

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)
BEFORE THE SOUTH CAROLINA
PROCUREMENT REVIEW PANEL
CASE NO. 1983-18

IN RE:)
PROTEST BY FLORENCE CRITTENDON)
HOME)

)
O R D E R
APPEALED

This matter is before the Panel for administrative re-
view pursuant to §§ 11-35-4210(7), South Carolina Code of
Laws of 1976, as amended. The Determination by the Materials
Management Officer concluded that the Florence Crittendon
Home of Charleston, South Carolina ("FCH") was wrongfully
denied a portion of the contract for special services for
unmarried mothers and that a portion of the contract which
should have gone to FCH went to Florence Crittendon Services,
Inc. ("FCS"), of Charlotte, North Carolina. The Determination
recommended that FCH apply to the Panel for reimbursement of
actual costs incurred in the solicitation and other relief.

FINDINGS OF FACT

L. On an unspecified date, but prior to August 3,
1983, the State Department of Social Services ("DSS")
issued Request for Proposal No. 3400, seeking proposals for
Special Services for Unmarried Mothers. DSS received two
proposals, one each from FCH and FCS; these were opened on
August 19, 1983. The end result was that FCH was awarded
6,964 service units at \$25.94 per unit (instead of 9,277 units

prepared by FCH at substantially the same price), and FCS was awarded 1435 units at \$25.84 per unit. (FCS was also awarded 3142 units at \$35.47 per unit, but those units involve medical care, a service which FCH does not provide, and that portion of the award is thus not involved in this appeal.)

2. DSS assembled a five-member evaluation panel to examine the proposals. The RFP stated that proposals would be evaluated on the following criteria:

"A. Understanding of the problem and soundness of approach

1. Program description
2. All service elements under Scope of Service are addressed
3. Treatment needs of the client population

B. Qualifications

1. Relevant and recent experiences in providing services applicable to this RFP
2. Qualifications of staff (See Exhibit IV)
3. Proximity of facility to client population
4. References (if new contractor)
5. Ability to be operational within thirty (30) days of a signed contract

C. Price

1. Cost per Unit
2. Number of clients to be served
3. Number of Units to be delivered (Unit is one twenty-four (24) hour period)."

3. The evaluators gave a total average score of 92.8 points out of a possible 95 to FCH and 93.6 points out of a possible 95 to FCS.

4. The award decision awarded a portion of the contract to each offeror based on a split proration of the available dollars; the ratio as in the the then-current contracts was used to prorate the awards between the two providers. The rate offered per unit was said to be the lesser of the 1982-83 contract rate, actual rate or requested rate.*

5. The unit rate offered to FCH was only one one-thousandth of a cent less (\$25.94 rather than \$25.941) than FCH proposed; in addition, it was \$1.10 per unit more than was offered to FCS.

6. FCH protested DSS's award to the Materials Management Officer by a letter dated September 27, 1983. The following grounds for the protest were stated:

- A. The award was not made in accordance with § 11-35-20(F) (maximizing purchasing power of the State) or § 11-13-1530(7) (award to be made to offeror whose offer is most advantageous to the State).
- B. The award violated § 11-35-1530(7) for the additional reason that "recommendations were based upon allocations last year," a factor allegedly not encompassed within the stated evaluation criteria.

* The record contains no indication as to how "actual rate" differs from the 1982-83 contract rate, what is meant by the term, what the "actual" rates were, or how they were arrived at.

- C. The approved rates were without basis in fact.
- D. The resident vendor preference of § 11-35-1520(9) was ignored.
- E. An additional issue was raised by letter dated October 17, 1983. That ground was that the award to FCS was improper because FCS was a foreign corporation not registered or licensed by the South Carolina Secretary of State.

7. The Materials Management Officer held a hearing on October 18, 1983, and issued a decision on October 27, 1983. That decision concluded as follows:

- 1. The evaluation methodology "did not provide for due consideration of the real hard dollar unit service cost offered in each proposal."
- 2. The award was based on dollar availability, split prorationally on current funding levels, a factor or factors not mentioned in the RFP.
- 3. The evaluation criteria did not take into consideration the relative importance of price.
- 4. If cost had been evaluated as referenced in the RFP, FCH would have achieved sufficient point assignment to be determined the most responsive and responsible bidder.

