

CAUSE NO. _____

Darryl S. Chapman

Plaintiff,

v.

City of Houston, Texas

Defendant.

§
§
§
§
§
§
§
§
§
§

IN THE DISTRICT COURT

OF HARRIS COUNTY, TEXAS

_____ JUDICIAL DISTRICT

**PLAINTIFF’S ORIGINAL PETITION AND
APPLICATION FOR TEMPORARY RESTRAINING ORDER,
TEMPORARY INJUNCTION, AND PERMANENT INJUNCTION**

Plaintiff Darryl S. Chapman files this Original Petition and Application for Temporary Restraining Order, Temporary Injunction, and Permanent Injunction against the City of Houston as follows:

I. Discovery Control Plan

1. Plaintiff intends to conduct discovery under Level 2 pursuant to Rule 190.3 of the Texas Rules of Civil Procedure.

II. Parties

2. Plaintiff Darryl S. Chapman (“Chapman”) is a property tax paying resident of the City of Houston, Texas.

3. Defendant City of Houston (the “City”) is a political subdivision of the State of Texas located in Harris County, Texas. The City may be served by serving its Mayor, Sylvester Turner, 901 Bagby St., Houston, Texas 78205.

III. Jurisdiction and Venue

4. This Court has jurisdiction pursuant to Sections 24.007(a) and 24.008 of the Texas Government Code, Section 252.061 of the Texas Local Government Code, and Section

65.021 of the Texas Civil Practice and Remedies Code. Plaintiff only seeks injunctive relief as specified herein.

5. Venue is proper in Harris County, Texas because it is the county in which all or a substantial part of the events or omissions giving rise to the claim occurred. Tex. Civ. Prac. & Rem. Code § 15.002.

IV. Introduction and Summary

6. The City has conducted an illegal procurement process to secure a third-party administrator for the City's medical plan, leading to an imminent vote on Wednesday, March 20, 2019 by the City Council to formally accept the results of the flawed process and award a contract to Cigna Health and Life Insurance Company ("CIGNA") under a Request for Proposal ("RFP"). The purpose of this action is to halt the award so that the illegalities of the procurement process can be brought to light and to prevent the illegal award of a City contract that is not in the best interest of the City.

7. Texas law requires that procurements of this type by local governments "be awarded to the lowest responsible bidder or to the bidder who provides goods or services at the best value for the municipality." Tex. Loc. Govt. Code Ann. § 252.043(a). If the local government fails to do so, any property tax paying resident of the municipality may file a suit to enjoin the contract and void any such contract. *Id.* § 252.061.

8. Although the objective in the RFP was to achieve the "best overall value" for the City, the City took a series of actions in connection with the RFP that prevented this result. First, on information and belief, the City improperly and illegally, and in violation of the RFP, sought and obtained a Best and Final Offer ("BAFO") from finalist CIGNA, while not seeking and obtaining one from another finalist, United Healthcare Services, Inc.

("United"). Second, the City's scoring of the proposals was not supported by the RFP, evaluation criteria, or the proposal submitted by the vendors. United, for example, was denied access to critical pricing data that was available to CIGNA, thereby handicapping a vendor in its ability to fairly compete. Finally, the City failed to properly perform an adequate "best overall value" analysis, particularly in light of the foregoing errors and omissions.

9. Because the City has not complied with procurement requirements, Texas law expressly allows a suit to enjoin the entry and/or performance of any such contract and render such contract void. The City intends to award the contract to CIGNA on Wednesday, March 20, 2019. Thus, a Temporary Restraining Order is necessary.

IV. Factual Background

A. The RFP at Issue.

10. On or about June 1, 2018, the City issued its "RFP # S67-T26617 - City of Houston Medical - TPA and Chronic Disease Management" (the "RFP"), seeking proposals for administrative services of a Third-Party Administrator ("TPA") for the City's medical plan, as well as services of a Chronic Disease Management ("CDM") vendor subcontracted with the TPA. The incumbent, CIGNA, currently administers medical services for the City. The City ultimately sought to negotiate a comprehensive TPA/CDM contract that would provide "competitive rates and promotes a long-term, collaborative relationship."

