

STATE OF SOUTH CAROLINA

**BEFORE THE SOUTH CAROLINA
PROCUREMENT REVIEW PANEL**

COUNTY OF RICHLAND

CASE NO. 2001-7

In Re:

**Protest of Value Options,
Magellan Behavioral Health &
Blue Cross and Blue Shield**

ORDER

**Appeal by Value Options,
Magellan Behavioral Health &
Blue Cross and Blue Shield**

This case came before the South Carolina Procurement Review Panel (Panel) for a hearing on July 19th and 20th, 2001, on appeal by Value Options (VO), Magellan Behavior Health (Magellan), and Blue Cross and Blue Shield (BCBS) of a decision by the Chief Procurement Officer (CPO). The CPO's Decision was posted on June 18, 2001. The appeal letters were received on June 28, 2001. On July 10, 2001, Blue Cross and Blue Shield, represented by M. Elizabeth Crum, Esquire, withdrew their appeal. Present and participating at the hearing before the Panel were VO, represented by Hardwick Stuart, Jr., Esquire, Magellan, represented by John E. Schmidt, III, Esquire and Melissa J. Copeland, Esquire, APS Healthcare (APS), represented by Richard Harpootlian, Esquire, the Office of Insurance Services (OIS), represented by Craig Davis, Esquire, and James Flanagan, Esquire, and the Office of General Services (GS), represented by Keith McCook, Esquire. Laura Fisher, Esquire, general counsel for APS, was also present at the hearing.

FINDINGS OF FACTS

On January 24, 2001, OIS issued a request for proposals (RFP) to procure behavioral health services for the State's group health plan. This procurement is in response to the Mental Health Parity Act that was enacted during the 2000 legislative session. The act requires parity coverage for behavioral health services under the State Health Plan which will effectively strengthen the State's coverage for mental health and substance abuse services. On February 21, 2001, OIS conducted a pre-proposal conference. On March 9, 2001, OIS issued an amendment to provide answers to the questions received from prospective offerors. On April 6, 2001 OIS opened proposals received from APS, Companion Benefit Alternatives-Blue Cross and Blue Shield, Magellan, Horizon, CIGNA Behavioral Health, MHN, United Behavioral Health and VO. OIS rejected the proposals of MHN, United Behavior Health, and VO as nonresponsive. On April 18, 2001 evaluation score sheets for responsive proposals were completed. The total scores of the responsive offerors were follows:

<u>OFFEROR</u>	<u>TOTAL SCORE</u>
APS	450.9
Companion Benefit Alternatives-BCBS	427.7
Magellan	426.4
Horizon	410.1
CIGNA Behavioral Health	405.5

On April 20, 2001 OIS posted a notice of intent to award the contract to APS. On May 4, 2001, the CPO received protest letters from VO, Magellan and BCBS. On June 18, 2001, the CPO's decision was posted. On June 28, 2001, VO, Magellan and BCBS appealed the CPO's decision to the Panel. On July 10, 2001, Blue Cross and Blue Shield withdrew their appeal.

MOTIONS TO DISMISS

OIS, joined by APS and GS, made motions to dismiss Magellan's appeal in its entirety alleging the appeal letter contained grounds not established in the protest letter and in the alternative that Magellan's original protest letter provided no "...particularity to give notice of the issues to be decided." OIS, joined by APS and GS, also made motions to dismiss several appeal claims averred by VO alleging new grounds were raised in the appeal letter, no question of material fact existed with regard to VO's disqualification as nonresponsive, failure to state a claim with any recognizable legal basis for relief, and abandonment of evaluation issues. The Panel in reviewing and considering the record on appeal determined what issues were consistent with the protest letters, addressed in the CPO's decision and properly asserted to the Panel by both appellants. Having made this independent determination in order to establish Panel jurisdiction, the motions to dismiss were denied.¹

¹ "...Since the Panel is an administrative review body, and not an investigative one; the Panel's scope of authority is limited to the appellate review of written determinations and decisions brought to it by way of protest or application..." *Hitachi Data Systems Corp. v. Leatherman* (S.C. 1992) 309 S.C. 174, 420 S.E.2d 843.

CONCLUSIONS OF LAW

ISSUE I: APS' FINANCIAL RESPONSIBILITY

The appellants asserted the following with regard to APS' financial responsibility:

- a. The preponderance of the evidence indicates that the State did not consider all of the relevant and important evidence with regard to APS Healthcare's financial responsibility.²

STATE STANDARDS OF RESPONSIBILITY

The South Carolina Consolidated Procurement Code requires the State to determine the responsibility of bidders and offerors prior to awarding contracts.

