

STATE OF SOUTH CAROLINA)	BEFORE THE SOUTH CAROLINA
)	PROCUREMENT REVIEW PANEL
COUNTY OF RICHLAND)	CASE NO. 2000-2
)	
)	
In re:)	ORDER
Protest of Transportation Management)	
Services, Inc.)	
)	
Appeal by Transportation Management)	
Services, Inc.)	

This matter arises from an appeal of Transportation Management Services, Inc. (TMSI) from a decision by the Chief Procurement Officer to uphold the award of a Title XIX Medicaid Transportation contract to Charleston County Human Services Commission, Inc. (CCHSC). On January 20, 2000, pursuant to S. C. Code of Laws Ann. § 11-35-4410(5), the Procurement Review Panel (Panel) appointed Ms. Faye A. Flowers, Esq. to serve as the hearing officer of the above referenced case for the purpose of conducting an administrative review. On March 20, 2000 a hearing was held. This case came before the Panel on May 8, 2000 by way of report and recommendations from the hearing officer. Ms. Flowers made an oral presentation to the Panel, submitted her written report and recommendations, and was available for questions from the Panel. The written report and recommendations are incorporated herein as part of this order.¹

¹ The findings of fact, questions presented, and conclusions of law in the report from the hearing officer are adopted by the Panel.

BEFORE
THE SOUTH CAROLINA PROCUREMENT REVIEW PANEL

In Re:)	CASE NO. 2000-2
)	
Protest of Transportation Management Services, Inc.)	REPORT AND RECOMMENDATION
)	OF THE HEARING OFFICER
Appeal by Transportation Management Services, Inc.)	
)	

This matter came before me for hearing on March 20, 2000, on the appeal of Transportation Management Services, Inc. ("TMSI") from a decision by the Chief Procurement Officer to uphold the award of a Title XIX Medicaid Transportation contract to Charleston County Human Services Commission, Inc. ("CCHSC"). Appearing at the hearing before me were the Protestant TMSI, represented by Michael H. Montgomery, Esquire; CCHSC, represented by M. Elizabeth Crum, Esquire; the Department of Health and Human Services ("HHS"), represented by Deirdra Singleton, Esquire, and Byron Roberts, Esquire; and the Division of General Services, Materials Management Office ("MMO"), represented by Keith McCook, Esquire, and Anne Macon Flynn, Esquire.

Findings of Fact

On May 4, 1999, MMO issued a Request for Proposals ("RFP") on behalf of HHS soliciting offers on contracts to provide transportation services to eligible Medicaid recipients in the forty-six counties of the state. Under the RFP, an offeror could make a proposal to provide these Title XIX Medicaid transportation services in any number of counties, and an award would be for each of the forty-six counties.

On May 18, 1999, MMO held a preproposal conference. On May 28, 1999, MMO issued Amendment No. 1, which responded in writing to all questions posed by vendors during the question and answer period. Amendment No. 1 also made certain revisions to the RFP and its Appendices.

In pertinent part, Amendment No. 1 required the following as to Appendix R, the cost proposal form: "Offeror shall propose a unit rate per passenger mile in whole cents (for example .69 not .699). Offerors' calculations must be rounded to the nearest whole cent."

On June 9, 1999, MMO issued Amendment No. 2 extending the opening date until further notice. Amendment No. 3, issued on July 2, 1999, established the new opening date as July 21, 1999. On September 8, 1999, MMO posted the Notice of Intent to Award for all counties.

The contract at issue in this proceeding concerned Title XIX services for Charleston County. Two offerors submitted proposals on the Charleston County contract, TMSI and CCHSC. The Notice of Intent to Award listed CCHSC as the awarded vendor with a price per passenger mile of 60 cents.

On September 22, 1999, TMSI protested the award to CCHSC on several grounds. The Chief Procurement heard the matter in November, 1999, and issued his decision on December 30, 1999, denying TMSI's protest on all grounds. On January 10, 2000, TMSI appealed the decision of the Chief Procurement Officer, raising only one timely issue for review.

Preliminary Motions

CCHSC, MMO, and HHS moved to dismiss certain portions of TMSI's January 10, 2000, letter of appeal. In that letter, TMSI alleges four numbered grounds of appeal. The first concerns the way CCHSC stated its bid price. This ground was timely raised before the Chief Procurement Officer and was a proper grounds of appeal.

