

NIKKI R. HALEY, CHAIR
GOVERNOR

CURTIS M. LOFTIS, JR.
STATE TREASURER

RICHARD ECKSTROM, CPA
COMPTROLLER GENERAL



THE DIVISION OF PROCUREMENT SERVICES
DELBERT H. SINGLETON, JR.
DIVISION DIRECTOR
(803) 734-8018

MICHAEL B. SPICER
INFORMATION TECHNOLOGY MANAGEMENT OFFICER
(803) 737-0600
FAX: (803) 737-0639

HUGH K. LEATHERMAN, SR.
CHAIRMAN, SENATE FINANCE COMMITTEE

W. BRIAN WHITE
CHAIRMAN, HOUSE WAYS AND MEANS

Protest Decision

Matter of: LogistiCare, Inc.

Case No.: 2016-132

Posting Date: April 18, 2016

Contracting Entity: South Carolina Department of Health and Human Services

Solicitation No.: 5400008382

Description: Transportation Coordinator to Manage the Daily Functions of the South Carolina Non-Emergency Medical Transportation Program

DIGEST

Protest of the award of a contract for a Transportation Coordinator to Manage the Daily Functions of the South Carolina Non-Emergency Medical Transportation Program, alleging issues of responsiveness, responsibility, and improper evaluation, is denied.

AUTHORITY

The Chief Procurement Officer¹ conducted an administrative review pursuant to S.C. Code Ann. §11-35-4210(4). This decision is based on the evidence and applicable law and precedents.

¹ The Interim Materials Management Officer delegated the administrative review of this protest to the Chief Procurement Officer for Information Technology.

DISCUSSION

LogistiCare Solutions, LLC (LogistiCare), protests an award to Southeastrans, Inc. (Southeast), for a Transportation Coordinator to Manage the Daily Functions of the South Carolina Non-Emergency Medical Transportation Program, alleging that Southeast is neither responsive nor responsible and that the evaluators were unqualified and their scoring was arbitrary and capricious. LogistiCare's letter of protest is incorporated by reference. [Attachment 1]

BACKGROUND

This solicitation was issued by the South Carolina Department of Health and Human Services (HHS) under a delegation from the Chief Procurement Officer to acquire a transportation coordinator to manage the daily functions of the South Carolina Non-Emergency Medical Transportation Program. The South Carolina Non-Emergency Medical Transportation (NEMT) program pays for non-emergency medical transportation services for eligible Medicaid Members to medical care or services, which are covered under the Medicaid program.

KEY EVENTS

Solicitation Issued	August 26, 2014
Amendment 1 Issued	October 2, 2014
Amendment 2 Issued	June 2 2015
Amendment 3 Issued	July 24, 2015
Amendment 4 Issued	September 3, 2015
Intent to Award Issued	February 16, 2016
Protest Received	February 26, 2016
Award Suspended	February 26, 2016

LogistiCare raises six issues of protest:

1. SET was non-responsive in that it failed to meet the call center requirement.
2. SET was non-responsive in that it failed to provide a contingency plan and its only proposed solution violates the RFP and governing federal law.

3. The scoring was arbitrary and capricious as SET actually received improved scoring for violating both the RFP requirements and governing federal law.
4. One or more of the evaluators misunderstood their task and/or were not qualified as they were not aware of and did not apply the governing requirements of the RFP and of federal law regarding this program.
5. SET was non-responsive in that it failed to provide the Security for Performance required by the RFP.
6. SET is not a responsible offeror as it lacks the financial and other ability to perform this contract.

Logisticare's first issue of protest is that Southeast was non-responsive in that it failed to meet the call center requirement. The solicitation required the successful contractor establish and maintain a call center in South Carolina:

3.4.1 Establish and maintain a call center staffed with customer service representatives in the State of South Carolina for taking reservations for NEMT services during the hours of 8:00 AM to 6:00 PM local time, Monday through Friday. A secondary location outside South Carolina, but within the continental United States, is permitted but only to take reservations for NEMT services that are outside these business hours. The secondary location shall be subject to the same performance requirements as the call center in the State of South Carolina.

[Amendment 2, Section 2; § 3.4.1]

9. Page 28, Section D.1: Can the vendor field 85% of calls during regular business hours in South Carolina and allow a portion of calls to be handled by another US based vendor call center? This will allow savings to the agency, as we do not have to staff to peak volumes and then have CSRs idle.

Response: No. The Transportation Coordinator shall field 100% of calls during regular business hours in South Carolina.

Please see Amendment Number Two (2), Revised Request for Proposal, Part 3 Scope of Work, 3.4 Call Center and Reservation Requirements, 3.4.1.

[Amendment #2, Section 1; Response to Question 9]

LogistiCare looked to the last paragraph of Southeast's response to a requirement for the offerors to provide detailed plans and resources for adapting to situations where additional staff is

required to perform the functions of the contract as evidence that Southeast failed to meet the requirement that 100% of calls during regular business hours must be answered in South Carolina:

Our call center staff *in Georgia and Tennessee* will also be trained on the SC NEMT program and will be utilized *during peak call times*, for after-hours calls, and during recovery situations.

Southeast Proposal, p. 198 (emphasis added).

The solicitation requirement and Southeast's complete response is as follows:

(d) Right-Sizing Staff Based on Program Fluctuations

(d) Offerors should provide their detailed plans and resources for adapting to situations where additional staff is required to perform the functions of the contract. Offerors should provide their plans to ensure the longevity of staff in order to allow for effective support during the term of the contract.

Southeast understands the challenges of providing continuous NEMT service during situations where additional staff is needed to perform the contract. Since we have operations in states neighboring South Carolina, we can easily obtain and bring transportation providers and operations resources into the State to quickly fill any gap, including the deployment of our own vehicles to ensure adequate transportation coverage.

During the initial implementation of a new contract, we will provide experienced personnel from our existing operations that have implemented new NEMT programs for our other state contracts. These subject matter resources will remain onsite until all new hires have been sufficiently trained and can perform their job functions to meet the performance goals of the SC NEMT contract.

Our call center staff in Georgia and Tennessee will also be trained on the SC NEMT program and will be utilized during peak call times, for after-hours calls, and during recovery situations.

Elsewhere in its proposal, Southeast responded to the requirement to have a South Carolina based call center as follows:

After evaluating several suitable sites, Southeast selected a facility in Greer, SC as the optimal location for our Central Business Office and statewide Call Center. This facility has up to 20,000 sq ft of available space and previously

served as a call center for a major insurance company. It is appropriately configured and has the required infrastructure and connectivity to fully support the needs of our statewide NEMT call center. The office is located at 112 South Main Street, Greer, SC 29651. We anticipate approximately 150 employees will be located in this office.

Our SC Call Center will be open from 8:00am to 6:00pm Monday through Friday. After-hours and weekend calls will be answered by live personnel at our 24/7/365 Call Center in Atlanta, Georgia. The Greer Call Center will manage all gatekeeping and trip reservation functions including, member eligibility, trip scheduling, standing order trip scheduling, dispatching, trip validation, and eligibility of public transportation and gas reimbursement transports.

[Southeast Technical Proposal, Page 48]

We have identified the Greenville/Greer area to provide a physical presence within the State for conducting business with members and transportation providers. This office will be the hub of our SC NEMT operations encompassing five (5) departments of highly-skilled, experienced personnel (Table 5.2-1).

