

STATE OF TENNESSEE
OFFICE OF THE
ATTORNEY GENERAL
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Opinion No. 05-123

Procurement of Pharmacy Services for Low Income Individuals Disenrolled from TennCare

QUESTIONS

1. Does Tennessee law permit the procurement of a contract for pharmacy services for low income persons disenrolled from TennCare without employing the Request for Proposal process?
2. Do the terms of the current contract to provide pharmacy services to such low income persons violate the “any willing provider” statute, Tenn. Code Ann. § 56-7-2359?

OPINIONS

1. Yes.
2. No.

ANALYSIS

Your questions concern a contract recently executed between the Department of Finance and Administration and Express Scripts, Inc. This one (1) year contract requires Express Scripts, Inc., to administer a drug discount program, a patient pharmacy assistance program, and to provide other short-term pharmacy services for those low-income Tennesseans who are subject to disenrollment from TennCare. These programs were authorized by 2005 Public Laws, Ch. 474 (Senate Bill 2300), which was enacted, in part, to “facilitate the expansion and augmentation of a health care safety net in the State of Tennessee.” “The health care safety net provides medical assistance to individuals in need of medical care who are uninsured and who lack financial resources to secure medical care.”¹ This contract was executed without employing the “Request for Proposal” procurement process.

1. Tennessee procurement rules do not require that the Request for Proposal process be employed for every state contract. Department of Finance and Administration (F&A) Rule 0620-3-3-.03(1)(c) identifies four different (4) procurement processes that may be employed in state contracting: (1) the Request for Proposal process, (2) the Competitive Negotiation, (3) the Non-

¹2005 Public Laws, Ch. 474, Section 1.

Competitive Negotiation, and (4) an Alternative Competitive Procurement Method. According to information provided to this Office by the Department of Finance and Administration, the Express Scripts, Inc., contract was procured through Non-Competitive Negotiation.²

Procurement through the Non-Competitive Negotiation method is governed by F&A Rule 0620-3-3-.03(5). This rule requires the Commissioner of F&A to determine that at least one of the following conditions are true before permitting Non-Competitive Negotiation: (1) there is only one uniquely qualified service provider capable of performing the needed service; (2) the selected service provider is a state agency or any political subdivision of the state of Tennessee, or any instrumentality of government created by either a political subdivision of Tennessee or by an act of the General Assembly; (3) the selected service provider is an entity of the federal government; (4) the use of Non-Competitive Negotiation is in the best interests of the state; or (5) the total cost of the services for which the contract will be written does not exceed \$5000 or another amount which may be established, in writing, by the Commissioner of F&A and approved by the Comptroller of the Treasury.³

In addition, before beginning Non-Competitive Negotiation, the head of the procuring agency is required to justify this method of procurement in writing and request and obtain the approval of the Commissioner of F&A. This request must specify details such as the service provider with whom the agency proposes to negotiate, the justification for employing the Non-Competitive Negotiation process, and the contract duration.⁴ If the request for approval is granted, the procuring agency is required to proceed with negotiating the best possible contract terms and price with the service provider, reduce the contract to writing, and commence the contract approval process.⁵ By signing the contract, the head of the procuring agency indicates and confirms his or her determination that the contract price resulting from the non-competitive negotiations is fair and reasonable.⁶ Finally, the procuring agency is required to document the Non-Competitive Negotiation process,⁷ and the Department of F&A is required to file approved requests to employ Non-Competitive Negotiation to procure services, and the reasons therefor, with the Comptroller of the Treasury.⁸ Based upon information provided by the Department of F&A, it appears that the

²This opinion letter will not address factual issues concerning whether the various regulatory requirements for Non-Competitive Negotiation have been satisfied in the specific instance of the Express Scripts, Inc., contract, insofar as other State agencies are responsible for auditing and overseeing such matters.

³F&A Rule 0620-3-3-.03(5)(a) 1 through 5.

⁴F&A Rule 0620-3-3-.03(5)(b)1 (i) through (vii). Under some narrowly defined circumstances, the request for approval for Non-Competitive Negotiation is not required. F&A Rule 0620-3-3-.03(5)(b)2.

⁵F&A Rule 0620-3-3-.03(5)(c).

⁶F&A Rule 0620-3-3-.03(5)(d).

⁷F&A Rule 0620-3-3-.03(5)(e).

⁸F&A Rule 0620-3-3-.03(5)(f).

Commissioner of F&A determined that one or more of the prerequisites listed in F&A Rule 0620-3-3-03(t) is satisfied with respect to Express Scripts, Inc., contract; accordingly, the State was authorized to utilize the Non-Competitive Negotiation process in connection with the contract.

