

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

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). On March 28, 2011, AMR moved to dismiss several appeal issues for lack of jurisdiction. Logisticare, MTM, and the other parties were afforded the opportunity to present written responses to the motion to dismiss.¹ On April 19, 2011, the Panel heard the parties' legal argument on the motion by telephone conference call, and the Panel now issues this written order granting AMR's motion to dismiss.

Logisticare is represented by John E. Schmidt, III, Esquire, and Melissa J. Copeland, Esquire. MTM is represented by E. Wade Mullins, III, Esquire. American Medical Response,

¹ In its response to AMR's motion to dismiss, MTM conceded that the federal regulation cited in its initial protest letter, 42 CFR § 438.6(c), did not apply to this NEMT Program solicitation and acknowledged that it had not appealed the CPO's ruling regarding that regulation. Furthermore, MTM also conceded that it had not appealed any issue regarding the solicitation's requirement of a firm, fixed price or any issue regarding the solicitation's omission of an annual actuarial review. Therefore, the only remaining question to be addressed by the Panel in AMR's motion to dismiss is whether MTM and Logisticare raised the issue of the reasonableness of AMR's price in their initial protest letters.

Inc. (AMR), is represented by M. Elizabeth Crum, Esquire. SCDHHS is represented by Deirdra T. Singleton, Esquire, and Vicki Johnson, Esquire. The Chief Procurement Officer for Goods and Services (the CPO) is represented by Molly R. Crum, Esquire.

I. Findings of Fact

A. Factual Background for the Solicitation

The Materials Management Office (MMO) conducted this solicitation on behalf of the 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. The transportation services were also expected to meet the federal requirements described in 42 CFR section 440.170(a)(4). 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. In addition, the RFP sought firm, fixed price offers. The RFP also provided that the procurement officer could reject a proposal if he determined in writing that the price offered was unreasonable.

The RFP was issued on September 9, 2010, and was amended twice, once on October 3, 2010, and again on October 11, 2010. 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. Factual Background for the Protests

In its initial protest letter, MTM raised several issues under the heading of “Pricing.” As noted above, MTM has conceded that several of those issues are not before the Panel on appeal. Thus, the only remaining question subject to AMR’s motion to dismiss is whether MTM raised the issue of the reasonableness of AMR’s price in its initial protest letter. In its initial protest letter, MTM variously described AMR’s pricing as “actuarially unsound,” “commercially unreasonable,” and “predatory.” However, those descriptions were provided in the context of MTM’s discussion of the inapplicable federal regulation and the State’s decision not to commission an annual actuarial study. MTM never cited to the RFP’s provision that the procurement officer could reject a proposal if he determined the offeror’s price was unreasonable. Furthermore, this portion of MTM’s initial protest letter did not cite the applicable state regulation.² MTM’s amended protest letter did not address or clarify the pricing issues raised in its initial protest letter.

Logisticare’s initial protest letter did not contain any of the issues raised by MTM in its initial protest letter under the heading of “Pricing.” In its amended protest letter, however, Logisticare included the following footnote:

[MTM] submitted a protest detailing that AMR’s Bid is around 24 million less than the lowest actuarially sound rate. Such an excessively low bid could only make sense if AMR was somehow aware of the impending changes announced by the December 14 Medicaid Bulletin, which the State in Amendment 1 disavowed were coming and of which no other bidders were aware.

² The applicable state regulation is codified at S.C. Code Ann. Regs. 19-445.2095(J)(1)(c) (2011) and allows the rejection of a proposal if “the proposed price is clearly unreasonable.” As an aside, the Panel notes that regulation 19-445.2095 is the controlling regulation for competitive sealed *proposals*. S.C. Code Ann. Regs. 19-445.2070, which is cited by the RFP and by MTM and Logisticare in their respective appeal letters, applies to competitive sealed *bids*.

Like MTM, Logisticare did not cite the RFP provision allowing the rejection of a proposal if an offeror's price is unreasonable in its amended protest letter, nor did it cite the applicable state regulation.