SC Call Center

[Southeast Technical Proposal, Page 170]

Our SC Call Center will be located in the Central Business Office in the Greenville/Greer area. The SC Call Center will be open from 8:00am to 6:00pm Monday through Friday. After-hours and weekend calls will be answered by live personnel at our 24x7x365 Call Center in Georgia. The Call Center will manage member eligibility, trip scheduling, standing order trip scheduling, dispatching, trip validation, and eligibility of public transportation and gas reimbursement transports.

[Southeast Technical Proposal, Page 170]

In describing its call center equipment and system, Southeast stated:

Automated Call Distribution System

We intend to supply a fully functional ACD system to support the SC NEMT Call Center by extending our ShoreTel Unified Communications platform currently utilized in our current operations. By extending this fully-functional ACD telecommunications infrastructure, Southeastrans will have the ability to easily route NEMT calls to its primary back-up call center in Georgia in the event the SC Call Center is unable to receive calls. Linking SCDHHS's

telecommunications infrastructure to our Georgia Call Center will also create an additional layer of redundancy.

[Southeast Technical Proposal, Page 57]

Reviewing Southeast's proposal in total, Southeast is responsive to the requirement that 100% of all calls during business hours will be processed through a South Carolina based call center. This issue of protest is denied.

Logisticare's second issue of protest is as follows:

SET was non-responsive in that it failed to provide a contingency plan and its only proposed solution violates the RFP and governing federal law.

This issue of protest alleges two interrelated claims: First, Southeast failed to provide a contingency plan; and second, Southeast's contingency plan included the use of its own vehicles in violation of the RFP and federal law. The solicitation requirement is as follows:

(b) Offerors should describe, in detail, their contingency plans for unexpected peak transportation demands and back-up plans when notified that a vehicle is excessively late or is otherwise unavailable for service.

[Amendment 2, Section 2; Page 68]

Southeast's proposal includes a page and a half, beginning on page 82, responding to the solicitation requirement that the offerors describe its contingency plan. In addition, in its letter of protest, LogistiCare acknowledged that Southeast's proposal included a contingency plan:

It is alarming that **SET's only contingency plan in its proposal is to provide services itself regardless of the circumstances.** SET offered the use of its own vehicles as its only contingency plan:

(emphasis in original). To the extent that LogistiCare is protesting that Southeast failed to propose a contingency plan, this issue is denied.

The second part of this issue of protest is that Southeast's only contingency plan was the use of its own Quick Response Vehicles in violation of federal regulation 42 CFR 440.170(a)(4)(ii)(B),

which rendered Southeastrans' proposal non-responsive. A review of Southeast's response to this requirement indicates that use of its Quick Response Vehicles is only part of Southeast's proposed contingency plan.

The solicitation included a requirement that the successful contractor comply with 42 CFR 440.170(a)(4)(ii).

The Transportation Coordinator shall:

3.1.8 Be prohibited from providing NEMT services or making a referral to, or subcontract with, a transportation provider, if the Transportation Coordinator has a financial relationship with the transportation provider or has an immediate family member who has a direct or indirect financial relationship with the transportation provider. Please see 42 CFR §440.170(4)(ii). As defined in 42 CFR §411.354(a), financial relationship means a direct or indirect ownership or investment interest in any entity that furnishes designated health services or a direct or indirect compensation arrangement with any entity that furnishes designated health services. No employee of the Transportation Coordinator who can influence or award trip assignments may engage in activities in a related business that may be construed to have a conflict of interest.

[Amendment 2, Section 2; Page 21]

As noted by LogistiCare in its letter of protest, the federal regulation anticipated the use of broker provided vehicles under certain circumstances as set forth in 42 CFR 440.170(a)(4)(ii)(B):

(B) Exceptions: The prohibitions described at clause (A) of this paragraph do not apply if there is documentation to support the following:

- (1) Transportation is provided in a rural area, as defined at § 412.62(f), and there is no other available Medicaid participating provider or other provider determined by the State to be qualified except the non-governmental broker.
- (2) Transportation is so specialized that there is no other available Medicaid participating provider or other provider determined by the State to be qualified except the non-governmental broker.

(3) Except for the non-governmental broker, the availability of other Medicaid participating providers or other providers determined by the State to be qualified is insufficient to meet the need for transportation.

(4) The broker is a government entity and the individual service is provided by the broker, or is referred to or subcontracted with another government-owned or operated transportation provider generally available in the community, if the following conditions are met:

LogistiCare points to the State's responses in the solicitation amendments indicating that none of the exceptions authorized by the regulation existed at the time of the amendment, as proof that none of these exemptions could arise during the term of the contract. A contingency plan is a plan or procedure created in anticipation of abnormal events or emergencies. Nothing in the solicitation or amendments guarantee that events will not unfold during the course of the contract that would authorize the use of broker supplied transportation. In addition, the solicitation provided for the use of broker provided vehicles in accordance with the regulation:

3.3.6 Control The Use of Transportation Coordinator Operated Vehicles

Only operate vehicles to provide NEMT services in limited circumstances, as provided in 42 CFR 440.170(a)(4)(ii)(B). If the Transportation Coordinator meets any of these limited circumstances, prior to use by the Transportation Coordinator, the vehicles must be inspected and the drivers must be credentialed using the same requirements applied to the contracted transportation providers.

[Amendment 2, Section 2; Page 25]

The solicitation asked the offeror to describe how it will handle unexpected peak transportation demands, and back-up plans when notified that a vehicle is excessively late or is otherwise unavailable for service. Southeast's response states in part:

Southeastrans will provide Quick Response Vehicles (QRVs) to be utilized in those cases where there are insufficient provider resources, an assigned provider is unable to successfully complete their trip assignment due to vehicle failure or traffic delay and other provider resources are unavailable, or other unforeseen circumstance.

[Southeast Technical Proposal, Page 82] It also describes a software-based reassignment of vehicles in the event the original vehicle is disabled or otherwise unavailable:

As mentioned in our response to 5.1 Offeror's Approach, subsection 3.3.9 Facilitate Trip Recovery, the InSight Mobile Application allows our dispatchers to identify the closest vehicles in the area to determine if "trip recovery" is an option via another provider. If another provider's vehicle is closer than the assigned provider, the dispatcher will begin the process of determining if the closer vehicle is available to accept the trip (Figure 4.4-4). If so, the dispatcher will "reassign" the trip in InSight to the new provider.

[*Id.*, Page 83] The section referenced in that paragraph describes the process by which Southeast will "identify the closest transportation resource to the scheduled pick up that has been delayed...[and]...contact the transportation provider to confirm acceptance of the additional trip assignment. Once confirmed, the trip will be re-assigned to the new provider...." [*Id.*, page 16] Reading these provisions together makes clear that Southeast's primary contingency plan contemplates reassignment of disrupted trips to other providers.

The inclusion of broker provided transportation in its contingency plan does not render Southeast's proposal non-responsive to a material requirement of the solicitation. This issue of protest is denied.

LogistiCare protests that the scoring was arbitrary and capricious as Southeast actually received improved scoring for violating both the RFP requirements and governing federal law. LogistiCare points to comments from evaluator #4 noting that Southeast's approach to regionalized call centers was impressive and its use of special vehicles and on call providers was an added advantage. LogistiCare explains that:

First, regional call centers (which, for SET, are located outside the state of South Carolina) is not an appropriate factor to increase scoring as calls were required to be answered 100% in South Carolina during business hours. Further, as noted above, the use of special vehicles as proposed by SET is in violation of the RFP and the law. It is arbitrary, capricious, and contrary to law for an evaluator to enhance the scoring to SET for offering performance that is in violation of law and the requirements of the RFP.

