STATE OF SOUTH CAROLINA	)	BEFORE THE SOUTH CAROLINA
	)	PROCURMENT REVIEW PANEL
COUNTY OF RICHLAND	)	CASE NO. 2000-4
	)	
	)	
In re:	)	**ORDER**
Protest of Coastal Rapid Public Transit Authority and Anderson-Oconee Council on Aging	)	
	)	
Appeal by Coastal Rapid Public Transit Authority and Anderson-Oconee Council on Aging	)	

This matter arises from the appeals of Coastal Rapid Public Transit Authority (CRPTA) and Anderson-Oconee Council on Aging from a decision by the Chief Procurement Officer finding CRPTA and AOCA nonresponsive offerors to a solicitation for proposals on statewide Title XIX Medicaid Transportation contracts. On January 20, 2000, pursuant to S. C. Code of Laws Ann. § 11-35-4410(5), the Procurement Review Panel (Panel) appointed Ms. Faye A. Flowers, Esq. to serve as the hearing officer of the above referenced case for the purpose of conducting an administrative review. On March 22, 2000 a hearing was held.[1] This case came before the Panel on May 8, 2000 by way of report and recommendations from the hearing officer. Ms. Flowers made an oral presentation to the Panel, submitted her written report and recommendations, and was available for questions from the Panel. The written report and recommendations are incorporated herein as part of this order.[2]

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[1] The report of the hearing officer contains a hearing date of March 20, 2000 which is the date she began hearing the Title XIX Medicaid Transportation cases. The actual hearing in this case took place on March 22, 2000.

[2] The findings of fact, questions presented, and conclusions of law in the report from the hearing officer are adopted by the Panel.

BEFORE
THE SOUTH CAROLINA PROCUREMENT REVIEW PANEL

In Re:	)	CASE NO. 2000-4
	)	
Protests of Coastal Rapid Public Transit Authority and Anderson-Oconee Council on Aging,	)	**REPORT AND RECOMMENDATION OF THE HEARING OFFICER**
	)	
Appeals by Coastal Rapid Public Transit Authority and Anderson-Oconee Council on Aging,	)	

This matter came before me for hearing on March 20, 2000, on the appeals of Coastal Rapid Public Transit Authority ("CRPTA") and Anderson-Oconee Council on Aging ("AOCA") from a decision by the Chief Procurement Officer declaring CRPTA and AOCA nonresponsive offerors on a solicitation for proposals on the statewide Title XIX Medicaid Transportation contracts. Appearing at the hearing before me were the Protestants CRPTA, represented by Emma Ruth Brittain, Esquire; AOCA, represented by M. Elizabeth Crum, Esquire; Transportation Management Services, Inc., ("TMSI"), an awarded vendor for one of the counties at issue, represented by Michael H. Montgomery, Esquire; the Department of Health and Human Services ("HHS"), represented by Deirdra Singleton, Esquire, and Byron Roberts, Esquire; and the Division of General Services, Materials Management Office ("MMO"), represented by Keith McCook, Esquire, and Anne Macon Flynn, Esquire.

Findings of Fact

On May 4, 1999, MMO issued a Request for Proposals ("RFP") on behalf of HHS soliciting offers on contracts to provide transportation services to eligible Medicaid recipients in the forty-six counties of the state. Under the RFP, an offeror could make a proposal to provide these Title XIX

Medicaid transportation services in any number of counties, and an award would be for each of the forty-six counties.

On May 18, 1999, MMO held a preproposal conference. On May 28, 1999, MMO issued Amendment No. 1, which responded in writing to all questions posed by vendors during the question and answer period. Amendment No. 1 also made certain revisions to the RFP and its Appendices. Among the changes made by Amendment 1 is the requirement that Appendix B be filled out and submitted with the offeror's proposal.

On June 9, 1999, MMO issued Amendment No. 2 extending the opening date until further notice. Amendment No. 3, issued on July 2, 1999, established the new opening date as July 21, 1999. On September 8, 1999, MMO posted the Notice of Intent to Award for all counties.

