

STATE OF SOUTH CAROLINA)	BEFORE THE SOUTH CAROLINA
)	PROCUREMENT REVIEW PANEL
COUNTY OF RICHLAND)	
)	
)	ORDER
IN RE: Protests of Qualis Health and)	
Georgia Medical Care Foundation d/b/a)	Case No. 2010-4
Alliant ASO)	
)	
Appeals of The Carolinas Center for)	
Medical Excellence; Qualis Health; and)	
Georgia Medical Care Foundation d/b/a)	
Alliant ASO)	
)	
MMO RFP #5400001140 – Quality)	
Improvement Organization for the SC)	
Department of Health and Human)	
Services)	

This matter came before the South Carolina Procurement Review Panel (the Panel) for a hearing on August 18, 2010. The Panel heard the appeal by The Carolinas Center for Medical Excellence (CCME), of the May 25, 2010, decision of the Chief Procurement Officer for Goods and Services (the CPO). The CPO’s decision granted the protests of Qualis Health (Qualis), and Georgia Medical Care Foundation d/b/a Alliant ASO (Alliant). The CPO canceled the intent to award to CCME and ordered the State to resolicit the contract. CCME, Qualis Health, and Alliant sought further administrative review before the Panel.

In the hearing before the Panel, Michael H. Montgomery, Esquire, represented CCME. Alexander J. Brittin, Esquire, represented Alliant. Deirdra T. Singleton, Esquire, represented the South Carolina Department of Health and Human Services (SCDHHS). Molly R. Crum, Esquire, represented the CPO.¹

¹ Prior to the Panel’s scheduled hearing, counsel for Qualis, M. Elizabeth Crum, Esquire, notified the Panel in writing that Qualis was withdrawing its appeal and would not participate in the Panel’s hearing.

Findings of Fact

I. The Request for Proposals

The Materials Management Office (MMO) issued this Request for Proposals (RFP) on behalf of SCDHHS on September 4, 2009. The solicitation sought to obtain a "Quality Improvement Organization" (QIO) which would satisfy the requirements of the RFP and comply with federal regulations governing Medicaid. The RFP was lengthy and complex, and contained standard state clauses as well as those drafted for SCDHHS's specific needs. Section III of the RFP, entitled SCOPE OF WORK/SPECIFICATIONS, was one of the sections drafted specifically for SCDHHS. See Record at 77-105. The Overview paragraph of this section stated that the desired QIO would

provid[e] utilization reviews for inpatient hospital services, mental hospitals, intermediate care facilities, and inpatient psychiatric care services for individuals under age 21, as outlined in the South Carolina State Plan for Medical Assistance. In addition, SCDHHS seeks additional pre-authorization reviews, pre-payment review and quality review functions as outlined in this Request for Proposal.

Record at 77. Additionally, because some of the services sought were new ones to SCDHHS, the agency also stated its intent that it desired "to improve utilization review services through innovative and proven business and technical solutions." *Id.*

The issue before the Panel centers on the staffing requirements of the RFP, which are detailed within the SCOPE OF WORK/SPECIFICATIONS section of the RFP. Paragraph 3.0, entitled Scope of Work, provided:

The Scope of Work section describes the requirements that proposals submitted in response to this RFP must meet. The Offeror must clearly and succinctly state how it proposes to meet or exceed the requirements if it is selected as the Contractor.

Record at 79. Paragraph 3.0 also provided that

SCDHHS requires that the Offeror be prepared to demonstrate and document its ability to perform the Scope of Work as stated in this RFP. SCDHHS reserves the right to consider other options, if innovative alternatives are more cost effective and ensure the same or better outcomes with quality results for the program.

Id.

Paragraph 3.3, entitled STAFFING, detailed the staffing requirements and set forth in pertinent part:

3.3.1 Offeror Responsibilities

The Offeror will provide sufficient staff to perform the required tasks and meet the performance standards. At a minimum, the Offeror must:

* * * *

3.3.1.3 Employ the following Review Staff:

3.3.1.3.1 Registered Nurses: All initial medical necessity reviews, except Organ Transplant Services, must be performed by registered nurses.

Record at 81.² The phrase “initial medical necessity reviews” was not defined in the RFP, and the parties expended considerable time during the Panel hearing eliciting various opinions about whether the phrase was a medical term of art which had a generally accepted meaning. This testimony did not definitively resolve the usage of the phrase. However, most of the witnesses questioned along these lines conceded that a medical necessity review is an integral part of the prior authorization process to determine whether requested treatments or services are “medically necessary.”

The phrases “Medically reasonable and necessary” and “medically necessary” are defined by the RFP as

procedures, treatments, medications or supplies that are:

3.4.1.1.1 ordered by a physician, dentist, chiropractor, mental health care provider, or other approved, licensed health care practitioner to identify or treat an illness or injury;

² Paragraph 3.3.1.3 also required the employment of physician reviewers, additional consultants, a licensed professional with psychiatric experience, and a psychologist.