Southeast agreed to answer 100% of calls received during business hours in South Carolina. As explained above, the use of regional call centers to handle after hours calls and emergencies, or as a redundant or fail-over facility, is not a violation of the solicitation. An evaluator finding

extra value in the manner in which Southeast proposed to deal with catastrophic service interruptions, by utilizing its regional call centers in a manner permitted by the solicitation, is not arbitrary or capricious.

Southeast's proposed use of "special vehicles" appears in Appendix F to Southeast's responses to the "Background, Experience and Approach to Staffing" section (5.1.5.1 and 5.1.5.2). Appendix F consists of letters of commitment from NEMT providers, and those letters describe the vehicles available for service. One potential provider offered ten "Advanced Life Support" vehicles. [Appendix F, Page 6] Another offered eleven "Wheelchair Lift Vans." [*Id.*, Page 12] Yet another offered nearly fifty special vehicles. [*Id.*, Page 17] All told, the forty-plus providers listed in Appendix F offered 400 vehicles other than basic "Ambulatory" shuttles.² An evaluator's finding extra value in Southeast's proposed available inventory of special vehicles is not arbitrary or capricious or contrary to law. This issue of protest is denied.

LogistiCare protests that one or more of the evaluators misunderstood their task and/or were not qualified as they were not aware of and did not apply the governing requirements of the RFP and of federal law regarding this program.

This case clearly demonstrates the importance of a well-prepared and properly chosen evaluation panel that understands its task and carries it out properly. In this case, one or more evaluators were not properly positioned or prepared to be an evaluator, clearly did not carry out their charge, and should have been removed from the process. The presence of such improper evaluators made the difference in the improper selection of SET rather than LogistiCare.

Here, the RFP and applicable federal law and regulations contain mandatory requirements and prohibitions. It is absolutely arbitrary, capricious and contrary to law for the evaluators, or any of them, to actually award a vendor more points or credit for a proposal to violate the RFP's requirements and the requirements of federal law and regulations. However, here, that is exactly what the scoring demonstrates.

² LogistiCare complains that this evaluator added points for the allegedly prohibited use of Southeast's own vehicles. As explained above, Southeast's proposed use of its own vehicles is not in violation of the solicitation or federal regulations. Even if it were, though, that use is proposed in Section 5.1.4, which was not considered in evaluating "Background, Experience and Approach to Staffing."

For example, Evaluator #4 specifically remarked that they found it an advantage that SET offered its own vehicles for use in meeting the RFP requirements. But this is not allowed under the RFP and more importantly, violates federal law and regulations. This same evaluator noted with approval that SET intended to use out of state call centers to handle peak call overloads when in fact the RFP specifically did not permit that at all. Also, Evaluator 4 credited SET significantly for its approach, when in fact SET's approach included no "contingency plan" whatsoever other than one that was directly contrary to the RFP's express requirements.

This is clear and irrefutable evidence that not all of the evaluators were qualified to serve as evaluators on this RFP.

As explained above, Southeast's proposed use of its own vehicles is not a violation of the solicitation or the federal regulations, nor was its proposed use of regional call centers a violation of the solicitation. The CPO will not substitute his judgement to that of the evaluators unless their actions were clearly erroneous, arbitrary, capricious or contrary to law. Nothing in the comments LogistiCare quotes to support its claim of unqualified evaluators demonstrates or suggests this sort of conduct. There is no evidence to support such a finding and this issue of protest is denied.

LogistiCare protests that Southeast was non-responsive in that it failed to provide the Security for Performance required by the RFP. The original solicitation required the successful contractor to provide performance and payment bonds within 10 calendar days of written notice of award. The original solicitation required offers be submitted by October 15, 2014 and anticipated that the award would be posted on November 21, 2014.

BB PERFORMANCE AND PAYMENT BOND REQUIREMENTS

Within ten (10) calendar days after written notice of award, the Contractor shall furnish performance and payment bonds.

[Solicitation, Page 83]

The performance and payment bond requirements were replaced with a requirement for a security in the form of cash, cash equivalent or an unconditional irrevocable standby letter of credit, on deposit in or issued by, respectively, a federal or state chartered bank with offices

physically located in the State of South Carolina in the amount of two million dollars US (\$2,000,000.00) by October 1, 2015.

8.34 SECURITY FOR PERFORMANCE, DAMAGES: The Contractor shall supply security no later than October 1, 2015. The Contractor shall supply security in the form of cash, cash equivalent or an unconditional irrevocable standby letter of credit, on deposit in or issued by, respectively, a federal or state chartered bank with offices physically located in the State of South Carolina in the amount of two million dollars US (\$2,000,000.00) whereby funds are (1) pledged to the benefit of the State; (2) are not under the control of the Contractor; and (3) are payable to the S.C. Department of Health and Human Services upon written demand to the holder.

This security is for the faithful performance of this contract between the State and Contractor and will further protect, indemnify and save harmless the State from all costs and damages by reason of the Contractor's default, breach or failure to satisfactorily perform the obligations outlined in this RFP, the Contractor's response thereto, and any amendments, modifications or change orders.

[Amendment 2, Section 2, Page 91]

Amendment 2 required bidders to submit proposals by August 4, 2015 with an anticipated award posting date of September 21, 2015 and the security was due by October 1, 2015. Amendment 4 was issued on September 3, 2015 with an anticipated award posting date of November 12, 2015 and changed the security due date to December 15, 2015.

8.34 SECURITY FOR PERFORMANCE, DAMAGES: The Contractor shall supply security no later than ~~October 1, 2015~~ **December 15, 2015**. The Contractor shall supply security in the form of cash, cash equivalent or an unconditional irrevocable standby letter of credit, on deposit in or issued by, respectively, a federal or state chartered bank with offices physically located in the State of South Carolina in the amount of two million dollars US (\$2,000,000.00) whereby funds are (1) pledged to the benefit of the State; (2) are not under the control of the Contractor; and (3) are payable to the S.C. Department of Health and Human Services upon written demand to the holder.

[Amendment 2, Section 2, Page 55]

LogistiCare protests that Southeast should be declared non-responsive for failure to post the required security by December 15, 2015—two months before it was awarded the contract and

had any performance obligation to secure. In the original solicitation the bonds were not due until after written notice of award and in each subsequent change of the requirement, the security was not due until after the anticipated award posting date which is the written notice of award. In this case, the Intent to Award was not posted until February 16, 2016 with an effective date of February 29, 2016. Since the apparent successful offeror was not known until February 16, 2016, Southeast could not have known to provide the security on December 15, 2015. With the filing of this protest, the award is not final until the protest is resolved. Interpreting the performance security requirement as LogistiCare does leads to the absurd proposition that every offeror must post a \$2 million cash bond, whether or not awarded a contract.³ This issue of protest is denied.

Finally, LogistiCare protests that Southeast is not a responsible offeror because it lacks the financial and other ability to perform this contract.

Financially, LogistiCare notes that Southeast's net worth is only \$14 million with annual revenue of \$92 million while this contract is valued at approximately \$80 million and requires the chosen vendor advance payments to transportation companies at a rate of 5 to 6 million dollars monthly and the State's ability to protect itself is limited to the \$2 million cash equivalent security.