The Protestant CRPTA was the only offeror for Horry County; however, it was declared not responsive for failure to include Appendix B with its proposal, as required by the RFP. AOCA made offers on Anderson, Oconee, and Greenville counties; however, it was declared not responsive for failure to include Appendix B with its proposal. In Greenville County, TMSI, as the only responsive offeror, was listed as the awarded vendor.

On September 23, 1999, both CRPTA and AOCA protested the determinations of nonresponsiveness. The Chief Procurement heard the matter in November, 1999, and issued his decision on December 30, 1999, denying both protests. On January 10, 2000, CRPTA and AOCA both filed appeals contesting the decision of the Chief Procurement Officer. Because of the similarity of issues, these cases were consolidated for review.

Questions Presented

Appendix B, entitled "Provider Program Proposal", contained seven items to which the offeror was required to respond: (1) Number of state-owned vehicles to be used for Title XIX; (2) Number of other vehicles to be used for Title XIX; (3) Number of drivers to be used for Title XIX; (4) Approximate total number of clients to be served monthly; and (7) Brief narrative of program describing operating procedures and goals. In addition, Appendix B required as item (5) that the offeror attach a copy of its Transportation Manual and as item (6) that offeror attach its Holiday Closing Schedule.

At the outset of the hearing, the parties stipulated that the State was able to locate in AOCA's proposal the information required by item (1), number of state-owned vehicles, item (2), number of other vehicles, item (3) number of drivers, and item (7), a brief description of the program .[1] AOCA admits that it failed to fill out and submit the form designated as "Appendix B" and to attach a transportation manual as required by item (5), and a holiday closing schedule, as required by item (6). AOCA contends, however, that such failure is a minor irregularity which can be waived by the State and cured by it under § 11-35-1520(13), because AOCA otherwise provided in its proposal all of the information requested, except the total number of other clients to be served monthly required by item (4). AOCA argues that its failure to respond to that requirement is a minor informality which can be cured by it.

As to CRPTA, the parties stipulated that CRPTA's proposal contained the information required by item (7), program narrative. CRPTA argues the same as AOCA that, although it did not complete and submit Appendix B, its failure to do so is a minor informality because either its

[1]TMSI would stipulate only to items 1, 3, and 7.

proposal otherwise contains the information or because the lack of such information can be waived and cured.

HHS and MMO argue that the failure to fill out Appendix B and attach the required information is not a minor irregularity because such failure has more than a negligible effect on quality and performance of the contract. As to the Greenville County contract and AOCA, TMSI joins in this argument.

Conclusions of Law

A "responsive bidder or offeror" is defined in § 11-35-1410(7) as "a person who has submitted a bid or offer which conforms in all material aspects to the invitation for bids or requests for proposals." Section 11-35-1520(13) of the South Carolina Consolidated Procurement Code provides for the waiver or curing of minor informalities and irregularities in bids and proposals.[2] That section provides in relevant part:

> A minor informality or irregularity is one which is merely a matter of form or is some immaterial variation from the exact requirements of the invitation for bids having no effect or merely a trivial effect on total bid price, quality, quantity, or delivery of the supplies or performance of the contract, and the correction or waiver of which would not be prejudicial to bidders. The procurement officer shall either give the bidder an opportunity to cure any deficiency resulting from a minor informality or irregularity in a bid or waive any such deficiency when it is to the advantage of the State.

Section 11-35-1520 then sets forth a non-exclusive list of examples of minor informalities or irregularities.

The Panel has read these two sections of the Procurement Code together to arrive at the following conclusions:

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[2]Section 11-35-1520(13) is made applicable to the request for proposal process by Regulation 19-445.2095(E).

> In order to be responsive, a proposal need not conform to all of the requirements of the RFP; it must simply conform to all of the essential requirements of the RFP. . . .[B]ecause the Code requires rejection of a proposal when it fails to meet an essential requirement but allows waiver of an immaterial variation from exact requirements, a requirement is not "essential" if variation from it has no, or merely a trivial or negligible effect on price, quality, quantity, or delivery of the supplies or performance of the services being procured. Waiver or correction of a variance from such a requirement is appropriate under the Code when relative standing or other rights of the bidders are not prejudiced.

