

STATE OF SOUTH CAROLINA	)	BEFORE THE SOUTH CAROLINA
	)	PROCUREMENT REVIEW PANEL
COUNTY OF RICHLAND	)	
	)	
	)	ORDER
IN RE: Protests of Logisticare Solutions,	)	
LLC, and Medical Transportation	)	
Management, Inc.	)	Cases No. 2011-1 and 2011-2
	)	
Appeals of Logisticare Solutions, LLC,	)	
and Medical Transportation	)	
Management, Inc.	)	
	)	

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These cases are before the South Carolina Procurement Review Panel (the Panel) pursuant to requests for administrative review. Logisticare Solutions, LLC (Logisticare), and Medical Transportation Management, Inc. (MTM), each protested the intended awards of contracts for the provision of Non-Emergency Medical Transportation Program services (NEMT Program). The NEMT Program services are provided to eligible Medicaid recipients and are administered by the South Carolina Department of Health and Human Services (SCDHHS). The Panel conducted a hearing on April 27 and 28, 2011. Logisticare was represented by John E. Schmidt, III, Esquire, and Melissa J. Copeland, Esquire. MTM was represented by E. Wade Mullins, III, Esquire. American Medical Response, Inc. (AMR), was represented by M. Elizabeth Crum, Esquire. SCDHHS was represented by Deirdra T. Singleton, Esquire, and Vicki Johnson, Esquire. The Chief Procurement Officer for Goods and Services (the CPO) was represented by Molly R. Crum, Esquire.

**I. Findings of Fact**

**A. Factual Background of the Solicitation**

The Materials Management Office (MMO) conducted this solicitation on behalf of SCDHHS. Under the terms of the Request for Proposals (the RFP), the state of South Carolina

was divided into three geographical regions, Regions 1, 2, and 3, and the State intended to award an NEMT Program contract for each of those regions. The broker or brokers awarded the contracts were expected to provide transportation services to eligible Medicaid recipients receiving covered medical care or services under the Medicaid program. Offerors were allowed to submit proposals for one or more regions, but they were required to submit separate technical and price proposals for each region.

To assist offerors in preparing their proposals, the Scope of Work section of the RFP referenced appendices showing historical service volume data for fiscal years 2008, 2009, and for a portion of fiscal year 2010. This statistical data was submitted to SCDHHS by the current NEMT brokers and indicated the number of trips and the types of transportation (e.g., ambulatory, wheelchair, stretcher) provided to eligible Medicaid members. In its discussion of past service volume in this portion of the RFP, SCDHHS noted that “approximately 710,000 members are eligible to receive non-emergency transportation in any given month . . . . However, approximately 20,000 unduplicated members a month actually utilize non-emergency transportation services.” RFP, Section III, subsection 1.4, “Past Service Volume.” SCDHHS also noted that it “does not guarantee the accuracy of this data. SCDHHS also does not guarantee the service volume will be the same throughout this contract.” *Id.* In another portion of the Scope of Work section of the RFP, SCDHHS observed that “[t]he overall Scope of Work and Deliverables required under this RFP may vary from year to year as South Carolina’s program changes due to federal and state Medicaid program requirements.” RFP, Section III, subsection 3.0, “Core Services.”

The RFP required an offeror to provide certain information regarding its financial health and responsibility. First, subsection 2.3.4 of the General Broker Requirements required an

offeror to “provide assurance of . . . financial stability and have the financial resources to sustain services for a minimum of ninety (90) days prior to the payment.” RFP, Section III, subsection 2.3.4. Second, the RFP required that the offeror pay transportation providers in full for authorized trips within thirty days of the date of a transportation provider’s undisputed invoice. RFP, Section III, subsection 3.9, “Payment to Transportation Providers.” Third, to assist the State in making a responsibility determination, incorporated offerors were to submit income statements and balance sheets for the previous three fiscal years. RFP, Section V, “2. Company Structure and Financial Information.” Finally, offerors were asked to “[p]rovide a list of failed projects, suspensions, debarments, and significant litigation.” RFP, Section V, “3. Additional Information.”