- 3.4.1.1.2 administered in accordance with recognized and acceptable medical and/or surgical discipline at the time the patient receives the services and in the least costly setting required by the patient's condition; and
- 3.4.1.1.3 administered in compliance with the patient's diagnosis and standards of care and not for the patient's convenience.

Record at 82. If the requested treatments or services are determined to be medically necessary, then they will receive prior authorization or approval. Furthermore, conducting prior authorization reviews was a specific Offeror responsibility under the terms of this RFP. *Id.*

Paragraph 3.5, entitled PRIOR AUTHORIZATION SERVICES, listed the services for which a prior authorization review was required. Record at 84. Those services were as follows: (1) inpatient admissions; (2) organ transplant services;³ (3) surgical justification reviews; (4) outpatient physical, occupational, and speech therapy; (5) ultrasounds during pregnancy;⁴ (6) durable medical equipment; and (7) mental health counseling services. The dispute before the Panel involves only two of these services: outpatient physical, occupational, and speech therapy; and durable medical equipment.

The RFP was amended five times before proposals were submitted. Record at 177-179, 180-182, 183-185, 186-230, and 231-237. During the question and answer process, no offeror asked the State to clarify the meaning of the phrase "initial medical necessity review." Moreover, no offeror questioned whether clinical staff other than registered nurses could perform such reviews, and no offeror protested the specifications of the RFP.⁵ Four proposals were opened on December 10, 2009. Record at 238. Although allowed under the Procurement Code, its regulations, and the terms of the RFP, State Procurement Officer John Stevens testified that

³The original RFP called for physicians to conduct medical necessity reviews for all organ transplant services. However, the RFP was subsequently amended to allow registered nurses to perform the first level of screening for single organ transplants. Record at 211.

⁴This service was removed from the RFP in MMO's request for Best and Final Offers. Record at 289.

⁵The Panel takes this opportunity to express its concern that there seems to be a current trend where bidders and offerors may recognize a potential ambiguity in the specifications of a procurement but fail to ask questions or protest those specifications, perhaps in the interest of gaining a competitive advantage. The Panel reminds vendors that a fair procurement process requires good faith on the part of all players, not just the State.

no discussions were conducted with any offeror prior to evaluation. Because of excessive pricing offers, MMO issued a request for Best and Final Offers (BAFOs) on February 12, 2010; this request removed ultrasounds during pregnancy from the scope of work for prior authorization services. Record at 287-289. The BAFOs were opened on February 19, 2010, and MMO posted an intent to award the contract to CCME on March 11, 2010. Record at 947. The intent to award was suspended on March 22, 2010, after protests were filed by Qualis and Alliant.

II. CCME's Proposal

In response to Paragraph 3.3 of the RFP, CCME proposed that "Only registered nurses will conduct initial medical necessity reviews for inpatient admissions." Record at 490. On the next page of its proposal, CCME proposed an additional category of review staff: "To perform the review of outpatient therapies CCME will use licensed physical, occupational and speech therapists to conduct the initial review." Record at 491. This portion of CCME's proposal did not explain how using licensed therapists would be equal to or better than using registered nurses for outpatient therapy reviews, nor did it offer to use registered nurses as an alternative solution.

In its more detailed response to Paragraph 3.5 of the RFP, specifically concerning prior authorization reviews for outpatient physical, occupational, and speech therapy, CCME described how it currently utilizes licensed therapists to conduct such reviews for those therapies in North Carolina. Record at 601-602. CCME also asserted its confidence that it could meet the needs of SCDHHS with regard to those therapies. Record at 602. Although CCME described the success of its North Carolina experience, it did not clearly state how using licensed therapists would be equal to or better than using registered nurses for reviews of outpatient therapies in this

portion of its proposal, nor did it offer using registered nurses as an alternative solution. Record at 601-603.

Somewhat similarly, CCME's detailed response regarding durable medical equipment prior authorization reviews proposed: "To ensure that [prior authorization] requests for [durable medical equipment] are evaluated by an appropriate professional, we suggest that physical therapists (PTs) review all requests for Cranial Molding Orthotic Devices and Power Wheel Chair packages." Record at 607. CCME then described its experience with using physical therapists to conduct durable medical equipment necessity reviews in North Carolina. Record at 607-608. Again, like its response with regard to outpatient therapies discussed above, CCME did not explain how using a physical therapist to conduct durable medical equipment reviews would be equal to or better than using a registered nurse to conduct them. *Id.* Although CCME did use the word "suggest" in this portion of its proposal, it did not offer using registered nurses as an alternative solution.

Conclusions of Law

At the beginning of the Panel hearing, the parties agreed that the only issue to be decided by the Panel is whether CCME's proposal was responsive when it proposed staff other than registered nurses to perform medical necessity reviews for outpatient therapies and durable medical equipment. The Procurement Code defines a responsive offeror as "a person who has submitted a bid or offer which conforms in all material aspects to the . . . request for proposals." S.C. Code Ann. § 11-35-1410(7) (2009). The Panel has previously noted that an RFP requirement will not be considered material or essential "if variation from it has no, or merely a trivial or negligible effect on price, quality, quantity, or delivery of the supplies or performance of the services being procured." *In re: Protest of National Computer Systems, Inc.*, Case No.

