IN THE CIRCUIT COURT FOR THE SEVENTH JUDICIAL CIRCUIT
SANGAMON COUNTY, ILLINOIS

HEALTH ALLIANCE MEDICAL	)	
PLANS, INC.	)	
and	)	
HUMANA HEALTH PLAN, Inc. and	)	
HUMANA INSURANCE COMPANY,	)	
	)	
Plaintiffs,	)	
v.	)	Cause Nos. 2011-MR-250
	)	and 2011-MR-259 consolidated
STATE OF ILLINOIS, ET AL.	)	
	)	
Defendants.	)	

ORDER REGARDING PLAINTIFFS' MOTION FOR STAY

OR TEMPORARY RESTRAINING ORDER

THIS CAUSE COMES FORWARD upon the Motions for Stay or Temporary Restraining Order filed herein by Plaintiffs Health Alliance Medical Plans, Inc. (Health Alliance) and Humana Health Plan, Inc. and Humana Insurance Company (Humana). Plaintiffs have filed separate complaints seeking legal and equitable relief from the decision by the Department of Healthcare and Family Services (DHFS) to award contracts for group health insurance plans to other named defendants and to reject Plaintiffs' bids for such contracts.

This Court ordered these cases consolidated for all future proceedings. Notice of Plaintiffs' motions was given to all party defendants, and hearings were held on such motions on June 8 and 10, 2011, at which all parties present were allowed to present written and oral arguments. Exhibits 1 through 29 of Health Alliance were incorporated by reference in its complaint and considered by the court. Given the nature of this proceeding and the issues raised, no witness testimony was offered at either hearing. Plaintiffs submitted memoranda of law in support of their motion and the Illinois Attorney General, representing the State of Illinois departments and officials named as defendants ("governmental defendants") filed a memorandum of law in opposition thereto. Defendants HEALTHLINK HMO, Inc. and PERSONALCARE INSURANCE OF ILLINOIS, Inc. also filed briefs in opposition to Plaintiffs' motions.

Background

This case involves various entities of state government and health insurance vendors involved in the provision of health benefits to (primarily) state employees and their families pursuant to the State Employees Group Insurance Act of 1971, 5 ILCS 375/1, et seq. (Group Insurance Act). Under the provisions of this Act, the Defendants Central Management Agency (CMS) and DHFS are charged with administering the State Employees Group Insurance Program (State Insurance Program).

Broadly speaking, there are two types of health benefit plans offered to employees: self-insurance plans in which the State pays claims (which are administered by a vendor) and assumes the risk of insuring those employees; and "fully-insured" plans, in which private vendors not only administer the plan but assume the risk, for which they are paid by the State at a contracted unit rate. Open Access Plans (OAPs) are examples of self-insured plans, and a Health Maintenance Organization (HMO) offers plans which are fully-insured.

Under the current State Insurance Program, three vendors provide self-insurance plans and five vendors provide fully-insured plans. Both Plaintiffs currently provide each type of plan. All eight of these plans are contracted to expire on June 30, 2011. The ninth and remaining plan, Quality Care Health Plan, is a self-insurance plan administered by a separate vendor under a contract which does not expire until 2012.

In September and October, 2010, DHFS issued Requests for Proposals (RFPs) for vendors to administer self-insured OAPs and fully-insured HMO plans. Both Plaintiffs bid on each type of plan. On

April 6, 2011, DHFS published its notice of intent to award contracts for both type of plans; Plaintiffs were among the unsuccessful bidders. They filed protests of the bidding process and results which were considered pursuant to the Illinois Administrative Code and denied.

On May 25, 2011, the Commission on Government Forecasting and Accountability (COGFA) approved, by a vote of 8-3, a motion that COGFA "does not give advice and consent to the continuation of self-insurance, except that all previously approved self-insurance components shall be continued until the expiration of the applicable contracts" (Health Alliance Exhibit No. 27). It is undisputed however that DHFS maintains its intent to award the contracts for both types of insurance plans as announced on April 6, 2011. This Court is advised that those contracts have yet to be signed.