This contract would so significantly increase Southeastrans' entire portfolio that it is unreasonable to expect any company to be able to absorb that type of increase without serious negative repercussions. Southeastrans' currently conducts 3.6 million annual trips and this contract will nearly double that figure by adding approximately 3 million more annual trips. Southeastrans currently has 308 FTEs and proposes to add 168.5 new FTEs to service the SC NEMT program. This 55% increase in total FTEs is a massive increase for all their internal systems and processes to absorb, from HR and training to IT and tech support.

Southeastrans references fail to support the proposition that it has the experience to perform a contract of similar to this one.

A responsible offeror is defined in Section 11-35-1410(6) as:

³ Additionally, requiring performance and payment bonds or, as in this case a \$2,000,000 cash security, prior to final award creates an unnecessary burden on the apparent successful bidder and unnecessarily increases the cost of doing business with the State.

"Responsible bidder or offeror" means a person who has the capability in all respects to perform fully the contract requirements and the integrity and reliability which will assure good faith performance which may be substantiated by past performance.

The factors to be considered in making a determination of responsibility are found in Regulation 19-445.2125(A) State Standards of Responsibility:

Factors to be considered in determining whether the state standards of responsibility have been met include whether a prospective contractor has:

- (1) available the appropriate financial, material, equipment, facility, and personnel resources and expertise, or the ability to obtain them, necessary to indicate its capability to meet all contractual requirements;
- (2) a satisfactory record of performance;
- (3) a satisfactory record of integrity;
- (4) qualified legally to contract with the State; and
- (5) supplied all necessary information in connection with the inquiry concerning responsibility.

The Code requires that the responsibility of the offeror shall be ascertained for every contract let by the State:

Section 11-35-1810(1) Determination of Responsibility. Responsibility of the bidder or offeror shall be ascertained for each contract let by the State based upon full disclosure to the procurement officer concerning capacity to meet the terms of the contracts and based upon past record of performance for similar contracts. The board shall by regulation establish standards of responsibility that shall be enforced in all state contracts.

Regulation 19-445.2125(A) requires that this determination of responsibility is made by the procurement officer:

Regulation 19-445-2125(D) Before awarding a contract or issuing a notification of intent to award, whichever is earlier, ***the procurement officer must be satisfied*** that the prospective contractor is responsible. The determination is not limited to circumstances existing at the time of opening.

(emphasis added).

In making this determination, the procurement officer is guided by Regulation 19-445.2125(C):

Demonstration of Responsibility.

The prospective contractor may demonstrate the availability of necessary financing, equipment, facilities, expertise, and personnel by submitting upon request:

- (1) evidence that such contractor possesses such necessary items;
- (2) acceptable plans to subcontract for such necessary items; or
- (3) a documented commitment from, or explicit arrangement with, a satisfactory source to provide the necessary items.

The procurement officer must make a written determination that an offeror's proposal is most advantageous to the State and the offeror is responsible prior to awarding the contract:

Section 11-35-1530(9) Award must be made to the responsible 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, unless the procurement officer determines to utilize one of the options provided in Section 11 35 1530(8). The contract file must contain the basis on which the award is made and must be sufficient to satisfy external audit.

The standard for review of this written determination is set forth in Section 11-35-2410(A) of the Code:

The determinations required by the following sections and related regulations are final and conclusive, unless clearly erroneous, arbitrary, capricious, or contrary to law: Section 11 35 1530(9) (Competitive Sealed Proposals Award)

While the procurement officer's written determination does not specifically address Southeast's responsibility,⁴ the issuance of an intent to award to Southeast indicates that the procurement officer was satisfied that Southeast was a responsible offeror and, in this case, the procurement

⁴ The Code does not require a written determination of responsibility, only of non-responsibility. S.C. Code Ann. 11-35-1810.

officer is an employee of the agency responsible for providing the services required by this contract.

The procurement file includes evidence of Southeast's responsibility. First, evaluator notes indicate that Southeast has experience successfully providing this type of service. It provided a plan for handling this contract that was reviewed and commented on by the evaluation panel. Second, The Dun & Bradstreet report for Southeast includes a rating of 4A2, indicative of financial strength between \$10 million and \$50 million. The report grants Southeast the highest score possible for financial stress and supplier evaluation risk. Third, the biographical information on Southeast's management shows a seasoned team of industry veterans. Its chief executive, operating, and administrative officers each have more than thirty years of experience. Its CFO has relevant financial management experience stretching back to 1994. Finally, while its financial statements may not place it as the richest offeror, the State does not award contracts on that basis. The fact that this contract is larger than any of its previous contracts or that it is not the largest offeror to submit a proposal or that it is not the best capitalized, does not necessarily mean that Southeast cannot successfully perform this contract.

DHHS reviewed all the information described above and reached a determination that Southeast was the responsible offeror whose proposal was most advantageous to the State. This determination represents the business judgment of the agency who will bear the risk of non-performance.⁵ The Procurement Review Panel and the CPOs have long held that they "will not substitute its judgment for the judgment of the evaluators, or disturb their findings so long as the evaluators follow the requirements of the Procurement Code and the RFP, fairly consider all

⁵ Logisticare's allegation of non-responsibility is nothing more than speculation about Southeast's future health and performance. Conjecture about the future health of an entity by a protestant, and not by the state that actually bears the risk, cannot be the basis for a determination of non-responsibility. *See, e.g., ASC Medicare Service, Inc.*, B-213724 (Comp.Gen.), 84-1 CPD P 45, 1983 WL 27814 (1983) ("Moreover, whether a contractor complies with its obligations under a contract is a matter of contract administration and is not for resolution under the Bid Protest Procedures..."); *Kitco, Inc.*, B-221386 (Comp.Gen.), 86-1 CPD P 321, 1986 WL 63328 (1986) ("It is beyond the bid protest function of this Office to review matters of contract administration because our procedures are reserved for considering whether an award of a contract complies with statutory, regulatory, and other legal requirements, not with post award performance."). [Although not controlling in S.C. State government protest, decisions of the U.S. Comptroller General are enlightening, particularly where it does not appear the Panel has directly and definitively addressed the issue.]

Protest Decision, page 17

Case No. 2016-132

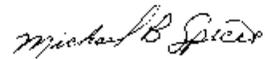
April 18, 2016

proposals, and are not actually biased”. *In re: Protest of Coastal Rapid Public Transit Authority*, Panel Case No. 1992-16. The CPO in this case will extend that guiding principle to the procurement officer and her determination of the responsibility of the offeror determined by the evaluation committee to be the most advantageous to the State. This issue of protest is denied.

DECISION

For the reasons stated above, the protest of LogistiCare, Inc. is denied.

For the Materials Management Office



Michael B. Spicer
Chief Procurement Officer

Attachment 1



John E. Schmidt, III
803.348.2984
John.Schmidt@TheSCLawfirm.com

Melissa J. Copeland
803.309.4686
Missy.Copeland@TheSCLawfirm.com

February 26, 2016

Via Email to protest-mmo@mmo.sc.gov and protest-mmo@mmo.state.sc.us

Mr. Michael B. Spicer
Chief Procurement Officer
Materials Management Office
1201 Main Street, Suite 600
Columbia, South Carolina 29201

RE: Protest of Notice of Intent to Award to Southeastrans Inc.
Solicitation: 5400008382
Description: Transportation Coordination for NEMT
Agency: Department of Health and Human Services

Dear Mr. Spicer:

This firm represents LogistiCare Solutions, LLC ("LogistiCare") in connection with the above matter and submits this protest of the notice of intent to award a contract to Southeastrans Inc. ("SET"). The grounds of this protest are set forth below. In accordance with applicable law, this protest letter is intended to provide notice of the issues to be decided. Accordingly, it does not purport to set forth all facts and evidence in support of the protest issues. LogistiCare reserves the right to offer facts, evidence and argument in support of the protest at any time as may be permitted by law. LogistiCare requests due notice and a hearing at which it will present facts, evidence and argument on these issues and any others as may be properly raised under law.