The relevant statutes and regulation are as follows:

- Section 11-35-1410 (6) states, "Responsible bidder or offeror" means a person who has the capability in all respects to perform fully the contract requirements and the integrity and reliability which will assure good faith performance which may be substantiated by past performance.

The parties took no exception to the issues the Panel decided to hear and made no motions addressing issues the Panel may have overlooked with the exception of an issue in regard to the evaluation process. Value Options contended that issue number 15 of their protest letter dealt with the evaluation process being arbitrary and capricious. The Panel was unconvinced by this argument because there is no evidence that this position was taken in the CPO's hearing below. In fact, examination of the evaluators was turned down by all parties during that hearing. The evaluators were present for the hearing before the Panel, but examination was limited to the issues which were properly raised.

² The appellants further asserted the following issue which this Panel did not have jurisdiction to address because it was not included in the protest letters and it was not addressed by the CPO: VO's #5 b. *In light of the State's request for audited financial statements, the State improperly considered the November 1999 unaudited financial statement of APS Healthcare.*

The following issue asserted by the appellants will be addressed in terms of evidence presented with regard to APS' financial condition: VO's #5 c. *The unrefuted expert testimony of Dr. Thomas Stanton is that APS Healthcare based on its audited financial statements is in financial distress.*

The following issue asserted by Magellan will not be addressed by the Panel because it was not included in the protest letter and it appears to misstate what was asked for in the RFP: #3 c. *The CPO erred in failing to find that APS was non-responsive in failing to supply the last two years' unaudited financial statements as required by the RFP.* The RFP requested the last two annual audited financial reports. [Record p. 111]

- Section 11-35-1810 (1) states, Responsibility of the bidder or offeror shall be ascertained for each contract let by the State based upon full disclosure to the **procurement officer** concerning capacity to meet the terms of the contracts based upon past record of performance for similar contracts.
- Section 11-35-2410 states, The determinations required by ... Section 11-35-1810 (Responsibility of Bidders and Offerors, Determination of Nonresponsibility) ... shall be final and conclusive unless they are clearly erroneous, arbitrary, capricious, or contrary to law.
- Regulation 19-445.2125 (A) states, Factors to considered in determining whether the state standards of responsibility have been met include whether a prospective contractor has:
 1. available the appropriate financial, material, equipment, facility, and personnel resources and expertise, or the ability to obtain them, necessary to indicate its capability to meet all contractual requirements;
 2. a satisfactory record of performance;
 3. a satisfactory record of integrity;
 4. qualified legally to contract with the State; and
 5. supplied all necessary information in connection with the inquiry concerning responsibility.

FINDINGS

Ms. Jane Britton, a contracts manager with OIS, acted as the procurement officer for this solicitation. Ms. Britton testified that she determined the initial responsiveness of the proposals before submitting them for evaluation. Ms. Britton testified that she has been working in this area for seven years. She stated that she has always felt bound by the Code in making these determinations and that she referred to the guidelines for determining responsibility contained in this particular RFP. [Record pp. 108,109]

Ms. Britton testified, that in her opinion, there were no “red flags” in APS’ proposal regarding their financial responsibility to perform the contract. She testified that she considered APS’ ratio, financial statements, and APS’ record of integrity as provided by their references before making a determination that APS had the financial resources to perform what the State was asking of them in this contract.

The Panel has not covered the issue of responsibility in great depth, but has stated, “*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 ... Award is not made to the most responsible offeror but rather to the most advantageous offeror, who must meet minimum responsibility standards*” Protest of Coastal Rapid Public Transit Authority, Case No. 1992-16. On the federal level it has been stated that, “*A contracting agency has broad discretion in making responsibility determinations since it must bear the brunt of difficulties experienced in obtaining the required performance. Responsibility determinations are of necessity a matter of business judgment and such judgement must, of course, be based on fact and reached in good faith.*” News Printing Co., Inc. v. U.S., 46 Fed.Cl. 740 (2000). The Panel finds that State agencies also have broad discretion in making responsibility determinations for procurement contracts.

