



MICHAEL P. STARKOWSKI
Commissioner

STATE OF CONNECTICUT
DEPARTMENT OF SOCIAL SERVICES
OFFICE OF THE COMMISSIONER

TELEPHONE
(860) 424-5053

TDD/TTY
1-800-842-4524

FAX
(860) 424-5057

EMAIL
commis.dss@ct.gov

February 8, 2008

The Honorable Richard Blumenthal
Attorney General
Office of the Attorney General
55 Elm Street
Hartford, Connecticut 06106

Re: Counsel to Seek Relief Against Illegal and Improper Actions [*Tortious Interference*] by Legal Services Attorneys Regarding State Procurement Process

Dear Attorney General Blumenthal:

The purpose of this letter is to request that you authorize the Department of Social Services (the "Department") to secure outside counsel to represent the Department and take appropriate legal action in response to illegal, improper and egregious activity by legal services attorneys against a State of Connecticut procurement and contracting process. I understand that as the state's Chief Legal Officer, you may authorize the appointment of outside counsel for state agencies, as has been done on past occasions, when your Office cannot directly represent them. I would ask for your direct representation, except that, with all due respect, you have previously collaborated with one of the legal services attorneys in question in legislative testimony and several litigation matters.

The following set of facts and analysis describes the current situation. It involves a clear, repugnant and intolerable attempt by legal services attorneys to interfere with and subvert the integrity of a State of Connecticut procurement and contracting process.

The Department wishes to seek any and all available relief and penalties to prevent such further activity and remedy its potential effects. The Department's action is taken on behalf of more than 320,000 Department clients who are beneficiaries of the HUSKY Plan, as legislated by the Connecticut General Assembly; and on behalf of prospective clients who will benefit from the new Charter Oak Health Plan, including many who have already contacted the administration in hopes of being served, as also legislated by the General Assembly.

On Tuesday, February 5, 2008, I received a fax copy of a 10-page letter of that same date written by Sheldon V. Toubman of the New Haven Legal Assistance Association, Randi Faith Mezzy of Connecticut Legal Services and Jamey Bell of Greater Hartford Legal Aid, to Daniel J. Hilferty, President and CEO of the AmeriHealth Mercy Health Plan ("AmeriHealth"). On the fax cover sheet, it is written that "[f]ive additional

letters will be going out today,” indicating that this letter was being sent to the other five entities that had submitted Letters of Intent in response to a Request for Proposals (“RFP”) issued by the Department on January 3, 2008 concerning administration of Medicaid (HUSKY A), SCHIP (HUSKY B) and the new Charter Oak Health Plan, established pursuant to section 23 of Public Act 07-2 (June Special Session) to the Department concerning the above-referenced RFP. I note that you were copied on this letter as well.

Based on analysis by DSS attorneys, I believe that the letter from these legal services attorneys to the companies that have submitted these Letters of Intent to bid on a contract with the state constitutes tortious interference with the Department’s prospective contractual relations with these companies. This attempted intimidation of potential bidders, done with the obvious intention of interfering with the Department’s ability to enter into contracts with them, and the attempted tainting of the integrity of the State of Connecticut’s procurement process, must be stopped.

As you read the letter, you will note that the writers are intentionally and improperly seeking to interfere with the Department’s ability to contract with these entities. There is no question that, by referencing “protracted litigation and other public conflicts” that occurred in the past and warning that “a court challenge under 1396a(a)(19)” is “likely,” thereby resulting in the delay of implementation of Charter Oak and the HUSKY MCO contracts, the legal services attorneys are seeking to intimidate and threaten prospective bidders. In addition, their biased and sometimes inaccurate descriptions of the law and what the RFP requires are designed to convince these organizations that they would be making a huge mistake if they were to respond to this RFP and enter into this contract with the state. This is both illegal and inappropriate.

Connecticut law “has long recognized a cause of action for tortious interference with contract rights or other business relations.” Blake v. Levy, 191 Conn. 257, 260, 424 A.2d 52 (1983). If there is evidence that the defendant “was guilty of fraud, misrepresentation, *intimidation* or molestation . . . or that the defendant acted maliciously,” this will satisfy the requirement that the conduct as, in fact, tortious. Id. at 261 (quoting Kecko Piping v. Monroe, 172 Conn. 197, 201-202, 374 A.2d 179 (1977)) (emphasis added).

We understand that, in making the claim that the legal services attorneys acted improperly in intentionally interfering with the prospective contractual relation between the Department and any of these entities, it is the Department’s burden to establish that there was “some improper motive or improper means.” Daley v. Aetna Life and Casualty Co., 249 Conn. 766, 806, 734 A. 2d 112 (1999).

