

On March 1, 1990, the six proposals received were opened, found to be responsive and subsequently scored using the following criteria set forth in the RFP at page 39:

Experience and Reliability	35%
Proposed Method of Performance	25%
Expertise of Personnel	15%
Cost and Cost Efficiency	25%

(Record Ex. 17). The results of the initial scoring were as follows:

<u>OFFEROR</u>	<u>Total Points Out of 500</u>
R. E. Harrington	426
Blue Cross/Blue Shield	420
Erisco	341
ACMG of South Carolina	337
CFA	247
GAB	233

Evaluation committee member Michael Jordan, who is Chief Actuary for Life and Health for the Department of Insurance, testified that he and the other evaluators reviewed and scored each proposal independently before the committee met to assign the initial scores listed above. According to Mr. Jordan, his notes of that meeting reflect that the committee discussed, among other things, DIS and dentists' satisfaction with Harrington's previous performance of the same contract in question here. (Record, Ex. 22). Mr. Jordan did not make his notes available to the other evaluation committee members.

On March 21, the evaluation committee sent a letter to Harrington advising it of the oral presentation phase of the procurement and requesting that Harrington clarify its cost proposal, among other items. (Record, pp. 154-155).

Although the RFP contemplated a fixed price per enrollee per month as the preferred method of pricing (Record, Ex. 17, p. 45), Harrington indicated in its proposal that its cost of \$.9483 per enrollee per month included a possible increase in the event postage rates went up or adverse legislative action were taken. (Record, p.308). After the State asked Harrington to clarify its cost, Harrington indicated that it would provide the requested services for a \$.9775 per enrollee per month with no qualifiers. (Record, p. 158).

Mr. Robert R. Parker, President and CEO of Harrington, testified that Harrington initially offered the contingent fee because it believed that rate would be more cost efficient for the State. Harrington did not know the prices offered by its competitors at the time it modified its cost proposal.

On April 2, 1990, the evaluation committee received oral presentations from Harrington, the initial high scorer, Blue Cross/Blue Shield, in second place, and ACMG of South Carolina, which was in fourth place but proposed the lowest cost. After oral presentation, the following scoring emerged:

Harrington	430
Blue Cross	420
ACMG of SC	325

Based on the above ranking, DIS issued a Notice of Intent to Award to Harrington on April 6, 1990. (Record, p. 46). ACMG protested the intent to award to Harrington to the CPO on April 16. (Record, pp. 44-45). ACMG filed

amendments to its protest letter on April 19 and again on April 23 as a result of testimony elicited in the hearing before the CPO on April 20. (Record, pp. 31-34 and 36-39).

The protest of ACMG as amended raised nine issues, each of which was addressed and ultimately dismissed by the CPO in his order of April 30, 1990. The CPO held in favor of DIS that Harrington should receive award of the contract.¹ (Record pp. 4-27).

The same nine issues are on appeal to the Panel by ACMG's letter of appeal dated May 3, 1990. (Record, pp. 1 - 1D).

CONCLUSIONS OF LAW

At the outset of the hearing before the Panel, ACMG moved for a decision by the Panel that, as a matter of law, this procurement should be considered a bid and ACMG of South Carolina should be awarded the contract as low bidder. S.C. Code Ann. §11-35-1510 requires that all state contracts be awarded by competitive bidding to the lowest responsive and responsible bidder unless a stated exception applies. One such exception is §11-35-1530, which allows the use of competitive sealed proposals when "the chief procurement officer, or the head of the purchasing agency determines in

¹At the time of the hearing before the Panel, the State and Harrington had entered into the contract and Harrington had begun performance. (See Record, pp. 313-371 and Testimony of Robert R. Parker).

writing that the use of competitive sealed bidding is either not practicable or not advantageous to the State"

ACMG argues that DIS did not determine in writing that competitive sealed bidding was not practicable or not advantageous in this case and, therefore, use of an RFP was void and this procurement converts into a competitive sealed bid solicitation.

The Panel denied ACMG's motion because it found that the application for approval of the RFP process made by DIS to the Budget and Control Board is a written determination in accordance with §11-35-1530. That application is signed by James Bennett, the head of DIS, and states in part:

The use of the bid process for the dental contract has not yielded the quality of claim processing and adjudication desired. The current contractor has disclosed that its original bid was too low. In order to compete for the lowest bid, apparently sacrifices were made. . . .Based on the aforementioned facts, it is recommended that the Request for Proposal (RFP) approach be used in the procurement of the dental third party administrator services. It is anticipated that a qualified evaluation panel can select an administrator who will provide the level of quality services desired at a competitive price.

