

3. Experience and background of contractor's organization and staff and information from references.

4. Financial Stability.
(Record p. 39)

Potential Offerors had until June 2, 1994, to submit questions. Amendment #001, containing potential Offerors' questions and the answers, was issued and faxed to potential Offerors on June 3, 1994. In Amendment #1, the following relevant questions and answers are provided:

Question:

5. Does the University prefer that any sessions provided beyond the first three be provided by another community resource (i.e. a private practitioner who will charge the university major medical benefit plan or the employee a fee of a least \$5 per hour)?

6. Does the University recognize that a comprehensive EAP provider can provide additional services for the employee without having a conflict of interest if the fees are based on ability to pay? (i.e. an agency provides (sic) three assessment sessions and provides additional counseling sessions through the same therapist)

Answer:

5. In the Request for Proposal, Section C. Contract Provisions, states that "the contractor shall include no less than three sessions without charge." At the end of these sessions, determination should be made by the contractor to refer to other resources or appropriate treatment if it is deemed necessary. Such referral would be the financial responsibility of the employee and/or in conjunction with his insurance benefits program.

6. Yes. However, the potential contractor should specify in their proposal if this type of approach is being suggested.
(Record p. 49).

The opening date for the proposals was June 9, 1994. (Record p. 33-34). USC received four proposals. USC distributed the proposals to the evaluators on June 9, 1994. The evaluators evaluated each proposal and turned in score sheets at the evaluation committee meeting on June 10, 1994.

On June 13, 1994, USC tabulated scores and began negotiating with the top ranked offeror, Family Service Center (Family Service), under S. C. Code Ann. Section 11-35-1530(9). First Sun EAP Alliance (First Sun) was the second highest ranked offeror. Family Service received 461 total points from all evaluators. First Sun received 424 points from all evaluators. The scores from each evaluator, by criteria, for Family Service and First Sun, are as follows:

<u>Evaluator:</u>	<u>Bonnette</u>	<u>Maw</u>	<u>Fogle</u>	<u>Raymond</u>	<u>Johnson</u>
Criteria No. 1	34-34	30-30	30-30	25-33	28-30
Criteria No. 2	30-30	25-30	20-25	25-30	25-30
Criteria No. 3	25-24	25-25	20-10	10-25	24-25
Criteria No. 4	10-10	10-10	08-10	10-10	10-10

(Under each evaluator name, the first score is for Family Service and the second score is for First Sun).

USC issued an Intent To Award the contract to Family Service on June 16, 1994. First Sun protested the award to the CPO on June 29, 1994. The CPO asked First Sun to concisely restate its protest issues, which it did by letter dated July 27, 1994. The CPO conducted a hearing on August 2, 1994, and the CPO decision was posted August 12, 1994.

MOTIONS

At the beginning of the Panel hearing, USC made a motion to dismiss for lack of jurisdiction certain protest issues. USC argues that the Panel has no jurisdiction to hear this case due to the untimeliness of First Sun's protest issue

identified as self referral. The Panel finds that the questions and answers of Amendment #1 discuss the issue raised by First Sun, which it terms self referral. In Amendment #1, the question and answer numbered 6, specifically states "Yes" to the question of whether the agency itself could provide "additional services" in counseling with the same therapist, without a "conflict of interest". First Sun's issue deals with Family Service "referring clients to itself". (Record p. 4). First Sun's issue is directly related to the question and answer in Amendment #1, therefore First Sun had fifteen days from the issuance of Amendment #1 to file its protest on this issue. First Sun filed its protest on June 29, 1994, twenty-six (26) days after the issuance of Amendment #1. Clearly, the protest issue was not filed timely under S. C. Code Ann. Section 11-35-4210(1), which provides in pertinent part:

Any prospective bidder, offeror, contractor, or subcontractor who is aggrieved in connection with the solicitation of a contract shall protest to the appropriate chief procurement officer in the manner stated in subsection (2) below within fifteen days of the date of issuance of the Invitation For Bids or Requests for Proposals or other solicitation documents, whichever is applicable, or any amendment thereto, if the amendment is at issue.

