



Singleton, Esq., the Office of General Services of the Budget and Control Board represented by Delbert Singleton, Jr., Esq., Lowcountry Regional Transportation Authority represented by H. Fred Kuhn, Jr. Esq., and Pee Dee Regional Transportation Authority represented by Chalmers Johnson, Esq.

## **FINDINGS OF FACT**

On April 16, 1997, the Materials Management Office (MMO) issued an Invitation for Bids (IFB) to procure transportation services for the Department of Health and Human Services (DHHS). DHHS is the state agency responsible for the administration of the Non-emergency Medicaid Transportation Program under Title XIX of the Social Security Act. Title XIX provides for, among other things, the use of federal funds to provide transportation services to Medicaid recipients. On May 22, 1997, MMO opened the bids. On June 13, 1997, MMO issued the Statement of Intent to Award. Councils, TMSI, and Spartanburg protested the Intent to Award on several grounds, the primary ground being that the Notice of Intent to Award and any resulting contracts were in violation of state law because an IFB was used instead of a Request for Proposals (RFP) to procure the contracts. The CPO dismissed the protest of this issue as untimely, finding that it was a protest of the solicitation method of the contract and should have been filed within fifteen days of the date of issuance of the IFB rather than within fifteen days of the Statement of Intent to Award. Protestants now appeal the dismissal of their protests as untimely, claiming their protest of the legality of the contract is a jurisdictional question and one that does not arise until the Notice of Intent to Award is issued.

## ISSUES

1. Whether the protest of the legality of the Notice of Intent to Award is untimely.
2. Whether the Notice of Intent to Award and any resulting contract violates South Carolina State law, policies, procedures, and the State Plan for Medical Assistance (State Plan).

## CONCLUSIONS OF LAW

Protestants claim that the Notice of Intent to Award and any resulting contract is illegal because the contracts were solicited pursuant to an IFB rather than an RFP as provided for in the Title XIX Medicaid Transportation Program Policy and Procedures Manual. Protestants argue that they protest the legality of the entire contract and that therefore the protest is timely under § 11-35-4210 (1) of the Consolidated Procurement Code (Procurement Code) which states the following:

Any actual bidder...who is aggrieved in connection with the intended award or award of a contract shall protest to the appropriate chief procurement officer... within fifteen days of the date notification of award is posted in accordance with this Code.

It is undisputed that Protestants filed their protests within the fifteen day statutory period provided for above. DHHS argues, however, that this section does not apply to Protestants because the protest is of the solicitation method used and therefore Protestants are required to protest under the first paragraph of §11-35-4210, which reads:

Any prospective bidder...who is aggrieved in connection with the solicitation of a contract shall protest to the appropriate chief procurement officer...within fifteen days of the date of issuance of the Invitation for Bids or Requests for Proposals or other solicitation documents....

Though Protestants protest the fact that an IFB was used instead of an RFP, their protest is that the use of the IFB renders the Notice of Intent to Award and any resulting contract illegal. When the legality of a solicitation or award is at issue, the applicable section of the Code is §11-35-4310 which reads as follows:

**11-35-4310 Solicitation or Awards in Violation of the Law**

(1) Applicability. The provisions of this section apply where it is determined by either the appropriate chief procurement officer or the Procurement Review Panel, upon administrative review, that a solicitation or award of a contract is in violation of the law.

This purpose of this section of the Procurement Code is to provide for an administrative review so that illegal solicitations or awards of contracts do not become exempt from review merely because the fifteen days allowed for protests has lapsed. The Panel finds that the Protestants have made a prima facie showing of illegality in the solicitation and resulting Notice of Intent to Award such that the Panel must proceed with an administrative review under §11-35-4310.

The review of the legality of the solicitation and Notice of Intent to Award requires the examination of both state and federal law. The Medicaid Statute requires, in its accompanying regulations at 42 CFR § 430.10, that individual States submit a State Plan to be approved by the federal Health Care Finance Administration (HCFA) in order to receive federal funding under Title XIX of the Social Security Act. 42 CFR § 430.12 specifies that the State Plan must cover the "basic requirements, and individualized content that reflects the characteristics of the particular State's program." In the submission of their State Plan, DHHS certifies the following:

[DHHS] submits the following State plan for the medical assistance program, and hereby agrees to administer the program in accordance with the provisions of this State plan, the requirements of titles XI and XIX of the Act, and all applicable Federal regulations **and other official issuances of the Department.** (Emphasis added) [Record p. 1108].

