

STATE OF SOUTH CAROLINA)	BEFORE THE SOUTH CAROLINA
)	PROCUREMENT REVIEW PANEL
COUNTY OF RICHLAND)	
)	
)	ORDER
IN RE: Appeal by Heritage Community)	
Services)	Case No. 2013-1
RFP No. 5400004813)	
)	
)	

This matter came before the South Carolina Procurement Review Panel (the Panel) pursuant to a request by Heritage Community Services (Heritage) for further administrative review under sections 11-35-4210(6) and 11-35-4410 of the Consolidated Procurement Code (the Procurement Code). Heritage appealed the December 27, 2012, decision of the Chief Procurement Officer (the CPO) for Supplies and Services denying its protest of an intended award to South Carolina Parents Involved in Education (SC PIE) to provide an abstinence curriculum for the South Carolina Department of Social Services (DSS). In the Panel’s hearing on March 13, 2013, P. Brandt Shelbourne, Esquire, represented Heritage. Michael H. Montgomery, Esquire, represented SC PIE. Kathy G. Gettys, Esquire, represented DSS, and William Dixon Robertson, III, Esquire, represented the CPO.

Motions to Quash Subpoenas

Prior to the Panel’s scheduled hearing on March 13, 2013, the parties’ counsel and the Panel’s Chairman participated in a telephone conference call on March 8, 2013, to consider motions to quash several subpoenas *duces tecum* issued by the Panel’s attorney at the request of Heritage and SC PIE. Counsel consented to the Chairman hearing argument and ruling on the motions to quash at the beginning of the conference call.

The Panel has the authority to issue subpoenas at a party’s request under section 11-35-4410(4)(a)(ii) of the Procurement Code. S.C. Code Ann. § 11-35-4410(4)(a)(ii) (2011). A party

aggrieved by the issuance of a subpoena may apply to the Panel for relief. S.C. Code Ann. § 11-35-4410(4)(b) (2011); *see also In re: Petition for Administrative Review GTECH Corp.*, Panel Case No. 2002-4 (May 3, 2002) (quashing several subpoenas on grounds of relevance and undue burden). This practice is consistent with Rule 45(c) of the South Carolina Rules of Civil Procedure. The Panel has also adopted the following policy:

A person commanded to produce and permit inspection and copying may, within fourteen (14) days after service of the subpoena or before the time specified for compliance if such time is less than fourteen (14) days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials except pursuant to an order of the SC Procurement Review Panel.

See “Protection of Persons Subject to Subpoenas,” a pre-printed Panel form included with all subpoenas issued by the Panel. This form also provides that, upon timely motion, the Panel will quash or modify a subpoena directed to a non-party if it (1) fails to allow a reasonable time for compliance, or (2) requires excessive travel by a non-party, or (3) requires production of privileged material, or (4) imposes an undue burden.¹ *Id.*

On February 7, 2013, the Panel’s attorney issued four subpoenas *duces tecum* at the request of counsel for SC PIE; these subpoenas were directed to Ms. Anne Badgley, Mr. Gordon Badgley, Mr. Jerry Raymond, and Ms. Sally Raymond, all of whom are officers, directors, or employees of Heritage. In addition to commanding that these persons attend the Panel’s hearing on March 13, 2013, the subpoenas requested the production, on the date of the hearing, of “Original letters of reference or recommendation included in Heritage’s proposal documents.”

On February 28, 2013, Heritage moved to quash the subpoenas on the grounds that the

¹ Careful comparison of the language on the Panel’s form with the language of Rule 45(c)(3)(A), SCRCF, reveals an inconsistency with regard to whom the enumerated protections apply. In light of the Chairman’s ruling on the subpoenas in this case and in order to ensure that the Panel’s subpoena practice is consistent with Rule 45, the Panel’s policy will be amended so that a party is also afforded protection when a subpoena fails to allow a reasonable time to comply; calls for privileged material; or imposes an undue burden.

documents sought were irrelevant to the issues before the Panel.² SC PIE opposed the motion to quash, arguing that the subpoenas were issued and served more than two weeks prior to the date of production, were limited to four documents, and were directed to parties to the appeal before the Panel. After hearing the arguments of counsel, the Panel Chairman found that these subpoenas were timely and not unduly burdensome. Furthermore, noting that there were several outstanding motions for dismissal or summary judgment scheduled to be heard at the beginning of the merits hearing on March 13th, the Panel Chairman determined that it would be premature to decide whether or not the documents sought would be relevant to the issues before the Panel. Therefore, the Panel Chairman denied Heritage's motion to quash these four subpoenas.