In its second numbered grounds, TMSI points out that it did not receive a complete response to its Freedom of Information Act request in time to adequately set forth protest grounds. As a matter of law, this issue fails to state a claim. As noted by the *Panel in Protest of Atlas Food*

Systems and Services, Inc., Case No. 1997-6, under the freedom of information and procurement laws as written today, a protestant might be put in the “patently unfair” position of having to state his protest grounds with particularity, even though he has not received any information concerning other bidders’ responses to the solicitation. As noted by the Panel, until such time as one or both of the laws change, the Panel is bound by the unfair deadlines.

In its third grounds of appeal, TMSI alleges that CCHSC is not responsive because “the proposal fails to demonstrate that the proposer is able to perform the services and functions provided for in the Solicitation in the following areas: Appendices.” Section 11-35-4210 requires that a protestant state its protest grounds “with enough particularity to give notice of the issues to be decided.” In numerous cases, including *Protest of NBS Imaging Systems, Inc.*, Case No. 1993-16, the Panel has held that references to unspecified or generalized defects concerning entire sections of a proposal do not meet the test of particularity required by the statute. In this case, the RFP contains some twenty Appendices. Ground number three is too broad and too vague as stated to put respondents on notice of how TMSI believes that CCHSC’s proposal is deficient relative to the twenty-three Appendices.

Finally, as ground number four, TMSI alleges that the letter grade scoring system recommended by the State failed to honor the intent of the RFP. This issue was not raised before the Chief Procurement Officer and is not timely on appeal.

Questions Presented

In its only remaining grounds of appeal, TMSI alleges that the award to CCHSC is in violation of the South Carolina Consolidated Procurement Code because CCHSC is either a nonresponsive offeror or its proposal is not the most advantageous to the State. TMSI’s protest is

based on CCHSC's cost proposal, Appendix R, wherein CCHSC filled in its price per passenger mile as "\$ 59.8". The dollar sign appeared on the original Appendix R form.

TMSI contends that, read literally, CCHSC has stated a price per passenger mile of fifty-nine dollars and eighty cents. If that is the case, then TMSI would be the most advantageous offeror, considering price and the other evaluation factors, and TMSI should receive award of the contract. In the alternative, TMSI argues that, if the State considered CCHSC's price per passenger mile to be fifty-nine and eight-tenths cents, then CCHSC is not responsive because of the requirement that all prices be stated in whole cents. TMSI argues that the State cannot allow CCHSC to correct its stated price per passenger mile under either scenario because the error is not a minor informality.

CCHSC argues that its price per passenger mile of "59.8" cannot be viewed as "\$59.80", although it concedes that, as actually written, it is not fifty-nine cents either. CCHSC points out that the dollar sign appears in the original Appendix R form and was not actually written in by it. CCHSC also notes that the bottom portion of Appendix R, which requires a calculation of projected contract amount, was filled in by CCHSC as follows:

Projected Units of Service for the county	<u>1,889,000</u> ¹
Unit Rate per passenger mile	x <u>59.8</u>
Maximum Contract Amount	<u>1,129,622</u>

CCHSC argues that this calculation on Appendix R indicates that its price per passenger mile was 59.8¢, not \$59.80.

As for the requirement that prices be stated in whole cents and rounded to the nearest whole cent, CCHSC argues that rounding 59.8¢ to 60¢ is a standard and simple mathematical procedure

¹The projected units of service were provided in the RFP.

which can be performed by the State. In sum, CCHSC argues that any error in recording its bid price can be waived by the State as a minor informality. In the alternative, CCHSC argues that it should be allowed to correct its bid price because the error is manifest on the face of the cost proposal form. MMO and HHS agree with CCHSC's position.

Conclusions of Law

a. Minor Informality

Section 11-35-1520(13) of the South Carolina Consolidated Procurement Code provides for the waiver or curing of minor informalities and irregularities in bids and proposals.² That section provides in relevant part:

A minor informality or irregularity is one which is merely a matter of form or is some immaterial variation from the exact requirements of the invitation for bids having no effect or merely a trivial effect on total bid price, quality, quantity, or delivery of the supplies or performance of the contract, and the correction or waiver of which would not be prejudicial to bidders. The procurement officer shall either give the bidder an opportunity to cure any deficiency resulting from a minor informality or irregularity in a bid or waive any such deficiency when it is to the advantage of the State.

