CMS to produce the procurement file, as statutorily defined;

v. declare that records showing the use of an ACO by Aetna in its proposal to RFP 22038660 are not trade secrets or other proprietary, privileged, or confidential commercial or financial information subject to withholding under § 7(b) of FOIA;

vi. enjoin CMS from withholding non-exempt public records under FOIA;

vii. order CMS to pay civil penalties for its willful and intentional violations;

viii. award Cigna reasonable attorneys' fees and costs; and

ix. award such other relief the court considers appropriate.

COUNT II

(INJUNCTION)

63. Cigna realleges and incorporates by reference the foregoing paragraphs as though fully set forth herein.

64. Cigna has a right to inspect the entire procurement file, as statutorily defined, including records showing that Aetna used its ACO in arriving at financial guarantees and pricing calculations.

65. Without those records, Cigna has been prevented from discovering all facts relevant to its protest.

66. Cigna is threatened with irreparable harm for which there is no adequate legal remedy because the Protest Review Office may decide the protest before Cigna has had the opportunity to review, and develop additional arguments based on, the withheld materials, which, as stated, will provide further evidence that Aetna's proposal did not conform to the RFP specifications.

67. As a result, the failure of CMS to turn over all procurement-related materials that are subject to disclosure has impaired Cigna's ability to show that Aetna's proposal deviated from the specifications in the RFP and that the proposed award to Aetna thus violates Illinois procurement law, which requires that proposals be evaluated in accordance with the "requirements set forth in the invitation for bids." 30 ILCS § 500/20-10(e); 44 Ill. Admin. Code § 1.2015(f)(3).

68. Considering the amount of money involved and the number of enrollees in the Plans, Cigna, the State of Illinois, the Plan's enrollees, the State taxpayers, and the public in general have a substantial interest in assuring that the award of the contract is made to the party with the most advantageous proposal to the State, in accordance with the evaluative criteria set forth in the RFP.

69. If Defendants determine Cigna's protest and finalize the contract with Aetna for the administration of the State's self-funded medical plans while Cigna has been denied the right to publicly available information that is necessary for Cigna to fully support that protest, Cigna will be irreparably harmed with no adequate remedy at law to address that harm.

70. Accordingly, the Court should issue a temporary restraining order and thereafter a preliminary injunction barring CMS and the Protest Review Office from deciding Cigna's protest until: (a) Cigna has been provided with the complete procurement file under the Procurement

Code, including information and documents showing the assumptions and methodology underlying key components of Aetna's proposal, including Aetna's provider network discount guarantee (RFP, § E.1.3), Aetna's repricing of claims for fiscal year 2014 (RFP, § E.1.5), and Aetna's reported discounts by provider type and zip code (RFP, § E.1.6); and (b) Cigna has been given an opportunity to submit a complete protest that is supported by the complete procurement file.

WHEREFORE, Cigna prays that this Court temporarily, preliminarily, and permanently enjoin Hoffman, Daley, Alstott, their successors, agents, servants, affiliates, employees, and all persons acting in concert with them from:

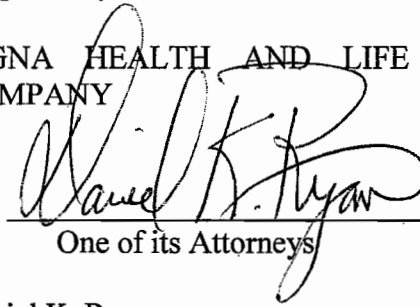
- i. considering, reviewing, determining, or acting upon in any manner Cigna's protest until such time as the records at issue herein are produced to Cigna;
- ii. setting a deadline for Cigna's final supplementation of its protest before fourteen days after the production of the records at issue; and
- iii. executing, entering, signing, or otherwise finalizing and implementing a contract with Aetna pursuant to RFP 22038660 until such time that Cigna's final supplementation to its protest is received and considered in accordance with the Illinois Procurement Code, the procurement rules, and the Court's Orders.

Cigna also prays that the Court grant its costs of suit and such other relief the court considers appropriate.

Respectfully submitted:

CIGNA HEALTH AND LIFE INSURANCE
COMPANY

By:



One of its Attorneys

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