BACKGROUND

This protest concerns the procurement of the State of South Carolina, South Carolina Department of Health and Human Services to solicit proposals for a Transportation Coordinator to manage the daily functions of the South Carolina Non-Emergency Medical Transportation ("NEMT") Program.

The South Carolina NEMT program pays for non-emergency medical transportation services for eligible Medicaid Members to medical care or services, which are covered under the Medicaid program.

Mr. Michael Spicer
Chief Procurement Officer
Information Technology Management Office
Page 2 of 13

Previously, SCDHHS had awarded contracts for the provision of non-emergency medical transportation services to multiple contractors by regions within the State. Through the RFP at issue here, SCDHHS sought instead to award a single, statewide contract to one (1) Offeror to serve as Transportation Coordinator.

The State's Clear Expectations

In the RFP, SCDHHS stated that "The Contractor, serving as Transportation Coordinator, is expected to manage the daily functions of the NEMT program in accordance with all of the requirements outlined in the RFP and the Offeror's response thereto, *in a manner consistent with all applicable state and federal laws and in a fiscally sound manner.*"

SCDHHS sought "proposals which comply with each of the material and essential requirements described in Part III, Scope of Work," and expected that "all requirements in Part III, Scope of Work, would be met fully, satisfactorily, and performed in their entirety in a first class manner for the fixed, all-inclusive PMPM Coordinator Rates proposed...."

Importantly, SCDHHS stated quite clearly in the RFP that it "considers any proposal which provides any deviations from, or caveats to, Part III, Scope of Work, Sections A through R, as unacceptable. Anything that any Offeror would like to modify, seek clarifications on, or any other deviation, however modest, MUST be presented during the question and answer phase, considered and determined by SCDHHS before the submission date for all proposals, so that all prospective Offerors will have a common and uniform basis upon which to submit its proposals, including fixed, all-inclusive PMPM Coordinator Rates." RFP, Part 3.

These statements of the SCDHHS set the clear and unalterable rules of competition, on which LogistiCare and the other vendors appropriately relied.

Several vendors submitted responses for consideration and evaluation, including LogistiCare and SET, among others. In the end, as a consequence of the errors and deviations from the RFP, law and proper procedure addressed herein, SET was ranked as the most qualified vendor, with LogistiCare, the current vendor, placing a close second. For the following reasons, the award to SET should be rescinded and the contract should be awarded to LogistiCare.

ISSUES OF PROTEST

The issues of protest as identified to date are set forth below:

- 1. SET was non-responsive in that it failed to meet the call center requirement.**

The RFP clearly and unequivocally required that 100% of all calls during regular business hours be answered in South Carolina:

Mr. Michael Spicer
Chief Procurement Officer
Information Technology Management Office
Page 3 of 13

9. Page 28, Section D.1: Can the vendor field 85% of calls during regular business hours in South Carolina and allow a portion of calls to be handled by another US based vendor call center? This will allow savings to the agency, as we do not have to staff to peak volumes and then have CSRs idle.

Response: No. The Transportation Coordinator shall field 100% of calls during regular business hours in South Carolina.

Please see Amendment Number Two (2), Revised Request for Proposal, Part 3 Scope of Work, 3.4 Call Center and Reservation Requirements, 3.4.1.

Amendment #2, Response to Question 9.

The Transportation Coordinator shall:

3.4.1 Establish and maintain a call center staffed with customer service representatives in the State of South Carolina for taking reservations for NEMT services during the hours of 8:00 AM to 6:00 PM local time, Monday through Friday. A secondary location outside South Carolina, but within the continental United States, is permitted *but only to take reservations for NEMT services that are outside these business hours*. The secondary location shall be subject to the same performance requirements as the call center in the State of South Carolina.

RFP, § 3.4.1 (emphasis added).

The RFP clearly provided that 100% of all calls during business hours had to be answered in South Carolina and prohibited vendors from taking any deviations or exceptions to the requirements. Further, vendors specifically requested that they be allowed to answer calls outside of South Carolina during business hours and even stated that allowing that would “allow savings to the agency.” See Amendment 2, Response to Question 9 quoted above. They were firmly told “No” by SCDHHS.

Contrary to this clear, material requirement and unqualified insistence on the part of SCDHHS, SET proposed unequivocally that it would have calls answered at peak times outside of South Carolina, stating:

Our call center staff *in Georgia and Tennessee* will also be trained on the SC NEMT program and will be utilized *during peak call times*, for after-hours calls, and during recovery situations.

Mr. Michael Spicer
Chief Procurement Officer
Information Technology Management Office
Page 4 of 13

SET Proposal, p. 198 (emphasis added). SET's proposal directly contravened this essential, material requirement of the RFP.

If other vendors had been allowed to use call centers outside of South Carolina for peak times, then, as recognized by the vendor submitting the question above, other vendors could have saved costs and offered better pricing. SET's pricing was lower than LogistiCare's pricing by only \$2 million over the seven years of the contract. However, the State was adamant that this requirement be fulfilled in South Carolina exclusively. SET's proposal is clear that it did not propose to or intend to meet this required performance and therefore its proposal should have been found non-responsive and removed from consideration for award.

2. SET was non-responsive in that it failed to provide a contingency plan and its only proposed solution violates the RFP and governing federal law.

Under governing federal law, a non-governmental broker generally may not provide transportation from its own resources. There are only three exceptions when a non-governmental broker may provide transportation itself. Those exceptions are defined in 42 CFR 440.170(a)(4)(ii)(B).¹ The State addressed those exceptions in the Q&A, first in response to question 41 in Amendment #2, and then in response to question 33 in Amendment #4.

The Q&A is clear that the broker *cannot* provide transportation services itself unless one of the exceptions is met:

41. Page 20, A. Transportation Coordinator Requirements, 8.

This provision states that the Transportation Coordinator shall "[b]e prohibited from providing NEMT services or making a referral to, or subcontract with, a transportation provider, if the Transportation Coordinator has a financial relationship with the transportation provider or has an immediate family member who has a direct or indirect financial relationship with the transportation provider. Please see 42 CFR §440.170(4)(ii)." However, on page 24, #6 states that the Transportation Coordinator should "[o]nly operate vehicles to provide NEMT services in limited circumstances, as provided in 42 CFR 440.170(a)(4)(ii)(B)."

As a result, would SCDHHS please clarify if the Transportation Coordinator shall be permitted to operate its own vehicles and under what circumstances this would be permitted?

Response: The Transportation Coordinator shall be permitted to operate its own vehicles under the following circumstances as set forth in the Code of Federal Regulations:

- (1) Transportation is provided in a rural area and there is no other

¹ There is a fourth exception applicable to brokers that are government entities that is not applicable here.

Mr. Michael Spicer
Chief Procurement Officer
Information Technology Management Office
Page 5 of 13

available Medicaid participating provider or other provider determined by the State to be qualified except the Transportation Coordinator.