(Emphasis added)(Record, pp. 84-85).

The Panel holds that, although Mr. Bennett's determination is framed as a "recommendation" to the Budget & Control Board, it is nevertheless a written statement by Mr. Bennett that, in his opinion, use of the bid process for the dental contract has yielded less than satisfactory

results for the State in the past. In other words, Mr. Bennett has determined in writing that competitive sealed bidding is not advantageous to the State in this case. It is irrelevant to compliance with §11-35-1530(1) that Mr. Bennett chose to go the extra step of seeking approval from the Budget & Control Board.

DIS also made several motions before and during the course of the hearing before the Panel. First, DIS moved to strike or dismiss issues number 2, 5, and 7 of ACMG's protest on that grounds that these issues are not timely filed. The Panel denied DIS's motion to strike or dismiss as premature and indicated that it would consider the timeliness of issues 2, 5, and 7 as part of the merits of this case. The Panel's findings on the timeliness of these issues is set forth below in the discussion of those issues.

At the end of ACMG's case, DIS also moved to dismiss ACMG's entire protest on the grounds that ACMG lacks standing to bring this protest under S.C. Code Ann. §11-35-4210(1). That section provides that "any actual or prospective bidder, offeror, contractor or subcontractor who is aggrieved in connection with the solicitation or award of a contract may protest to the appropriate chief procurement officer."

DIS argues that ACMG, Inc., the protestant in this case (Record, pp. 31-34, 36-39, 44-45) is not an actual or prospective offeror and, therefore, lacks standing to protest under the Procurement Code. The Panel agrees.

It came to light during the testimony of Messrs. Tom Maynard and Lance Marshall that the protestant ACMG, Inc., is a corporation separate from ACMG of South Carolina, Inc., the entity which made the proposal on the dental contract. (Record, Ex. 21). Mr. Maynard, the Vice-president of ACMG of South Carolina, Inc., testified that ACMG South Carolina is a South Carolina corporation based in Spartanburg, formed in July of 1989, and owned by the principals of ACMG, Inc. of Ohio.

Mr. Marshall, a Vice-president for both ACMG Ohio and South Carolina, testified that ACMG Ohio is an Ohio corporation licensed to transact business in South Carolina. Mr. Marshall believes that ACMG South Carolina is a wholly-owned subsidiary of ACMG Ohio. According to Messrs. Maynard and Marshall, ACMG South Carolina would have only two employees working on the dental contract while ACMG Ohio would supply the remaining twelve workers.

ACMG Ohio argues that there is no practical difference between it and ACMG South Carolina. Indeed, in this case at least, ACMG Ohio and ACMG South Carolina behave almost as alter egos.² Nevertheless, the Panel finds that the two

²ACMG of South Carolina's proposal offers licensing information relative to ACMG of South Carolina. (Record, Ex. 21, sec. IV.B.2.). However, the financial, personnel and operations information appears to concern ACMG Ohio. The name "ACMG" is used interchangeably to refer to both corporations. Although at least two evaluators questioned the relationship between the two corporations relative
(Footnote Continued)

corporations are distinct for purposes of §11-35-4210(1). Whatever role ACMG Ohio intended to play in assisting ACMG South Carolina in performing this contract (consultant, agent, independent contractor or employee), it is not the offeror who would become contractually bound to the State and, therefore, may not maintain this protest. See In Re: Architectural Services Procurement for Replacement of Central Correctional Institute, Case No. 1989-5 (Parent corporation and officers of offeror had no standing to intervene).

Regardless of ACMG's lack of standing, however, the Panel is empowered to review any decision arising from or concerning the expenditure of state funds under the Consolidated Procurement Code. S.C. Code Ann. 11-35-4410(1) (1976). This is true even though no party has appealed the decision. Florence Crittendon Home v. S.C. Procurement Review Panel, June 18, 1984 Order of Judge John Hamilton Smith, Decisions of the South Carolina Procurement Review Panel 1982-1988, p. 111.