8. In concluding that the entire contract should have gone to FCH, the Materials Management Officer noted that a contract had already been given to FCH, and recommended that FCH apply to the Panel, as provided for in § 11-35-4410 (actually § 11-35-4210(7)) for reimbursement of costs and other relief.

9. FCH, on November 7, 1983, made such application. It waived the cost of preparing its offer, but seeks reimbursement of the costs incurred in pursuing the protest. By way of "other relief," FCH requests that the Panel amend the contract by adding 2, 313 units at a cost of \$60,011, or in the alternative that the Panel award damages to FCH in the amount of \$60,011.

CONCLUSIONS OF LAW

1. The Panel finds that in reviewing requests for remedy under § 11-35-4210(7), the Panel has the duty and authority pursuant to § 11-35-4410(5) and (6) to examine the Chief Procurement Officer's decision.

2. The Chief Procurement Officer, in the opinion of the Panel, erred in concluding that it was improper for DSS to make the award based on funding availability and for DSS to split the award prorationally between the two offerors. Funding availability is an inherent prerequisite to any government procurement, and to require a statement that funding availability is a criterion would be to require a statement of the obvious. Likewise, a proportional award under this RFP was not improper. The RFP in no way suggests that an award, if made, would be exclusive, and, like the availability of funds, the power to make more than one award was inherent in the procuring agency and needed no explicit statement in the RFP.

3. The Panel concludes that the evaluation of cost was proper. Since FCH provides comparable service to that provided by FCS, but at a higher price, it is difficult to see how the State's interests would have been better served by a greater award to FCH.

4. In summary, the Panel concludes that DSS acted properly within the terms of the RFP. It found the two offers to be roughly equal and made the award based on funding availability and geographic distribution of the client population, a factor explicitly set forth in the RFP.

5. FCH has also asserted that an award to FCS was improper because FCS is a foreign corporation not domiciled in South Carolina. However, the Panel concludes, based in part on Attorney General's Opinion No. 3008 (1970), that this does not invalidate the contract. In any event, FCS will provide all its services in Charlotte, North Carolina.

6. Likewise, the instate bidder preference question raised by FCH is inapplicable. The preference by its terms does not apply to RFP's, but only applies to competitive sealed bids submitted under § 11-35-1520.

7. Since the Panel concludes that DSS properly awarded the contract within the criteria set forth in the RFP, it is unnecessary to consider the request for remedial relief submitted by FCH. The Panel would note in addition that in the

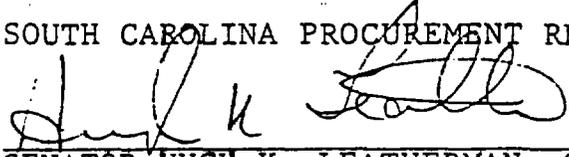
Panel's opinion it is improper for Chief Procurement Officers to make recommendations as to further relief to be sought by persons who appear before them. Such actions, in the view of the Panel, are inappropriate for adjudicatory officers.

Finally, the Panel would point out to DSS and to other state agencies that, while not constituting grounds for vacating the award, the use of an RFP in this case may not have been the most appropriate procedure. The service solicited has been provided to the State for some years, its dimensions must be well known by now, and there appears to be no reason why competitive sealed bidding could not have accomplished the State's purposes. Overuse of the RFP process tends to undermine the preference expressed in § 11-35-1510 for competitive sealed bidding and substitute negotiations for sealed bidding. Accordingly, the Panel would caution state agencies that excessive use of the RFP process might lead to a challenge in the future.

For the reasons set forth above, the Panel concludes that DSS did not make an improper award. Accordingly, the decision of the Chief Procurement Officer is hereby vacated.

AND IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT REVIEW PANEL


SENATOR HUGH K. LEATHERMAN, CHAIRMAN

December 19th, 1983