First Sun argues that the intent to award was posted prior to the expiration of the fifteen days from the issuance of the amendment, and thus First Sun had fifteen days from the date the award was posted. However, the issuance of the intent to award does not modify or extend the statutorily established time to protest a solicitation or amendment document. S.C. Code Ann. Section 11-35-4210(1) further provides that:

any actual bidder, offeror, contractor, or subcontractor who is aggrieved in connection with the intended award or award of a contract shall protest to the appropriate chief procurement officer in the manner stated in subsection (2) below within fifteen

days of the date notification of award is posted in accordance with this code.

The language of this code section does not allow for an extension of time on an issue raised by the RFP documents or Amendments. The Panel finds that First Sun's issue concerning self referral, which was discussed in Amendment #1, is not timely filed, and therefore the Panel does not have jurisdiction.

USC also argues that the Panel does not have jurisdiction to determine violations of ethical standards of an accrediting or licensing organization. The Panel agrees that it does not have jurisdiction to determine ethical violations of standards set out by an accrediting or licensing association of a profession. However, the Panel does have jurisdiction to consider the issue of an offeror's "obligation of good faith" as it relates to an offeror's proposal, under S. C. Code Ann. Section 11-35-30.

CONCLUSIONS OF LAW

1. Arbitrary, Capricious, and Clearly Erroneous

S. C. Code Ann. Section 11-35-2410 provides for the finality of determinations under the RFP process unless "clearly erroneous, arbitrary, capricious, or contrary to law". First Sun argues that the ratings for the first three award criteria are arbitrary, capricious, and clearly erroneous. First Sun has the burden to prove its issue by a preponderance of the evidence. As the Panel had stated in previous cases, "the Panel 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 proposals, and are not actually biased". Case No. 1992-16, In re: Protest of Coastal Rapid Public Transit Authority.

First Sun questions the lack of bias of Dr. Frank Raymond, one of the evaluators. However, the Panel does not need to determine the issue of Dr.

Raymond's alleged bias, because with or without bias, the outcome of the award is not effected. Nor has First Sun shown that Dr. Raymond's alleged bias in any way effected the scores of the other evaluators. Even if Dr. Raymond is biased, his scores do not make a difference in the outcome of the award. If Dr. Raymond's scores are removed from the totals, Family Service still has a higher total score than First Sun. First Sun argues that the outcome could be in its favor if a different evaluator had been chosen which scored First Sun higher. The Panel points out that such speculation is irrelevant. Neither the RFP nor the law, requires a specific number of evaluators on the evaluation committee. Therefore, the results of the remaining four evaluators would be valid without Dr. Raymond's scores. If an evaluator's score is erroneous, arbitrary, capricious or even biased, but it does not effect the outcome of the award, than it may not effect the finality of the award. The Panel does not condone any actions of evaluators that are other than clearly fair and unbiased, but the Panel recognizes the State's need to procure goods and services in a timely manner.

A. EAP Professional or Ethical Standards Not Met By Program Design

First Sun contends that Family Service's program design does not meet established EAP professional or ethical standards and therefore the high ratings Family Service received from the evaluators are arbitrary, capricious, and clearly erroneous. First Sun objects to Family Service's program design including the option of referral to Family Service for counseling after assessment. First Sun did not establish that such a program design does not meet industry-wide EAP standards. Testimony reveals there is more than one association that certifies EAP's. First Sun relies on the rules of the organization that provides its own certification to prove that Family Service's program design does not meet professional standards. Family Service's program design may or may not meet the standards of the organization which certifies First Sun. Under the RFP,

Family Services is not required to meet those standards. In fact, the RFP allows for different approaches to the design of the program, and does not disallow a program design as proposed by Family Service. The RFP does not require an offeror to be certified by a specific organization, nor does the RFP require an offeror to adhere to the rules of a specific organization. The evidence shows that First Sun and Family Service rely on different professional certifications and different approaches, which comply with the RFP requirements, to providing USC's employee assistance program. The evaluators were not arbitrary, capricious, clearly erroneous or acting contrary to law, in failing to apply association standards that are not required by the RFP or the law. The Panel finds that First Sun has failed to prove the evaluators acted erroneously, arbitrarily, capriciously, and contrary to law in evaluating the first award criteria.