On March 4, 2013, the Panel's attorney issued a subpoena *duces tecum* directed to Sheri Few, SC PIE's president, at the request of counsel for Heritage. This subpoena requested that Mrs. Few produce

Any and all documents and data sent to and received from, including, but not limited to, communications with or from, any United States Health and Human Services office including FYSB, OAH, or OAPP, regarding any SCPIE program or curriculum and any evaluation or approval of the same, and any and all SCPIE documents and data that discuss or depict the behavioral aspects of the SCPIE curriculum submitted in response to the present RFP.

Heritage requested that these documents and data be produced to its counsel's offices by 5:00 p.m. on March 11, 2013. SC PIE moved to quash this subpoena on the grounds that it was untimely because it was not served on Mrs. Few until the evening of Thursday, March 7, 2013, and called for production on the following Monday, March 11, allowing just two business days for production. Moreover, Mrs. Few was scheduled to be out of town from Friday, March 8th through Monday, March 11th, and argued that the potential volume of the material sought by the subpoena subjected her to an undue burden. Finally, Mrs. Few pointed out that the date for the

² Heritage's written motion also objected to the attendance of these witnesses at the Panel hearing. However, counsel for Heritage withdrew this objection during argument on the motions to quash.

Panel's March hearing was set on or about January 28, 2013, but that Heritage's subpoena was not issued until March 4 and not served until March 7, less than a week before the scheduled hearing. Considering all of these circumstances, the Panel Chairman agreed that the subpoena was not timely because it was served less than a week prior to the scheduled Panel hearing and did not allow a sufficient amount of time to comply. Therefore, the Panel Chairman quashed the subpoena served on Mrs. Few.

Findings of Fact

On August 28, 2012, the South Carolina Department of Social Services (DSS) issued a Request for Proposals (RFP) seeking a vendor to provide an abstinence-based teen pregnancy prevention program for use in the state. Among other requirements, the Scope of Work/Specifications section of the RFP set forth the following relevant specification:

- A. Offeror must utilize a program or evaluation process approved by, and under the supervision of, a federally approved Institutional Review Board (IRB) and have been evaluated and approved for medical accuracy by the United States Health and Human Services' Office of Adolescent Health or the Office of Adolescent Pregnancy Prevention.

A Contract may also be awarded to an Offeror that does not meet these requirements on the date of the award but the Offeror must meet the requirements by the end of the fiscal year or the Offeror must forfeit the final quarterly payment (last three monthly payments).

Record at PRP58. In addition to this and other specifications, Section IV of the RFP asked offerors to submit certain information for purposes of evaluation. In particular, the RFP requested information regarding

- (4) The extent to which a proven and public history of having effectively implemented abstinence programs in this State where participating students were

at least thirty percent lower than comparable non-program students, utilizing the process analysis as detailed under Scope of Work Item C.³

Record at PRP60. Section IV also requested six other types of information for evaluation purposes: a program description, a brief history of the offeror's experience, a list of the counties in the state currently receiving the offeror's services, documentation of IRB approval and supervision, financial information, and references. *Id.*

Heritage and SC PIE both submitted proposals in response to this RFP, and on October 10, 2012, DSS posted notice of its intent to award the contract to SC PIE. Record at PRP176. The intended award was suspended on October 23, 2012, after Heritage filed a timely protest. Record at PRP177. The CPO conducted a two-day hearing on the protest and issued an order denying all of the grounds of protest on December 27, 2012. Record at PRP5 – PRP20. Heritage timely appealed to the Panel on January 4, 2013. Record at PRP27.

SC PIE's proposal was included in the initial record transmitted by the CPO to the Panel and was entered into evidence without objection during the Panel's hearing. Record at PRP117 – PRP160. In response to the RFP's request that offerors provide information regarding IRB approval and oversight, SC PIE submitted a letter dated January 4, 2012, from Dr. Guang Zhao. Record at PRP128; PRP178 – PRP179. Dr. Zhao is the Chair and Director of the South Carolina Department of Health and Environmental Control Office of Public Health Statistics and Information Systems' IRB. Record at PRP127. Dr. Zhao's letter is printed on DHEC letterhead and bears a federal wide assurance number. Record at PRP128; PRP178. Dr. Zhao states in the letter that SC PIE's statewide pregnancy prevention project, which proposes to use SC PIE's Healthy Image of Sex curriculum, has been reviewed by the DHEC IRB. *Id.* Dr. Zhao also

³ Scope of Work Item C requested offerors to "include their implementation and process analysis using three data sources including a. [a] review of the program documents and records; b. [i]nterviews and focus group results; [and] c. [r]esults of on-site program observation." Record at PRP58.

