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A well-done request for proposal (RFP) is called for whether fiduciaries of an employee benefit plan are looking for a new service provider or taking a fresh look at what services are available.

by | **Rachel R. Parisi, CEBS**

**T**rustees serving employee benefit plans are charged with ensuring the successful operation of their plan. In order to make a plan work, assistance is needed from a variety of service providers, including financial advisors, consultants, attorneys, accountants, auditors and actuaries. From time to time and for a variety of reasons, it becomes necessary to select new service providers.

We have all seen those television commercials for online matchmaking services in the dating world. Wouldn't it be nice if trustees could go online, punch in their employee benefit plan's relevant characteristics, describe their "perfect match" and press a button for the ideal service provider? Well, they can't. Instead, trustees and their plan professionals have a somewhat more laborious process, called the *request for proposal (RFP)* process. The RFP process, while not as simple as online matchmaking, can yield service providers that will serve the plan well for the benefit of all of the plan's participants.

## The Fiduciary Nature of Selecting Service Providers

The selection of a plan's service provider is a fiduciary act. As such, it is governed by the duty-of-prudence provision under the Employee Retirement Income Security Act (ERISA).<sup>1</sup> Specifically, a fiduciary must "discharge his duties with respect to a plan solely in the interest of participants and beneficiaries" using "the care, skill, prudence, and diligence under the cir-

cumstances 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."<sup>2</sup>

Cutting through the statutory definition, what does the standard truly require? It may be easier to state what will not meet the test. Fiduciaries may not select a provider simply because it is the least expensive or because they heard from a colleague at the International Foundation's Annual Conference that a provider offers great service or because he or she gets along well with the provider on a personal level. While all of those elements may contribute to the ultimate selection of a service provider, a systematic investigative process must be used to ensure that the plan is hiring the best provider for the task. The best way to meet this objective is to employ the RFP process.

### *What Is an RFP, Anyway?*

Simply put, an RFP puts out the word that a plan is looking for a new service provider. The RFP process puts into motion the "courtship" procedure and allows the plan and its trustees to closely examine what potential new service providers can offer the plan.

Importantly, a well-run RFP process will allow trustees to meet their fiduciary duty. The Department of Labor has stated that, in the context of selecting a service provider, fiduciaries must use "an objective process designed to elicit information necessary to assess the qualifications of the provider, the quality

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of services offered, and the reasonableness of the fees charged.”<sup>3</sup> The RFP process, when done properly, accomplishes just that.

### When the “Same Old, Same Old” Isn’t Enough

How do you know when it is time for an RFP? Some instances may provide an obvious indication—such as the incumbent service provider closing shop or no longer providing the services needed. Other triggers may be less apparent, but just as problematic for the plan. For instance, the needs of the plan may have shifted such that the current provider may no longer be the best fit. Boards should be mindful of the changing needs of the plan and, when necessary, investigate whether moving to another provider warrants investigation. On occasion, the call for an RFP may be awkward and uncomfortable, particularly where the service provider has a long history with the plan and personal relationships have de-

veloped. However, ERISA does not make allowance for hurt feelings. Service providers understand and respect that a plan, through its board of trustees, must ensure that the best providers for the plan are in place and that a call for an RFP is not a reflection on the providers’ overall merit.

An established relationship with a service provider that knows the plan, its board of trustees and its history inside and out is invaluable. This type of long-term service allows for a familiarity and depth of knowledge that is beneficial to the operation of the plan and, ultimately, its participants. Don’t forget that the RFP process still has a role even for those boards fortunate enough to have these types of relationships with one or more service providers. While “change for change’s sake” is certainly not required, a due diligence RFP is appropriate and should be conducted periodically. A due diligence RFP allows the board to review available options and compare them to the service currently being provided.

In circumstances where a change is not needed, the due diligence RFP satisfies the fiduciary standard for selection and retention of service providers.<sup>4</sup>

### Conducting the RFP

#### What a “Good” RFP Questionnaire Looks Like

While the potential service providers’ responses are of course critical to the resolution of the RFP process, nothing is more crucial than the RFP questionnaire itself. When it comes to the questionnaire, there is no truer case for the maxim, “You get out of it what you put into it.” If a board wants to receive robust and detailed information about the potential service providers for the benefit plan, then significant time and energy must be put into developing the RFP questions. Do not attempt to accomplish this task by doing a Google search for “RFP template.” Each plan is unique, and it is necessary to tailor the questions to ensure that the full picture of the candidates is being generated.

Some basic elements that should be included in an RFP questionnaire are:

- Years of experience in employee benefits (multiemployer plans should make sure to ask for candidates’ experience in the Taft-Hartley market in particular).
- Who will be the primary contact from the service provider if selected? While the individual pitching the service at the RFP interviews may have a wealth of experience and a pleasing personality, boards will want to verify who the plan will be dealing with on a day-to-day basis after the wooing period is over.

<< bio



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- If appropriate, are performance guarantees offered?

It is important to know how other plans have fared with the potential candidates. Worthwhile inquiries include asking for plans that have terminated the provider's services and professional negligence actions against the provider within the recent time frame. Along those lines, be sure to ask for references. Particularly useful are references from benefit plans that are similar in size and funding structure.

Once references are in hand, by all means call them! Many times this step is neglected. A telephone call to the reference will more likely yield candid assessments because many times people are hesitant to commit to writing a bad experience.