Conclusions of Law

In its motion to dismiss, AMR argues that MTM raises the issue of the reasonableness of AMR's price offer with regard to state law for the first time on appeal because its initial protest letter only referred to federal law and regulation. AMR further argues that Logisticare's initial and amended protest letters did not allege price unreasonableness at all. In response, MTM asserts that its characterization of AMR's pricing as "actuarially unsound, and consist[ing] of predatory, commercially unreasonable pricing" in its initial protest letter was sufficient to raise the issue of price reasonableness.³ Moreover, MTM argues that raised the RFP's unreasonable price provision and Regulation 19-445.2070⁴ in support of its position in the hearing before the CPO. In its response, Logisticare argues that MTM's characterizations of AMR's pricing were sufficient to raise the issue of price reasonableness and that the CPO permitted the issue to be argued on the merits. Logisticare also asserts that even if it did not raise the issue of price reasonableness itself, it is entitled to bring the matter before the Panel because the CPO heard its protest together with MTM's protest and section 11-35-4410(6) allows it to "set[] forth the reasons for disagreement with the decision of the appropriate chief procurement officer." S.C. Code Ann. § 11-35-4410(6) (2011).

³ It is interesting to note that MTM also applied this characterization to Logisticare's pricing for Region 1 as well as to AMR's pricing for Regions 2 and 3.

⁴ As previously noted, the controlling regulation for competitive sealed proposals is S.C. Code Ann. Regs. 19-445-2095.

A party bringing a protest of an intended award under the Procurement Code must meet the requirements of section 11-35-4210(1)(b) to confer jurisdiction on the CPO and, by extension, the Panel. S.C. Code Ann. § 11-35-4210(1)(b). Section 11-35-4210(1)(b) establishes that a protest must be brought within ten days of the posting of the intent to award. *Id.* The protest must be in writing and “set forth both the grounds of the protest and the relief requested with enough particularity to give notice of the issues to be decided.” S.C. Code Ann. § 11-35-4210(2)(b) (2011). A party may amend an initial protest of an intended award as long as it does so within fifteen days after the posting of the intended award. *Id.*

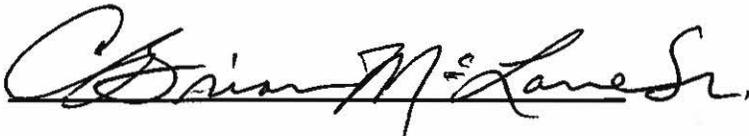
The Panel has consistently held that the issues to be decided by the CPO and the Panel are established by the protest letter, and that issues raised for the first time in an appeal letter are untimely under the time constraints of S.C. Code Ann. section 11-35-4210. *See In re: Protest of Volume Services*, Panel Case No. 1994-8 (August 31, 1994) (“The letter to the Panel cannot add issues. If new issues were allowed to be included in the appeal letter to the Panel, no effect would be given to the requirements of subsection[s] (1) and (2).”); *In re: Protest by J & T Technology, Inc.*, Panel Case No. 1987-3 (July 13, 1987) (“The protestant cannot alter or modify its grievance as the protest develops except as permitted by § 11-35-4210.”); and *In re: Protest of DP Consultants, Inc.*, Panel Case No. 1998-6 (“The protest letters establish the issues of the case, and any issues not established in the protest letter are untimely filed under the time constraints of S.C. Code § 11-35-4210.”).

In the instant case, MTM couched all of its initial pricing issues in the context of the inapplicable federal regulation, the solicitation’s requirement of a firm, fixed price, and the State’s decision not to commission an annual actuarial study. Neither its initial protest letter nor its amended protest letter placed AMR or any other party on notice that the complained of

pricing was unreasonable in light of the RFP's provision allowing rejection of a proposal based on unreasonable price or in light of the controlling state regulation. Likewise, neither Logisticare's initial protest letter nor its amended protest letter placed AMR or any other party on notice that it was relying on the relevant RFP provision or the controlling state regulation.⁵ Furthermore, the fact that MTM and Logisticare were permitted to raise the RFP provision and the state regulation in the CPO hearing did not cure any jurisdictional defects in the protest letters. For these reasons, the Panel finds that the issue of the reasonableness of AMR's price with regard to state law is untimely under section 11-35-4210. Therefore, the Panel dismisses the issue of price reasonableness for lack of jurisdiction.⁶

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT REVIEW PANEL

BY: 
C. BRIAN MCLANE, SR., CHAIRMAN

This 11th day of May, 2011.
Columbia, South Carolina

⁵ Indeed, Logisticare's amended protest letter asserted that AMR's "excessively low" bid suggested that AMR had information that other bidders did not have, which is a different matter from alleging that the price offered was unreasonable.

⁶ Because the Panel has dismissed the issue of the reasonableness of AMR's price for lack of jurisdiction, it need not address Logisticare's argument that it was entitled to bring up that issue for the first time on appeal under section 11-35-4210(6) simply because it disagreed with the CPO's ruling on the matter.