Request for Administrative Stay – OAP Contracts

Section 15(h) of the State Insurance Act, 5 ILCS 375/15(h) states: "Any final order, decision or other determination made, issued or executed by the Director under the provisions of this Act whereby any contractor or person is aggrieved shall be subject to review in accordance with the provisions of the Administrative Review Law . . . [which] shall apply to and govern all proceedings for the judicial review of final administrative decisions of the Director." This Court finds that the decisions of the Director and DHFS in this case to award self-insurance contracts and deny the protests of Plaintiffs are final decisions within the purview of Section 15(h). Thus, the Plaintiffs have standing to contest the award of the OAP contracts.

The underlying Complaints herein both contain counts requesting administrative review of the decision of the DHFS Director to award the self-insured OAP contracts to the successful bidders.

Section 3-111 of the Administrative Review Law, 735 ILCS 5/3-111(a)(1) authorizes this Court to stay the decision of the DHFS with regard to self-insurance contracts upon "good cause shown." That section requires the Plaintiffs to establish "(i) that an immediate stay is required in order to preserve the status quo without endangering the public, (ii) that it is not contrary to public policy, and (iii) that there exists a reasonable likelihood of success on the merits." The "good cause" standard does not necessitate a showing of traditional equitable requirements sufficient to support an injunction but may be

established by the need to preserve the status quo and "at least a fair question as to the likelihood of success on the merits." Markert v. Ryan, 247 Ill. App. 3d 915, 617 N.E.2d 1373 (4th Dist. 1993).

The action of COGFA on May 25, 2011, in deciding to refuse advice and consent for DHFS to continue the award of self-insurance contracts provides more than sufficient basis for predicting success on the merits. COFGA is charged by law with overseeing the administration of the State Insurance Program. Additionally, Section 6.2 of the Group Insurance Act requires that DHFS proceed "with the advice and consent" of COGFA if it determines to offer self-insurance plans "in whole or in part."

Prior to its ruling on May 25, 2011, COFGA sought the opinion of the Illinois Attorney General as to the extent of its authority under Section 6.2. The Attorney General responded by opinion letter dated May 18, 2011 (Health Alliance Exhibit 26), which clearly supports the position of the Plaintiffs that the determination by DHFS to proceed after May 25, 2011, with the award of self-insurance contracts violates Section 6.2.

In this proceeding, the Attorney General notes, as was discussed in the May 18, 2011 opinion letter, that COGFA is authorized only to approve or disapprove the policy decision to offer self-insurance plans; COGFA does not have authority to approve or disapprove individual plans. It is true that, given the arguably unfortunate timing of COGFA's action, the consequence of that ruling was to invalidate those self-insurance plans which DHFS had already awarded. Nevertheless, the COGFA decision is a declaration of policy to prohibit DHFS from awarding any new self-insurance plans, not just the awards made by DHFS on April 6, 2011.

The Attorney General points out that COGFA's ruling provides that "all previously approved self-insurance components shall be continued until the expiration of the applicable *contracts*"(emphasis supplied). Counsel urges an interpretation that this exception includes the contracts awarded on April 6, 2011. However, when the preamble and approved motion are read together, it is clear that the exception refers only to the aforementioned Quality Care Health Plan which expires in 2012. Any ambiguity arising from the plural use of "contracts" is completely dispelled by the audio record of COFGA's proceedings leading up to the 8-3 vote to discontinue self-insurance. (A link to the audio recording of the May 25, 2011 meeting is available at COGFA's website.) This Court considered a summary of those debates in an effort to confirm the legislative intent of COGFA's ruling, and has taken judicial notice of the May 25, 2011 ruling and the recorded deliberations surrounding that decision.

The status quo issue

The Plaintiffs assert that a stay of the DHFS decision should preserve the status quo by extending the currently contracted self-insured and fully-insured plans, including their own, for an indefinite period until this litigation is concluded. However, given the circumstances of this case, this Court can only preserve the status quo ante the May 25, 2011 decision by COGFA. That status quo included the fact that, as of June 30, 2011, these Plaintiffs' current contracts would expire. If this Court were to order the current self-insured/OAP contracts of Plaintiffs to extend beyond June 30, 2011, it would be violating the ruling which Plaintiffs seek to enforce. Moreover, there is nothing about the determination that the prospective self-insured plans approved by DHFS were effectively declared a nullity on May 25, 2011, that equitably entitles the Plaintiffs to an extension of their current fully insured/HMO contracts.