While we all know that "money isn't everything," costs do count in today's tight economy, and a board of trustees must be cognizant of selecting a provider that not only fits the plan's needs, but also will be a prudent selection in terms of reasonableness of fees. Make sure that the RFP questionnaire asks the key questions that will allow the board a full and accurate picture of how much the service provider's services will cost. Go beyond the flat fee and ask about:

- Services not provided under the retainer or flat fee—how much will these cost? Are they charged per service or per hour?
- Cost for attendance at extra meetings
- Travel costs
- Start-up fees
- Rate guarantees—how many years will the provider guarantee the given rate and will the provider give a maximum increase in later service years after the rate guarantee has lapsed?

### ***The Interview Process—"A First Date"***

To return to the "online matchmaking" analogy, once the questionnaire is completed and all candidates have been evaluated, it is time to pare down the list of potential suitors. Some service providers may not have the expertise needed, while others may fall out of the plan's price range.

Once the field has been narrowed, in-person interviews should be scheduled—a sort of "first date" for the candidates. While there is no perfect number of candidates to interview, seeing three to five prospective providers should allow for a good field from which to select.

The interview process can range from very formal to highly informal, depending upon the plan and its board. It is a good idea to schedule all interviews on the same day. While this can

make for a long day for the board, hearing the presentations in one day allows for a more equitable and useful comparison process. Typically, the interview day would consist of scheduled allotments of time for each candidate, with time built in after each presentation for the board to briefly discuss or make notes while the presentation is fresh in trustees' minds. Permitting each candidate 30-45 minutes should provide enough time for the candidate's planned presentation as well as questions from the board.

With respect to the question-and-answer portion of the interview process, trustees should come to the presentations with questions in mind. The planned presentation will allow a basic look at the service provider but an earnest question-and-answer exchange offers boards a sneak preview of how future interactions about plan business with a particular provider might look and feel. Questions can be general in nature ("How long would a transition to your organization take?") to specific ("I see on your RFP that your law firm has experience with collections. Can you describe to us your approach and how often you litigate delinquency cases?"). The candidates will certainly come to the interview prepared and having done their homework; boards must do the same to ensure that the interview process's value is fully optimized.

### ***Time to Choose***

Ideally, once the interviews are completed the board will have a tough selection to make because it has seen a number of top-quality candidates, any of which would make great partners in the operation of the plan. How does the board choose? As in other plan business, the board must exercise its fiduciary duty in making the selection. Specifically, the board must review the candidates' written responses in the RFP questionnaire, discuss the candidates' performance in the presentation phase, compare the candidates and measure what each candidate can offer the plan—with thorough discussion and debate throughout.<sup>5</sup> Once a provider is selected, formal letters (to the selectee, those not selected and of course the provider who is being replaced) should be promptly prepared and issued simultaneously as a courtesy to the candidates.

### **Who Will Conduct the RFP?**

If it sounds like a good RFP process is a lot of work—that is because it is. While it is certainly possible to fast-track an RFP process and just go through the motions, both ERISA and plan participants demand more. At its core, the selection of a service provider can have a tremendous impact on the plan and

its participants: Choose poorly and the plan will suffer; choose wisely and the plan will benefit. As a result, the execution of a good RFP process is critical.

Who, then, will do all of this work? While the board will ultimately have the task of making the selection, getting to the point of selection will entail numerous steps, including drafting the RFP questionnaire, identifying potential candidates, reviewing responses, providing a summary for the board<sup>6</sup> and scheduling the interviews. Many plans use the plan's consultant or attorney to conduct the RFP, with the benefit being a more intimate knowledge of the plan itself and therefore the capacity to draft the RFP questionnaire in a manner that gets to the heart of the plan's key concerns. Other plans opt for a neutral party, such as a consulting firm or a law firm specializing in RFPs, to conduct the RFP. The benefit of using a neutral party is the option of a "fresh look" and freedom from predetermined expectations. Whichever route chosen, the key will be an experienced RFP coordinator that understands the importance of the RFP process and can aid the board in getting the desired end product—producing a strong field of candidates, each well-suited to servicing the

plan, and putting those candidates through their paces to allow the board to make the best selection possible.

## Conclusion

The RFP process can be time-consuming and inconvenient. Some trustees may have developed a personal relationship with their service providers, which can make the RFP process awkward. Nonetheless, the obligation to use due care in selecting the plan's service providers can create potential liability for a breach of fiduciary duty if not properly done.<sup>7</sup> Likewise, a failure to "shop around" can also result in a breach of fiduciary duty.<sup>8</sup> Given the high standard required of the plan fiduciaries and, despite the relative inconvenience inherent in the process, there really is no better way to select the best service providers for a plan than through a well-executed RFP process. ●

## Endnotes

1. Similarly, monitoring of plan service providers is also governed under these standards.

2. 29 U.S.C. §1104(a).

3. DOL *Field Assistance Bulletins* 2002-3, 2007-01.

4. As a courtesy to RFP candidates, it is advisable to let them know that the RFP process is of a due diligence nature.

5. Minutes taken at the meeting or special meeting held to select a service provider should certainly reflect the care taken by the board in making the selection.

6. One of the elements that can make for a highly successful RFP process is a well-drafted comprehensive response summary for the board. A call for candidates often yields literally hundreds of pages of material. The entity in charge of the RFP, whether it is the plan's consultant, the plan's attorney or a neutral RFP coordinator, can make this information more accessible, relevant and useful for the board by compiling a summary that offers side-by-side analysis and comparison of the information provided.

7. *Whitfield v. Tomasso*, 682 F. Supp. 1287 (E.D.N.Y. 1988).

8. *Liss v. Smith*, 991 F. Supp. 278 (S.D.N.Y. 1998).

## takeaways >>

- The RFP process is the best way to ensure the plan hires the best provider.
- As a plan's needs change, a change in providers may be warranted.
- Because each plan is unique, questions to ask prospective providers must be tailored for the plan.
- Ask for references—and then check them.