(2) Transportation is so specialized that there is no other available Medicaid participating provider or other provider determined by the State to be qualified except the Transportation Coordinator.

(3) Except for the Transportation Coordinator, the availability of other Medicaid participating providers or other providers determined by the State to be qualified is insufficient to meet the need for transportation.

RFP, Amendment #2, Question 41.

33. Amendment Number Two (2); Section II, Revised RFP - 3.1.8 - Regarding the exception as provided in 42 CFR 440.170(a)(4)(ii)(B)

a. What areas are currently considered rural areas where there is no other available Medicaid participating provider or other provider determined by that State to be qualified except for Transportation Coordinator?

Response: No areas of the State are currently considered rural areas where there is no other available Medicaid participating provider or other provider determined by the State to be qualified except for the Transportation Coordinator.

b. If a new Transportation Coordinator is selected, would current Transportation Coordinator's past provision of service in these areas prevent the new Transportation Coordinator from seeking an exception in these areas?

Response: Please see the response to question number 33. a.

c. Are there any transportations [sic] currently considered so specialized as to fall within the exception? If so, what are they?

Response: No.

d. Are there any areas that the State has determined that the providers available are insufficient to meet the need for transportation such that the exception would be invoked and the Transportation Coordinator would be able to provide service?

Response: No.

e. Would a new Transportation Coordinator request additional or continued exceptions from the State during Implementation?

Response: The Transportation Coordinator must demonstrate that the transportation provider network provides adequate access in each city or county in the state, based on the number of Members and the number of trips provided. If the Transportation Coordinator or SCDHHS identifies insufficient transportation resources in any area, the Transportation Coordinator shall, within five (5) business days, develop and implement a

Mr. Michael Spicer
Chief Procurement Officer
Information Technology Management Office
Page 6 of 13

transportation provider recruitment plan to develop sufficient resources to meet the transportation needs of the Members in the geographical areas covered. During this interim period, NEMT services shall still be delivered utilizing alternate resources. The Transportation Coordinator shall develop contingency plans in the event of unexpected changes with contracted transportation providers.

Amendment #4, Question 33.

As shown above, the RFP and applicable law prevent the Transportation Coordinator from using its own vehicles except in very limited circumstances and only then with approval on a case by case basis.

Here, the RFP required vendors to set forth their "Transportation Provider Contingency Plan" in detail, to be evaluated and scored. It is alarming that SET's **only contingency plan in its proposal is to provide services itself regardless of the circumstances**. SET offered the use of its own vehicles as its *only* contingency plan:

(b) Transportation Provider Contingency Plan

2. Offerors should describe, in detail, their contingency plans for unexpected peak transportation demands and back-up plans when notified that a vehicle is excessively late or is otherwise unavailable for service.

Southeastrans considers back-up mechanisms an essential element to providing effective transportation to all members. We acknowledges [sic] that even under the best circumstances, unexpected peak transportation demands, mechanical problems, traffic delays, weather, or other operational issues occur that may require additional resources in order to maintain timely service.

The NEMT provider and Southeastrans will be equally responsible² for arranging back-up service when notified by a member/member representative or medical provider that a vehicle is excessively late or is otherwise unavailable for service.

Quick Response Vehicles

As the owner and CEO of Southeastrans had his foundation as a provider of NEMT services, we pride ourselves on maintaining our culture of familiarity with the level of responsibility required to perform human transportation delivery services. *In each of the states we service, we personally provide some level of back-up vehicle services.*

Southeastrans will provide Quick Response Vehicles (QRVs) to be utilized in those cases where there are insufficient provider resources, an assigned

² Further, SET violated the RFP requirement by failing to take full responsibility to arrange back-up transportation and instead asserting that the transportation provider was *equally* responsible.

Mr. Michael Spicer
Chief Procurement Officer
Information Technology Management Office
Page 7 of 13

provider is unable to successfully complete their trip assignment due to vehicle failure or traffic delay and other provider resources are unavailable, or other unforeseen circumstance.

SET Proposal, p. 82 (emphases added). Plainly, the QRVs referenced by SET in its proposal are prohibited broker-owned/affiliated vehicles. As a result, SET not only violated the RFP requirements prohibiting the use of their own transport resources, but also failed to meet the essential, mandatory requirement to provide a Transportation Provider Contingency Plan to be evaluated and scored³. SET's offering to use its own vehicles violates the RFP as well as federal law. *See* 42 CFR 440.170(a)(4)(ii)(A). A review of SET's proposal shows that they implement the use of their own vehicles in all of their contracts; that is their established business model for the dissimilar contracts they hold. *See* SET Proposal, pp. 155-156, 160. That model, however, violates the law for this contract, and violates the RFP. SET is permitted to use their own vehicles in other places because of the way the Medicaid programs are set up in those other states. However, that is not allowed under South Carolina's plan. Such violation of law puts significant funding to the State of South Carolina at grave risk because in the event a CMS audit showed that the broker was using its own vehicles to perform transports, with or without the state's knowledge, the state's federal match would be jeopardized. SET's proposal materially violated the RFP and the law and was incomplete in a significant and material respect. As such, SET's proposal should have been rejected and deemed ineligible for award.

3. SET is not a responsible offeror as it lacks the financial and other ability to perform this contract.

Here, SET's total net worth as a business is \$14 million (*see* SET's Technical Proposal, page 163) with annual revenue of approximately \$92 million based on its current Dun & Bradstreet report. This contract is, by all accounts, an \$80 million dollar per year contract in terms of cash flow. This would be in addition to the volume of existing business that SET already holds and for which it is responsible. Yet, this contract requires the selected vendor to post only \$2,000,000 in cash, pledged to the State and out of SET's control. And while the RFP required such cash be posted by the vendor no later than December 15, 2015 (a requirement SET failed to meet) the contract requires that the chosen vendor *advance payments to transportation companies at a rate of 5 to 6 million dollars monthly.*

It is not rational for the State to award an 80 million dollar contract to a vendor whose total worth is not more than \$14 million, especially when the State has no ability to protect itself beyond a mere 2 million dollars by virtue of security. This is particularly so when the payments being advanced, for which the State is ultimately responsible, run between 5 and 6 million dollars *per month.*

³ Given the prohibition against the only plan SET offered, it is also disturbing that SET was scored favorably for such plan. Such scoring is also arbitrary and capricious and is separately a basis of protest.

Mr. Michael Spicer
Chief Procurement Officer
Information Technology Management Office
Page 8 of 13

Further, the addition of this contract to SET's existing contracts would so significantly increase SET's entire portfolio of total covered lives and annual trips that it is unreasonable to expect any company to be able to absorb that type of increase without serious negative repercussions to the state and Medicaid members. SET asserts in its proposal that it conducts 3.6 million annual trips and that its software for scheduling such trips has a capacity of 3.6 million annual trips. *See* SET Proposal, Executive Summary. By those measures, as stated in SET's proposal, SET is already operating at maximum capacity. Because the South Carolina NEMT program schedules nearly 3-million trips per year, SET is proposing to practically double its capacity overnight. Consider that SET has only 308 FTEs today. Their staffing plan calls for 168.5 new FTEs to service the SC NEMT program, a 55% increase in total FTE for the entire company. That is a massive increase for all of their internal systems and processes to absorb, from HR and training, to IT and tech support.

