

STATE OF SOUTH CAROLINA	)	BEFORE THE SOUTH CAROLINA
	)	PROCUREMENT REVIEW PANEL
COUNTY OF RICHLAND	)	CASE NO. 2000-3
	)	
	)	
In re:	)	<b>ORDER</b>
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 Aiken Area Council on Aging (AACOA). 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.<sup>1</sup>

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<sup>1</sup> 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. 2000-3
	)	
Protest of Transportation Management Services, Inc.	)	<b>REPORT AND RECOMMENDATION OF THE HEARING OFFICER</b>
	)	
Appeal by Transportation Management Services, Inc.	)	
	)	
	)	

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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 Aiken Area Council on Aging ("AACOA"). Appearing at the hearing before me were the Protestant TMSI, represented by Michael H. Montgomery, Esquire; AACOA, 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 and which made certain revisions to the RFP and its Appendices. 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.

After proposals were opened, a three-member panel undertook to review and rate the twenty-two responsive proposals submitted. Prior to evaluation the evaluators met with David Quiat, the procurement officer in this case, and received an evaluation panel briefing sheet which contained instructions to aid the evaluators. The instructions contained sections advising the panel of the confidentiality of the evaluation process, requiring that no evaluator have a conflict of interest, requiring that each evaluator score proposals independently of the other evaluators, requesting that evaluators monitor the responsiveness of proposals by checking proposals against the requirements of the RFP, explaining the rating structure, indicating that cost was not a factor to be considered by the evaluators, explaining how evaluators could document their evaluations, indicating that oral presentation might be requested, and advising panel members of the possibility of protests.

The evaluators were also given score sheets setting forth the criteria and the weightings assigned by the RFP as Cost, 45 points, technical approach, 25 points, coordination of transportation efforts, 15 points, corporate background, experience and financial stability, 10 points, and approach to staffing, 5 points. In addition, the score sheet contained a grade description which attempted to correlate letter grades to possible point ranges, for example, 80 to 89 was described as "Criterion was addressed well. The response indicates some excellent capabilities ("B")."

After the evaluators had independently reviewed and scored proposals, they met with Mr. Quiat to discuss the responses and finalize scores. Mr. Quiat supplied the cost information to determine the final ranking of vendors.

On September 8, 1999, MMO posted the Notice of Intent to Award for all counties. For the Aiken County contract at issue in this proceeding, two offerors submitted proposals, TMSI and AACOA. The Notice of Intent to Award listed AACOA as the awarded vendor.

On September 22, 1999, TMSI protested the award to AACOA 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.

#### Questions Presented

TMSI alleges that the award to AACOA violates the South Carolina Consolidated Procurement Code because the evaluation process was flawed. Specifically, TMSI alleges that evaluator James Boggs assigned a grade of 85 to all proposals, with few exceptions, without regard to the completeness and merits of each proposal. TMSI contends that Mr. Bogg's evaluation was contrary to the underlying purpose of the Procurement Code to "ensure the fair and equitable treatment of all persons dealing with the procurement system", that his assigning every proposal the same score undermines the criteria and weightings set forth in the Request for Proposals and removes subjectiveness from the process, and that his evaluation was clearly erroneous, arbitrary, capricious and contrary to law.<sup>1</sup> In its appeal letter, TMSI concedes that Mr. Boggs was not biased.

AACOA argues that, while Mr. Boggs' scoring method was unconventional, it was not arbitrary, capricious, or contrary to law. AACOA urges the Panel to apply its longstanding rule that

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<sup>1</sup>Evaluator's Boggs' actions must be considered in this case because elimination of his scores result in a change in the relative positions of TMSI and AACOA, resulting in TMSI becoming the highest scoring offeror. See, *Protest of First Sun EAP Alliance, Inc.*, Case No. 1994-11 (If an evaluator's score does not affect the outcome of the procurement, his conduct is harmless error and there is no need for review of the process).

it will not substitute its judgment for the judgment of the evaluators. MMO and HHS join in AACOA's arguments

#### Conclusions of Law

Under § 11-35-2410, a determination by the State as to which proposal is the most advantageous considering price and the other evaluation criteria is final and conclusive unless such determination is "clearly erroneous, arbitrary, capricious, or contrary to law." The Panel has held numerous times that this section dictates that the Panel will not re-evaluate proposals and will not substitute its judgment for the judgment of the evaluators. *See, e.g., Protest of Travelsigns*, Case No. 1995-8; *Protest of First Sun EAP Alliance, Inc.*, Case No. 1994-11; *Protest of NBS Imaging Systems, Inc.*, Case No. 1993-16; and *Protest of Coastal Rapid Public Transit Authority*, Case No. 1992-16.

