

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

BEFORE THE SOUTH CAROLINA
PROCUREMENT REVIEW PANEL
CASE NO. 1992-15

IN RE: PROTESTS OF ORANGEBURG-CALHOUN-ALLENDALE-)
BAMBERG COMMUNITY ACTION AGENCY, INC.,)
LOWCOUNTRY COMMUNITY ACTION AGENCY, INC.,)
BERKELEY-DORCHESTER COUNTIES ECONOMIC)
DEVELOPMENT CORPORATION, BEAUFORT-JASPER)
EOC, INC., CHARLESTON COUNTY HUMAN)
SERVICES COMMISSION, INC.;) O R D E R
)
)
APPEAL BY TRANSPORTATION MANAGEMENT)
SERVICES, INC.)
)
)

This matter came before the South Carolina Procurement Review Panel for hearing on July 30, 1992, on the appeal of Transportation Management Services, Inc. ("TMSI") from a decision by the Chief Procurement Officer ("CPO") sustaining the protests of Orangeburg-Calhoun-Allendale-Bamberg Community Action Agency, Inc., Lowcountry Community Action Agency, Inc., Berkeley-Dorchester Counties Economic Development Corporation, Beaufort-Jasper EOC, Inc., and Charleston County Human Services Commission, Inc., (the "Protestants") and ordering resolicitation of contracts awarded to TMSI.

Present and participating in the hearing before the Panel were the Protestants, represented by Paul Tecklenburg, Esq., and M. Elizabeth Crum, Esq., and the Protestant Orangeburg-Calhoun-Allendale-Bamberg Community Action Agency, additionally represented by Robert Horger, Esq.; TMSI, represented by Michael Montgomery, Esq.; and the Division of General Services, represented by Jim Rion, Esquire.

FINDINGS OF FACTS

On January 17, 1992, the State issued a Request for Proposals ("RFP") on a contract to provide Title XIX Medicaid transportation services to citizens in Beaufort, Berkeley, Calhoun, Charleston, Colleton, Dorchester, Hampton, Jasper and Orangeburg Counties. Proposals were received and opened on February 27.

Among other things, the RFP required all offerors to "provide a total fixed cost to include all aspects of the work associated with this RFP. Any offeror who submits an estimate or fails to include all aspects of the project in their total cost will be deemed nonresponsive and their proposal will be rejected." (Record, p. 328). The RFP also required offerors to set forth a plan to be followed in the event that vehicles which would normally be supplied by the State were unavailable. (Record, p. 327).

TMSI responded to this requirement by setting forth a detailed listing of alternate vehicles followed by the statement:

If State vehicles are not forthcoming, TMSI will provide all vehicles. In the course of its regular business, the company regularly leases and purchases vehicles from several suppliers. Securing vehicles to replace any State vehicles not available can be done. If this is done at the outset of the contract, a small increase in fee may be required.

(Record, pp. 138-139).

The RFP also required providers to furnish "Vehicle Insurance Coverage information regarding comprehensive and

liability insurance coverage on the vehicles not leased from the state." (Record, p. 327). TMSI furnished information concerning liability insurance but did not respond as to comprehensive insurance. (Record, p. 121).

Notwithstanding the above two responses, after evaluation TMSI emerged as the high scorer on the contract for all relevant counties. The Protestants, who unsuccessfully submitted offers on the contracts for their respective counties, protested the award to TMSI on the grounds that TMSI was not responsive to the fixed cost requirement and the comprehensive insurance requirement. The CPO, after hearing, agreed and found that TMSI was not responsive to the RFP in those two respects. The CPO ordered that the contracts be resolicited as a result of TMSI's nonresponsiveness and because he found the specifications vague at best and unnecessary at worst.

TMSI appeals the CPO's decision to the Panel.

CONCLUSIONS OF LAW

1. Standing of the Protestants

At the outset of the hearing before the Panel, TMSI moved to dismiss the original protests for lack of standing. TMSI claims that the Protestants are not responsive to the RFP's requirement of fixed costs in the same manner that TMSI was declared to be not responsive and, therefore, the Protestants are not "aggrieved" within the meaning of S. C.

Code Ann. § 11-35-4210(1)(1986).¹ TMSI urges the Panel to review the proposals of the Protestants, declare them nonresponsive, and dismiss the original protests.

The Panel declines to do so. Even if the Protestants are not responsive to the RFP, they have the requisite standing to challenge TMSI's award under the Panel's decision in In re: Protests of Pizzagalli, et al., Cases No. 1991-8 and 1991-9 (consolidated).

In Pizzagalli, the Panel determined that, when rebid is a probable remedy, even nonresponsive bidders have standing to protest. The protestant in Pizzagalli challenged the responsiveness of all the bidders, which challenge, if successful, would have gained it the opportunity to participate in a rebid and possibly win the contract. The Panel found that the interest in a rebid was sufficient to bestow "aggrieved" status and, therefore, standing, on the nonresponsive protestant.

