

STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND

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BEFORE THE SOUTH CAROLINA  
PROCUREMENT REVIEW PANEL

IN RE:

Appeal of Medical Review of North  
Carolina d/b/a The Carolinas Center  
for Medical Excellence  
RFP No. 06-S7205  
CPO Decision No. 2006-161

CASE NO. 2007-2

**ORDER**

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This matter came before the South Carolina Procurement Review Panel (PRP) for a hearing on March 22, 2007 based upon an appeal by Carolinas Center. Materials Management Office (MMO) issued a RFP for hospitalization review services and awarded the contract to Qualis. Carolinas Center protested the award to the Chief Procurement Officer (CPO) and a hearing was held on January 11, 2007 wherein the CPO denied the grounds of protest presented by Carolinas Center. An appeal for further administrative review of the CPO Decision was made to the PRP by Carolinas Center.

At the hearing, Carolinas Center was represented by John E. Schmidt, III, Esquire. Qualis was represented by M. Elizabeth Crum, Esquire. The CPO was represented by Keith McCook, Esquire. Appearing on behalf of the South Carolina Department of Health and Human Services were Deirdre Singleton, Esquire and Byron Roberts, Esquire.

#### **FINDINGS OF FACT**

The South Carolina Department of Health and Human Services (SCDHHS) sought a quality improvement organization to perform hospitalization review services for eligible persons. MMO issued RFP No. 06-S7205 for a term contract for the services. Carolinas Center submitted a proposal in response to the RFP. An Intent to Award the contract went to Qualis on October 26, 2006. On November 3, 2006, Carolinas Center filed a protest of

the award to Qualis alleging that Qualis' proposal was not responsive to the RFP. A hearing was held before the CPO on January 11, 2007 and a decision denying the protest grounds was issued. Carolinas Center appealed the CPO Decision.

As grounds for appeal, Carolinas Center alleged that the proposal submitted by Qualis was non-responsive and imposed certain conditions that failed to meet and/or modified the material requirements of the RFP. The appeal alleges that Qualis' bid was non-responsive on the grounds that it: 1) failed to outline a plan for post procedure pre-payment screening for sterilization procedures; 2) failed to provide a plan to provide certain quality of care review of providers based upon certain defined screening criteria; 3) failed to provide a plan to conduct a review of certain behavioral health service providers, to include unannounced visits; 4) failed to meet staffing requirements of the RFP; 5) failed to disclose a terminated contract in another state.

The CPO Decision addressed each ground of appeal and found that the proposal submitted by Qualis was responsive to the RFP and denied the grounds of protest by Carolinas Center.

### **CONCLUSIONS OF LAW**

Prior to the hearing before the Panel, a Motion for Summary Judgment and a Motion to Dismiss was filed by Qualis. The Panel reviewed the motions and heard oral arguments at the hearing. Qualis requested a Motion for Summary Judgment in regards to Carolinas Center's appeal ground number five (5) alleging that Qualis failed to disclose that its Medicare contract with the State of Alaska was terminated for failure to meet minimum requirements of a RFP. At the CPO hearing, this ground of appeal was denied

as Carolinas Center presented no evidence that the contract had been terminated. Further, Qualis asserted that the contract expired and was not terminated as alleged. During oral arguments on this motion, counsel for Carolinas Center withdrew its appeal grounds in regards to this issue. Therefore, the Panel did not address this appeal ground.

Qualis also presented a Motion to Dismiss in regards to appeal ground number two (2) by Carolinas Center alleging that Qualis' proposal was non-responsive because it proposed a process that only provides for acute care screens which did not include psychiatric screens as provided by the RFP. In the protest letter dated November 3, 2006, Carolinas Center cited Section 3.4 of the RFP as the section that Qualis was non-responsive to in its proposal. In Carolinas Center's appeal letter to the Panel, it cites Section 3.4 of the RFP and 3.5 and 3.6 in arguing that Qualis was non-responsive. Section 3.4 was the only section referenced in the CPO Decision. During oral arguments, counsel for Carolinas Center stated that he did not intend to argue during the appeal hearing that Qualis was non-responsive to Sections 3.5 and 3.6 and was not asking the Panel to make a ruling of non-responsiveness to those sections. He would only use those sections as probative evidence to support an argument that Qualis did not meet the requirements of Section 3.4. The Panel held this motion in abeyance in order to hear testimony. Carolinas Center then proceeded to present its case.