Section IV of the RFP detailed the information offerors were to submit in their technical and price proposals. With regard to their technical proposals, an offeror was expected to “include a straightforward, concise description of the Offeror’s capabilities that satisfy the requirements of the RFP.” RFP, Section IV, subsection (a), “Technical Approach.” Subsection (a) also required an offeror to “cross-reference its Technical proposal with each requirement listed in Section III of this RFP. In addition, the [o]fferor must provide a point-by-point response to each of the requirements in Section III.” RFP, Section IV, subsection (a), “Critical Elements of the Technical Proposal.” As noted above, the RFP required price proposals to be submitted separately from the technical proposals.

The RFP was issued by MMO on September 9, 2010. On October 3, 2010, MMO issued Amendment 1 to the RFP; this amendment answered various questions submitted by prospective offerors. Amendment 1 included the following questions and answers which are germane to the issues before the Panel:

[Vendor #6] 10. Page 20, 1.4: Section 1.4, Past Service Volume references the number of Medicaid eligibles in Appendix I and states that those eligible for NE[M]T services are approximately 710,000. In the last three contract periods, we have seen our monthly Medicaid membership increase by approximately 80,000 members in our regions alone (roughly 20%) and according to an August 30th, Deloitte Center for Health Solutions Bulletin, it estimated that within the next three years the Medicaid enrollment will increase from 58.8 million to 76 million due to HealthCare reform, approximately 31%. Has the Agency developed any forward-looking projections on the potential growth of South Carolina Medicaid enrollment that may assist all bidders and can you share with us what those growth assumptions are?

**Answer:** The agency has developed some forward looking projections but not specifically for the purpose of non-emergency transportation. These projections may be found on the agency's website at [www.scdhhs.gov](http://www.scdhhs.gov). Discovery of any inaccuracy in this data will not constitute a basis for renegotiation of any payment rate after contract award. It remains the Offeror's responsibility to take into consideration normal volume increases over the contract period.

[Vendor #6] 13. Page 25, 2.3.4: Section 2.3.4 requests financial resources to sustain services for a minimum of ninety days prior to payment. Is the purpose of this requirement to establish the financial strength of the company that is being awarded the contract? If not, what is the purpose of the requirement?

**Answer:** Yes, the purpose is to establish that the organization is financially viable.

[Vendor #7] 19. From our understanding, the proposal should be set up as follows:

- Table of Contents
- Transmittal Letter
- Authorizing Document
- Executive Summary
- Certifications Statement
- Technical Proposal
  - Technical Approach
  - Price Proposal (Separately Sealed)
  - Corporate Background, Experience and Approach to Staffing

Is this correct?

**Answer:** Yes.

[Vendor #8] 8. Are any benefit changes anticipated or under consideration that may impact utilization under this program?

**Answer:** SCDHHS is expecting to add the Healthy Connections Kids (HCK) population of approximately 16,000 children in the fourth quarter of the calendar year 2010. However, this population currently provides its own transportation and the agency does not anticipate significant utilization of the transportation program. At this point, no additional programs are anticipated.

Amendment 1. MMO issued Amendment 2 to the RFP on October 11, 2010, but this amendment did not impact any of the issues currently before the Panel. MMO posted an intent to award the contract for Region 1 to Logisticare on December 3, 2010. MMO posted an intent to award the contracts for Regions 2 and 3 to AMR, on December 3, 2010. MTM protested the Region 1 award to Logisticare and the Region 2 and 3 awards to AMR on December 10, 2010. MTM filed a supplemental protest on December 20, 2010. MMO suspended the awards on December 13, 2010. Logisticare protested the Region 2 and 3 awards to AMR on December 13, 2010. Logisticare also filed an amended protest of the Region 2 and 3 awards on December 17, 2010.

**B. The Medicaid Bulletin Issued on December 14, 2010**

On December 14, 2010, SCDHHS released a Medicaid Bulletin which announced the reduction or elimination of certain previously covered services in an effort to address the agency's significant budget shortfall. For example, vision services for Medicaid members over the age of 21 were eliminated unless medically necessary and home health visits were reduced from seventy-five to fifty per year. The bulletin covered many other types of medical goods and services; however, nothing in this bulletin specifically eliminated or reduced NEMT Program services. In other words, if a medical service was covered by Medicaid and transportation was needed, then the NEMT Program would continue to provide the necessary transportation.