B. Procurement Irregularities.

11. After a lengthy process and submission of responsive technical and financial proposals, the City chose CIGNA and United as finalists. Each was invited to a finalist presentation. Ultimately, a recommendation was made to the City Council to approve an Ordinance authorizing an award of a five (5) year contract (with two (2), one-year options) to

CIGNA. On information and belief, the vendors were not treated the same or fairly in several respects, resulting in the erroneous selection of CIGNA for presentation to the City Council for award of a contract.

12. The most significant procurement illegality was the failure of the City to invite United to make a Best and Final Offer (“BAFO”), while allowing CIGNA to make a BAFO. A BAFO is a standard part of the procurement process and ensures that the City receives the most financially advantageous offer from vendors. CIGNA’s pre-BAFO pricing was approximately 5% **higher** than United’s initial offer. CIGNA was then invited to make a BAFO (while United was not), and CIGNA’s revised BAFO suddenly became lower than United’s offer (albeit by a mere 0.01%). This result strongly suggests that CIGNA was aware of United’s offer, which is clearly improper. In any event, the failure of the City to secure BAFOs from **both** finalists is a fatal error in the procurement process.

13. Another significant error that occurred was the City’s refusal to place vendors on an equal footing in making financial proposals by failing to release all claims and pricing related data. There are two components to pricing under the RFP – fee-for-service and capitation. Claim-specific data for pricing purposes is not available for capitated groups – only “encounter” data representing plan usage. Seventy-five (75%) of the City employee population is enrolled in the Kelsey Plan, a capitated plan. While the City provided claims data for 25% of its employees for the fee-for-service group to United, it refused to disclose encounter data for 75% of covered employees under the Kelsey Plan. However, CIGNA – as the incumbent – had access to this data.

14. By failing to release the encounter data, the City intentionally benefitted the incumbent, CIGNA, to the competitive disadvantage of United. There was no utilization data for

this large group given to United, which significantly advantaged CIGNA in making its final financial proposal. This information is not proprietary and includes no Personal Health Information (“PHI”); thus, the refusal to disclose the data to United was irrational, capricious, and designed to advantage – and did advantage – the incumbent, CIGNA.

15. Finally, the RFP required a 15% Minority & Women Business Enterprise (“MWBE”) participation rate. United’s offer exceeded the requirement at 20%; however, CIGNA’s offer included only 15.07%. While this number is just above the requirement, the City ignored the fact that CIGNA is not achieving the MWBE goal under their current contract. According to the City Council, CIGNA is currently achieving only 14.01% MWBE participation. CIGNA’s underperformance on this criteria speaks volumes, as opposed to its representations.

16. In summary, the City’s “best overall value” determination was improper because it was based on an irrational and undisclosed strategy of allowing CIGNA to submit a BAFO while not providing the same opportunity to United, and by refusing to disclose critical pricing-related data to United when such data was readily available to CIGNA. This led to improper scoring and evaluation of proposals, and not the fair and consistent treatment of vendors expected in a competitive procurement. If United had been provided the same data available to CIGNA, and allowed to submit a BAFO, it would have resulted in a better value to the taxpayers of the City by offering a significantly lower-priced, compliant proposal that met the City’s technical and financial needs. A correction to the scoring necessarily would have altered the City’s best value determination, particularly in light of CIGNA’s underperforming MWBE performance.

17. The identified procurement irregularities render the entire process fatally flawed, and the recommended award of a contract to CIGNA should not go forward.

