Newsday/News 12 probe: Inside the Foley nursing home deal

Published: March 18, 2013 10:20 PM

The administration of Suffolk County Executive Steve Bellone failed to follow its own competitive bidding procedures in the $23 million sale of the county's nursing home to private operators and gave the buyers financial advantages, records show.

A Newsday/News 12 Long Island investigation also found that the administration hired an unlicensed broker who worked for two of the prospective buyers to sell the property and obtained an appraisal after the sales contract was signed.

Supporters of the John J. Foley Skilled Nursing Facility in Yaphank say the sale has produced a lawsuit, charges of a rushed process and could curtail care to its most vulnerable patients. They say the Bellone administration's handling of the transaction lacked transparency and raised questions of favoritism.

Thousands of pages of records and dozens of interviews show a rushed transaction in which officials bypassed safeguards intended to prevent fraud and favoritism.

Bellone and others who favor the sale or closure of the facility said the county, with a projected deficit of $250 million by the end of 2014, can no longer afford it. Bellone said that the facility is losing $1 million a month, and that the county took all the proper steps to sell the nursing home, including opening it up for sale through a request for proposal (RFP) process. He said the county initiated direct talks with nursing home operators because that RFP produced bids that were too low.

Beyond the administration's actions, a majority of the Suffolk Legislature voted to approve the contract to the eventual buyers without competitive bidding, essentially giving its own stamp of approval to the administration.

Handling 'difficult choices'

Bellone refused to be interviewed for this story but did send an email to Newsday explaining his administration's actions in making the nursing home sale.

"I believe we handled this issue in the manner we would want our elected leaders to tackle difficult choices," Bellone said. "We reached out to everyone, we pursued every opportunity possible in a limited time frame, we worked to build consensus, and then we made a decision to move forward with a plan.

"Our only interest throughout this process has been to help get the county through its financial crisis, a process that continues today."

Bellone said that 15 of 18 legislators "have said in one form or another" that they would support selling Foley to a private party, and that the eventual buyer was an experienced nursing home operator and the best choice financially. Bellone said the RFP process had produced low bids and the county was running out of time.

"We were now free to negotiate for the best deal we could get in a public-private partnership or a sale," he wrote.

The agreement to sell the nursing facility to Israel and Samuel Sherman, brothers who co-own 13 nursing home facilities throughout the state, has foundered in recent weeks and the Bellone administration took another step in that direction Monday, asking the state Department of Health to approve a closure.

The Shermans failed to get two state and town approvals that are necessary to operate Foley. Bellone and the Shermans say they will press ahead with the sale. But Bellone told the county Legislature he will close the nursing home if a sale isn't successful.

The deal is being challenged in a lawsuit filed by the Association of Municipal Employees, the union representing Foley employees. The suit charges that a direct sale by the county to a private operator violates state and county competitive bidding laws.

"Lease or sale, we're trying every which way to go ahead with the deal," Samuel Sherman said in an interview.

Israel Sherman said no favoritism was involved in the sale process. "We've not had any unusual connection with Suffolk County before this, so I'm not aware of any kind of reason why they would have given us special consideration," he said.

The state Public Health and Health Planning Council, which must approve all nursing home sales, was originally scheduled to discuss the sale March 21 in Albany, but has postponed that discussion.

Last month, after raising questions about the care of poor patients if the facility were sold, a council committee voted unanimously against the sale. At the same meeting, the committee voted to reconsider its decision at a later meeting. The panel had never before agreed to reconsider a vote, a state Health Department spokesman said.

Bellone's former chief deputy, Regina Calcaterra, who played a key role in the transaction, said that she did everything "at the direction of the county executive."

Earlier Foley suitors

Citing Suffolk’s financial troubles, former County Executive Steve Levy in 2011 agreed after a competitive bidding process to sell the nursing home to Kenneth Rozenberg for $36 million. Rozenberg eventually pulled out of the deal and is suing to recover his deposit.

The Legislature's deputy presiding officer, Wayne Horsley (D-Babylon), a Bellone supporter who voted to sell the nursing home, said legislators had been assured by the administration that the deal was proper when they voted to approve two key provisions of the sale agreement.

Critics of the sale said the administration's process was flawed, and one former county official said it may have not been the best deal for Suffolk.

"Unless it was an open and honest bidding, there's no way of knowing whether they got the best value," said former Suffolk Real Estate Director Patricia Zielinski.