In this case, the Protestants are alleging that the winning offeror on an RFP is not responsive. If successful in this claim, the appropriate remedy is resolicitation. In re: Carter Goble and Associates, Inc., Case No. 1989-5. This interest in resolicitation confers standing on the Protestants in this case whether or not they are nonresponsive.

¹Section 11-35-4210(1) allows an actual or prospective offeror who is "aggrieved in connection with the solicitation or award of a contract" to file a protest.

2. Responsiveness of TMSI

A. Fixed Cost of Alternate Vehicle Plan

The RFP requires all offerors to provide a total fixed cost to include all aspects of the work associated with the RFP. As noted earlier, TMSI in its alternate vehicle plan, stated that, "Securing vehicles to replace any State vehicles not available can be done. If this is done at the outset of the contract, a small increase in fee may be required." (Record, pp. 138-139).

The Protestants and General Services argue that the emphasized language in TMSI's proposal violates the requirement that the proposal cost be fixed with regard to every aspect of performance.

TMSI counters, first, that the RFP does not require an offeror to state a cost associated with the alternate vehicle plan, and, second, even if a fixed cost is required, TMSI's statement that cost may increase is a minor technicality because the State and all parties to the procurement understood that all needed vehicles were in fact available from the State so any price increase was extremely remote.

The Panel does not agree with either of TMSI's arguments. The RFP requires that a fixed cost be stated to include all aspects of the work associated with this contract. The RFP requires each offeror to state an alternate vehicle plan in the event that all needed vehicles are not available from the State. If such vehicles were

unavailable and no alternate means of transportation were available, then the main purpose of the contract, i.e., transportation of Medicaid clients, could not be accomplished. Clearly, the alternate vehicle plan is essential to complete, uninterrupted performance of the contract.

The Panel interprets the RFP as now structured to require that the stated cost of each offeror include the cost of the alternate vehicle plan and not be subject to increase. Because TMSI seeks to leave that price component open, it is not responsive to the RFP. See Reg. 19-445.2070.

Further, TMSI's violation of the fixed cost requirement cannot be termed a minor informality which can be waived or cured under Reg. 19-445.2080 because it clearly affects price and because waiver would prejudice the other offerors who were required to calculate their prices taking into account the possibility that they might have to provide alternate vehicles.

It may be, as TMSI argues, that the State does not actually anticipate that needed vehicles will be unavailable.² In that event, the Panel agrees with the CPO

²At the nonmandatory preproposal conference, state procurement officials indicated that historically all needed vehicles were available from the State and that such availability was anticipated for this contract. However, Amendment #1, issued after the conference, contains the statement, "[P]lease be advised that state-owned vehicles are assigned to contractual providers on an as needed basis subject to availability. The vehicles on this list may or

(Footnote Continued)

that the requirement of an alternate vehicle plan to include all unforeseen contingencies is "unnecessary and onerous" and "contrary to the State's interest in obtaining the lowest price possible . . ." (Record, p. 12).

Because TMSI, as the apparent most advantageous offeror, is not responsive to the RFP, the contracts in question must be resolicited. In re: Carter Goble and Associates, Inc., Case No. 1989-5.

B.. Comprehensive Insurance

The RFP requires all providers to furnish "Vehicle Insurance Coverage information regarding comprehensive and liability insurance coverage on the vehicles not leased from the state." (Record, p. 327). Comprehensive insurance is required by federal law. (Record, pp. 347 and 352).

The Protestants and General Services argue that TMSI failed to furnish any information on comprehensive insurance as evidenced by its response to this section of the RFP which quotes liability coverage in the amount of \$1,000,000 but does not mention comprehensive coverage. (Record, p. 121).

TMSI admits that it furnished only liability information in the insurance portion of its response to the RFP but points to its budget proposal which quotes a figure under the "casualty" insurance column, as opposed to the

(Footnote Continued)
may not be available for a particular county when the new contract year begins" (Record, p. 307).

"liability" column. TMSI further argues that its financial statements attached to its proposal indicate that it is able to self-insure. TMSI contends that, because the presence or absence of comprehensive insurance has no cost consequence to the State, TMSI's failure to provide information is a minor technicality.

It may be true that the State is not directly affected by the comprehensive insurance that providers carry on their own vehicles. However, the requirement that such insurance exist is a federally mandated one. The State undertook to determine whether providers on this RFP met the federal requirements on comprehensive insurance by asking for information.

The Panel finds the requirement that information on comprehensive insurance be provided relates to the quality of performance and that the absence of such information is not a minor technicality under Reg. 19-445.2080.

TMSI is not responsive to the RFP because it failed to provide information concerning comprehensive insurance. Therefore, the contracts must be resolicited.

CONCLUSION

For the reasons stated above, the Panel affirms the June 15, 1992 decision of the Chief Procurement Officer and declares the offer of Transportation Management Services, Inc., nonresponsive. The State is directed to resolicit the contracts at issue here. In resoliciting, the State may

make any changes or clarifications to the specifications it
deems appropriate.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT
REVIEW PANEL

By: 
Gus J. Roberts

Columbia, S.C.
August 10, 1992