Protest of National Computer Systems, Inc., Case No. 1989-13.[3]

In the *National Computer* case, the Panel determined that a requirement is not "essential" simply because the RFP states that it is mandatory. Also of relevance in this case, the Panel has determined that mere failure to follow the RFP format and organize a response under appropriate sections headings is a minor informality which can be waived. *Protest of Justice Technology, Inc.*, Case No. 1992-4.

Thus, any analysis of what is waivable as a minor irregularity includes two parts, whether the irregularity has more than a trivial effect on price, quality, quantity, delivery or performance of the contract and whether the waiver and cure of the minor irregularity is prejudicial to the other bidders. With these general rules in mind, each requirement of Appendix B is examined below.

A. Minor Informality or Irregularity

Item (1) - Number of State-Owned Vehicles

As to AOCA, the parties stipulated that this information, although not filled in on Appendix B, is included in AOCA's proposal. Under the *Protest of Justice Technology* case, cited above,

[3]When this case was decided, the minor informality section was contained in Regulation 19-445.2080. It has since been re-enacted as a part of the Consolidated Procurement Code at § 11-35-1520(13). Although the statutory version expanded upon the regulation by adding examples of minor informalities, the essence of the law remained the same.

AOCA's failure to provide this information on Appendix B is a minor irregularity, which can be waived by the State.

CRPTA contends that, although it did not fill out Appendix B to state the number of state-owned vehicles to be used for Title XIX services, this information is contained in the RFP at Appendix U, which is a listing of all state-owned vehicles by county as of May 24, 1999. As the only Medicaid transportation provider in Horry County, all the state-owned vehicles listed for Horry County are in CRPTA's possession.

MuMin Abdul Razzaaq, the HHS program manager for Medicaid transportation, testified that Appendix U is a listing of the current state-owned vehicles leased to CRPTA and is not the number of state-owned vehicles "to be used". Mr. Abdul Razzaaq stated that the purpose of this question was to give the State an idea of how many state-owned vehicles the providers intended to use.

As CRPTA points out, however, the RFP specifically states, "The contractor shall have the opportunity to request to lease State vehicles provided by SCDHHS under the terms and conditions set forth by SCDHHS. Subject to availability, these vehicles shall be dispersed solely on an as-needed basis and as requested by the Contractor and determined by SCDHHS. *The Contractor cannot rely on the availability of State vehicles to provide to scope of services required in this RFP.*" (RFP, at page 18)(Emphasis added). Thus, while knowing the number of state-owned vehicles a provider intends to request is no doubt of use to the State, the failure to include it could not affect price, quality, quantity, delivery or performance. Therefore, CRPTA's failure to state the number of state-owned vehicles can be considered a minor irregularity.

Item (2) - Number of Other Vehicles To Be Used

All parties but TMSI stipulated that AOCA provided the number of other vehicles to be used for Title XIX services in its proposal. In its Executive Summary, AOCA states, "Transportation services in the three counties are provided utilizing twenty-five (25) vehicles leased from the state and sixteen (16) agency owned vehicles." As pointed out by AOCA, only one technical proposal, including Appendix B, was required to be submitted, regardless of the number of counties to be served.[4] Thus, AOCA has provided the number of other vehicles to be used. Under the *Protest of Justice Technology* case, cited above, AOCA's failure to provide this information on Appendix B is a minor irregularity, which can be waived by the State.

HHS and MMO contend that CRPTA's proposal does not contain a statement of the number of other vehicles to be used by CRPTA to perform this contract. In its proposal, CRPTA states that it has a total bus fleet of nineteen vehicles, twenty-three 15-passenger vans, and nine wheelchair lift-equipped vehicles, all of which "are used at one time or another to provide Medicaid Title XIX services within Horry County." Further, as noted by CRPTA, the RFP requires in Amendment No. 1 that the offeror must provide a sufficient number of vehicles to perform the services required by the RFP.