Section 11-35-1520 then sets forth a non-exclusive list of examples of minor informalities or irregularities, none of which relate to errors in pricing.

CCHSC argues that its statement of its price per passenger mile as "59.8", when it meant to bid 59.8¢, is a minor irregularity which can be waived by the State and cured by it under § 11-35-1520(13). I do not agree.

By definition, a "minor irregularity" is one whose waiver and correction will have no effect or merely a trivial effect on contract price. At best, CCHSC erred by bidding a nonsensical amount

²Section 11-35-1520(13) is made applicable to the request for proposal process by Regulation 19-445.2095(E).

(59.8) and, at worst, CCHSC bid fifty-nine dollars and eighty cents. Under either view, allowing CCHSC to change its bid to 59.8¢ has more than a trivial effect on contract price.³ See, e.g., *Protest of Coca-Cola Bottling Company*, Case No. 1996-13 (Failure to state a single commission rate not minor); *Protest of Miller's of Columbia, Inc.*, Case No. 1989-3 (failure to state unit prices is not minor); *Protest of CNC Company*, Case No. 1988-5 (Failure to separately state installation charges not minor).

b. Correction of Bid After Opening

CCHSC's second argument is that, even if the irregularity in its stated price per passenger mile is not minor, CCHSC should nevertheless be allowed to correct it pursuant to § 11-35-1520(7) and Regulation 19-445.2085.⁴ Under these sections, a bidder can correct its bid price as follows:

To maintain the integrity of the competitive sealed bidding system, a bidder shall not be permitted to correct a bid mistake after bid opening that would cause such bidder to have the low bid unless the mistake in the judgment of the procurement officer is clearly evident from examining the bid document; for example, extension of unit prices or errors in addition.

Reg. 19-445.2085(B). Whether a mistake is minor or immaterial or has an effect on bid price, quality, quantity, or delivery is irrelevant under this regulation.

At the hearing before the Chief Procurement Officer, CCHSC submitted a letter requesting that it be allowed to correct its bid under Regulation 19-445.2085(B). The regulation contains no time limit for requesting correction although both it and the statute contemplate that the request will

³Allowing the correction would not affect CCHSC's stated total maximum contract price because it was figured using 59.8¢; however, maximum contract price was requested for informational purposes only and was not the price which was tabulated and used to score the proposal.

⁴The procedures for correcting or withdrawing bids is made applicable to the request for proposal process by Regulation 19-445.2095(G).

occur after bid opening. CCHSC's request was therefore timely. Such request can be granted, however, only if, *in the judgment of the procurement officer*, the mistake was evident on the face of the bid. As noted by the Panel in *Protest of Brantley Construction Company*, Case No. 1994-6:

The law requires the mistake to be clearly evident, not to a specialist or expert, but to the procurement officer. If not interpreted this way, the regulation would, in effect, require the procurement officer to be an expert in every area covered by each specification in the bid. The Panel finds that to be an unreasonable interpretation of the requirements of the Code and Regulations. If a specialist or expert, or even the bidder, must be consulted to determine that a mistake has been made, then it is not clearly evident from the bid document that a mistake has been made, as required by the Code.

This discussion can be expanded upon to note that the Code and Regulations do not require that the mistake be evident to the reasonably informed layperson or the man-on-the-street or any such objective standard. It can therefore be presumed that the Legislature, in requiring the mistake to be evident in the judgment of the procurement officer, intended that the procurement officer utilize his unique knowledge and experience in making the judgment. By use of the qualifier "clearly" in the regulation, along with the examples given, however, the Legislature sets parameters on the discretion given the procurement officer.