The burden of proof is on the appellants to demonstrate by a preponderance of the evidence that the determination made by the procurement officer is clearly erroneous, arbitrary, capricious or contrary to law. *“To prove arbitrary and capricious conduct such as will permit the court to overturn a procurement decision, the aggrieved bidder must demonstrate a lack of reasonable or rational basis for the agency decision or subjective bad faith on the part of the procuring officer or clear and prejudicial violation of relevant statutes and regulations which would be tantamount to a lack of reasonable or rational basis.”* Robert E. Derektor of Rhone Island, Inc. v. Goldschmidt, 516 F.Supp. 1085. The Panel finds that the appellants have failed to prove that the procurement officer’s determination of APS’ responsibility lacked a reasonable or rational basis, or that there was a clear and prejudicial violation of any procurement regulation.³

ISSUE II: APS’ RESPONSIVENESS IN REGARD TO THEIR FINANCIAL CONDITION AND ALLEGED MISREPRESENTATIONS TO THE STATE IN REGARD TO THE FINANCIAL STATEMENTS IN APS’ PROPOSAL

The appellants asserted the following in regard to APS’ financial condition and alleged misrepresentations to the State:

The decision of the Chief Procurement Officer that the parties failed to prove that APS Healthcare is not financially responsible and/or responsive is in error; the error being that the preponderance of the reliable and probative evidence indicates that APS Healthcare has misrepresented its financial condition to the State and that APS Healthcare is in financial distress.

³ The responsibility inquiry is delegated to the procuring agency and the Panel takes the position that review of this issue is limited to whether the procuring officer’s determination was clearly erroneous, arbitrary, capricious, or contrary to law.

FINDINGS

Appellants called Dr. Thomas C. Stanton, a Forensic Economist, to testify as to his findings in regard to APS' financial condition and alleged misleading proposal. Dr. Stanton was qualified as an expert in financial statement analysis and ratio analysis. Dr. Stanton testified that he analyzed the financial viability of APS and compared the financial statements in APS' proposal to the financial statements submitted to the Securities and Exchange Commission (SEC) as of the same date. Dr. Stanton's analytical report of APS' service proposal was introduced into evidence. The findings of Dr. Stanton are summarized as follows:

- The Service Proposal submitted by APS Healthcare on April 6, 2001 is false and misleading.
- Dr. Stanton concluded that APS is not a financially sound company.
- APS' statement that it had a positive net income in the third and fourth quarters of 2000 is misleading as it ignored the fact that APS has had net losses in every year of its existence.
- APS' report that it is operating cash flow positive was largely the result of an increase in notes payable.
- APS' report of a current ratio of 1:1:1 was false, not a ratio at all, and an obvious error.⁴

⁴ Ms. Britton during her testimony acknowledged that this ratio statement was probably a mistake, but in reviewing APS' entire proposal she was satisfied that they were fully capable of performing the contract.

- As to APS' report that they were a growing company that continues to improve its financial performance year to year, Dr. Stanton argued that the company's growth has come largely from acquisitions and that there is no substantial evidence of improvement in their financial performance.
- Dr. Stanton noted several differences in the financial statements contained in APS' service proposal and the SEC Registration Statement, and commented that "One of the statements is obviously false, since the Registration Statement was presumably prepared with greater care, the Service Proposal is likely the false one."
- APS Healthcare is highly leveraged and cannot withstand any interruption of its business.
- APS Healthcare's cash flow comes mostly from borrowing.
- APS Healthcare does not have sufficient earnings to service its debt.
- APS Healthcare cannot be solvent in the long term until it is able to service its debt obligations from operations.
- As of December 31, 1999 APS Healthcare was in financial distress.

Dr. Stanton was asked by the Panel's Chairman if it was possible for a growing company such as APS' to improve their financial situation. He responded that it would be possible if APS eliminated unprofitable operations, motivated its employees, sought new work, and cut costs.

APS Healthcare responded to Dr. Stanton's allegations by calling Mr. William Cole, Jr., a partner with Ernst & Young, the renown and internationally recognized firm of Certified Public Accountants responsible for the preparation of both of APS' financial statements. Mr. Cole testified that the differences in the financial statement submitted to the SEC were because of special standards required by the Form S-1 on how financial statements should be reported. Mr. Cole further testified that the differences were not misleading and that both financial statements were true and correct. Mr. Cole testified that much of the debt incurred by APS was from growth and even with losses the acquisition growth was positive. He stated that just because a company's cash flow may be shown at a loss that does not make the company unsound or make a going concern statement necessary.

