

STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND

BEFORE THE SOUTH CAROLINA  
PROCUREMENT REVIEW PANEL  
Case No. 1990-14

IN RE:

PROTEST OF HEALTH SYSTEMS  
MANAGEMENT, INC.

ORDER

This case came before the South Carolina Procurement Review Panel for hearing on October 29, 1990, on the protest by Health Management Systems, Inc., ("HMS") of a decision by the Chief Procurement Officer ("CPO") upholding the award to PHP Healthcare Corporation ("PHP") of a contract to provide nursing home management services to the Richard Michael Campbell Veteran's Nursing Home.

Present at the hearing were HMS, represented by John G. Felder, Esq.; PHP, represented by William Hubbard, Esq. and John Schmidt, Esq.; the Department of Mental Health, represented by William Davidson, Esq., and Leslie Moore, Esq.; and the Division of General Services, represented by Helen Zeigler, Esquire.

#### FINDING OF FACTS

On February 20, 1990, State Procurement solicited proposals to provide management and operation services for a 220-bed veteran's nursing home in Anderson, South Carolina, called the Richard Michael Campbell Veterans' Nursing Home. The facility falls under the responsibility of the Department of Mental Health.

The Request for Proposals ("RFP") listed the evaluation criteria in order of importance, as follows:

Experience - (35 points maximum) -

(a) experience of corporate management in community long term care, specifically ownership and/or operation of community intermediate and skilled nursing care facilities;

(b) quality of services provided as determined by references, on-site visits, and recent licensure and certification surveys; and

(c) history of successful contracting with government agencies for managing this type of facility.

Quality of Response - (26 points maximum) -

(a) Contractor's understanding of the project; and

(b) The quality and comprehensiveness of Offeror's plan.

Price - (24 points maximum)

Corporate Financial Stability - (10 points maximum) - financial stability, resources and ability to manage a project of this size.

References - (5 points maximum)

(Department of Mental Health Ex. 1, p. 24). The proposals were evaluated by a committee with the following results:

<u>Evaluator</u>	<u>Offeror</u>			
	<u>PHP</u>	<u>Diversified</u>	<u>Cathcart</u>	<u>HMS</u>
Sheilda Friendly	68.38	65.08	57.43	56.96
Carolyn Egbert	92.89	70.97	56.00	58.96
Paul Eleazor	77.89	67.97	67.00	63.96
Kennerly McLendon	86.89	71.97	67.00	50.96
John Bourne	84.69	74.57	58.60	53.36
	<u>410.74</u>	<u>350.56</u>	<u>306.03</u>	<u>284.20</u>
Site visit	102.25	90.75	73.25	78.50
TOTAL	<u>512.99</u>	<u>441.31</u>	<u>379.28</u>	<u>362.70</u>

(Record, p. 110). The highest possible score any offeror could receive was 666 points.

Based on the evaluation results, an Intent to Award to PHP, a Virginia corporation, was issued on July 16, 1990. (Record, p. 35). HMS protested the award to PHP on July 24, 1990. (Record, p. 29). In his decision dated August 24, 1990, the Chief Procurement Officer found in favor of the State and PHP and dismissed HMS's protest. HMS appealed the CPO's decision to the Panel by letter dated August 31, 1990.

At the end of HMS's case, the Panel granted Mental Health, PHP and General Services' motions to dismiss HMS's protest for lack of evidence. The Panel discusses its decision to dismiss each of HMS's grounds in detail below.

#### CONCLUSIONS OF LAW

1. HMS should be awarded the contract because its price is lower than PHP.

The Panel finds as a matter of law that this grounds for relief fails to state a claim. Section 11-35-1530 of the Consolidated Procurement Code requires that award be made to "the responsive offeror whose proposal is determined in writing to be the most advantageous to the State, taking into consideration price and the evaluation factors, set forth in the request for proposals." The consideration of factors other than price is what distinguishes a Request for Proposals from an Invitation for Bids (§11-35-1520). See In re: Protest of Polaroid Corporation, Case No. 1988-12, Decisions of the South Carolina Procurement Review Panel 1982-1988, p. 527.

In this case, proposals were to be judged on five criteria. The price component was the third most important and accounted for a maximum of 24 points out of hundred. The mere fact that HMS had a lower price (\$74.02 per day) than PHP (\$74.35) is not legally significant to warrant award of the contract in an RFP situation.

2. HMS should have been awarded the contract because under the Procurement Code when there is a tie between an in-state and out-of-state bidder, award is automatically made to the in-state firm.

It is undisputed in this case that PHP, the winning offeror is a Virginia corporation while HMS is a South Carolina corporation. HMS seeks to apply the provisions of the South Carolina resident vendor preference statute (11-35-1520(9)(a)(1989 Supp.)) to this procurement. Even if the resident vendor preference did apply to a Request for Proposals,<sup>1</sup> HMS presented no factual evidence that a tie existed between HMS and anyone in this procurement. Most certainly no tie existed between HMS and PHP, the ultimate victor.

