

STATE OF SOUTH CAROLINA)	BEFORE THE SOUTH CAROLINA
)	PROCUREMENT REVIEW PANEL
COUNTY OF RICHLAND)	CASE NO. 1997-12

In re:)	
)	
Protest of Councils on Aging,)	ORDER
Transportation Management Services, Inc.,)	ON
Spartanburg Regional Health Care System;)	RECONSIDERATION
Appeal by Councils on Aging,)	
Transportation Management Services, Inc.,)	
Spartanburg Regional Health Care System.)	

This matter came before the South Carolina Procurement Review Panel for a hearing on October 6, 1997, on appeal by Aiken Area Council on Aging, Anderson/Oconee Council on Aging, Council on Aging of the Midlands, Inc., Generations Unlimited, Edgefield County Senior Citizens, Piedmont Agency on Aging, McCormick Council on Aging, Newberry Council on Aging, Pickens Seniors Unlimited, Inc., and York County Council on Aging, hereinafter collectively referred to as "Councils", Transportation Management Services, Inc. (TMSI), and Spartanburg Regional Health Care System (Spartanburg). Councils, TMSI and Spartanburg are hereinafter collectively referred to as "Protestants". Protestants appeal the Chief Procurement Officer's (CPO) decision dismissing their protest of the Notice of Intent to Award contracts to provide transportation services for the Department of Health and Human Services (DHHS) pursuant to the Title XIX Medicaid Transportation Program as untimely filed. Present and participating at the hearing before the Panel were the following: Councils represented by M. Elizabeth Crum, Esq., TMSI represented by Michael H. Montgomery, Esq., Spartanburg represented by Susan Batten Lipscomb, Esq.,

the DHHS represented by Deirdra T. 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. DHHS, the Office of General Services, LowCountry Regional Transportation Authority, and Pee Dee Regional Transportation Authority are hereinafter collectively referred to as "Respondents".

The Panel issues this order in response to a Motion for Reconsideration filed by Respondents.

FINDINGS OF FACT

On April 16, 1997, the Materials Management Office (MMO) issued an Invitation for Bids (IFB) to procure transportation services for 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, and on June 13, 1997, MMO issued the Statement of Intent to Award. Protestants protested the Statement of 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 to procure the contracts instead of a Request for Proposals (RFP) as specified in the Title XIX Medicaid Transportation Program Policy and Procedures Manual. 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. Protestants now appeal the dismissal of their protest, claiming their protest is timely filed because it is a protest of the legality of the Notice of Intent to Award and any resulting contracts.

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 contracts violate South Carolina State law, policies, procedures, and the State Plan for Medical Assistance (State Plan).

CONCLUSIONS OF LAW

1. Protestants argue that the Title XIX Medicaid Transportation Program Policy and Procedures Manual specifies that transportation contracts will be solicited using the RFP method. Because the State used an IFB to procure the contracts, Protestants assert that the Notice of Intent to Award and any resulting contracts are rendered illegal. Protestants argue that their protest is to the legality of the entire contract and is therefore timely under § 11-35-4210 (1) of the South Carolina Consolidated Procurement Code (Procurement Code) SC Ann. § 11-35-10 et. seq., which provides for 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 protest within fifteen days of the date the notification was posted. However, DHHS argues that Protestants can not proceed under this section because their protest deals with the solicitation

method used in the procurement and that they must proceed 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....

DHHS asserts that the protest is untimely because Protestants filed their protest within fifteen days after the Notice of Intent to Award and not the issuance of the IFB. DHHS moves to dismiss the protest before the Panel on these grounds.

The Panel finds that, under the statutory scheme set forth in §11-35-4210, the solicitation and the Notice of Intent to Award are separate and distinct actions which trigger distinctive protest periods. In this case, Protestants are challenging the legality of the Notice of Intent to Award and any resulting contracts. It is well settled that if any element of a contract is illegal, the entire contract becomes illegal. The Panel finds that if a Notice of Intent to Award is issued pursuant to an illegal solicitation, then the entire contract will be rendered illegal. A protest of the legality of a Notice of Intent and resulting contract is timely if it is filed within fifteen days of the Notice of Intent to Award as specified in the statute. For this reason, the Panel denies the Respondents' motion to dismiss and finds the protest to be timely under §11-35-4210.

2. Protestants argue that the Notice of Intent to Award and any resulting contracts violate South Carolina State law, policies, procedures, and the State Plan for Medical Assistance (State Plan). The review of the legality of the Notice of Intent to Award requires the examination of both state and federal law. The

Medicaid Statute, in its accompanying regulations at 42 CFR § 430. et seq., requires that individual states submit a State Plan to be approved by the federal Health Care Finance Administration (HCFA). In order for the State to receive Medicaid funds and grants, the State Plan must meet all of the requirements of Title XIX of the Social Security Act and DHHS must administer the Medicaid program in accordance with Title XIX, the Code of Federal Regulations (CFR) and other official issuances of the U.S. Department of Health and Human Services. 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 contend that the Title XIX Medicaid Transportation Program Policy and Procedures Manual (Manual) constitutes State policies and procedures to be followed in administering the State Plan because it is the Manual issued by the Department to transportation providers to follow in fulfilling their transportation contracts with the State. The Manual addresses the award of transportation contracts in § 1.4 which reads as follows:

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 the use of 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 transportation program. DHHS argues that the Manual, which became effective in July 1994, was written when the transportation program was administered by the Governor's Office and that it is therefore 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 has consistently applied the Manual to monitor and enforce the transportation contracts. 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.

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]

This 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. Furthermore, 42 CFR § 430.12 requires that the State Plan be amended whenever necessary to reflect any material changes in State law or policy. In keeping with this requirement, Section 7.1 of the State Plan specifies 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].

From the testimony and evidence presented at the hearing, the Panel finds that the Manual is the state policy governing the policies and procedures of the transportation program. The Panel finds that § 1.4 of the Manual specifies the use of an RFP to solicit the transportation contracts. The Panel therefore finds that the Notice of Intent to Award and any resulting contracts are illegal. Having determined that the Notice of Intent to Award is in violation of the law, the Panel applies § 11-35-4310 of the Procurement Code which sets forth the

remedies available when a such a determination is made. §11-35-4310 reads, in part, as follows:

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....

The Panel finds that the appropriate remedy provided for by the statute is for the Notice of Intent to Award to be canceled.

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 to be canceled.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT
REVIEW PANEL

BY: 

Gus J. Roberts, Chairman

Columbia, South Carolina

January 15, 1998