V. Causes of Action

A. Application for Temporary Restraining Order

18. Plaintiff incorporates herein by reference the allegations in the foregoing paragraphs.

19. Pursuant to Section 252.061 of the Texas Local Government Code, and Section 65.011 of the Texas Civil Practice and Remedies Code, Plaintiff seeks the issuance of an immediate Temporary Restraining Order prohibiting the City of Houston from awarding the contract in connection with the RFP to CIGNA. “If the contract is made without compliance with this chapter, it is void and the performance of the contract, including the payment of any money under the contract, may be enjoined by: (1) any property tax paying resident of the municipality; or (2) a person who submitted a bid for a contract for which the competitive sealed bidding requirement applies, regardless of residency, if the contract is for the construction of public works.” Tex. Loc. Govt. Code Ann. § 252.061. Additionally, an injunction may be granted if “the applicant is entitled to a writ of injunction under the principles of equity and the statutes of this state relating to injunctions” Tex. Civ. Prac. & Rem. Code Ann. § 65.011(3). As shown above, Plaintiff has a probable right to relief on its claim for injunctive relief enjoining the City from performing a contract with CIGNA as a result of the RFP.

20. The City is required to evaluate proposals based **only** on the criteria set forth in the solicitation. See *Texas Hwy. Comm'n v. Texas Ass'n of Steel Importers, Inc.*, 372 S.W.2d 525, 527 (Tex. 1963) (“‘Competitive bidding’ requires due advertisement, giving opportunity to bid, and contemplates a bidding on the same undertaking upon each of the same material items covered by the contract; upon the same thing.”) (citation omitted). Here, the CIGNA proposal

was not evaluated in this way in comparison to the United proposal, resulting in an unfair and improper evaluation.

21. If Plaintiff's application is not granted, then Plaintiff will suffer a probable, imminent, irreparable injury because the City will award the contract to CIGNA on March 20, 2019 and could immediately begin performing the illegal and void contract. The harm to Plaintiff in the absence of a temporary restraining order greatly exceeds any harm that may be caused to Defendant if a temporary restraining order is entered since Defendant can simply remedy the procurement errors and award a valid contract. The City will be protected – not harmed – because a TRO will protect the integrity of the system and Texas law's mandate that a "best value" standard govern. Plaintiff has no adequate remedy at law because Plaintiff cannot be adequately compensated in damages nor does it even have an action for damages. This is the quintessential example of when an injunction should issue.

22. Plaintiff is requesting a hearing and will notify the City Attorney of the hearing time once it is obtained.

23. Plaintiff is ready and willing to post a bond or cash deposit in lieu thereof in favor of the City as the Court deems necessary, although Plaintiff contends that none is necessary under the circumstances.

B. Application for Temporary and Permanent Injunction

24. Plaintiff repeats and incorporates herein by reference the allegations in the foregoing paragraphs.

25. Plaintiff asks the Court to set its application for a temporary injunction for a hearing and, after the hearing, issue a temporary injunction against Defendant, temporarily enjoining the City from entering into or performing a contract with CIGNA as a result of the

RFP. Plaintiff further asks the Court to set its request for a permanent injunction for a full trial on the merits and, after the trial, issue a permanent injunction against the City, permanently enjoining it from entering into or performing a contract with CIGNA as a result of the RFP.

VII. Prayer

For the foregoing reasons, Plaintiff respectfully requests that Defendant be cited to appear and answer and that the following be granted:

1. Temporary Restraining Order preventing the City from entering into or performing any contract with CIGNA in connection with the RFP;
2. Temporary and permanent injunctions enjoining the City from entering into or performing any contract with CIGNA in connection with the RFP; and
3. All other relief, in law and in equity, to which Plaintiff may be entitled.

Respectfully submitted,

JACKSON WALKER L.L.P.

By: /s/ John K. Edwards

John K. Edwards
State Bar No. 24002040
jedwards@jw.com
William J. Stowe
State Bar No. 24075124
wstowe@jw.com
1401 McKinney Street
Suite 1900
Houston, Texas 77010
(713) 752-4200– Telephone
(713) 752-4221– Facsimile