B. First Sun Superior in Organization and Staff Experience

First Sun contends that as to the "award criteria of Organization and Staff Experience, the ratings do not reflect the superiority of First Sun EAP qualifications over those of Family Service Center". (Record p. 3). USC contends that different qualifications of staff were emphasized by each offeror, which was allowed by the RFP. The RFP states that "the University prefers Master's level in psychology, social work, counseling, or related area plus significant clinical experience, and current licensure in appropriate profession." (Record p. 38). As already stated, the RFP does not require certification by a specific association or organization. It is undisputed that the RFP does not require certification as a Certified Employee Assistance Professional (CEAP). To become a CEAP requires a certain level of experience, but does not require a master's level educational degree. First Sun emphasizes the value of certification as a CEAP. Family Service disavows the value of such certification. The evidence supports USC's position that each offeror emphasized different

staff qualifications, which is allowed by the RFP. The Panel will not re-evaluate and compare the professional qualifications of the offerors, and thus second guess the decision of the evaluators. The Panel finds that First Sun has not proven that the evaluators' ratings for organization and staff criteria are erroneous, arbitrary, capricious, and contrary to law.

C. Ratings for the Staff Time Award Criteria

First Sun argues that the ratings for the Staff Time award criteria do not reflect the unlimited services offered by First Sun, which First Sun feels far exceeds the staff time proposed by Family Service. First Sun often responded to the RFP by stating services would be provided "as needed". First Sun contends "as needed" indicates unlimited service, which is far above the limited services offered by Family Service, and deserves higher ratings. The testimony of at least one of the evaluators, Ms. Maw, reveals that she did not interpret the words "as needed" to mean unlimited, but considered them to simply be less specific than the specific answer of Family Service. First Sun's response of "as needed" can reasonably be found to be ambiguous and open to the interpretation of the evaluators. The evaluators were not erroneous, arbitrary, capricious or acting contrary to law in not interpreting First Sun's response of "as needed" to mean unlimited. The Panel finds that First Sun has failed to carry its burden of proof that the ratings for the second award criteria concerning staff time are erroneous, arbitrary, capricious and contrary to law.

D. Family Service's Inability to Provide Regional Services

First Sun further argues that evaluator scoring does not reflect at least one evaluator's concerns about Family Service's inability to provide regional services. One evaluator, Peter Johnson, made notes on his score sheet for Family Service stating "this company needs to demonstrate services & resources are available to Lancaster, Union, & Sumter". (Record p. 66). Mr. Johnson

testified that he meant to place the notes on the score sheet for First Sun, instead of Family Service. At any rate, the evaluators properly scored the proposals independently of each other, so there is no reason to believe this issue was a concern of the remaining evaluators, or influenced their scores in any way. First Sun did not provide evidence concerning Family Service's ability to provide regional services. The Panel finds that First Sun has failed to prove the evaluators acted erroneously, arbitrarily, capriciously, or contrary to law in evaluating this issue.

Based on the above findings and conclusions, the Panel finds that First Sun has failed to prove that USC's determination of award under S. C. Code Ann. Section 11-35-1520(9) is arbitrary, capricious, and clearly erroneous.

2. Obligation of Good Faith

First Sun also alleges that Family Service violates the obligation of good faith in S. C. Code Ann. Section 11-35-30, which provides:

Every contract or duty within this code imposes an obligation of good faith in its negotiation, performance or enforcement. "Good Faith" means honesty in fact in the conduct or transaction concerned and the observance of reasonable commercial standards of fair dealing.

First Sun claims Family Service violates this Code section in that its proposal "offers misleading statements about its EAP qualifications and experience". (Record p. 4).