states that the DHEC IRB considered SC PIE's program to be a Public Health Practice and that as such "[n]o further action or IRB oversight is required, as long as the project remains the same." *Id.*

With regard to approval for medical accuracy by either the United States Department of Health and Human Services' Office of Adolescent Health (OAH) or the Office of Adolescent Pregnancy Prevention (OAPP), SC PIE's proposal submitted that it had received OAH approval initially in 2008, but that its curriculum had been "revised in 2010 to meet the medical accuracy standards provided by the US Health and Human Services Office of Adolescent Health." Record at PRP128. Mrs. Few did not testify before the Panel. Nonetheless, the Panel notes that the CPO's order found that Mrs. Few admitted during his hearing that SC PIE actually submitted its program to a different office under the United States Department of Health and Human Services, the Family and Youth Services Bureau (FYSB). Record at PRP12 – PRP13. The CPO concluded that Mrs. Few had confused the two offices. *Id.*

In responding to RFP Section IV (4), SC PIE's proposal submitted that participants in its program averaged 61% lower than comparable non-program students.⁴ This portion of SC PIE's proposal included two tables prepared by an independent evaluator showing that participants in SC PIE's abstinence program had lower sex initiation rates than non-participants. Record at PRP152 – PRP153. This portion of SC PIE's proposal also referred the reader back to the description of its implementation and process analysis in its response to the RFP's Scope of Work Item C. Record at PRP151. SC PIE's response to Scope of Work Item C is comprised of six and a half pages demonstrating its success in abstinence education since 2004, including a

⁴ As an observation only, the Panel notes that the language of factor (4) is inherently confusing and does not make clear exactly how program participants are supposed to be "lower" than non-program students. However, this specification was not protested, and both Heritage and SC PIE offered evidence of reduced state pregnancy rates and reduced sex initiation rates among program participants in response to this RFP provision. *See* Record at PRP107 – PRP108; PRP151 – PRP153.

description of its implementation and process analysis, examples of interviews and focus group results, results of on-site program observations, and staff observations. Record at PRP129 – PRP135.

Heritage called Dr. John Vessey as a witness during the Panel’s hearing. Dr. Vessey is an associate professor at Wheaton College who teaches statistics and has been involved in the evaluation of abstinence-only pregnancy prevention projects. He testified that he is frequently involved in statistical evaluations and the Panel qualified him to testify as an expert in statistical analysis.⁵ Dr. Vessey testified that he had had an opportunity to review both the tables and the underlying data presented in SC PIE’s proposal under the heading “Third Party Evidence of Effectiveness.” Record at PRP152 – PRP153. With regard to the first table, which is entitled “Trends in Sex Initiation Rates*⁶ in Marlboro County by Gender and Race,” Dr. Vessey testified that the percentages given, which indicate a decrease in initiation rates between the pre-test and post-test surveys, simply did not make sense based on the question that was asked. Dr. Vessey offered his opinion that the decrease was not evidence that the program had worked, but might indicate that the students did not understand the question when it was first asked or that they had changed their answers to please the researchers. Dr. Vessey also testified that the numbers did not add up in the table. For example, one column presents a total percentage of 37%, but the breakdown between males (32%) and females (35%) was not consistent with that total. Dr. Vessey explained that these types of inconsistencies brought into question the accuracy of the study.

⁵ Heritage also offered Dr. Vessey as an expert in the operation of federal IRBs based on his status as an IRB member and the training he had received as a result of that membership. However, the Panel declined to receive his testimony as an expert in this area because the only issues before the Panel involved SC PIE’s responsiveness to the RFP, not the operation of the DHEC IRB. Therefore, the Panel determined that Dr. Vessey’s testimony would not be helpful to it as the trier of fact under Rule 701 of the South Carolina Rules of Evidence.

⁶ “*based on the answer to the question ‘Have you ever had sex[?]’” Record at PRP152.

Regarding Table 2, which is entitled “Sex Initiation Rates in School Program Compared to YRBS⁷ Data,” Dr. Vessey pointed out that the YRBS surveyed ninth, tenth, eleventh, and twelfth graders, but that the comparison group from the SC PIE program consisted of eighth and ninth graders. Dr. Vessey offered his opinion that the two groups were not comparable and that the apparent differing percentages were not reflective of reality. Finally, Dr. Vessey testified that the YRBS data had not been broken down into grade groups. Panel Exhibit #1, “Table 62. Percentage of high school students who ever had sexual intercourse and who had sexual intercourse for the first time before age 13 years, by sex – selected U.S. sites, Youth Risk Behavior Survey, 2009.”