In regards to appeal ground number one (1), the RFP required a contractor to implement and maintain a post procedure, pre-payment screening review of all sterilizations. Qualis proposed to perform a sterilization utilization review upon receipt of the sterilization consent form from the providers. If all parts of the form appear

correct, Qualis would approve the sterilization. Carolinas Center argued that this is non-responsive because it failed to provide for a post procedure plan. However, a post procedure screening cannot be performed on a prior approval basis. Qualis' offer to review the forms upon receipt from the attending physician meets the requirements of the RFP for a post procedure pre-payment review. The STERILIZATION FOR MEDICAID RECIPIENTS form clearly uses past tense terms such as, "performed," "sterilized," "counseled," and "informed," indicating a post procedure activity. The form also states that at least 30 days have passed between the date of the individual's signature and the consent form and the date the sterilization was performed. Dr. Gary Fuquay testified for Carolinas Center that Qualis was going to propose a screen for the physician performing the sterilization to certify compliance, therefore this was not an independent review. However, he stated that the proposal in this regard was confusing to him. The Panel finds that Qualis set forth a plan for a post procedure, pre-payment review and was responsive to the RFP.

In regards to appeal ground number two (2), the RFP required a contractor to implement and maintain a quality of care review for institutions for mental diseases (IMD) and residential treatment facilities (RTF) using the Centers for Medicare and Medical Services (CMS) hospital generic quality screening criteria. IMD/RTF cases must be screened to determine that the care rendered meets acceptable standards of medical care. Carolinas Center argued that Qualis' proposal only provided for acute care screens which did not include psychiatric screens as required by the RFP.

Carolinas Center offered Dr. Charles Hamm as a witness. Dr. Hamm testified that certain screens in the Qualis proposal looked more surgical in nature than psychiatric as would be needed for IMD/RTF reviews. He testified that, in his opinion, some of the screens were not pertinent to IMD/RTF reviews and did not meet the RFP requirements. During cross examination, it was noted that nothing in the RFP required the contractor to use a certain method of review, other than the CSM generic screening. Further, many of the screens in the Qualis proposal could be applicable to a psychiatric facility even though they are generic in nature. Qualis' proposal also states that it will implement and maintain a quality of care review for IMD/RTF providers using CSM's generic screening criteria if that is what SCDHHS determines is in the best interest of its Medicaid program.

Qualis proposed that their quality review activities involved developing and up-dating quality screening criteria as well as using CSM's existing hospital generic quality screening criteria. Qualis recommended that the state consider Qualis' quality of care reviews. Qualis did not take exception to the RFP requirement and did not offer their screening criteria as a substitution to the RFP requirement, but rather for the state's consideration. Such a recommendation does not make the proposal non-responsive. Qualis agreed to provide what the RFP required regarding the screens. Further, the screens are applicable to a psychiatric facility and can be adjusted depending upon the type of facility being reviewed. The Panel finds that Qualis' proposal was responsive to the RFP.

In regards to appeal ground number three (3), the RFP required the bidder to

provide an on-going quality assurance monitoring of all enrolled Medicaid providers of certain services, to include unannounced visits. Carolinas Center argued that Qualis changed the requirement by proposing to use some announced visits. Qualis proposed to schedule the initial visit with the provider rather than making an unannounced visit. Qualis also proposed to confirm with SCDHHS to determine whether they wanted all site visits to be unplanned or if the unannounced visits could be reserved for follow up and ad hoc monitoring purposes. Qualis clearly stated in its bid that, "The comprehensive reviews will consist of: desk review, **unannounced** (emphasis added) site visits, written reports to providers, and additional monitoring visits to assess compliance." The Panel finds that Qualis' was responsive to the RFP.

In regards to appeal ground number four (4), the RFP required a contractor to retain a sufficient number of professionals to meet staffing requirements. The RFP did not require a specific staffing number to be submitted, only a sufficient number to be retained. The contractor's staff had to include physicians licensed by the South Carolina Board of Medical Examiners and practicing their profession in South Carolina. The offeror was required to provide copies of resumes, licenses and certifications for all professional staff that would be conducting reviews and participating in reconsideration appeals.

SCDHHS would approve each proposed staff member prior to the start of the contract.

An Amendment to the RFP included questions from providers and responses from MMO.

A provider asked if SCDHHS would accept written position descriptions for each position in the proposal with the understanding that all candidates would be approved by SCDHHS prior to hiring. The response from MMO replied, "Yes, position descriptions

along with certification of staff qualifications are acceptable.”

