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THE DIVISION OF PROCUREMENT SERVICES

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DIVISION DIRECTOR
(803) 734-8018

MICHAEL B. SPICER
INFORMATION TECHNOLOGY MANAGEMENT OFFICER
(803) 737-0600
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Protest Decision

Matter of: Miracle Hill Ministries

Case No.: 2019-121

Posting Date: November 20, 2018

Contracting Entity: South Carolina Department of Social Services

Solicitation No.: 5400013905

Description: Certified Placement Agencies (Regular Foster Families)

DIGEST

Protest of solicitation dismissed as moot. Miracle Hill Ministries protest is included by reference. [Attachment 1]

AUTHORITY

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

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

BACKGROUND

Solicitation Issued	October 25, 2018
Amendment One Issued	October 26, 2018
Amendment Two Issued	October 26, 2018
Protest Received	November 9, 2018

The State Fiscal Accountability Authority (SFAA) issued this Fixed Price Bid on behalf of the South Carolina Department of Social Services (DSS) to contract with Licensed Regular Child Placing Agencies (CPAs) to recruit, retain and support regular foster families.

ANALYSIS

MHM raises three issues of protest:

- (1) We protest the target population described on page 15 of the Solicitation. Specifically, although the Solicitation is expressly meant to seek bids for “Child Placing Agencies (*Regular Foster Families*),”¹ *e.g.*, “Level I” services, the Statement of Work found on page 15 of the Solicitation includes a description of children that are normally placed in a Level II or Level III foster home. MHM is a Level I placing agency whose foster parents are not trained or equipped to receive children needing Level II and Level III care. This fact should neither disqualify MHM from bidding nor should it impose on MHM obligations that are beyond the actual scope of this Solicitation.
- (2) We protest the rate of \$10 per family per day.² This rate is a change from the prior rate of \$10.00 per *child* per day. We believe it will cost participating CPAs at least \$20.00 per child per day to support these families and comply with SCDSS expectations. Accordingly, we believe the proposed rate is insufficient both as a practical matter and under applicable state and federal laws. While we think even the prior rate of \$10.00 per child per day was too low, it at least covered up to half the cost of CPA overhead for this service. The new, lower rate proposed in the Solicitation may only cover 40% of those costs.
- (3) We protest the requirement initially found as the third of the “Child Placing Agencies’ (Contractor) Responsibilities.”³ This requirement purports to require bidders to “adhere to the requirements provided in the licensing regulations without adding to, or taking away from said requirements” and purports to require the bidder to suspend any such practice after being notified by SCDSS that said practice allegedly violates this requirement. To the extent this requirement purports to restrict or penalize MHM for its religious nature

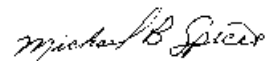
or purports to restrict or penalize MHM's ability to make decisions relating to employment, personnel, volunteers, or other associations including the recruiting, screening, training, supervision, and partnership with any individuals or entities whose roles include spiritual influence, spiritual guidance, religious or spiritual teaching, counseling, discipleship, and formation, such restrictions or penalties violate MHM's rights under the United States Constitution, Amend. I, as recognized by the Supreme Court in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, __ U.S. __, __ S. Ct. __ (June 26, 2017) and *Hosanna-Tabor Evangelical Lutheran Church & Sch. V. Equal Employment Opportunity Commission*, 565 U.S. 171 (2012); the South Carolina Constitution, Art. I § 2; the South Carolina Religious Freedom Act, S.C. Code Ann. §§ 1-32-10 to -60; and under the budget proviso enacted by the South Carolina General Assembly in 2018.

After receipt of Miracle Hill's protest, DSS requested cancellation of the solicitation so that it may revise and reissue the solicitation at a later date. [Attachment 2] As a result, the protest of Miracle Hill Ministries is moot.

DECISION

For the reasons stated above, the protest of Miracle Hill Ministries is dismissed.

For the Materials Management Office



Michael B. Spicer
Chief Procurement Officer

Attachment 1

STATE OF SOUTH CAROLINA)
) BEFORE THE PROCUREMENT REVIEW BOARD
)
COUNTY OF RICHLAND)

IN THE MATTER OF:

Miracle Hill Ministries,

Protestant,

PROTEST AND MEMORANDUM

vs.

South Carolina Department of Social Services,

Solicitor.

To the Chief Procurement Officer, Materials Management Office:

The purpose of this email is to file an official protest in regard to Solicitation Number 5400013905 (“the Solicitation”) and any Contract issued pursuant thereto and incorporating the terms discussed below.

Reasons for the Protest

Miracle Hill Ministries (“MHM”) is not-for-profit provider of residential services for children in the care of the South Carolina Department of Social Services (“SCDSS”) and is currently a provisionally-licensed Child Placing Agency (“CPA”). MHM is also a current SCDSS contract holder and has been a SCDSS contractor since the early 1990s.