Mr. Kendall Quinton, the Senior Executive Assistant to the Director of SCDHHS, testified at length before the Panel. He emphasized that changes to Medicaid covered services were common, especially in light of the agency's sizable deficit. He also pointed out that some of the services eliminated or reduced in the December 14th bulletin were added back in subsequent Medicaid Bulletins. Mr. Quinton further testified that trips under the NEMT Program had not ceased since the December 14th bulletin. As far as anticipated changes to the Medicaid program in South Carolina in light of the agency's deficit and proposed health care reform, Mr. Quinton acknowledged that the agency was considering a wide range of options – everything from no change to the elimination of Medicaid – to address the challenges facing the agency. Moreover, Mr. Quinton testified that the agency was conducting a discussion of all the possible changes to the Medicaid program with the public and vendors through its Sustainability Project. Mr. Quinton also indicated that information regarding the Sustainability Project was readily available on the agency's website.

Mr. Albert Cortina, Logisticare's Chief Administrative Officer, also testified before the Panel. Mr. Cortina testified that the reductions and eliminations announced in the December 14th Medicaid Bulletin could affect transportation because Medicaid members who were no longer eligible for services would not need transportation. Mr. Cortina also testified that had Logisticare known in advance that SCDHHS was planning to reduce and eliminate some services on December 14th, it would have offered reduced pricing to the State in its proposal. However, Mr. Cortina also acknowledged that the RFP did not guarantee any set volume of services and conceded that Medicaid covered services frequently change.

Mr. Randall Baum, MTM's Chief Financial Officer, testified before the Panel as well. Mr. Baum agreed with Mr. Cortina that the changes announced in the December 14th Bulletin

would significantly impact the utilization of transportation services. Furthermore, Mr. Baum also stated that MTM would have reduced the pricing in its proposal had it known of the changes in advance. However, Mr. Baum admitted that everyone relied on the same information when preparing their proposals and acknowledged that the State could issue a new Medicaid Bulletin at any time.

### **C. AMR's Proposals for Regions 1 and 2**

As reflected in MMO's notice of intended award, AMR was selected to provide NEMT Program services for Regions 2 and 3. In accordance with the RFP's requirements, AMR submitted separate technical and price proposals for each of those regions. In the Executive Summary portion of its technical proposal for each region, AMR included information regarding its financial strength and noted "As shown in the chart below, at the end of 2009, AMR had over \$500 million in working capital, and over \$300 million in cash and cash equivalents." The chart referenced detailed AMR's assets, liabilities, and net worth for 2006, 2007, 2008, and 2009.

Later in its technical proposal for each region, AMR also confirmed its ability to pay transportation providers within thirty days of invoice as required by the RFP in Section III, subsection 3.9. In addition to this assurance, AMR also included the following language and chart<sup>1</sup> in this portion of its proposal for Region 2:

In fact, Section 2.3.1 requires the Bidder to provide assurance [of] financial stability, with the financial resources to sustain services for a minimum of ninety (90) days prior to receiving payment from SCDHHS. AMR's financial exposure as calculated for the first 90 days of operation finds us with \$4,717,758.70 exposure and this represents 0.91% or [sic] our current working capital.

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<sup>1</sup> The appearance of the chart has been modified to fit the formatting of this order. The text and monetary amounts are reproduced verbatim from AMR's original proposal.

Region 2	
Start up costs	\$319,756.00
First year billing (9 mos)	\$13,194,008.00
1/3 billing equals financial risk from Operations	\$4392,002.70
Total potential 90 day financial exposure	\$4,717,758.70

In similar fashion, AMR provided the following language and chart<sup>2</sup> in its proposal for Region 3:

In fact, Section 2.3.1 requires the Bidder to provide assurance [of] financial stability, with the financial resources to sustain services for a minimum of ninety (90) days prior to receiving payment from SCDHHS. AMR's financial exposure as calculated for the first 90 days of operation finds us with \$4748023. [sic] exposure and this represents 0.92% or [sic] our current working capital.