On cross-examination, Dr. Vessey admitted that his critique of SC PIE’s program was confined to the two tables that he had reviewed. Dr. Vessey also acknowledged that SC PIE had not conducted the study from which the tables were taken. Moreover, Dr. Vessey admitted he had not reviewed any of the studies cited elsewhere in SC PIE’s proposal.

SC PIE called Dr. Patsy Myers as a witness during the Panel’s hearing. Dr. Myers holds a Doctor of Public Health degree and is a chronic disease epidemiologist with the South Carolina Department of Health and Environmental Control. Dr. Myers testified that she has conducted efficacy studies of abstinence programs since 2007 and that she conducted the study included in SC PIE’s proposal. With regard to Table 1 and the apparent inconsistencies in the numbers, Dr. Myers testified that sometimes students do not answer all of the questions on a survey or that sometimes an individual might take the pre-test but not the post-test. Regardless, Dr. Myers testified that the numbers in Table 1 were consistent with the surveys reviewed in the course of the study. In addition to the pre-test and post-test survey data, Dr. Myers testified that she

⁷ “YRBS” stands for Youth Risk Behavior Survey. The YRBS relevant to Table 2 was a national survey conducted in 2009.

considered other sources of data such as focus groups, statewide teen pregnancy rates, and statewide sexually-transmitted disease rates. Although she initially testified that the YRBS data that she used in Table 2 was broken down into grade groups, Dr. Myers admitted on cross-examination that she did not have documentation with her establishing that fact and that it appeared that the total percentage listed under the YRBS 2009 column, 53.4%, was identical to the percentage for the entire state of South Carolina on Panel Exhibit #1. Despite this admission, Dr. Myers affirmed her conclusion that SC PIE's abstinence program was effective because teen pregnancy rates are falling at a faster rate in counties that have implemented the SC PIE program than in those that have not.

Conclusions of Law

I. Preliminary Motions

Prior to hearing the merits of Heritage's appeal, the Panel considered two motions filed by SC PIE and Heritage. First, SC PIE moved to strike Heritage's protest and appeal on the grounds that the initial protest letter was too vague to satisfy the notice requirements of section 11-35-4210(2)(b), which requires that a protest 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). In response, Heritage argued that the initial protest letter adequately raised the issues of responsiveness currently before the Panel, as evidenced by the CPO's consideration of those issues in his order. The Panel denied this motion, finding that the initial protest letter did provide adequate notice of the responsiveness issues and that any other issues raised by Heritage in its initial protest letter had either been abandoned or not appealed.

For its part, Heritage moved for the dismissal, or alternatively for summary judgment, of the appeal based on the grounds that SC PIE's proposal was non-responsive as a matter of law because the abstinence program it offered had not been evaluated and approved for medical accuracy by either OAH or OAPP as required by the RFP. The Panel denied this motion as well, finding that questions of fact existed as to whether SC PIE's proposal was responsive and as to whether this particular requirement was a mandatory requirement.

II. Responsiveness

In its appeal, Heritage asserts that SC PIE's proposal was non-responsive to three requirements of the RFP. First, Heritage argues that SC PIE's proposal did not meet the requirement that the offered program be evaluated and approved for medical accuracy by either OAH or OAPP. Second, Heritage asserts that SC PIE's offered program has not been approved by and is not under the supervision of an approved federal IRB. Third, Heritage argues that SC PIE's offer was non-responsive because it failed to demonstrate the effectiveness of its program because it could not substantiate the data included in its proposal.

Under the RFP source selection process, only proposals from responsive offerors are evaluated, ranked, and considered for award. *See* S.C. Code Ann. § 11-35-1530(7) (2011) ("Once evaluation is complete, all *responsive* offerors must be ranked from most advantageous to least advantageous to the State, considering only the evaluation factors stated in the request for proposals.") The Procurement Code defines a "responsive offeror" as one "who has submitted a[n] . . . offer which conforms to all material aspects to the . . . request for proposals." S.C. Code Ann. § 11-35-1410(7) (2011). Responsiveness is determined at the time an offer is opened, and, unless discussions are conducted under section 11-35-1530(6),⁸ is based on the information

⁸ This statutory provision allows a procurement officer to conduct discussions with offerors whose proposals are "reasonably susceptible of being selected for award" in order to clarify the "full understanding of, and

Panel Decision 2013-1

included in an offeror's proposal. Moreover, in the RFP context, a procurement officer's selection of an offer for evaluation and ranking is a determination that is "final and conclusive, unless clearly erroneous, arbitrary, capricious, or contrary to law." S.C. Code Ann. § 11-35-2410(A) (2011). Finally, as the party challenging SC PIE's responsiveness, Heritage bears the burden of proving its claims by the preponderance of the evidence. *In re: Protest by Blue Bird Corp.*, Panel Case No. 1994-15 (December 16, 1994). Thus, Heritage must prove by a preponderance of the evidence that the procurement officer's determination that SC PIE's proposal was responsive was "clearly erroneous, arbitrary, capricious, or contrary to law."