Based on my many conversations with Attorney Toubman about managed care in general, and this RFP in particular, it is clear to me that the motive behind this letter is improper. Attorney Toubman has expressed to me his desire to either delay indefinitely or thwart permanently the combined procurement of Charter Oak and reprocurement of the HUSKY program as managed care contracts. The letter was designed for these

purposes only, not, as it states, to apprise the companies of their responsibilities. In fact, I specifically informed the potential bidders about the state's insistence that, as a contractor with the Department in these programs, they would be subject to the provisions of the state Freedom of Information Act. Moreover, many of the potential bidders are contractors with other states in their Medicaid programs; accordingly, they are quite knowledgeable about the enhanced due process requirements and the medical necessity standards in the Medicaid program.

The means by which the legal services attorneys chose to interfere with the Department's ability to contract prospectively is also absolutely improper. "Litigation and the threat of litigation are powerful weapons. . . . The use of these weapons of inducement is ordinarily wrongful if the actor has no belief in the merit of the litigation or if, though having some belief in its merit, he nevertheless institutes or threatens to institute the litigation in bad faith, intending only to harass the third parties and not to bring his claim to definitive adjudication." Blake, 191 Conn. at 263 n.4. *See also* Restatement (Second), Torts §§ 766 (1979).

Although the legal services attorneys assert that they intend to initiate a court challenge against this procurement under 42 U.S.C. § 1396a(a)(19), it is hard to see how these attorneys actually believe in the merit of such litigation, given the fact that the overwhelming majority of circuits that have reviewed claims under this federal statute have concluded that there is no private right of action under it because the statute is too "vague and amorphous" to confer one. *See, e.g., Bruggeman v. Blagojevich*, 324 F. 3d 906, 911 (7th Cir. 2003) (section does not create any specific duty on the part of the states and does not confer an individual right enforceable by § 1983); Harris v. James, 127 F. 3d 993, 1010 (11th Cir. 1997) (citing Suter v. Artist M. 503 U.S. 347 (1992)); Bryson v. Shumway, 177 F. Supp. 2d 78 (D.N.H. 2001) ("[A]bsent any contrary precedent in any other circuit, this court concludes that plaintiffs have no private right of action under § 1396a(a)(19) because the statute is too 'vague and amorphous' to confer one, under the rule of Blessing, 520 U.S. at 340-41."), *rev'd on other grounds*, 308 F. 3d 79 (1st Cir. 2002).

Further evidence of the fact that the letter from legal services attorneys is designed to threaten potential bidders is their insinuation that the Department has somehow failed to provide them all of the information and that it is distorting the reality of what it will be like for them to contract with the Department for these programs. On December 4, 2007, I wrote a letter to all those entities that indicated interest in the RFP, specifically informing them of the requirement that they agree to very specific language concerning their compliance with the state's Freedom of Information Act. I attached the proposed contract language and asked them to respond in writing regarding whether this would affect their interest in the RFP. All of this information is on the Department's website. For the legal services attorneys to hint, in any way, that the Department has been anything but honest and forthright concerning what is expected of potential bidders for this RFP is disingenuous and in bad faith.

Moreover, these legal services attorneys know that the potential bidders on this contract have their own attorneys who thoroughly research the legal landscape that awaits them should they choose to seek to do business in a jurisdiction with which they are not familiar. There is no need for lawyers who have no relationship with these entities to take it upon themselves to be the protector of these organizations.

The underlying message in this letter is that potential bidders must be wary of a deceptive state agency that it believes is purposely withholding the truth, another way to intimidate bidders and discourage them from contracting with the Department for this project. This message is not only inaccurate, it is an outrageous action that can only be regarded as an attempt to sabotage the legal procurement process.

Outside interference with the state-sanctioned procurement process must not be tolerated. Bidders must not be subjected to threats and harassment, simply because they express interest in entering into a contract with the state. We have all worked very hard to eliminate any element of impropriety from the contracting process. To allow such letters to be sent to potential bidders taints this process and inhibits the state from conducting its business in an objective, ethical manner.

We need to take immediate appropriate legal action to enjoin any further inappropriate communications by these attorneys and preserve the propriety of the procurement and contracting process. Improving and safeguarding the integrity of the state's procurement and contracting processes has been a special hallmark of Connecticut government reform since 2004, when Governor Rell took office. I know that you have supported and participated in this priority, and I look forward to your immediate positive response and support of the Department in this matter. Thank you in advance, and best regards.

Sincerely,

A handwritten signature in black ink, appearing to read 'Michael P. Starkowski', with a long horizontal flourish extending to the right.

Michael P. Starkowski
Commissioner

c: The Hon. M. Jodi Rell, Governor
Robert L. Genuario, Secretary, Office of Policy and Management