In the *Coastal Rapid Public Transit Authority* case, the Panel established the basic framework for review of challenges to evaluators' conduct:

The determination by the State who is the most advantageous offeror is final and conclusive unless clearly erroneous, arbitrary, capricious, or contrary to law. . . . The burden of proof is on [the protestant] to demonstrate by a preponderance of the evidence that the determination in this case has such flaws. . . . The Panel will not substitute its judgment for the judgment of the evaluators, who are often experts in their fields, or disturb their findings so long as the evaluators follow the requirements of the Procurement Code and the RFP, fairly consider all proposals, and are not actually biased.

The Panel has held that the evaluation process does not need to be perfect so long as it is fair. *NBS Imaging Systems, Inc.*, cited above. Further, because the Panel will not re-evaluate proposals or substitute its judgment for that of the evaluators, the Panel has held that a claim of superiority by a vendor in certain areas of evaluation, however valid, does not compel the finding that the vendor

is the most advantageous to the State. *See, Protest of First Sun EAP Alliance, Inc., and Protest of Coastal Rapid Public Transit Authority*, cited above.

Evaluator Boggs testified as follows concerning his evaluation procedures. He reviewed the RFP once thoroughly prior to beginning evaluations to determine the criteria and specific requirements. He thereafter reviewed each proposal and evaluated it against his understanding of the RFP criteria and requirements and not by comparing one proposal against the others. He determined, based on the scoring sheet grade description that, as to each listed criteria, if a proposal covered the elements and was a good proposal, he would assign a “solid ‘B’ ” grade, in other words, an 85. Although he had no “hard and fast” criteria for deducting or adding to the 85 grade, he did in some instances discount points for certain deficiencies he observed. He reviewed and followed the instructions given to the evaluators. He has no economic or other relationship with any vendor which might create a conflict of interest. He scored the proposal independently and not in concert with other evaluators. He did not consider any information outside the RFP or the proposals. He used the same method to grade each and every proposal reviewed by him. His evaluation of the proposals took several weeks.

As pointed out by TMSI, the result of Mr. Boggs’ evaluation was that nearly every proposal received a grade of 85 in every category with some few exceptions. TMSI and AACOA both received 85's in every category evaluated by Mr. Boggs, with the result that the cost factor determined the winner.

TMSI presented the testimony of its President, Joseph Zaviska, who testified as to TMSI’s lengthy experience in performing Title XIX contracts in South Carolina. Mr. Zaviska also pointed out several places in TMSI’s technical proposal where, although it received the same score as

AACOA from Mr. Boggs, it responded in a much more complete manner than AACOA. TMSI contends that Mr. Boggs' assignment of identical grades to TMSI and AACOA in every category was clearly arbitrary, capricious, contrary to law and unfair.

Although TMSI has demonstrated that Evaluator Boggs' evaluation method was unorthodox, based on the requirements of § 11-35-2410 and the previous Panel decisions, I cannot find that his conduct was clearly erroneous, arbitrary, capricious, or contrary to law. As pointed out by AACOA, MMO, and HHS, Mr. Boggs' scores for TMSI and AACOA are similar in most respects to the scores assigned by the other two evaluators.<sup>2</sup> Further, as Mr. Boggs testified without contradiction, he independently evaluated each proposal for compliance with the requirements of the RFP, he applied the same method to each proposal, he spent approximately two weeks reviewing and evaluating proposals, and in his opinion, most of the proposals were "good, solid 'B' " proposals. However meritorious TMSI's claims of superiority in certain areas might be, the Panel has held numerous times that it will not re-evaluate proposals and substitute its judgment for that of the evaluators.

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<sup>2</sup>Evaluator Boggs scores in each of the four categories were as follows: TMSI - 85, 85, 85, and 85; AACOA - 85, 85, 85, and 85. Evaluator Busbee's were: TMSI - 90, 85, 90, and 90; AACOA - 90, 90, 85, and 90. Evaluator Stevens' were: TMSI - 98, 98, 100, 98 and AACOA - 88, 85, 85, and 83.

Recommendations

1. The award to AACOA should be affirmed and the protest of TMSI should be dismissed.

Respectfully Submitted,

  
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Hearing Officer

Columbia, S.C.  
May 8, 2000

## CONCLUSION

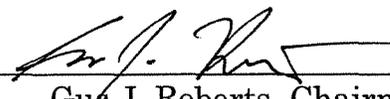
Based on the report and recommendations of the hearing officer the award to AACOA is affirmed.

For the foregoing reasons, the appeal by TMSI is dismissed and the decision of the CPO is upheld.

**IT IS SO ORDERED.**

SOUTH CAROLINA PROCUREMENT  
REVIEW PANEL

BY: \_\_\_\_\_

  
Gus J. Roberts, Chairman

Columbia, SC

May 16, 2000