Because no limit exists on the number of passengers to be transported and because CRPTA cannot rely on having any state-owned vehicles, CRPTA, like all bidders, has committed to provide whatever number of vehicles are required to perform the contract. Thus, the number of non-state-owned vehicles required to transport passengers during the course of the contract could vary widely. Although information concerning the number of other vehicles the offeror initially plans to use is

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[4]A separate cost proposal was required for each county.

certainly important to the State for planning purposes, its absence on Appendix B has no, or only a negligible, effect on price, quality, quantity, delivery, and performance. Further, the number of CRPTA's other vehicles falls into the same category as "failure of a bidder to furnish the required information concerning the number of the bidder's employees or failure to make a representation concerning its size", both of which are examples of minor informalities under § 11-35-1520(13).

Item (3) - Number of Drivers

The parties stipulated that this information, although not filled in on Appendix B, is included in AOCA's proposal. Under the *Protest of Justice Technology* case, cited above, AOCA's failure to provide this information on Appendix B is a minor irregularity, which can be waived by the State.

In its Executive Summary, CRPTA indicates that it employs a total of forty-six operators. Further, in the "Approach to Staffing" section of its proposal in Exhibit O, CRPTA provides a list of all personnel whose positions are to be funded by the Title XIX contract. Included in the list are the names of all Title XIX drivers, who are clearly identified as such. This listing provides the information requested on Appendix B. Therefore, under the *Protest of Justice Technology* case, cited above, CPRTA's failure to provide this information on Appendix B is a minor irregularity, which can be waived by the State. Further, to the extent that CRPTA has failed to provide the number of drivers, this omission falls into the same category as "failure of a bidder to furnish the required information concerning the number of the bidder's employees or failure to make a representation concerning its size", both of which are examples of minor informalities under § 11-35-1520(13).

Item (4) - Approximate Total Number of Clients to Be Served Monthly

Neither AOCA nor CRPTA provides the total number of clients to be served monthly in its proposal. In fact, there was great disagreement among the parties as to what information was being requested by this item. Both David Quiat, the procurement officer, and Mr. Abdul Razzaaq, the HHS program manager, testified that item (4) calls for the offeror to provide the total number of all clients, Medicaid or otherwise, served by the provider. Both witnesses noted that the purpose of this requirement was to explain how the provider intended to integrate Medicaid clients into its overall operations. AOCA and CRPTA contend that the term "client" is not defined and that both interpreted it to mean Medicaid Title XIX clients.

Assuming, as the State contends that, item (4) requires a statement of the total number of clients served by the provider, as to AOCA and CRPTA, the failure to provide this information has no effect on price or quantity because both of these factors are based on "per passenger mile" units, not on number of clients served.

As to quality of services, it is difficult to see how a simple statement of the number of other clients aids the State in determining the provider's plan for, and ability to, integrate Medicaid clients into its overall program. Doug Wright, the Executive Director of AOCA, testified that AOCA serves many clients in many programs, some of which involve no transportation. Thus, the mere number of clients served by AOCA is no indication of AOCA's ability to transport Medicaid clients. CRPTA offered similar evidence concerning its other programs.

As argued by both CRPTA and AOCA, the RFP, particularly in Amendment 1, provides extensive historical information to aid offerors in preparing their proposals, none of which concerns the total number of monthly clients. Although, the total number of monthly clients requested on Appendix B, might be useful to the State, the RFP has numerous other requirements from which the

State can evaluate the offeror's ability to provide transportation services to Title XIX clients. For example, under "Technical Approach", exists the requirement that the offeror outline in detail its plan to meet and perform the Scope of Work requirements. Likewise, the RFP requires that the offeror discuss its plans for "Coordination of Transportation Efforts." Given that the total number of monthly clients has little or no effect on the price, quantity, quality, delivery, or performance of the requirements of the RFP, AOCA and CRPTA's failure to include this information on Appendix B is a minor irregularity.