The terms of the Solicitation include certain provisions that are internally inconsistent and/or violate applicable state and federal laws. We contend there are at least three bases to protest this contract solicitation:

- (1) We protest the target population described on page 15 of the Solicitation. Specifically, although the Solicitation is expressly meant to seek bids for “Child Placing Agencies (*Regular* Foster Families),”¹ *e.g.*, “Level I” services, the Statement of Work found on page 15 of the Solicitation includes a description of children that are normally placed in a Level II or Level III foster home. MHM is a Level I placing agency whose foster parents are not trained or equipped to receive children needing Level II and Level III care. This fact should neither disqualify MHM from bidding nor should it impose on MHM obligations that are beyond the actual scope of this Solicitation.
- (2) We protest the rate of \$10 per family per day.² This rate is a change from the prior rate of \$10.00 per *child* per day. We believe it will cost participating CPAs at least \$20.00

¹ See Solicitation — Cover Page — Description (emphasis added).

² See Solicitation page 41.

per child per day to support these families and comply with SCDSS expectations. Accordingly, we believe the proposed rate is insufficient both as a practical matter and under applicable state and federal laws. While we think even the prior rate of \$10.00 per child per day was too low, it at least covered up to half the cost of CPA overhead for this service. The new, lower rate proposed in the Solicitation may only cover 40% of those costs.

- (3) We protest the requirement initially found as the third of the “Child Placing Agencies’ (Contractor) Responsibilities.”³ This requirement purports to require bidders to “adhere to the requirements provided in the licensing regulations without adding to, or taking away from said requirements” and purports to require the bidder to suspend any such practice after being notified by SCDSS that said practice allegedly violates this requirement. To the extent this requirement purports to restrict or penalize MHM for its religious nature or purports to restrict or penalize MHM’s ability to make decisions relating to employment, personnel, volunteers, or other associations including the recruiting, screening, training, supervision, and partnership with any individuals or entities whose roles include spiritual influence, spiritual guidance, religious or spiritual teaching, counseling, discipleship, and formation, such restrictions or penalties violate MHM’s rights under the United States Constitution, Amend. I, as recognized by the Supreme Court in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, __ U.S. __, __ S. Ct. __ (June 26, 2017) and *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Employment Opportunity Commission*, 565 U.S. 171 (2012); the South Carolina Constitution, Art. I § 2; the South Carolina Religious Freedom Act, S.C. Code Ann. §§ 1-32-10 to -60; and under the budget proviso enacted by the South Carolina General Assembly in 2018.

Potential Remedies:

- (1) SCDSS could revise the description of the target population found on page 15 of the Solicitation to include only children normally and usually placed in Level I care.
- (2) SCDSS could revise the payment rate found on page 41 of the Solicitation to reflect the prior contract rate of \$10 per child per day.
- (3) SCDSS could modify the requirement found on page 16 of the Solicitation to clarify that CPAs must adhere to the licensing regulations’ criteria except to the extent deviation from said criteria is permissible under constitutional and/or statutory rights.

On behalf of Miracle Hill Ministries, I thank you in advance for helping us work through the concerns expressed in this protest.

[SIGNATURE PAGE ATTACHED]

³ See Solicitation page 16.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: 

Miles E. Coleman

SC Bar No. 78264

E-Mail: miles.coleman@nelsonmullins.com

104 S. Main Street / 9th Floor

Greenville, SC 29601

Tel: (864) 373-2352

Counsel for Miracle Hill Ministries

November 9, 2018
Greenville, SC

Attachment 2

From: Johnson, Andrew
To: [Spicer, Michael](#); [Robertson, Dixon](#); [Miles E. Coleman](#)
Subject: FW: Regular CPA FPB
Date: Tuesday, November 20, 2018 8:46:48 AM

Gentlemen,
Forwarding for your information.
AJ

From: Faile, Kendra R
Sent: Tuesday, November 20, 2018 8:43 AM
To: Derrick, Barbara E <Barbara.Derrick@dss.sc.gov>; Claspill, Laura <Laura.Claspill@dss.sc.gov>; Johnson, Andrew <Andrew.Johnson@dss.sc.gov>; Grant, Don D <Don.Grant@dss.sc.gov>
Subject: FW: Regular CPA FPB

Please see below Kathy's response she sent back last night.

From: Santandreu, Kathy [<mailto:ksantandreu@mms.sc.gov>]
Sent: Monday, November 19, 2018 9:10 PM
To: Faile, Kendra R <Kendra.Faile@dss.sc.gov>
Subject: Re: Regular CPA FPB

*** THIS IS AN EXTERNAL E-MAIL. Use CAUTION when clicking on links as they could open malicious websites. *** (DLP2)
Hi,

Just getting a chance to read over emails. I will let leadership know (so that Spicer doesn't have to deal with protest) and I will pull it. Thanks

Sent from my iPhone

On Nov 15, 2018, at 4:00 PM, Faile, Kendra R <Kendra.Faile@dss.sc.gov> wrote:

Hey Kathy!

I know you are on vacation and I hope you enjoy but wanted to notify you that after meeting this morning with our leadership and attorney, it was decided that we want to pull the regular CPA contract. We will rewrite the contract and request to resolicit.

Thank you!
Kendra R. Faile
Private Provider Manager
SC Department of Social Services
P. O. Box 1520
1535 Confederate Avenue Extension
Columbia, SC 29202-1520

803-898-8730 (office)

803-603-3031 (cell)

Disclaimer: Please do not use this e-mail address to report child or adult abuse and neglect.

The abuse/neglect hotline number for your county is located on the SCDSS home web page at

www.dss.sc.gov.

For emergencies, please contact your local law enforcement office.

STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW

Protest Appeal Notice (Revised June 2018)

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 2018 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
1205 Pendleton Street, Suite 367, 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.