Moreover, SET's own references fail to support the proposition that SET has the experience to perform a contract similar to the one at stake here. The references SET chose to provide, presumably the best it could muster, are not probative of SET's ability to perform and are non-compliant references because the contracts associated with the SET references are so dissimilar to the contract at issue here. For example, the Louisiana reference is for a contract (now terminated) in which SET merely manages prior authorization services for a rapidly dwindling population. *See* SET RFP Response at 163. Similarly, SET's reference from BlueCare Tennessee represents a contract with an MCO, not a state, in which SET manages fewer than 900,000 trips per year. *Id.* at 160.

SET simply does not have the financial or other ability to perform this contract, and the State puts itself at serious risk by entering into such a contract on such terms with such minimal protection against default.

The State has recent very relevant experience with the failure of a chosen NEMT contractor to be able to handle this contract. The last time this same contract was solicited, a company was selected, over objections, and that company failed and left the State in a predicament within a year. That company's conduct was so egregious that they agreed not to bid in future solicitations. Also, the State's recent experience in at least one other well-documented contract setting has adequately demonstrated the intolerable risk of contracting with an under-sized vendor to perform a large cash flow contract without very ample and adequate security.

4. The scoring was arbitrary and capricious as SET actually received improved scoring for violating both the RFP requirements and governing federal law.

Mr. Michael Spicer
Chief Procurement Officer
Information Technology Management Office
Page 9 of 13

The maximum score for a Vendor's "Approach" was 55 points. The maximum points for "Background, Experience, and Approach to Staffing" was 25. The RFP indicated which sections of the proposal responses would be used to reach the scores under each category:

6.1 **Approach.** 55 points

The information submitted in response to Part 5, Information For Offerors To Submit, 5.1.4 Offeror's Approach, 5.1.4.1 through 5.1.4.11 will be used to evaluate this criterion. The State will normalize scores assigned for Approach so that the highest scoring Offeror(s) will receive the maximum available points. Scores for other Offerors will be scaled using the same factor. For example, if the highest scoring Offeror for Approach receives 50 points of the 55 points available, then all Offerors' scores for Approach will be normalized by being multiplied by 1.1, bringing the highest score for Approach up to 55 points.

6.2 **Background, Experience and Approach to Staffing.** 25 points

The information submitted in response to Part 5, Information For Offerors To Submit, 5.1.5 Offeror's Background, Experience and Approach to Staffing, 5.1.5.1 and 5.1.5.2 will be used to evaluate this criterion. The State will normalize scores assigned for Background, Experience and Approach to Staffing so that the highest scoring Offeror(s) will receive the maximum available points. Scores for other Offerors will be scaled using the same factor. For example, if the highest scoring Offeror for Background, Experience and Approach to Staffing receives 20 points of the 25 points available, then all Offerors' scores for Background, Experience and Approach to Staffing will be normalized by being multiplied by 1.25, bringing the highest score for Background, Experience and Approach to Staffing up to 25 points.

RFP, § 6.1 and 6.2.⁴

Here, evaluator # 4 awarded SET 50 (out of 55) points for Approach and 23 (out of 25) points for Background, Experience, and Approach to Staffing. Evaluator #4 noted in the comments for Background, Experience, and Approach to Staffing that "Staffing and *the approach to regionalize call centers was impressive. Use of special vehicles and on call providers was an added advantage.*" (emphasis added). First, regional call centers (which, for SET, are located outside the state of South Carolina) is not an appropriate factor to *increase* scoring as calls were required to be answered 100% in South Carolina during business hours. Further, as noted above,

⁴ The evaluator score sheets actually referred to the wrong sections of the RFP with regard to which sections would be considered for scoring. The evaluator's scoring form provides that for the Approach section, "[t]he information submitted in response to Part V, Information for Offerors to Submit, Item Number Four (4), Offeror's Approach, items A. through K. will be used to evaluate this criterion." *There were no such numbered sections in the RFP and Proposal.* The evaluator's form provides that for the Background, Experience, and Approach to Staffing section "[t]he information submitted in response to Part V, Information for Offerors to Submit, Item Number Five (5), Offeror's Background, Experience, and Approach to Staffing, A. and B. will be used to evaluate this criterion." *There were no such numbered sections in the RFP and Proposal.*

Mr. Michael Spicer
Chief Procurement Officer
Information Technology Management Office
Page 10 of 13

the use of special vehicles as proposed by SET is in violation of the RFP and the law. It is arbitrary, capricious, and contrary to law for an evaluator to *enhance* the scoring to SET for offering performance that is in violation of law and the requirements of the RFP. Finally, there is nothing in SET's proposal to support any "added advantage" from "on call providers." Therefore, that could not and should not be a basis for any enhanced scoring. Accordingly, at a minimum, the scores from Evaluator #4 should be removed from the evaluation. If those scores are removed, LogistiCare would be the highest ranked responsive and responsible offeror and thus should be awarded the contract.

5. One or more of the evaluators misunderstood their task and/or were not qualified as they were not aware of and did not apply the governing requirements of the RFP and of federal law regarding this program.

This case clearly demonstrates the importance of a well-prepared and properly chosen evaluation panel that understands its task and carries it out properly. In this case, one or more evaluators were not properly positioned or prepared to be an evaluator, clearly did not carry out their charge, and should have been removed from the process. The presence of such improper evaluators made the difference in the improper selection of SET rather than LogistiCare.

Here, the RFP and applicable federal law and regulations contain mandatory requirements and prohibitions. It is absolutely arbitrary, capricious and contrary to law for the evaluators, or any of them, to actually award a vendor more points or credit for a proposal to violate the RFP's requirements and the requirements of federal law and regulations. However, here, that is exactly what the scoring demonstrates.

For example, Evaluator #4 specifically remarked that they found it an advantage that SET offered its own vehicles for use in meeting the RFP requirements. But this is not allowed under the RFP and more importantly, violates federal law and regulations. This same evaluator noted with approval that SET intended to use out of state call centers to handle peak call overloads when in fact the RFP specifically did not permit that at all. Also, Evaluator 4 credited SET significantly for its approach, when in fact SET's approach included no "contingency plan" whatsoever other than one that was directly contrary to the RFP's express requirements.

This is clear and irrefutable evidence that not all of the evaluators were qualified to serve as evaluators on this RFP. It is noteworthy that Evaluator 4 also was not instructed on process along with the other evaluators, but was instead for some reason instructed separately. When Evaluator # 4's scores are removed from the process, LogistiCare is the winning vendor.

6. SET was non-responsive in that it failed to provide the Security for Performance required by the RFP.

Mr. Michael Spicer
Chief Procurement Officer
Information Technology Management Office
Page 11 of 13

The RFP required that vendors supply security in the amount of \$2,000,000 in cash or equivalent by December 15, 2015:

8.34 SECURITY FOR PERFORMANCE, DAMAGES: The Contractor shall supply security no later than ~~October 1, 2015~~ **December 15, 2015**. The Contractor shall supply security in the form of cash, cash equivalent or an unconditional irrevocable standby letter of credit, on deposit in or issued by, respectively, a federal or state chartered bank with offices physically located in the State of South Carolina in the amount of two million dollars US (\$2,000,000.00) whereby funds are (1) pledged to the benefit of the State; (2) are not under the control of the Contractor; and (3) are payable to the S.C. Department of Health and Human Services upon written demand to the holder.

RFP, Amendment # 4. This was a new requirement that replaced the previous contract's requirement for a much larger performance bond. The change noted by strike-through and bolding in the above quote was a change in Amendment #4 that maintained the requirement and only changed the date for performance from October 1, 2015 to December 15, 2015.