Item (5) - Transportation Manual

Item (5) of Appendix B required the offeror to attach a copy of its Transportation Manual. Mr. Abdul Razzaaq testified at length as to the information he expected to be contained in a transportation manual, to include driver educational requirements, maintenance and scheduling procedures, operational procedures, accident/emergency procedures, and hazardous weather procedures. Although, both CRPTA and AOCA addressed a number of these elements in their responses to Technical Approach, Mr. Abdul Razzaaq testified that these discussions were not as thorough as he would expect to see in a transportation manual.[5]

Joe Zavisca, President of TMSI, testified without contradiction that transportation manuals are generally used in the industry and that they typically contain all of the policies and procedures germane to operation of the company's business. Nevertheless, as admitted by both Mr. Abdul Razzaaq and Mr. Quiat, the RFP does not require that a provider's transportation manual contain any particular policies or procedures. Mr. Quiat testified that, when he reviewed proposals for

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[5]CRPTA addresses dispatching and vehicle communications procedures in Section 4.1.1 of its proposal, driver training and certification in Section 4.1.5, quality assurance requirements in Section 4.1.7,and general maintenance requirements in Section 4.3. AOCA addresses driver training and eligibility requirements, scheduling and dispatch procedures, and maintenance procedures in various places in its proposal.

responsiveness, he did not perform a qualitative analysis of the provider's attached transportation manual, rather he only checked to see if a document called "transportation manual" was attached. If such a document was attached, he considered the provider responsive to that portion of Appendix B. In other words, the contents, or lack thereof, of the transportation manual was a subject for evaluation by the evaluation panel and not a matter of responsiveness.

Given that a provider could have attached any document to Appendix B, so long as it was designated "Transportation Manual", and been responsive, and given that the RFP in "Technical Approach" otherwise requested much of the information the State expected to find in a transportation manual, I cannot find that AOCA and CRPTA's failure to attach a transportation manual affected price, quality, quantity or performance of the contract.[6] Indeed, AOCA and CRPTA would have been responsive had they attached the operations and maintenance information included elsewhere in their proposals, however minimal this information was in Mr. Abdul-Razzaaq's opinion. The State's legitimate concern that the provider be bound in the contract by the policies and procedures set forth in its transportation manual can be met by allowing AOCA and CRPTA to cure this deficiency.

Item (6) - Holiday Closing Schedule

Item (6) of Appendix B required the offeror to attach a copy of its holiday closing schedule. Mr. Abdul Razzaaq testified that the State requested this information to determine how the needs of special patients, such as those undergoing kidney dialysis, would be met. All parties acknowledged that these types of patients need transportation without regard to weekends and holidays.

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[6]This conclusion is supported by the fact that many of the requirements of this contract are mandated by state and federal regulations.

In the Scope of Work, the RFP requires a winning contractor to provide transportation to meet the needs of the clients, including on weekends and holidays. AOCA in its proposal under "Schedule of Services", states that, "Transportation in all three counties will be flexable [sic] to meet the clients [sic] demand of needs for weekends or holidays." CRPTA's proposal contains no specific statement of a holiday schedule, because as James Lewis, CRPTA's Finance Director, testified, no holiday schedule exists for transportation staff.[7] CRPTA, in its submittal letter, does indicate its agreement to comply with all requirements of the RFP, including the requirement concerning transportation of special needs patients.[8]

As with the transportation manual, HHS and MMO argue that, because the proposal becomes part of the contract, it is essential to bind the offeror to providing services for special needs patients on holidays. This proposition is true; however, simply having the offeror attach a holiday schedule does not accomplish this result. In that regard, I note that there is no requirement that the offeror provide a weekend schedule for special needs patients.

In AOCA's case, it has stated that its schedule will be flexible to meet the needs of clients on both holidays and weekends, as is required by the RFP. CRPTA has agreed to comply with all requirements of the RFP, including the one concerning weekend and holiday transportation of special needs patients. Given that the RFP otherwise binds offerors to provide weekend and holiday transportation, the failure to attach a holiday closing schedule on Appendix B is a minor informality which can be cured by AOCA and CRPTA.

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[7]Mr. Lewis admitted that CRPTA's administrative staff did take certain holidays.

[8]In that regard, it is noted that CPRTA is the past provider of services under this contract and is the current provider under an emergency procurement pending resolution of this controversy.