A. SC PIE's Motion for Directed Verdict: Medical Accuracy Review and IRB Approval and Supervision

At the close of Heritage's case, SC PIE moved for a directed verdict, which the Panel treats as a motion to dismiss for failure to meet the burden of proof. *In re: Protest of PS Energy*, Panel Case No. 2002-9 at 5, n. 3 (July 3, 2002) (citing *In re: Protest of MTC Service Maintenance*, Panel Case No. 1997-2 (February 28, 1997)). First, SC PIE argued that Heritage had offered no real proof that SC PIE's program lacked a medical accuracy review or IRB approval and supervision, but that even if Heritage had done so, its claims must still fail because the solicitation specification on which Heritage based its claims did not create mandatory requirements for the purposes of responsiveness, but rather contract performance requirements. Specifically, SC PIE argued that Heritage's interpretation of the specification fails to take into consideration its second paragraph, which provides:

A Contract may also be awarded to an Offeror that does not meet these requirements on the date of the award but the Offeror must meet the requirements

responsiveness to, the solicitation requirements." S.C. Code Ann. § 11-35-1530(6) (2011). Because there is no record that discussions were held in this solicitation, the Panel concludes that the procurement officer for DSS determined that SC PIE's proposal was responsive to the solicitation requirements.

by the end of the fiscal year or the Offeror must forfeit the final quarterly payment (last three monthly payments).

In other words, the very terms of the RFP contemplated award to an offeror that had not met the requirements of the preceding paragraph on the date of award. Furthermore, this paragraph also provided a remedy to the State if the successful offeror had not met the requirements by the end of the contract period: forfeiture of the final quarterly payment. Thus, an offeror responding to this RFP had three options: (1) comply by having a medical accuracy review and IRB approval and supervision at the time an offer is submitted; (2) comply by the end of the contract period; or (3) fail to comply and forfeit the final quarterly payment. In light of the options created by the language of the RFP, the Panel agreed that the specification relied upon by Heritage did not create mandatory requirements for purposes of responsiveness. Therefore, the Panel granted SC PIE's motion to dismiss Heritage's claims based on the responsiveness issues related to the medical accuracy review and the IRB approval and supervision.⁹

B. Proven Effectiveness of SC PIE's Program

Heritage's remaining responsiveness issue concerns whether or not SC PIE's proposal demonstrated the effectiveness of its program as requested in Section IV, factor (4) of the RFP. Specifically, Heritage argued that discrepancies in two tables contained in SC PIE's proposal called into question the accuracy of the independent study SC PIE relied upon to show that its program participants "were at least thirty percent lower than comparable non-program students." Record at PRP60. Although the testimony presented to the Panel suggested that the challenged tables presented in SC PIE's proposal would perhaps not satisfy careful statistical review,¹⁰ the

⁹ The Panel denied SC PIE's motion to dismiss the remaining responsiveness issue alleging SC PIE had failed to demonstrate the proven effectiveness of its program.

¹⁰ Nonetheless, the Panel takes this opportunity to remind vendors that they should act in good faith to ensure the accuracy of all of the information contained in their proposals. However, the Panel also observes that there is no evidence before it suggesting that SC PIE intentionally made false statements in its proposal. *See In re: Protest of*

Panel finds that SC PIE's proposal contains several other sources demonstrating its program's effectiveness, including interviews and focus group results, on-site observations, and staff observations. Considering all of the documents and testimony before it, the Panel finds that Heritage has failed to prove by a preponderance of the evidence that the procurement officer's decision to include SC PIE's proposal in the evaluation and ranking process was "clearly erroneous, arbitrary, capricious, or contrary to law."

Therefore, for the reasons stated above, the Panel denies Heritage's protest and upholds the decision of the CPO.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT REVIEW PANEL

BY:


C. BRIAN MCLANE, SR., CHAIRMAN

This 27th day of March, 2013.

Columbia, South Carolina

PS Energy, Panel Case No. 2002-9 at 3 and 5 (July 3, 2002) (recognizing that a material misrepresentation could be a basis for rejecting a proposal if it is made in bad faith or materially influences an agency determination or evaluation; such a claim requires a showing of intent).