2. The “any willing provider” statute, Tenn. Code Ann. § 56-7-2359, is not applicable to the recently executed contract between F&A and Express Scripts, Inc., because the statute only applies to health insurance issuers and managed health insurance issuers. The “any willing provider” statute states, in relevant part, as follows:

(a) No *health insurance issuer and no managed health insurance issuer* may:

(1) Deny any licensed pharmacy or licensed pharmacist the right to participate as a participating provider *in any policy, contract or plan* on the same terms and conditions as are offered to any other provider of pharmacy services under *the policy, contract or plan*; provided, that nothing herein shall prohibit a managed health insurance issuer or health insurance issuer from establishing rates or fees that may be higher in non-urban areas, or in specific instances where a *managed health insurance issuer or health insurance issuer* determines it necessary to contract with a particular provider in order to meet network adequacy standards or patient care needs.

(2) Prevent any person who is a party to or beneficiary of *any policy, contract or plan* from selecting a licensed pharmacy of such person’s choice to furnish the pharmaceutical services offered under any contract, policy or plan; provided the pharmacy is a participating provider *under the same terms and conditions of the contract, policy or plan* as those offered any other provider of pharmacy services;

* * * * *

(c) [. . .] Nothing contained in this section shall be construed or interpreted as applying to the TennCare programs administered pursuant to the waivers approved by the United States department of health and human services.

(d) The term “managed care health insurance issuer” has the same meaning as such term is defined in § 56-32-228(a).

* * * * *

(Emphasis added).

In a previous opinion letter, this Office has opined that the “any willing provider” statute does not apply to the state insurance committees administering the state health plan for state, local, and local education employees.⁹ In that opinion, the applicability portions of Tenn. Code Ann. § 56-7-2359 were thoroughly examined to determine the legislative intent regarding to whom the statute was intended to apply. The previous opinion concluded that, as used in the “any willing provider” statute, the terms “health insurance issuer,” and “managed care health insurance issuer” could not be reasonably interpreted to include the state insurance committees that administer the state, local, and local education employees’ health plan. In the instant case, the analysis set forth in 2004 Op. Tenn. Att’y Gen. 001 leads likewise to the conclusion that these terms employed in the “any willing provider” statute do not include the programs administered by Express Scripts, Inc., pursuant to its contract with the Department of F&A.

The Express Scripts, Inc., contract requires the contractor to administer three (3) programs of services to be provided to those individuals who are no longer eligible for TennCare:

- (1) The Rx Outreach Patient Assistance Program is designed to provide free generic medicines from a list of 55 FDA-approved drugs. This program expires on December 31, 2005, except for those disenrollees identified by TennCare as “severely and persistently mentally ill,” for whom the program will remain in place until June 30, 2006).
- (2) The Additional Pharmacy Assistance program is designed to assist disenrollees in accessing patient assistance programs already offered by many major pharmaceutical manufacturers.
- (3) The Express Access Discount Card program is designed to provides savings of up to 10% on name-brand prescription medicines, and up to 50% on generic medicines purchased at participating pharmacies. TennCare disenrollees will receive a drug discount card in the mail, and this program will remain in place until June 30, 2006.

Without repeating the lengthy analysis of our previous opinion letter, in light of the short-term programs to be administered under the contract, Express Scripts, Inc., cannot be characterized as either a “health insurance issuer” or a “managed care health insurance issuer.”

Tenn. Code Ann. § 56-7-2802(16) defines “health insurance issuer” as follows:

“Health insurance issuer” means an entity subject to the insurance laws of this state, or subject to the jurisdiction of the commissioner, that contracts or offers to contract to provide health insurance coverage, including but not limited to, an insurance company, a health maintenance organization and a nonprofit hospital and

⁹Op. Tenn. Att’y Gen. 2004-001 (January 6, 2004)(copy attached).

medical service corporation. “Health insurance issuer” does not include a group health plan [.]

Tenn. Code Ann. § 56-32-228(a) defines “managed health insurance issuer” as follows:

(a) As used in this section [“managed health insurance issuer”] means an entity that:

(1) Offers health insurance coverage or benefits under a contract that restricts reimbursement for covered services to a defined network of providers; and

(2) Is regulated under this title or is an entity that accepts the financial risks associated with the provision of health care services by persons who do not own or control, or who are not employed by, such entity.

The services performed by Express Scripts, Inc. under the contract do not require that company to serve as either a “health insurance issuer” or a “managed health insurance issuer.” Accordingly, the “any willing provider” statute, which by its own terms applies only to such entities, has no application to the Express Scripts, Inc., contract. The contract therefore does not violate the statute.

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