Item (7) - Program Description

The parties stipulated that both AOCA and CRPTA provided information describing their programs in other parts of their proposal. Thus, under the *Protest of Justice Technology* case, cited above, the failure to provide this information on Appendix B is a minor irregularity, which can be waived by the State.

B. Prejudice to Other Bidders

The second part of any analysis of whether a minor irregularity may be waived or cured is whether the waiver or correction prejudices other bidders. In the case of the Horry County contract, CRPTA was the sole bidder. Therefore, allowing CRPTA to cure its failure to submit Appendix B will not prejudice any bidder and will be to the advantage of the State. Similarly, allowing AOCA to correct its failure to submit Appendix B as to the Anderson and Oconee County contracts will not result in prejudice to any bidder and will be to the advantage of the State.

In the case of the Greenville County contract, AOCA and TMSI were both offerors, and TMSI is the awarded vendor. The loss of an offeror's position as most advantageous offeror is not enough to demonstrate prejudice, however, because this is often the case when a minor informality is waived or cured.

Prejudice to TMSI results in this case from the following. If AOCA is allowed to correct its failure to submit Appendix B with its proposal, its proposal will be evaluated and scored. AOCA's ultimate score will then be compared with TMSI's to determine who is the most advantageous vendor. AOCA admits that it did not have a transportation manual at the time it submitted its proposal. AOCA has since had the benefit of input from the State as to what the State believes a transportation manual should contain. It would be prejudicial to TMSI to allow AOCA to create a transportation manual and submit it for evaluation under these circumstances. Because the waiver

and correction of AOCA's failure to submit Appendix B in Greenville County will prejudice TMSI, such error cannot be waived or cured as a minor informality. Therefore, AOCA is not responsive to the RFP for the Greenville County contract.

Recommendations

1. CRPTA's failure to submit Appendix B in its proposal for Horry County is a minor irregularity which can be waived and cured without prejudice to other bidders under § 11-35-1520(13). Once cured, CRPTA's proposal should be evaluated by the State.

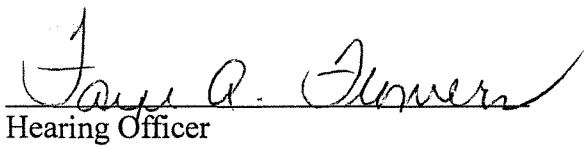
2. ACOA's failure to submit Appendix B in its proposal for Anderson and Oconee Counties is a minor irregularity which can be waived and cured without prejudice to other bidders under § 11-35-1520(13). Once cured, AOCA's proposal should be evaluated by the State.

3. ACOA's failure to submit Appendix B in its proposal for Greenville County cannot be waived or cured without prejudice to TMSI. Therefore, ACOA should be declared not responsive as to the Greenville County contract.

4. The award of the Greenville County contract to TMSI should be reinstated.

5. Nothing herein should prevent the State from declaring CRPTA or AOCA not responsive on other grounds if evaluation of their proposals reveals them to be.

Respectfully Submitted,



Hearing Officer

Columbia, S.C.
May 8, 2000

CONCLUSION

Based on the report and recommendations of the hearing officer, the Panel finds that CRPTA's and AOCA's failure to submit Appendix B in their proposals is a minor informality. The State is directed to waive this deficiency and allow these bidders to cure the minor informality. Once cured, CRPTA's proposal shall be evaluated by the State for Horry County and AOCA's proposal shall be evaluated by the State for Anderson and Oconee Counties.

AOCA's proposal is deemed nonreponsive for Greenville County because the failure to submit Appendix B cannot be waived and cured without prejudice to Transportation Management Services, Inc. (TMSI). Nothing herein prevents the State from declaring CRPTA and/or AOCA nonresponsive on other grounds after evaluation of their proposals.

For the foregoing reasons, the award to TMSI of the Greenville County Contract shall be reinstated and AOCA's appeal in this county is dismissed. The appeals by CRPTA and AOCA as to Horry, Anderson and Oconee Counties are granted and the decision the CPO is reversed in as much as it is inconsistent with this order.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT
REVIEW PANEL

BY: _____
Gus J. Roberts, Chairman

Columbia, SC
May 16, 2000