Neither Regulation 19-445.2125 nor the RFP state definitive financial criteria for determining whether a contractor will be found responsible. In a federal case that the Panel finds substantially similar to the case at hand, *the plaintiff alleged that the defending contractor had a longstanding history of financial problems and provided the court with evidence that the defending contractor lost money every year since its inception. The plaintiff alleged that such financial setbacks would cause the agency to incur additional costs, in terms of technical staff, equipment and support staff, not included in the defending contractor's proposal.*

The plaintiff interpreted the defending contractor's loss of revenue as a lack of financial health. While not disputing the losses, the defending contractor pointed to the installation of new management and subsequent steady improvements in its financial situation as an indication of improved financial health. The court found a reasonable basis existed for the governmental agency's financial responsibility determination. Anadac, Inc. v. United States Department of Justice, Immigration and Naturalization Service, 44 F.Supp.2nd 306 (1999). The Panel finds that the appellants have not proved by a preponderance of the evidence that APS misrepresented their financial condition and provided false or misleading financial statements to the State. Accordingly, the Panel finds that the procurement officer's determination that APS is financially capable of performing the contract was not clearly erroneous, arbitrary, capricious, or contrary to law.

The appellants also asserted another responsiveness issue in regards to APS' alleged misrepresentations as follows:

The Chief Procurement Officer erred in dismissing the protest relating to APS Healthcare's misrepresentations of experience in administering and managing behavioral health care programs similar to that described in the RFP for groups of similar size.⁵

⁵ Section 11-35-1410(7) of the Code states, "*Responsive bidder or offeror*" means a person who has submitted a bid or offer which conforms in all material aspects to the invitation for bids or request for proposals. Section I of the RFP is titled Services Proposal which contains the following subparts: *A. Executive Overview B. Point-by-Point Response C. Questionnaire for Proposers D. RFP Term and Certification* and *E. Drug-Free Workplace Certification*. This portion of APS' proposal consists of 103 pages considered by the procurement officer and the evaluators in regards APS' ability to administer and manage behavioral health care programs.

FINDINGS

The initial determination of responsiveness was made by Ms. Britton, the procurement officer. Ms. Britton testified that she reviewed the entire proposals before submitting them to the evaluators. She found APS' proposal conformed in all material aspects to the RFP. Ms. Phyllis Buie, one the evaluators, also testified at the Panel's hearing. Ms. Buie testified that she read each proposal and scored them against the RFP without bias toward any one vendor. APS signed and submitted the RFP Term and Certification That Proposer Will Meet All Requirements. [Record p. 403] Further, the record contains a letter to Ms. Britton from Terah Cochrane, Senior Vice President of National Sales for APS, in which Ms. Cochrane supplies information in regards to APS ability to administer and manage a behavioral healthcare program such as the one in OIS' RFP. [Record p. 213] This letter, dated April 4, 2001, states that *"APS is the third largest independently owned managed behavioral healthcare company in the country. We currently serve 7.9 million covered lives, which encompass a variety of employer and State contracts"* (This information is also included in APS' proposal in response to question 1 of the Questionnaire for Proposers). [Record p. 306] There is evidence in the record that the procurement officer and the evaluators had a reasonable and rationale basis for concluding APS could administer and manage behavioral health care programs similar to that described in the RFP for groups of similar size.⁶

⁶ There is no evidence in the record of misrepresentations made by APS in this area of the RFP.

ISSUE III: APS' RESPONSIVENESS IN REGARD TO PROVIDING THE NAMES AND THE QUALIFICATIONS OF THE TOP THREE PRINCIPAL INDIVIDUALS RESPONSIBLE FOR IMPLEMENTING THE CONTRACT

The appellants asserted the following in regard to APS' responsiveness to providing the names and the qualifications of the top three principal individuals responsible for implementing the contract:

The CPO erred in dismissing the protest concerning APS' nonresponsiveness with regard to supplying the names and qualifications of the top three principal individuals responsible for the implementation of the contract based on the fact that it was not an essential requirement and it has been waived or corrected pursuant to the Code; the error being that:

- a. the evidence does not support the Chief Procurement Officer's determination that this requirement was not essential;
- b. the Chief Procurement Officer has failed to explain why he felt such a requirement involving key personnel was not essential; and
- c. pursuant to Section 11-35-1520(13) which is applied to competitive sealed proposals pursuant to Budget and Control Board Regulation 19-445.2095(E) any communication or determination with regard to curing any deficiency or waiving such deficiency shall be in writing, which was not followed with regard to the nonresponsiveness of APS and therefore contrary to the Procurement Code.