In the past the Panel has been cautious not to exercise this special jurisdiction except in extraordinary cases (In Re: Protest of Scholar Chips Software, Inc., Case No. 1990-1) and it is the intention of the Panel to continue to

(Footnote Continued)
contract performance (Def. DIS Ex. 1), the proposal itself never makes clear that the offeror ACMG South Carolina has only one current employee and one to be hired and that all other work will be performed by an entity other than itself.

be cautious in the future. However, because the issue of ACMG's standing was not raised in this case until the hearing was well underway and because of the possibility that this case might be remanded on appeal, the Panel addresses and decides the issues raised by ACMG in logical sequence below.

Issue No. 1. ACMG'S OFFER WAS THE LOWEST MADE AND, THEREFORE, ACMG SHOULD HAVE BEEN AWARDED THE CONTRACT.

ACMG argues that Reg. 19-445.2065, which provides that, "Unless there is a compelling reason to reject one or more bids, award will be made to the lowest responsible and responsive bidder," requires that the State award this contract to whichever responsive and responsible offeror had the lowest price. This section is made applicable to the RFP process by Reg. 19-445.2095, which provides, "The provisions of the following Regulations shall apply to competitive sealed proposals:... (2)Regulation 19-445.2065, Rejection of Bids"

The CPO held that the thrust of Reg. 19-445.2065 is to define under what circumstances the State may reject a bid or cancel an award and not who should get an award. The Panel agrees with the CPO that reading Reg. 19-445.2065 in its entirety compels this conclusion.

The Panel also agrees with the CPO that S.C. Code Ann. §1-35-1530(7)(1989 Cum. Supp.) dictates to whom the State must award in an RFP procurement when it provides, "Award must be made to the responsive offeror whose proposal is determined to be the most advantageous to the State, taking

into consideration price and the evaluation factors set forth in the request for proposals."(Emphasis added). The consideration of factors other than price in awarding a contract is what distinguishes the competitive sealed proposal process from the sealed bid process. To read Reg. 19-445.2065 as ACMG suggests is to render the RFP process meaningless.

Finally, the Panel holds that, even if ACMG is correct that a strict reading of Regs. 19-445.2065 and .2095 compels award to the low bidder in an RFP situation, the regulations are invalid insofar as they conflict with the Procurement Code itself. See Charleston Television, Inc. v. Budget & Control Board, Sup. Ct. Op. No. 23201, filed April 30, 1990 (Regulation promulgated in contravention of Procurement Code held invalid in certain cases).

Issues No. 2 and 5. THE RFP PLACED UNDUE EMPHASIS ON EXPERIENCE AND NOT ENOUGH EMPHASIS ON COST.

Before the CPO, ACMG argued that the choice by the State to assign 50% of the total evaluation points available to offeror experience and expertise and only 25% to price is contrary to the intent of the Procurement Code that the State get the best value for its dollar. ACMG points out that, although it was in fourth place, its price was almost \$1 Million lower than Harrington's.

The CPO held that the State has sole discretion to chose RFP evaluation criteria and assign the weight to be given each factor, subject to the limitation that such choice does not otherwise violate the Procurement Code and

is not arbitrary but related to contract performance. The CPO further held that these two issues are not timely raised because the RFP, which ACMG received on January 19, 1990, put ACMG on notice of the weight to be assigned each criteria and ACMG did not protest this issue until April 16.

The Panel agrees with the CPO's holdings in both respects.³

Issues No. 3 and 4. THE EVALUATION PROCESS WAS UNFAIR BECAUSE ONE MEMBER OF THE EVALUATION COMMITTEE WAS LISTED AS A REFERENCE BY THE WINNING OFFEROR AND THE EVALUATION COMMITTEE FAILED TO INVESTIGATE THE REFERENCES LISTED BY ACMG.

ACMG argues that it was not fairly evaluated because committee member Phyllis Beighley was listed by Harrington as a reference for its prior experience with this same dental contract for the years 1985-87. (Record, p. 263). Ms. Beighley is the Manager of Contracts and Communication for the Division of Insurance Services. ACMG argues that, because the committee never contacted ACMG's references while one of Harrington's (Ms. Beighley) actually sat on the committee, ACMG was unfairly disadvantaged.