At Foley, every room is hospital grade and equipped with oxygen. The facility is able to treat many acute medical conditions, minimizing the need for hospital transfers. Its design makes it "a very desirable property," said former Foley administrator Ken Gaul, who operates two private nursing homes and who tried unsuccessfully to buy the Foley home with Brookhaven Memorial Hospital for $24 million in 2009.

As a public facility, the Foley home takes patients turned away by other nursing homes because they require more costly, long-term care. The legislative budget review office's 2008 report found that 35 to 40 of Foley's patients "would not be placeable elsewhere."

In his email, Bellone disputed that point. " . . . there is not a single patient at Foley that cannot be placed at a private nursing home on Long Island," he wrote.

Among the patients is Christopher Barnes, 40, who worked as a Ford model and lived in London when he suffered a stroke while jogging almost eight years ago. He has been unable to speak, walk or perform basic bodily functions unassisted since then, said his father, George Barnes of Mastic Beach.

He arrived at Foley after four other nursing homes declined to take him because he needs 24-hour care, his father said.

"If it [Foley] was to close, if it was approved by the state to close the facility, where would I put my son?" he said.

Although Bellone was publicly noncommittal about the nursing home's future during the 2011 campaign, discussions with potential buyers started almost immediately after he took office on Jan. 1, 2012, records show.

Proposal to broker a sale

On March 1, Peter Degere, a physical therapist employed by the Shermans, spoke to Deputy County Executive Fred Pollert. "It was good catching up yesterday during a our phone conversation," he said in an email to Pollert.

Degere had a proposal: He could provide names of potential buyers for the nursing home, and he wanted to broker the deal, according to a memo written by then-County Attorney Dennis Cohen.

Bellone, in his email, explained Degere's role. "Degere had approached the county stating that he represented some private operators that might be interested in purchasing the facility," he wrote, noting that the administration received approval to use Degere from a waiver committee.

An unsigned memo supporting the waiver said Degere needed no special license to broker the sale. Under state law, anyone paid a fee to sell real estate in New York must have a real estate license.

New York general municipal law 104-b requires the county to use competitive bidding when hiring a vendor. The county may waive that requirement if a vendor is uniquely qualified and if the waiver is approved by a committee.

The three-member committee is composed of one legislative appointee and two people appointed by the county executive. On May 29, 2012, the committee voted 2-1 to authorize hiring Degere. The legislative appointee voted not to hire Degere.

In the email, Bellone said the agreement with Degere was not exclusive and if another prospective buyer came up, he would not have been used or paid a fee.

"We were looking at this as someone who was bringing potential buyers," said Calcaterra, who left the administration last fall. "We were not looking at him as a real estate broker."

After pressure from legislators, Cohen later said in a memo that Degere could not legally broker the real estate sale. But Cohen argued that Degere did not need to be a broker to sell the nursing home business. Although the transaction included 14 acres, Cohen argued the real estate was incidental -- even though it accounted for more than $18 million, or nearly 80 percent -- of Foley's appraised value.

Cohen declined to be interviewed for this story.

Sizing up buyers

Attached to the contract the county signed with Degere, for a fee originally set at $560,000 and eventually lowered to $175,000, was a list of potential buyers, including the Shermans.

In addition to working for the Shermans, Degere worked for one of the other potential buyers on that list, Joel Liefer, a nursing home executive from Staten Island, Liefer said. County officials did not explain why the list included these potential buyers or how the names were drawn up.

Degere declined to be interviewed.

Around mid-July, records show, Pollert and Calcaterra began meeting with potential buyers. Calcaterra later told legislators they were just having "conversations."

By law, the county must use competitive bidding after public advertisement to sell an asset. Bellone said his administration found the responses to previous RFPs unacceptable and needed to move quickly.

Bellone said in his email that the two previous requests for proposals conducted by the Levy administration failed, that the nursing home was losing money and that time was of the essence. The failure of the RFPs freed the county to pursue a negotiated deal, he said, which the legislature approved in September.

"Just because you don't like the results of a competitive process doesn't permit you to abandon all the statutes that require a competitive process," said Paul Sabatino, Suffolk's former chief deputy county executive who is representing the Foley union fighting the sale.

Between July 9 and July 20, Pollert and Calcaterra met with prospective buyers, the records show. Three offers came in from the five on the list, ranging from $21.5 million to $23 million, according to a county auditor's memo. The Shermans were the highest bidder at $23 million.