Region 3	
Start up costs	\$321,697.00
First year billing (9 mos)	\$13,278,978.00
1/3 billing equals financial risk from Operations	\$4,426,326.00
Total potential 90 day financial exposure	\$4,748,023.00

Elsewhere in its proposals, AMR certified that it was not currently suspended, debarred, declared ineligible, or voluntarily excluded from participating in the NEMT Program solicitation. AMR did not disclose any involvement in previous or current litigation.

Mr. Daniel Covey, the MMO procurement officer who conducted this solicitation, testified in the hearing before the Panel. Mr. Covey confirmed that AMR did submit separate technical and pricing proposals for each region and that he noticed the monetary figures included in the paragraphs and charts reproduced above from AMR's technical proposals. He recognized that the inclusion of these figures was potentially prejudicial and admitted that he redacted them

<sup>2</sup> This chart has also been modified to fit the formatting of this order. The text and monetary amounts are reproduced verbatim from AMR's original proposal.

from the technical proposals prior to sending them to the evaluators. Mr. Covey described his action in redacting the figures as first a waiver of a minor informality, which he then redacted out of an abundance of caution. He admitted that he did not create a written record of what he had done, nor did he discuss the redactions with AMR or ask it for clarification of its proposal. Mr. Covey also testified that if AMR had included its price proposal within its technical proposal his practice would be to simply remove the price proposal before sending the technical proposal to the evaluators.

Although Mr. Covey redacted the monetary figures from the charts, he did not redact the percentage figures (i.e., 0.91% and 0.92%) from the paragraph immediately preceding the charts, nor did he remove the amounts from the technical proposals' executive summaries which indicated AMR's current working capital. Mr. Covey conceded that the evaluators could have figured out AMR's pricing for each region by comparing the percentage figures with AMR's stated amount of working capital. However, Mr. Covey testified that he had no knowledge of any evaluators actually doing that. Moreover, Mr. Covey testified that none of the offers from the other vendors contained any pricing information.

Mr. Covey also testified about the steps he took to determine AMR's responsibility prior to awarding the NEMT Program contracts for Regions 2 and 3. Mr. Covey confirmed that AMR's Dunn and Bradstreet report had been accessed and reviewed and that the report indicated that AMR was not involved in any litigation. Moreover, AMR's corporate references were checked and also did not reveal any litigation. Mr. Covey testified that he found AMR to be a responsible offeror and would likely make that same determination again.

#### **D. Evidence of Prior Litigation**

The record before the Panel includes an October 5, 2006, press release from the United States Department of Justice announcing the settlement of a civil fraud case involving AMR's predecessor, Laidlaw, Inc. The press release states that "[t]he settlement arose out of qui tam or whistleblower lawsuits filed in 2000 and 2001"; these lawsuits alleged that the company "provided illegal inducements to hospitals in Texas in exchange for referrals." AMR reportedly paid over \$9 million to settle the claims.

In the hearing before the Panel, AMR introduced a copy of the 8-K report filed by its parent company, Emergency Medical Services Corporation (EMSC), with the Securities and Exchange Commission on October 5, 2006. This report includes a press release issued by EMSC which acknowledges the \$9 million settlement. However, the press release also points out that the alleged inducements occurred between 1994 and 2001, "a period during which AMR was under different ownership and management." Furthermore, the press release states that AMR "entered into the settlement to avoid the uncertainties of litigation, and has not admitted any wrongdoing."

## **II. Conclusions of Law**

### **A. AMR's Inclusion of Pricing Information in Its Technical Proposals**

Both MTM and Logisticare allege that AMR improperly included pricing information in its technical proposals for Regions 2 and 3, which is an issue of responsiveness. As a related issue, MTM and Logisticare also argue that Mr. Covey's redaction of some of the monetary figures in AMR's proposal was unfair and prejudicial to the other bidders. For the reasons discussed below, the Panel concludes that AMR's technical and pricing proposals were

responsive to the requirements of the RFP and that any inclusion of pricing information in AMR's technical proposals was a minor informality.