There were several vendor questions regarding this requirement, none of which allowed fulfillment of this obligation after the RFP stated deadline, which was a specific date.

126. RFP Section # 8.34 Page #91 Heading/Description: Security for Performance Damages
Would a performance bond be an acceptable alternative in addition to the listed cash, cash equivalent or an unconditional irrevocable standby letter of credit?

Response: No. A performance bond has the effect of introducing a third party into the process necessary to protect the interests of this undertaking and this is an unacceptable potential delay and creates a separate potential basis for dispute considered fundamentally disadvantageous to a critical public function. SCDHHS requires immediate and unfettered access to this security.

127. RFP Section # 8.34 Page #91 Heading/Description: Security for Performance Damages
Originally the RFP requested a Performance and Payment Bond issued specifically for the terms of this agreement. This option has now been removed and substituted with cash or cash equivalent of \$2 Million.

a. Can you please provide the reasoning as to why the Performance and Payment bond was removed as this is the most common performance security used and it often highlights a lack of financial stability on the part of a bidder that is not able to obtain one?

Mr. Michael Spicer
Chief Procurement Officer
Information Technology Management Office
Page 12 of 13

Response: The intent is for these funds to be accessed by the State upon written notice, without restriction or substantive prerequisite, from the State to the security holder such as a bank. Nothing more is required. The accessing of the funds, as with all duties under the contract, must be consistent with the duty of good faith and fair dealing. The purpose is to provide the State, free of any entanglement, an immediate means to remedy a problem caused by the conditions set out in Part 8 Terms and Conditions – B. Special, 8.34 Security for Performance, Damages, e.g. Contractor's default, breach, or failure to satisfactorily perform the obligations of the contract.

b. Can you please offer this as either the original Payment and Performance bond or the new Cash and Cash equivalent of \$2 Million as Payment and Performance bonds cost less administratively than the Letter of Credit or Cash?

Response: This request is denied.

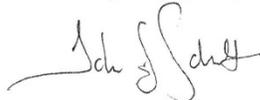
RFP, Amendment #4, Responses to Questions 126-127.

As shown above, the State refused to remove the requirement, stressed the importance of it, and only changed the date for compliance from October 1, 2015 to December 15, 2015. However, as confirmed by the procurement official after inquiry following an FOIA request for such documentation, SET failed to comply with this requirement by December 15, 2015. As such SET's offer should have been rejected as non-responsive.

CONCLUSION

Based on the grounds set forth herein, LogistiCare requests that the CPO honor the award's automatic stay, cancel the intent to award the contract to SET, and award the contract to LogistiCare. Alternatively, LogistiCare requests that the CPO cancel the intent to award and solicitation under the governing authority set forth in the Procurement Code and Regulations. LogistiCare also requests a hearing in this matter. If the CPO determines that it will not hold a hearing, LogistiCare requests that the CPO provide LogistiCare access to the evaluators to take their recorded statements, and set a deadline by which LogistiCare may provide evidence for the CPO to consider in reaching its decision.

Very truly yours,



John E. Schmidt, III

Mr. Michael Spicer
Chief Procurement Officer
Information Technology Management Office
Page 13 of 13

STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW

Protest Appeal Notice (Revised September 2015)

The South Carolina Procurement Code, in Section 11-35-4210, subsection 6, states:

(6) Finality of Decision. A decision pursuant to subsection (4) is final and conclusive, unless fraudulent or unless a person adversely affected by the decision requests a further administrative review by the Procurement Review Panel pursuant to Section 11-35-4410(1) within ten days of posting of the decision in accordance with subsection (5). The request for review must be directed to the appropriate chief procurement officer, who shall forward the request to the panel or to the Procurement Review Panel, and must be in writing, setting forth the reasons for disagreement with the decision of the appropriate chief procurement officer. The person also may request a hearing before the Procurement Review Panel. The appropriate chief procurement officer and an affected governmental body shall have the opportunity to participate fully in a later review or appeal, administrative or judicial.

Copies of the Panel's decisions and other additional information regarding the protest process is available on the internet at the following web site: <http://procurement.sc.gov>

FILE BY CLOSE OF BUSINESS: Appeals must be filed by 5:00 PM, the close of business. *Protest of Palmetto Unilect, LLC*, Case No. 2004-6 (dismissing as untimely an appeal emailed prior to 5:00 PM but not received until after 5:00 PM); *Appeal of Pee Dee Regional Transportation Services, et al.*, Case No. 2007-1 (dismissing as untimely an appeal faxed to the CPO at 6:59 PM).

FILING FEE: Pursuant to Proviso 111.1 of the 2015 General Appropriations Act, "[r]equests for administrative review before the South Carolina Procurement Review Panel shall be accompanied by a filing fee of two hundred and fifty dollars (\$250.00), payable to the SC Procurement Review Panel. The panel is authorized to charge the party requesting an administrative review under the South Carolina Code Sections 11-35-4210(6), 11-35-4220(5), 11-35-4230(6) and/or 11-35-4410...Withdrawal of an appeal will result in the filing fee being forfeited to the panel. If a party desiring to file an appeal is unable to pay the filing fee because of financial hardship, the party shall submit a completed Request for Filing Fee Waiver form at the same time the request for review is filed. The Request for Filing Fee Waiver form is attached to this Decision. If the filing fee is not waived, the party must pay the filing fee within fifteen days of the date of receipt of the order denying waiver of the filing fee. Requests for administrative review will not be accepted unless accompanied by the filing fee or a completed Request for Filing Fee Waiver form at the time of filing." PLEASE MAKE YOUR CHECK PAYABLE TO THE "SC PROCUREMENT REVIEW PANEL."

LEGAL REPRESENTATION: In order to prosecute an appeal before the Panel, business entities organized and registered as corporations, limited liability companies, and limited partnerships must be represented by a lawyer. Failure to obtain counsel will result in dismissal of your appeal. *Protest of Lighting Services*, Case No. 2002-10 (Proc. Rev. Panel Nov. 6, 2002) and *Protest of The Kardon Corporation*, Case No. 2002-13 (Proc. Rev. Panel Jan. 31, 2003); and *Protest of PC&C Enterprises, LLC*, Case No. 2012-1 (Proc. Rev. Panel April 2, 2012). However, individuals and those operating as an individual doing business under a trade name may proceed without counsel, if desired.

**South Carolina Procurement Review Panel
Request for Filing Fee Waiver
1105 Pendleton Street, Suite 209, Columbia, SC 29201**

Name of Requestor

Address

City

State

Zip

Business Phone

1. What is your/your company's monthly income? _____

2. What are your/your company's monthly expenses? _____

3. List any other circumstances which you think affect your/your company's ability to pay the filing fee:

To the best of my knowledge, the information above is true and accurate. I have made no attempt to misrepresent my/my company's financial condition. I hereby request that the filing fee for requesting administrative review be waived.

Sworn to before me this

_____ day of _____, 20_____

Notary Public of South Carolina

Requestor/Appellant

My Commission expires: _____

For official use only: _____ Fee Waived _____ Waiver Denied

Chairman or Vice Chairman, SC Procurement Review Panel

This _____ day of _____, 20_____
Columbia, South Carolina

NOTE: If your filing fee request is denied, you will be expected to pay the filing fee within fifteen (15) days of the date of receipt of the order denying the waiver.