David Quiat, the procurement officer in this case, testified that he initially did not even notice that CCHSC's cost proposal form contained an ambiguous bid price. He testified that he automatically assumed, based on his knowledge of the contract and his involvement in previous Title XIX transportation solicitations, that CCHSC's bid of "59.8" was 59.8¢. Mr. Quiat's assumption was logical given that a bid of \$59.80 would be approximately 100 times greater than that of any of the other bidders. As review of the Notice of Intent to Award reveals, the highest price bid by a winning vendor for any county was TMSI's \$1.05 for Greenville County. In general, the prices bid

ranged from 50¢ to 80¢. Mr. Quiat testified that the highest Medicaid Title XIX transportation bid price he had ever seen in his experience was between \$1.05 and \$1.10 per passenger mile. Amendment No. 1 to the RFP is itself some evidence of the extreme unlikelihood that CCHSC was bidding \$59.80. As noted this amendment required “Offeror shall propose a unit rate per passenger mile *in whole cents (for example .69 not .699).*”(Emphasis added).

Further, a bid of \$59.80 would make CCHSC’s maximum contract price over \$110 Million, just for Charleston County. As noted, this a factor of 100 greater than the \$1,129,622 calculated by CCHSC on Appendix R. Again, Mr. Quiat testified that he did not initially notice that CCHSC’s maximum contract price calculation was inconsistent with its stated price per passenger mile because fifty-nine dollars was not a conceivable price in his judgment and experience. Regardless of whether Mr. Quiat initially noticed it, however, CCHSC’s calculation of its maximum contract price is clear evidence on the face of the bid from which Mr. Quiat could have reasonably concluded that “59.8” meant fifty-nine and eight-tenths cents.

Finally, I do not believe that allowing this correction will prejudice the State or fair competition. On the contrary, if no correction is allowed, no competition exists and the State loses that benefit. Further, even though, as TMSI argues, correction in this case allows CCHSC to become the “low bidder”, that fact alone cannot be prejudicial to fair competition because Regulation 19-445.2085(B) specifically speaks to, and allows, correction when such correction would cause the bidder to have the low bid. Given the factual circumstances of this case, I conclude, and recommend that the Panel find, that the State properly allowed CCHSC to correct its price per passenger mile pursuant to Regulation 19-445.2085(B) because the mistake was clearly evident on the face of the bid in the reasonable judgment of the procurement officer.

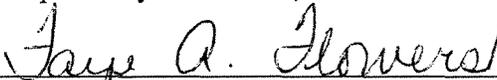
c. Minor Informality - Rounding Up to Whole Cents

Because this correction leaves CCHSC's price as 59.8 cents, one further analysis is necessary. TMSI's final argument is that, if CCHSC's price is 59.8 cents, then CCHSC is not responsive to the bid requirement that prices be stated in whole cents, rounded to the nearest whole cent. As noted earlier, a minor informality or irregularity is one which has no effect or merely a trivial effect on price, quality, quantity, delivery, or performance. I agree with CCHSC that its failure to round its bid to nearest whole cent is a minor irregularity which can be waived and cured because the rounding of 58.9 cents to 60 cents has no effect on quality, quantity, delivery or performance of the contract and only a trivial effect on price. Further, because the effect of rounding in this case is to slightly *increase* CCHSC's price, it does not have a prejudicial effect on the other bidders.

Recommendations

1. TMSI's grounds of appeal numbers 2 through 4 should be dismissed as either vague or untimely.
2. The State should not be allowed to waive CCHSC's error in stating its price per passenger mile as a minor informality or irregularity under § 11-35-1520(13).
3. The State should allow CCHSC to correct the error in its price per passenger mile under Regulation 19-445.2085(B).
4. The State should be allowed to waive and cure CCHSC's failure to round its price per passenger mile to the nearest whole cent.

Respectfully Submitted,


Hearing Officer

Columbia, S.C.
May 5, 2000

CONCLUSION

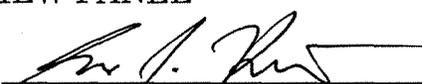
Based on the report and recommendations of the hearing officer, the Panel dismisses TMSI's grounds of appeal numbers 2 through 4 as vague. The State is directed to allow CCHSC to cure the deficiency in its price per passenger mile by correction under Regulation 19-445.2085(B). The State is directed to waive CCHSC's failure to round its price per passenger mile to the nearest whole cent.

For the foregoing reasons, the appeal by TMSI is dismissed and the decision of the CPO is upheld in as much as it is consistent with the Panel's findings.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT
REVIEW PANEL

BY: _____


Gus J. Roberts, Chairman

Columbia, SC

May 16, 2000