First Sun points to Family Service's proposal which states that "Family Service Center (FSC) has been a leading provider of Employee Assistance Program (EAP) services since 1983 with contractual relationships with over 20,000 employees in the Midlands of South Carolina. As a leader in the field of EAP...." (Record p. 80). The Panel notes that the statement made by Family

Service is an introductory statement that does not relate to a specific requirement of the RFP. It is made in an "overview" that introduces Family Service's proposal and can be compared to the general, flattering statements, or "puffing", that salesmen make. The Panel discourages all vendors from using "puffing" statements as they have no value in the procurement process.

First Sun contends that Family Service does not have contractual relationships with 20,000 employees, and therefore that statement is not made in good faith. Larry Shaw, president of Family Service, testified that Family Service provides EAP services to over 20,000 employees under different contractual relationships, including relationships similar to subcontracting. The statement indicates that Family Service provides EAP services to over 20,000 people in the Midlands. The Panel finds that Family Sun's statement in its proposal concerning contractual relationships is not misleading or in violation of the obligation of good faith.

First Sun contends that Family Service is not a leader in the field of EAP and its proposal statement is misleading. The Panel finds this argument manifestly without merit. Family Service's involvement in EAP development was testified to by Don Lake, president of First Sun, who formerly worked for Family Service. Changes in personnel or clientele of Family Service does not negate its past nor present involvement in providing EAP services. It is Family Service's opinion that it is a "leader in the field", and Mr. Lake's opinion to the contrary does not make that a misleading statement. It is clearly a matter of opinion. Each evaluator can make its own interpretation of such a statement, and the weight given to (if any) upon review of the information provided by the offeror.

The Panel finds that these general statements made by Family Services do not rise to the level of violating the obligation of good faith in negotiation. Any general statements in a proposal must be weighed against the specific

details provided in response to the specific requirements of the RFP. First Sun puts too much emphasis on an introductory statement, and its possible ability to mislead.

First Sun also argues that Family Service was misleading in not providing information concerning the history of its EAP development in relation to the fact that several of its personnel and corporate clients are no longer with Family Service. Family Service stipulates that it did not list fourteen companies which were prior clients with EAP's since 1983. First Sun contends that the RFP requires a complete history of Family Service's contracts for EAP services. The RFP states under "Additional Proposal Information" to include "a listing and description of similar EAP's, assessments and projects performed in other organizations and dates of performances." Then under "Checklist", the RFP lists "prior EAP projects with performance dates." First Sun contends that Family Services is required by the RFP to provide every past company it has contracted with to provide similar EAP services. The RFP clearly does not state to list every or all prior EAP assessments and projects performed. The provision in the RFP allows USC to ascertain the extent of a company's experience with similar projects. If a company does not wish for certain programs to be counted towards its experience, it is not required to include the programs.

The Panel notes that the issue is not the responsiveness of Family Service. USC did not find Family Service to be nonresponsive, so it considered Family Service's response to meet this requirement of the RFP. First Sun did not raise the issue of responsiveness in its protest letter. The issue raised is the alleged misleading quality of the response, which could be a violation of the obligation of good faith. The Panel finds that Family Service's failure to provide every EAP client and program on its list of prior similar EAP programs administered, is not misleading and does not violate the obligation of good faith.

3. Violation of Accepted Professional Standards of EAP Practice

First Sun claims Family Service violates standards of EAP practice by "referring clients to itself for secondary financial gain." This final issue is dismissed for lack of jurisdiction as discussed above.

CONCLUSION

For the foregoing reasons, the Panel finds that First Sun failed to carry the burden of proof that the ratings for the first three award criteria are arbitrary, capricious, clearly erroneous and contrary to law. First Sun also failed to prove that Family Service violated the obligation of good faith established in the Procurement Code. Therefore, First Sun's protest is denied, and the CPO decision is upheld in as much as it is consistent with the Panel's findings.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT
REVIEW PANEL



Gus J. Roberts, Chairman

Columbia, S. C.

Oct 31, 1994.