Carolinas Center argued that Qualis did not provide for adequate staffing in its proposal and that Qualis had not retained staff prior to the submission of its proposal and was therefore non-responsive. Dr. Richard Foster testified for Carolinas Center that he did not think that Qualis submitted the names or job descriptions of enough people to meet the staffing needs of the RFP. Carolinas Center argued that staff had to be retained at the time of the submission of the bid . However, the RFP did allow an “offeror” to submit position descriptions in lieu of retaining staff at the time of the submission of the proposal. The RFP requires a “contractor” to retain professionals to meet the staffing needs. The RFP defines a “contractor” as an offeror receiving an award. Hence, the language of the RFP and the MMO response to the provider regarding the use of position descriptions provides that the offeror could submit staff position descriptions and after the award was made, the contractor would then retain sufficient staff. Further, SCDHHS will approve all staff to be hired. There was no evidence presented to show that Qualis cannot provide a sufficient number of staff. Qualis submitted twenty- five (25) pages regarding staffing in its proposal. Qualis agreed to perform the contractual obligations of the RFP and referred to the types of staff required for the RFP.

Qualis presented the testimony of Dr. Lydia Bartholomew, Senior Medical Director for Qualis, that Qualis will have an office in South Carolina if awarded the contract and physicians to perform the required reviews. Position descriptions were submitted for staffing as allowed by the response of MMO to a provider question. There was no

requirement in the RFP for a specific number of staff, only a sufficient number of staff. Qualis has had no problem with staffing in other states to meet needs. The Panel finds that Qualis' proposal was responsive to the RFP.

At the conclusion of the appeal presentation by Carolinas Center and the close of its case, Qualis made a Motion for a Directed Verdict in regards to the pre-payment post procedure reviews, the IMD/RTF screens and the unannounced site visits appeal. (Appeal grounds one (1), two (2) and three (3)). Qualis did not make a Motion for a Directed Verdict in regards to the staffing issues (Appeal ground number four (4)). Qualis argued that Carolinas Center did not carry its burden of proof by a preponderance of the evidence that the proposal submitted by Qualis was non-responsive. Also, that even if the facts were viewed in a light most favorable to Carolinas Center, it failed to meet its burden of proof. The Panel heard arguments by the parties in regards to the motion. The Panel granted the Motion for a Directed Verdict in favor of Qualis as Carolinas Center failed to meet its burden of proof that Qualis' proposal was non-responsive in regards to appeal grounds one (1), two (2) and three (3) mentioned above. The burden of proof lies with the protestant which must sustain its allegation by a preponderance of the evidence. See, In Re: Protest of Johnson Controls, Inc., Case No. 1989-9; In Re: Protest of Morganti National, Inc., Case No. 1995-11.

Pursuant to S.C. Code of Regulations Section 19-445.2070, "Any bid which fails to conform to the delivery schedule, to permissible alternatives thereto stated in the invitation for bids, or to other material requirements of the solicitation may be rejected as

non-responsive.” Carolinas Center did not meet its burden of proof establishing that Qualis was non-responsive to the RFP. The Panel finds that the proposal submitted by Qualis was responsive to the RFP.

Pursuant to S.C. Code of Laws Section 11-35-2410, a determination by the State as to which proposal is the most advantageous considering price and the other evaluation criteria is final and conclusive unless such determination is “clearly erroneous, arbitrary, capricious, or contrary to law.” The Panel has held numerous times that this section dictates that the Panel will not re-evaluate proposals and will not substitute its judgments for the judgment of the evaluators. See, Protest of Travelsigns, Case No. 1995-8; Protest of First Sun EAP Alliance, Inc., Case No. 1994-11; Protest of NBS Imaging Systems, Inc., Case No. 1993-16. The Panel will not substitute its judgment for the judgment of the evaluators, who are often experts in their fields, or disturb their findings so long as the evaluators follow the requirements of the Procurement Code and the RFP, fairly considers all proposals and are not actually biased. Protest of Coastal Rapid Public Transit Authority, Case No. 1992-16. The Panel has held that the evaluation process does not have to be perfect so long as it is fair. Protest of NBS Imaging Systems, Inc., Case No. 1993-16. The Panel finds that Qualis’ proposal to the RFP was responsive and was not clearly erroneous, arbitrary, capricious or contrary to law.

Qualis agreed to perform the contractual obligations of the RFP. While some suggestions were offered by Qualis on how to conduct some of the reviews, those suggestions were not imposing conditions on the state. Qualis was simply presenting some other option that SCDHHS might want to consider, but the bid did not impose

conditions to the RFP. Arguments by Carolinas Center that the Qualis bid was not responsive because did not offer enough information, the most appropriate screens or a certain number of staff does not meet the burden of proving that the bid was non-responsive simply because it does not like the bid submitted. Qualis agreed to the RFP requirements and was responsive to the requirements of the RFP on all appeal grounds submitted by Carolinas Center.

**ORDER**

For the reasons stated above, the Panel finds that Qualis was responsive to the RFP and the Panel concurs with the CPO in dismissing the appeal grounds of Carolinas Center.

AND IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT REVIEW PANEL

BY ITS VICE CHAIRMAN:

  
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Willie Franks

This 2<sup>nd</sup> day of April 2007