FINDINGS

The appellants questioned Ms. Britton in regard to APS' responsiveness to providing the names and the qualifications of the top three principal individuals responsible for implementing the contract and as to what she considered as essential requirements of the RFP. Ms. Britton testified that she initially determined that APS was responsive in this respect because she considered their proposal to have supplied the information requested. She testified that APS supplied the names and qualifications of two individuals and although no "Christian" name was supplied for the third individual, that person's qualifications were described and APS extended the agency the option of feedback and approval as to who this individual would be. Ms. Britton further testified that she felt the evaluator's score sheet was a good indicator for what the essential requirements of the RFP were.

The Panel has previously held, *"In order to be responsive, a proposal need not conform to all of the requirements of the RFP; it must simply conform to all of the essential requirements of the RFP. Because the Code requires rejection of a proposal when it fails to meet an essential requirement but allows waiver of an immaterial variation from exact requirements, a requirement is not "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. Waiver or correction of a variance from such a requirement is appropriate under the Code when relative standing or other rights of the bidders*

are not prejudiced ... However, a requirement is not "essential" simply because it is mandatory." Protest of Gregory Electric Company, Inc., Case No. 1989-17.

Section 11-35-1520(13) of the Code provides in part the following:

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 or negligible 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. Such communication or determination shall be in writing.

The Panel finds that Ms. Britton was correct in her assertion that the evaluation score sheet was a good indicator for what the essential requirements of the RFP were. In reviewing the evaluator's score sheet, roman numeral one is titled "ESSENTIAL AND MATERIAL FEATURES," and roman numeral two is titled "RECORD OF PERFORMANCE AND INTEGRITY." [Record p. 177] **Personnel** (Appendix 2. Item C. 21-27) is a subcategory under roman numeral two. The Panel finds this as convincing evidence that the answer to question 21 was not an essential requirement of the RFP, but merely an indication of APS' record of performance and integrity. The Panel finds that the name of the third principal individual would have no effect or merely a trivial or negligible 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. Here the procurement officer found the information supplied by APS was enough to be considered responsive to question 21.

She stated that she also referred to APS' responses to question 27 and 43 in regards to their implementation team. [Record pp. 581, 582] In regards to APS' not providing the name of this third individual, the Panel finds that this is a minor informality. However, the determination that this issue falls under 11-35-1520(13) was first made by the CPO and not by the agency. Therefore, the Panel takes the position that the agency may comply with the writing requirement of the statute after being informed that a formal determination of a curable or waivable deficiency in the proposal has been made.

ISSUE IV: VALUE OPTIONS' RESPONSIVENESS

VO asserted the following in regards to their proposal being determined nonresponsive:

The Chief Procurement Officer erred in dismissing Issues No. 1-5 that Value Options submitted the proposal most advantageous to the State of South Carolina, based on experience, financial condition, and cost and was, and is, a responsible offeror ready and willing to provide the services at the cost in the proposal.

FINDINGS

Ms. Jane Britton drafted a memorandum of her determination that Value Options' proposal was nonresponsive to the RFP in which she stated the following: *"Value Options (VO) inserts on its price submission sheet the following: "Value Options guarantees that the Year 2 and 3 rates will not increase by more than the Medical CPI at the time of renewal, given that there are no changes to the plan design." This conditions the price under*

[Regulation] 19.445.2070D [and] is an “attempt by the proposer “to impose conditions which would modify requirements ... since to allow the [proposer] to impose such conditions would be prejudicial to other [proposers]. The more specific examples include “attempts to protect himself against future changes in conditions, such as increased costs...” This also contradicts the principles of [Regulation] 19-445.2070D (1) and (3) which is that disqualification would ordinarily occur if a price is stated but is qualified as being subject to price in effect at time of delivery. It is not possible to either budget for or evaluate an unknown price.”