1989-13 (September 5, 1989). Thus, the pivotal question before the Panel is whether the RFP's staffing specification was an essential requirement. As explained below, the Panel finds that the RFP's specification that registered nurses perform "all initial medical necessity reviews" was an essential and mandatory requirement.

With regard to staffing, the plain language of the RFP speaks in mandatory terms: "All initial medical necessity reviews, except for Organ Transplant Services, **must** be performed by registered nurses."⁶ The Panel finds that this requirement is also essential because offering someone other than a registered nurse to perform such reviews undeniably affects the performance of the services being procured and arguably has a more than negligible effect on price. In its proposal, however, an inpatient hospital admission is the only service for which CCME unequivocally offers registered nurses to perform the medical necessity review. For durable medical equipment, CCME suggests using physical therapists to perform the reviews, but does not offer registered nurses as an alternative if the State prefers.⁷ As for outpatient physical, occupational, and speech therapy necessity reviews, CCME states it will use licensed therapists. Although CCME argued that a therapist would be the equivalent or better than a registered nurse for certain types of medical necessity reviews, the fact remains that the two professions are separate and have quite different educational and clinical training requirements. Moreover, CCME's proposal itself did not set forth why it proposed therapists instead of registered nurses.⁸ In short, the Panel lacks an objective basis for determining the relative

⁶The Panel notes that the dispute before it could have been avoided had the requirement stated "by registered nurses or other appropriate clinical staff." If the State wishes to benefit from the statutory and regulatory flexibility of solutions-based procurements, it must be careful when using mandatory language in stating its requirements.

⁷As the CPO noted in his order, such an alternative suggestion would have been acceptable as long as the rest of the proposal was also responsive. The Panel cautions offerors to draft proposals carefully when offering something other than what the State has specified.

⁸ The current statutory and regulatory scheme governing competitive sealed proposals expressly allows discussions with offerors "for the purpose of clarification to assure full understanding of, and responsiveness to, the solicitation requirements." S.C. Code Ann. § 11-35-1530(6) (2009); *see also* S.C. Code Ann. Regs. 19-445.2095(I) (2009). As

qualifications of registered nurses and therapists.⁹ Based on the record before it, which is necessarily limited to CCME's written proposal because discussions were not held, the Panel concludes that CCME was non-responsive when it failed to offer registered nurses to perform medical necessity reviews for outpatient therapies and durable medical equipment.

Therefore, for the reasons stated above, the Panel grants Alliant's protest, upholds the decision of the CPO, and directs the State to resolicit this procurement.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT REVIEW PANEL

BY: 
C. BRIAN MCLANE, SR., CHAIRMAN

This 30th day of August, 2010.

Columbia, South Carolina

MUNSON, Kenneth D., and HARTLEY, Mark, CONCURRING IN RESULT: Unlike the majority, we believe CCME's proposal could be found to be responsive based on the qualifying language appearing in Paragraph 3.3.1 which states: "At a minimum, an Offeror must." This phrase modifies the specifications listed below it, including the sentence regarding registered nurses performing all initial medical necessity reviews. If employment of a registered nurse is considered to be the minimum requirement, then offering someone with greater expertise arguably exceeds that requirement. However, we also believe that this RFP was ambiguous in that it requested innovative solutions but then also specified certain requirements in mandatory terms. This ambiguity undoubtedly caused confusion among offerors because a witness for Alliant testified that they were certain that registered nurses were a mandatory requirement, but a

previously noted, the State did not conduct discussions with any offerors with regard to this solicitation. Such a discussion prior to evaluation and ranking could have provided the clarification needed here and would have given the State an evidentiary basis for finding CCME's proposal responsive. However, once the proposals have been evaluated and ranked, it is too late for such clarification, and allowing it after those stages would be unfair to the other offerors. *Cf. In re: Protest of Express Scripts, Inc.*, Case No. 2005-8 (October 6, 2005) (wherein the Panel found that a clarification allowed after opening, but before evaluation and award, was fair because the vendor had no way of knowing at the time of clarification whether it had the winning proposal). Here again, if the State wishes to take full advantage of the flexibility afforded competitive sealed proposals, it should consider conducting the discussions allowed by the applicable Procurement Code provisions and the corresponding regulations. Clarification would seem especially critical when, as is the case in this solicitation, the State is procuring services for the first time and is looking for "innovative" solutions.

⁹ The Panel also notes this is a question more properly within the purview of the evaluation committee.

witness for CCME testified that they were certain that registered nurses were not a mandatory requirement. Based on that ambiguity, therefore, we agree with the majority that the proper and fair remedy in this case is for the intent to award to be canceled and the contract to be resolicited. *Cf. In re: Protest of Blue Cross Blue Shield of South Carolina*, Case No. 1996-3 (April 13, 1996) (in the context of a cancellation after award under S.C. Code Regs. 19-445.2085, the Panel found resolicitation to be the only cure where the top-offeror's nonresponsiveness and ambiguities in the RFP created a problem in the solicitation process).