³Before the Panel, ACMG argued that it does not challenge the point values assigned experience and cost but rather that the factors and weights as applied by the evaluation committee resulted in ACMG not being fairly evaluated. ACMG's characterization of its issues 2 and 5 this way is not supported by its appeal letter to the Panel (Record, pp. 1A-1B). Nevertheless, if ACMG does raise these issues to illustrate the unfairness of the process, the Panel addresses them as part of issue 6.

The testimony of Michael Jordan, one of the evaluators, indicates that Ms. Beighley did make several comments relative to the State's and the service providers' satisfaction with Harrington's performance under the prior dental contract and that the committee did not contact any other reference for any other offeror. However, Mr. Jordan also testified that similar information concerning Harrington's past performance was provided by Harrington.⁴ Further, Mr. Jordan stated that Ms. Beighley did not try to influence any committee members, showed no favoritism toward any offeror and made no "speeches" about any particular offeror.

Ms. Beighley's score sheets support Mr. Jordan's testimony that she did not appear to favor any particular vendor. She awarded Harrington and Blue Cross/Blue Shield the same total number of points in the initial round and her scoring was comparable to the other committee members in both the initial and final rounds. (Record, pp. 130-135, 209-211). In fact, if Ms. Beighley's scores are thrown out, the relative standing of the offerors remains the same.⁵

⁴From Harrington's proposal, "During the time that Harrington administered the program, all performance criteria were met. The population being served by the program was provided with professional, responsive services and an excellent relationship with the South Carolina dental community was established." (Record, p. 261).

⁵As the CPO notes, information contained in the proposals offers a sound basis for Harrington's receiving a
(Footnote Continued)

On balance, the Panel finds that there is not enough evidence to conclude as ACMG urges, that Ms. Beighley's past business relationship with Harrington and her presence on the committee rendered the procurement process unfair. While it might have been preferable for the committee to contact references for all offerors, there is no evidence that the failure to do so tainted the process so as to affect the outcome.

Issue No. 7. THE EVALUATION COMMITTEE CONSIDERED FACTORS NOT LISTED IN THE RFP.

ACMG argues that it was improper for committee member Michael Jordan to consider the following factors which he mentions in his evaluation notes: (a) size of offeror; (b) percentage of total business this contract would represent; (c) whether the offering price is too low; (d) whether the offeror has any current dental contracts; (e) what hardware and software are to be used; and (f) the amount of company assets, equity and other financial information. (Record, Ex. 22). Mr. Jordan testified that he did not consider any information not provided by the offerors in their proposals and not related to the evaluation criteria.

(Footnote Continued)

much higher score than ACMG on experience and reliability. Harrington has previously held this contract and is currently servicing dental contracts. In addition, Harrington has assets of \$32 Million and 1100 employees in 30 cities. Neither ACMG South Carolina or Ohio has a current dental contract and ACMG South Carolina has only one employee. ACMG Ohio has only 70 employees in 3 locations.

The Panel holds that all of the above information was solicited in the RFP, that it all relates to either the experience criteria (item d) or the reliability criteria (items a, b, c, e, and f) and that its use by Mr. Jordan was not improper.

Issue No. 6. THE EVALUATION WAS ARBITRARY AND CAPRICIOUS, CONTRADICTORY, AND CONTRARY TO ESTABLISHED LAW.

This issue appears to encompass all of the issues discussed above. ACMG argues that all of the above detailed conduct by DIS resulted in ACMG's not receiving a fair evaluation of its proposal.

As the Panel noted in In Re: Protest of Polaroid Corporation, Case No. 1988-12, Decisions of the South Carolina Procurement Review Panel 1982-1988, p. 527, the policies behind the Consolidated Procurement Code require that in the RFP process each proposal must receive fair and equal consideration by the State. Examining and weighing all of the evidence presented, the Panel concludes that ACMG did receive fair and equal consideration of its proposal and that the conduct complained of did not affect the outcome of this procurement. The Panel agrees with the CPO that a review of the proposals offers ample justification for the scoring and ranking arrived at by the evaluation committee. The Panel finds no evidence to suggest that the evaluation was arbitrary, capricious, contradictory, or contrary to established law.

Issue No. 8. HARRINGTON'S PROPOSAL WAS NOT RESPONSIVE.