A "responsive bidder or offeror" is defined as "a person who has submitted a bid or offer which conforms in all material aspects to the invitation for bids or request for proposals." S.C. Code Ann. § 11-35-1410(7) (2011). Proposals must be responsive in order to be ranked and considered for award. S.C. Code Ann. §11-35-1530(7) (2011). However, a failure to conform with the exact requirements of an RFP may be waived if it is

[a] minor informality or irregularity . . . which is merely a matter of form . . . [that has] no effect or merely a trivial or negligible effect on total bid price, quality, quantity, or delivery of the supplies or the performance of the contract, and the correction or waiver of which would not be prejudicial to bidders.

S.C. Code Ann. § 11-35-1520(13) (2011).<sup>3</sup> Section 13-35-1320(13) also requires that a procurement officer's determination to waive a minor informality be documented in writing. *Id.*

The Panel has previously noted that an RFP requirement is not 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). In the instant case, AMR unquestionably submitted separate technical and pricing proposals as required by the RFP. In its technical proposals, AMR also attempted to assure the State of two other RFP requirements: (1) that it could meet the payment requirements of the RFP and (2) that it was financially stable. In giving this assurance, however, AMR included information from which one could glean its pricing for each region. Because nothing in the RFP requirements specifically prohibited AMR from including such information in its technical proposal, the Panel concludes that its inclusion was merely a deviation of form which could be waived by the

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<sup>3</sup> This provision is made applicable to competitive sealed proposals by S.C. Code Ann. section 11-35-1530(1) (Supp. 2011) and by S.C. Code Ann. Regs. 19-445.2095(E) (2011).

procurement officer because it did not affect “price, quality, quantity or delivery of the supplies or performance of the services being procured.” The Panel also finds that the CPO’s written order affirming such waiver satisfies the writing requirement of section 11-35-1520(13).<sup>4</sup> *In re: Protest of College Source*, Case No. 2008-4 (January 8, 2009).

Although the Panel has concluded that the inclusion of the pricing information in the technical proposals was a minor informality, the Panel still must address Mr. Covey’s action in redacting a portion of that information prior to sending the technical proposals to the evaluators. MTM argues that Mr. Covey’s action in redacting portions of AMR’s technical proposals is inherently prejudicial to the other offerors because the State has essentially involved itself in the creation of AMR’s proposal. MTM cites the case of *In re: Protest of Industrial Sales Co., Inc.*, Case No. 1993-11 (June 30, 1993) in support of its argument. In the *Industrial Sales* case, the procurement officer culled information from two proposals from a vendor to create one acceptable proposal. The Panel disagrees that *Industrial Sales* is controlling because the Panel finds that its facts are distinguishable from those currently before the Panel. Mr. Covey did not alter or create AMR’s proposal, he merely removed superfluous information. The substance of AMR’s technical proposals and price proposals were unchanged by the redactions. Therefore, the Panel finds that Mr. Covey’s redactions amount to a “correction” as contemplated by section 11-35-1520(13) and the applicable regulation, which notes that “proposals need not be unconditionally accepted without alteration or correction.” S.C. Code Ann. Regs. 19-445.2095(J)(1)(2011).<sup>5</sup>

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<sup>4</sup> The Panel recognizes that competitive sealed proposals allow a greater amount of flexibility than competitive sealed bids. However, the Panel reminds procurement officers that they still need to comply with the formalities of the Procurement Code and that written records of waivers and corrections should be included in the procurement file.

<sup>5</sup> Nonetheless, as noted in the previous footnote, the Panel continues to be concerned by the lack of a written record memorializing Mr. Covey’s action. While the CPO’s written order may suffice as the writing requirement under

Having found that Mr. Covey's redactions were allowed by section 11-35-1520(13), the Panel must next determine if they were prejudicial to other bidders. Neither MTM nor Logisticare presented evidence showing that any evaluator actually figured out AMR's pricing by comparing the percentage amounts Mr. Covey neglected to redact with the stated amount of working capital in the executive summaries. Furthermore, because none of the other proposals contained any pricing information, even if an evaluator had determined AMR's pricing, that evaluator had no other prices with which to compare AMR's prices. Therefore, the Panel finds that Mr. Covey's "correction" of AMR's technical proposals was not prejudicial to the other offerors and denies the issues of protest based on AMR's inclusion of pricing information in its technical proposals.