VO argued that their proposal was most advantageous to the state, was responsive or was a minor technicality which had a trivial or negligible effect on price and was not prejudicial to the other offerors under precedent established in Protest of ACMG, Inc., Case No. 1990-4.⁷ In that case which was decided under a statute which has since been modified the Panel found ... *“That section allows the State to “negotiate” with any offeror whose proposal appears to be eligible for contract award.”*

The current statute 11-35-1530(6) provides *“...discussions may be conducted with apparent **responsive** offerors for the purpose of clarification to*

⁷ The Panel has held that, *“A proposal that is nonresponsive cannot, by definition, be the proposal that is most advantageous to the state.”* Protest by J&T Technology, Inc., Case No. 1987-3. In a footnote to Case No. 1995-8, Protest of Travelsigns, the Panel stated, *“Travelsigns alleges it offered the procurement most advantageous to the state, and attempts to explain why it’s proposal is superior to the proposal ranked highest by the State. The determination of what is most advantageous to the State can only be determined by the State. An offeror’s claim to be superior to other offerors is fruitless because the Panel has consistently held that it will not substitute its judgment for the judgment of the evaluation committee which determines the ranking of the offerors.*

*assure full understanding of the requirements of the request for proposals. All offerors, whose proposals, in the **procuring agency's sole judgement**, need clarification shall be accorded such an opportunity."*

In the present case VO was found nonresponsive for the reasons stated above by Ms. Britton. Ms. Britton testified that she felt prohibited by the Code from contacting VO. Under the current statute, the appropriate precedent to be followed in this case is Protest of Steen Enterprises, Inc., Case No. 2000-9. In Steen the Panel found, "*Steen's bid, by including the additional costs...clearly qualified such price as being subject to "price in effect at the time of delivery."* *The price of the equipment to the State could not be determined by simply reading the written bid submitted by Steen. The Panel finds Steen's bid nonresponsive.*" Therefore, the Panel finds that the determination by Ms. Britton that VO's bid is nonresponsive was not clearly erroneous, arbitrary, capricious, or contrary to law, but is consistent with the precedent established by this Panel in Steen.⁸

ISSUE V: MAGELLAN BEHAVIORAL HEALTH'S RESPONSIVENESS

Magellan asserts the following in regard to CPO finding their proposal nonresponsive:

The CPO erred in finding Magellan nonresponsive as that remedy was not requested by any party and the clarification that Magellan was allowed to make was allowed by the Procurement Code.

⁸ VO's qualification of their cost proposal [Record p. 656] was not a minor technicality because it directly effected price and if found responsive other bidders would be prejudiced by VO receiving the advantage of changing their rates in Year 2 and 3 if the Medical CPI increased or if the plan design changed.

FINDINGS

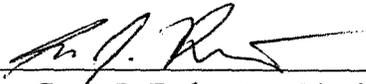
The CPO addressed the issue of Magellan's nonresponsiveness in relation to VO's allegation that OIS allowed Magellan and Cigna Behavioral Health to clarify their proposals while rejecting VO's proposal as nonresponsive for a similar infraction. The Panel finds that the CPO did not err in addressing Magellan's responsiveness because the issue was raised by VO and whether or not it was requested as a remedy is irrelevant. Magellan argues that the clarification that they were allowed to make was allowed by the Procurement Code. Section 11-35-1530 (6) of the Code provide, "*As provided in the request for proposals, discussions may be conducted with **apparent responsive** offerors for the purpose of clarification to assure full understanding of the requirements of the request for proposals...*" The Panel finds that the communication Ms. Britton made with Magellan dated April 11, 2001 was made prior to a determination of Magellan's responsiveness. This is evident from the last sentence of Ms. Britton's letter which states, "*Please understand that this is a preliminary matter and in no way suggests anything about the eligibility for further consideration of your submission to us.*" [Record p. 206] Therefore, this clarification was clearly in violation of the Code because Magellan was not yet deemed an apparent responsive offeror as is required for Discussion with Offerors under 11-35-1530 of the Code. Therefore, the CPO did not err in finding Magellan nonresponsive to the RFP by submitting more than one proposal which was contrary to Paragraph 1.15.1 of the RFP. [Record p. 69]

CONCLUSION

For the foregoing reasons, the decision of the CPO is upheld. The appeals of VO and Magellan are hereby dismissed.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT
REVIEW PANEL

BY: 
Gus J. Roberts, Chairman

Columbia, SC
August 3, 2001

APPENDIX

In the letter of withdrawal submitted by Blue Cross and Blue Shield (BCBS) on July 10, 2001, BCBS pointed out that on page 14 of the CPO's determination he found that VO, Magellan, and BCBS collectively protested APS' experience and key personnel. BCBS requested that the Panel take note and correct this finding because they protested that APS' alleged network of participating behavioral health care providers is not sufficiently credentialed which is a different ground. It is so noted and corrected in this Appendix rather than in the body of the Order because BCBS withdrew it's appeal.