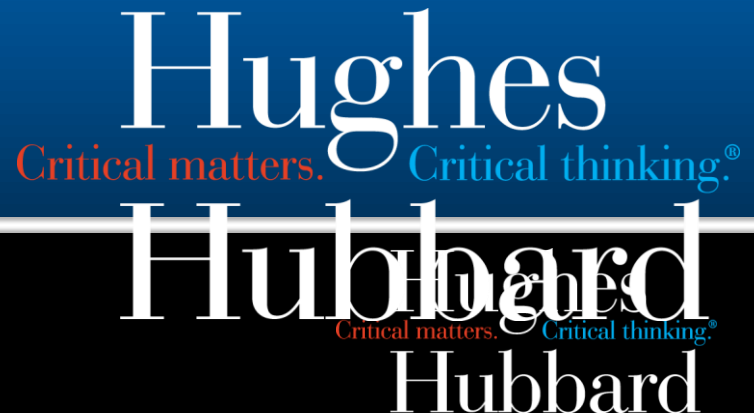


The RFP Process and Benefit Plans: Considerations and Best Practices

WEB – NY Chapter

February 18, 2016



Overview

- Background principles and applicable law
- The RFP Process – beginning, middle and end
 - Selected considerations for the RFP process
- The RFP Process and Negotiation of the Service Provider Agreement

Applicable Law

- ERISA § 404(a)
 - “care, skill, prudence, and diligence, under the circumstances then prevailing, that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims”
 - “Procedural prudence”
 - Practical analysis
 - Documentation that demonstrates process and awareness of fiduciary responsibilities and obligations

Applicable Law (cont'd)

- DOL Report of the Working Group on Guidance in Selecting and Monitoring of Service Providers
<http://www.dol.gov/ebsa/publications/srvpro.htm>
 - Focus on process and documentation
 - Representative questions on which fiduciaries should seek answers when hiring a service provider
 - Qualifications of service provider
 - Fees
 - Conflicts of interest

The RFP Process -- Overview

- Beginning the Process
 - May make sense to “start at the end”
 - What does the plan fiduciary want the final negotiated agreement with the service provider to look like?
- Search Phase
- Interview Phase
- Selection Phase
- Negotiating the Agreement

Outsourcing the Process

- Should you outsource?
 - Considerations:
 - Lack of time, lack of resources, lack of access to the full range of service providers
 - Identity of the third-party outsourcer
 - Reputation, credibility, access to market
 - RFP for the RFP outsourcer?
 - Fiduciary considerations: will the third-party outsourcer be a fiduciary? Think about the agreement with the third-party outsourcer

Conducting the Process In-House

- Considerations
 - Control over the process and timeline
 - Concerns about reputation of outsourcers and possible issues if something were to go wrong
 - Fit of the questionnaire to specifics of your business may be easier achieved by insiders
 - But... more time and power may be taken away from insiders to complete the RFP process

Conducting the Process In-House (cont'd)

- Create a timeline
- Assemble a team and allocate responsibilities
 - Writing questionnaire
 - Approving questionnaire
 - Reviewing and analyzing responses
 - Selection of provider
 - Negotiation of final agreement
- Make sure RFP team is communicating with negotiating team

The Search Phase

- Identify appropriate service providers based upon plan needs
 - Get recommendations from other plan fiduciaries
 - Find names in trade publications, from industry regulatory bodies or from industry associations
 - Send out requests for information to potential candidates
- Narrow down the list of candidates to exclude those involved in litigation or subject to a complaint
 - Look at court records, reported cases, the provider's Form ADV Part II (if applicable) and check with industry regulatory bodies

The RFP Questionnaire

- Information to be addressed in the questionnaire:
 - Services offered
 - Experience with employee benefit plans
 - Breakdown of fees and expenses
 - References and information about service provider quality, including performance record
 - Provider business information, including financial condition and business practices
 - Details about the professional who would be handling the account
 - Any litigation or enforcement actions against the provider
 - Details on plan investments
 - Fiduciary liability insurance and fiduciary bond
 - Provide form agreement with “must-haves”

The RFP Questionnaire (cont'd)

- Keep questions focused
 - Use case studies or ask for examples
- Ownership structure of provider
- Significant developments affecting provider in the past or future
- Total clients
- Clients lost and gained
- Conflict of interest policy/compliance policies

The RFP Questionnaire – Specific Issues

- Fee and Expense Questions
 - Type of fees to be charged
 - Fees for “out-of-scope” work
 - Additional fees (i.e., start up and travel fees)
 - Lock-in fees for an agreed upon number of years
 - Changes to fees in the past five years

The RFP Questionnaire – Specific Issues (cont'd)

- Other specific areas fiduciaries should consider inquiring in the questionnaire:
 - Performance guarantees
 - The use of subcontractors
 - Location of the service provider
 - Security of the service provider
 - Communications, responsiveness and point of contact
 - Dispute resolution
 - Technological capabilities of the service provider
 - Transition of projects at the end of the relationship

The Interview

- Once the questionnaire has been received, the plan fiduciary will want to interview the best candidates. Typically, 3 candidates will be interviewed, although 2-5 interviews are normal.
- The typical interview will include a candidate presentation followed by questions from the decision-makers.
- The interview should be fully documented to comply with ERISA and DOL guidance.

The Decision

- In making the final decision, fiduciaries must comply with ERISA's prudent selection requirements and DOL guidance. The record must show that the decision-makers:
 - reviewed written responses and took steps to ensure that all issues were addressed through follow-up or interview;
 - actively partook in the interview process and reviewed the record in order to make a final decision;
 - tried to compare all candidates evenly;
 - actively discussed and debated the candidates; and
 - chose the best candidate “solely in the interest of plan participants and beneficiaries” according to ERISA Section 404(a)(1)(A).

The Decision (cont'd)

- Determine how to score candidates
- Create score matrix evaluating:
 - Proposed team
 - Business structure
 - Fees performance
 - Agreement to “must-haves”
- Determine weighting to be given to each factor
- Be objective – know biases
- Keep ERISA rules and DOL guidance in mind

Negotiations of Service Provider Agreements

- The following are terms and conditions that are typically included in a service provider agreement:
 - Provision of services/fees for services
 - ERISA fiduciary status and standard of care
 - Compensation and fee disclosures required by ERISA Section 408(b)(2)
 - Plan sponsor responsibilities
 - Indemnification and limitation of liability
 - Bonding and insurance
 - Subcontracting and affiliates
 - Sale of the business and assignment of the agreement
 - Termination
 - Plan data, records and electronic communication
 - Statute of limitations
 - Audits

Monitoring the Service Provider

- Fiduciaries have the obligation to monitor the service provider during the relationship. The fiduciary should:
 - Periodically review performance
 - Read all reports provided
 - Ensure all fees charged are correct
 - Ask about business policies and practices
 - Follow up on any participant complaints

Tips and Best Practices

- Plan ahead and leave ample time for the RFP process before a contract needs to be signed
- Ask questions specific to the plan sponsor (e.g., plan provisions applying to employees covered by a collective bargaining agreements)
- Thoroughly document each step of the RFP process in writing to meet the DOL requirements for fiduciaries
- Be sure to include any related representations or warranties in the service provider contract

Questions?