"Based on all information available," Bellone wrote in his email, "the Shermans were the best choice. They operated 13 facilities in New York State with an average quality rating from the Department of Health and Human Services higher than the rating for Foley."

One potential buyer, Bruce Peckman, who operates Highfield Gardens Care Center in Great Neck, said he felt rushed and declined to make a bid. Peckman said Calcaterra wanted him to sign a contract and put down a $1.2 million deposit within a week.

"I didn't have enough time to make an educated decision," he said. "I had to review the contract in four days. I do not do business that way."

Calcaterra disputed Peckman's account and said in an interview that she gave him three weeks.

In testimony to legislators Aug. 16, she said the administration spent a week vetting buyers and completed the deal with the Shermans within a few hours.

Peckman also said he told county officials they were making a mistake in selling Foley and that they should hire him to turn its finances around. The county was not interested, according to an auditor's memo.

While during the Levy administration the Shermans submitted a written bid, they didn't in this case. Moreover, they were allowed to raise their bid by $1 million last year to match another bidder's offer, according to an auditor's memo and interviews.

Nursing home operator David Simha, who confirmed he bid $21.5 million, said he was never given the chance to raise his bid, but that he did not challenge the process. "My feeling was I can't fight City Hall," he said.

"We ultimately received three bids and then we negotiated those bids up to reach the price we ultimately settled on," Bellone said.

An eye on tax abatements

In exchange for the Shermans raising their bid, Calcaterra said, county officials agreed to work on getting tax abatements worth an estimated $400,000 annually for the next 10 years.

"That was the exchange for the million dollars," she said. "In order to bring them up, they wanted a tax break."

Other bidders were not offered that option, according to an auditor's memo and interviews, even though Peckman said he specifically asked about tax breaks. Peckman also sought the county's assistance in getting required zoning approvals, but said he was told it was the buyer's responsibility. By contrast, when the Shermans sought a special zoning permit for the home from Brookhaven Town, the county made the application and county officials and consultants appeared before the zoning board.

Calcaterra said that there was no preferential treatment, and that she preferred the Shermans because they employed workers who are members of Local 1199 of the health care workers union, a staunchly Democratic union she thought would be acceptable to the county Legislature.

After getting the bids, the county obtained an appraisal, which set the price at $22.75 million. The appraisal is dated July 27, 2012, but it refers to a July 31 Newsday.com article reporting the county had signed a contract to sell the nursing home to the Shermans. The contract is dated July 30, 2012.

In his email, Bellone said "if this agreement was going to be included in the 2013 budget and reported to the rating agencies as part of our budget mitigation plan, then it needed to be laid on the table at the Legislature by August 1."

Cohen, who is now Bellone's chief deputy county executive, confirmed the timing of the appraisal to legislators. "We didn't get the appraisal until after the contract was signed," he said. But he said an appraisal wasn't necessary. "Fair market value is what people are willing to pay for the asset," he said.

Critics in the Legislature disagreed. "To say that you came up with an appraisal value after you signed the contract with Mr. Sherman, I think that definitely there's something wrong there," said Legis. Kate Browning (WFP-Shirley), a sale opponent.

In an Aug. 8 memo, Cohen argued the need to continue the delivery of health care at Foley "may surpass highest price requirements . . . " and concluded that the process "was legal and proper in every respect."

On Aug. 20, the county lowered Degere's fee to $175,000 from $560,000. Cohen told legislators on Aug. 21 that while he disagreed with legislators' view that Degere had to be licensed to broker a real estate transaction, the county would take the real estate portion out of the fee.

As the Legislature was poised to approve the deal in September, questions persisted.

County Controller Joseph Sawicki, Jr. assigned an auditor, Barbara Marano, to review the deal. Marano asked Calcaterra and Cohen for the bids and bidders' names; but they declined, citing nondisclosure agreements. After being pressed by the Comptroller's office, they released only the names.

The comptroller's Sept. 13 review found the county should have advertised the deal and should have gotten two appraisals. It also found the market value to be about $25.1 million.

That same day, the Legislature approved two resolutions: one to authorize a direct sale of Foley without competitive bidding and the other to approve the contract the county signed with the Shermans.

For Foley patients, the controversy over their home has been painful. "Without this place open, I could be homeless," said Richard Phillips, 51, who has cerebral palsy and has lived at Foley for the last 13 years.