HMS offered a lower price than PHP and received higher points for this. In the overall point scoring, HMS came in fourth with 362.70. PHP came in first with 512.99 points.

The Panel finds no factual or legal basis for HMS's second grounds of protest.

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<sup>1</sup>See In re: Protest of Florence Crittenton Home, Case 1983-18, Decisions of the South Carolina Procurement Review Panel, p. 108, for authority that the resident vendor statute does not apply to RFPs.

3. The presence of Sheilda Friendly on the evaluation committee tainted the committee given her past business relationship with PHP.

HMS presented evidence that one of the members of the evaluation committee, Sheilda Friendly, had a business relationship with PHP because of her connection with the state contract for the Dowdy-Gardner Nursing Care Center in Rock Hill. Ms. Friendly is an employee of the Department of Mental Health and is the Director of the Dowdy-Gardner Center. PHP manages the facility pursuant to state contract.

HMS's witness David Little testified that Ms. Friendly had daily contact with PHP and that no one from his company had daily contact with anyone on the evaluation committee. Mr. Little stated that he had no evidence that Ms. Friendly influenced or attempted to influence any other member of other committee to vote in favor of PHP or that Ms. Friendly herself was biased in favor of PHP. HMS instead wishes to Panel to infer such improper influence from the fact of the business relationship.

The Panel finds as a matter of law that an evaluation committee member's business relationship with one of the vendors being evaluated, which arises solely by reason of his or her state employment, does not by itself warrant the conclusion that the committee was tainted by improper influence. See, In re: Protest of ACMG, Inc., Case No. 1990-4.

The correctness of this conclusion is borne out by the record in this case. Ms. Friendly had the narrowest point spread of any evaluator at 11.42 points. Other evaluators scores varied by as much as 30 points. Further, all five evaluators scored PHP the highest and, even if Ms. Friendly's score were deleted, there would be no change in the ranking of any of the offerors.

4. HMS claims that its scores were too low and PHP's were too high because the on-site visit for PHP was for a new facility.

HMS presented no direct evidence on this issue. On cross-examination, Mr. Little admitted that HMS had only two facilities which could be visited by the on-site team - the Valley Falls site and the Calhoun County site because HMS's only other site in Chesterfield was under construction during the pendency of this RFP. Mr. Little testified that both the Valley Falls and the Calhoun sites had patients who were veterans although neither site was exclusively a veteran's hospital. The Valley Falls site has 52 beds while the Calhoun site contains 88 beds.

It is clear from the testimony that the site evaluation committee had no choice but to choose the HMS sites that it did. HMS presented no evidence that the choice of the newer PHP site was in error or that the PHP site was not representative of the type of facility being bid on here. In sum, HMS presented no factual basis for its claim that its site visit scores were too low and that PHP's were too high.

5. HMS claims that a videotape which was included in PHP's proposal package violates the RFP and renders PHP nonresponsive.

The only evidence on this issue was the testimony of Mr. Little that PHP included a videotape in its proposal and HMS did not. HMS presented no evidence of the content of the tape and whether any evaluator had seen or was influenced it.

Section 3.3 of the RFP provides, "Each copy of the proposal should be bound in a single volume where practical. All documentation submitted with the proposal should be bound in a single volume." The Panel finds that inclusion of the videotape does not violate this provision because it is not practical to bind a videotape into a paper proposal.

Further, HMS presented no evidence that inclusion of the videotape violates section 3.4, which provides, "If your proposal includes any comment over and above the specific information requested in our Request for Proposal, you are to include this information as separate appendix to your proposal."

The Panel dismisses this issue for lack of evidence.

6. HMS should have received a higher score on financial stability.

Mr. Little testified that he and his partner in HMS (Bill Cecil) have 43 years of combined experience in the health care field and a combined individual net worth of \$12 million. HMS's proposal contained a statement from a lending institution that a line of credit in the mid-six figures would be opened for HMS to finance its startup costs

if it received this contract. The letter from the bank was included in HMS's proposal but no personal guarantees by Mr. Little or Mr. Cecil were. Mr. Little admitted that the financial statement submitted by HMS is unaudited, not done in accordance with generally accepted accounting procedures and shows HMS's current total assets as of 9/30/89 to be \$3,356 with current liabilities of \$36,894. (Department of Mental Health Ex. 2).

HMS presented no evidence to support its claim that the evaluation committee abused its discretion in awarding HMS an average of only 2 of 10 points on corporate financial stability, especially considering HMS's negative balance.<sup>2</sup> The financial merit of HMS's individual owners is not relevant to this RFP because, if HMS had won the contract, the owners would not be personally obligated to the State.

For the foregoing reasons, the Panel finds that HMS has failed to present sufficient evidence to sustain its protest and the protest is therefore dismissed. The August 24, 1990, decision of the Chief Procurement Officer is affirmed.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT  
REVIEW PANEL

  
Glenn F. McConnell  
Acting Chairman

Columbia, S. C.

Dec. 3, 1990

<sup>2</sup>HMS received 1 point from two evaluators, 2 points from two evaluators and 5 points from one evaluator on corporate financial stability.