Protestants claim that the use of an IFB to solicit the transportation contracts violates the State Plan because the State of South Carolina Title XIX Medicaid Transportation Program Policy and Procedures Manual (Manual) specifies that transportation contracts will be solicited by the use of the RFP process. Section 1.4 of the Manual states the following:

Program funds are available to private or public organizations or individuals that can provide the necessary services and assurances in accordance with the state plan. **The State contracts for services with eligible providers are awarded through the Request for Proposal (RFP) process** through the Materials Management Office of the State Budget and Control Board. (Emphasis added) [Record p. 981].

The Manual clearly states that the contracts will be awarded through an RFP. DHHS claims, however, that the Manual is not part of the State Plan and is therefore not binding on the agency in its administration of the Medicaid transportation program. DHHS argues that the Manual, which was written in July 1994, was written when the transportation program was administered by the Governor's Office and that it therefore is not binding on DHHS. The Record, however, is replete with evidence that the Manual is the only policy and procedures manual in effect currently governing the Medicaid transportation program and that DHHS relies on the Manual and requires the transportation providers to follow its provisions. For example, a January 28, 1997 memorandum from DHHS Department head, John Zemp, to Title XIX providers,

addresses a complaint about authorization forms and refers the providers to the Manual when it states “[t]he title XIX Medicaid Transportation Program Policy and Procedures Manual, Page 47, items 6.12.2 specifically requires the following....” [Record p.1121]. A letter of August 8, 1996 from DHHS to a provider directs them to a section of the Manual to resolve problems with the transportation services. [Record p. 1125]. In addition to the evidence contained in the Record, numerous witnesses testified that as providers of transportation services, they were issued the Manual by DHHS, referred to Manual by DHHS, and relied on the Manual in fulfilling their contracts with the State. There was no testimony at the hearing before the Panel that the Manual did not fall under the State Plan as state policy for the transportation program. In fact, Mr. James Jollie, the witness from DHHS who is responsible for overseeing the administration of the transportation program, testified that the Manual was state policy.

DHHS argues that even if the Manual is the state policy governing the transportation program, they have the right to change the policy. DHHS argues that the agency did change the policy in the first sentence of a letter dated April 14, 1997, written by the agency Director, Gwen Power, which states:

This letter is to inform you that the Department of Health and Human Services plans to issue an Invitation for Bids (IFB) for the provision of statewide Title XIX Transportation for Non-Emergency Medical Transportation Services for Medicaid Eligible Recipients. [Record p. 1129]

The letter, whose purpose was to inform bidders of the agency’s intent to solicit bids, makes no reference to the Manual, nor does it indicate in any way that it is

to serve as notice of a change in policy or an amendment to the Manual. The Panel agrees that DHHS, as the administering agency, has the right to change their policy governing the transportation program. However, the Panel does not agree that that the letter of April 14, 1977 is sufficient to materially change state policy. Furthermore, 42 CFR § 430.12 requires that the State Plan be amended whenever necessary to reflect any material changes in State law or policy. The State Plan as submitted by South Carolina and approved by HCFA provides in section 7.1, the following:

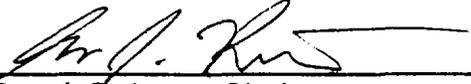
The plan will be amended whenever necessary to reflect new or revised Federal statutes or regulations or material changes in State law, organization, **policy** or State agency operation. (Emphasis added) [Record p. 1113].

The Panel finds that the Manual constitutes state policy and that Section 1.4 of the Manual specifies the use of an RFP to solicit transportation contracts. The RFP process is materially different from the IFB process in that it is used in circumstances where factors other than the lowest price need to be considered, such as in transporting citizens on Medicaid. The Panel finds that the use of an IFB is a material change in state policy and that neither the State Plan nor the Manual as policy under State Plan was properly amended.

For the foregoing reasons, the Panel finds the solicitation and Notice of Intent to Award to be illegal and orders the Notice of Intent to Award canceled.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT  
REVIEW PANEL

BY:   
Gus J. Roberts, Chairman

Columbia, South Carolina

NOVEMBER 4, 1997