Plaintiffs are in essence requesting that this Court reform their current insurance contracts with the State by extending them beyond their termination date. However, equity cannot be used to add a provision to a contract that was never agreed upon. Klemp v. Hergott Group, Inc., 267 Ill. App. 3d 574, 641 N.E.2d 957 (1st Dist. 1994). Additionally, as the Attorney General points out, the Illinois Procurement Code prohibits contracts exceeding ten years in duration. 30 ILCS 500/20-60.

Humana Request for Stay Regarding HMO Bid

Humana has also filed a count for administrative review of the DHFS decision to reject its bid for an HMO contract. This Court hereby grants leave of Humana to file this date, over the objection of the Attorney General, its supplemental memorandum of law. The Court has considered all arguments therein. Consideration of the complaint and the arguments made by Humana does not support a finding that Humana has raised a fair question regarding its likelihood of success on that count sufficient to support a stay. Obviously, there is no issue regarding the continued viability of the HMO contracts awarded to the successful bidders.

Many of Humana's claims relating to the award of the HMO contracts relate to policy and economic considerations which Humana claims made its bid superior to the other bids. These claims essentially invite the Court to substitute its judgment for that of DHFS. The record herein does not support the possibility that this Court will in the future accept that invitation. Therefore, the request for stay of the DHFS decision to award HMO contracts is DENIED.

Request for Temporary Restraining Order

The Plaintiffs bear a higher burden of persuasion with regard to this request. They must show that they: (1) possess a certain and clearly ascertained right which needs protection; (2) will suffer irreparable harm without the protection of injunctive relief; (3) have no adequate remedy at law; and (4) are likely to be successful on the merits.

The Plaintiffs' asserted standing as corporate citizens and/or taxpayers is certainly more tenuous than their standing to seek administrative review. The Plaintiffs do have other remedies at law, some of which are asserted in their complaints and include administrative review. They are likely to succeed, but in this Court's view only on the claim regarding the viability of the prospective self-insurance contracts.

This Court finds that, regardless of the sufficiency of the above elements, the request for injunctive relief must fail because Plaintiffs are unable to show that they will suffer irreparable harm (an element that is not required for an administrative stay). The Complaints and exhibits do not establish that, but for some defect in the bidding process which can be proven and remedied during the injunctive period, the Plaintiffs would be designated by DHFS or declared by this Court to be successful bidders. See Keefe-Shea Joint Venture v. City of Evanston, 332 Ill. App. 3d 163, 773 N.E.2d 1155 (1st Dist. 2002). The asserted harm of lost revenues, business reputation, ability to retain network providers, i.e. business losses, are entirely too speculative to be considered irreparable or to support injunctive relief.

Further, to repeat: to the extent that the Plaintiffs are requesting that their self-insured plan contracts be extended to preserve the status quo, this Court observes that any such extension would violate the very law, expressed in the COGFA decision, which Plaintiffs seek to uphold.

Conclusion

This Court recognizes that the administrative stay herein will, without further action by DHFS or especially COGFA, result in significant disruption in the benefits enrollment period for participants in the State Insurance Plan (currently set to expire on June 17, 2011), and ultimately to the timely and orderly administration of that Plan and the benefits it provides. Such disruption, while highly regrettable, is unavoidable given the time frame presented by the circumstances of this case and by COGFA's action at the eleventh hour of the bidding process.

IT IS HEREBY ORDERED that the STATE OF ILLINOIS, Department of Healthcare and Family Services, and JULIE HAMOS, in her official capacity as Director of the Illinois Department of Healthcare and Family Services stay any further action in awarding or signing the self-insurance contracts, also known as OAP contracts, awarded on April 6, 2011, pending the ultimate determination of Plaintiffs' action herein for administrative review or until further Order of the Court. All other requests for injunctive or temporary relief are denied.

ENTER:_____ _____

Brian T. Otwell, Associate Judge