#### **B. AMR's Responsibility**

MTM argues that AMR did not disclose involvement in past litigation as required by the RFP and that the CPO should have found AMR to be a non-responsible offeror. Under the Procurement Code, a responsible offeror is one "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." S.C. Code Ann. § 11-35-1410(6) (2011). The State must determine responsibility prior to award. S.C. Code Ann. § 11-35-1810(1) (2011). In this case, the finding of responsibility is implied by the issuance of an intent to award. *In re: Protest of CollegeSource, Inc.*, Panel Case No. 2008-4 (January 8, 2009). The Panel has held that if a bidder's responsibility is challenged, "[t]he protesting bidder must prove the determination of responsibility is clearly erroneous, arbitrary, capricious, or contrary to

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section 11-35-1520(13), the Panel strongly urges procurement officers to document in writing every action they take during the solicitation process, whether expressly required by the Procurement Code or not.

law.” *In re: Protest of Brantley Construction Co., Inc.*, Case No. 1999-3 (June 25, 1999) (citing S.C. Code Ann. § 11-35-2410).

Mr. Covey testified to the steps he took to determine AMR’s responsibility, which included accessing and reviewing AMR’s Dunn and Bradstreet report and contacting AMR’s corporate references. Neither that report nor the references revealed any ongoing lawsuits. Moreover, the lawsuits settled by AMR in 2006 were not originally filed against AMR and involved activity by AMR’s predecessor from 1994 through 2001. The Panel finds that AMR was not required to disclose these lawsuits inasmuch as they were filed against its predecessor regarding activity that occurred ten years ago or more. Because MTM did not present any evidence of more recent litigation or complaints involving AMR, the Panel concludes that it has failed to carry its burden of proof showing Mr. Covey’s determination of responsibility was clearly erroneous or arbitrary. Therefore, the Panel also denies the protest issue related to AMR’s responsibility.

### **C. Effect of the December 14th Medicaid Bulletin**

Both MTM and Logisticare argue that the Medicaid Bulletin issued by SCDHHS on December 14, 2010, significantly changed the scope of work and specifications of the NEMT solicitation. MTM and Logisticare specifically complain that the State knew that the changes to Medicaid services were planned, but failed to disclose that information to offerors before the proposals were received and opened. They also assert that the pricing in their proposals would have been lower had they known in advance of the planned reductions and eliminations in covered Medicaid services. As discussed below, the Panel concludes that the Medicaid Bulletin affected all offerors equally and ultimately did not change the scope of transportation services under the NEMT Program.

First, the RFP clearly placed offerors on notice that the State did not guarantee that the current volume of transportation services would remain the same, let alone increase or decrease. Second, all the offerors were well aware of the financial challenges facing SCDHHS in light of its substantial budgetary shortfall, and the answers given to specific vendor questions referenced the agency's website and its Sustainability Project. Third, as current NEMT brokers, MTM and Logisticare were also aware that changes to Medicaid covered services occur frequently. Fourth, such fluctuation is evidenced by the Medicaid Bulletins subsequently issued which reinstated some of the services reduced or eliminated by the December 14th bulletin. Finally, nothing in the December 14th bulletin specifically addressed transportation, which was the only service sought by the NEMT Program solicitation. In light of the evidence before it, the Panel finds that the scope of the work for the solicitation under review was not substantially changed by the December 14th bulletin and denies this ground of protest.

Therefore, for the reasons discussed above, the Panel denies the protests of MTM and Logisticare and upholds the order of the CPO.

**IT IS SO ORDERED.**

**SOUTH CAROLINA PROCUREMENT REVIEW PANEL**

BY: 

**C. BRIAN MCLANE, SR., CHAIRMAN**

This 18<sup>th</sup> day of May, 2011.  
Columbia, South Carolina