ACMG lists some forty-two sections of the RFP to which it claims Harrington failed to respond:

Part IV.A. 13, 16, 17, 18, 19, 20, 21 and 22
Part IV.B. 3, 4 and 5
Part IV.C. 1(b), (c), (d), (e), (f), (g), (h),
(h)(1), (h)(4), (i), (j), (o), (r), (t) and (w)
Part IV. C. 2, 4, 5 and 6
Part V.A. 1 and 2
Part V.C. 3(b)
Part V.D. 1, 2, 3, and 4.
Part V.F.
Parts VI, VII, VIII and IX.

The CPO went through each section listed (Record, pp. 18-23) and found that most required no specific response or were covered by Harrington's statement at page 2 of its proposal as follows:

The proposed services are in compliance with the specified requirements and where appropriate, we have suggested alternatives or expanded upon our response.

(Record, p. 262) or by the later statement:

This section of the proposal responds to the requirements stated in section IV-C of the RFP. Harrington understands all of the requirements specified in this section of the RFP and specifically proposes to comply with them. Additional information is provided in response to the specific items when such information is required or provides additional information related to Harrington's capabilities and resources.

(Record, p. 269).

The CPO found that Harrington did in fact respond to Part V, D, 4 (Record pp. 275-297) and that Part V, C 3(b) does not even exist in the RFP and cannot, therefore, require a response.

The Panel adopts the CPO's reasoning and affirms his conclusion that Harrington was responsive to all of the essential requirements of the RFP.

Issue No. 9. HARRINGTON'S PROPOSAL SHOULD HAVE BEEN REJECTED BECAUSE ITS PRICE WAS NOT RESPONSIVE AND SUBSEQUENT MODIFICATION SHOULD NOT HAVE BEEN ALLOWED.

ACMG argues that Harrington was not responsive to the following requirement of the RFP:

PART IV. Special Requirements

A. General Conditions

. . .

18. [Contractor s]hall agree that the contract rate per employee per month shall be full payment by DIS for all services rendered by the administrator under this contract.

19. [Contractor s]hall agree that benefits shall be determined at the sole discretion of the State and that no additional charges will be made against the State for administrative services as a result of changes in the plan of benefits.

Part V. PROPOSAL SUBMISSION INFORMATION

F. COST AND EFFICIENCY

The current and preferred method of compensation is based on a specific administrative fee per month per participating employee. The offeror should submit total combined administrative fee based on this requirement. The fee per employee per month will remain constant for the entire contract period. . . .

(Record, Ex. 17, pp. 18-19, 45).

Harrington responded to these sections by proposing a monthly fee of \$.9483, to include "all services and

materials covered by the requirements outlined in the RFP and included in this proposal with the exception of cost increases arising from increases in the postal rate or increases resulting from specific federal or South Carolina state legislative actions." (Emphasis added). Harrington proposed to increase the \$.9483 price to cover postal or legislative increases when and only if they occurred. (Record, p. 308). After being asked to clarify its cost, Harrington was allowed to modify its proposal to offer a fixed price of \$.9775 per enrollee per month.

ACMG argues that the State erred in allowing Harrington to modify its cost proposal because the requirement that the price be fixed is an essential requirement of the RFP and cannot be cured.

The Panel finds that ACMG's argument is contrary to S.C. Code Ann. §11-35-1530(6) (1989 Cum. Supp.) That section allows the State to "negotiate" with any offeror whose proposal appears to be eligible for contract award.⁶ If such negotiation results in a material alteration to the RFP or potentially affects the ranking of the offerors, then the State must give all other offerors the opportunity to submit best and final proposals.

⁶The original version of this section allowed the State to contact offerors for the purpose of "clarification." S.C. Code Ann. §11-35-1530(6) (1976). The Panel believes that the subsequent amendment to allow "negotiation" indicates that offerors are allowed to modify their proposals under this section.

In this case, the State contacted Harrington in order to negotiate a price that was fixed. The resulting modification to Harrington's proposal did not alter the scope of the RFP or in any way affect the ranking of the offerors. Mr. Marshall of ACMG testified that ACMG would not have altered its price quotation even if it had been given the opportunity. The Panel holds that the State properly allowed Harrington to change its cost proposal under §11-35-1530(6).

In addition, the Panel finds that Harrington's failure to quote a fixed price is a minor technicality under Reg. 19-445.2080 because (a) Harrington proposed to fully meet the entire scope of the solicitation; (b) the increase in price amounted to \$.0292 over the original price - a very small percentage of total cost; (c) the other offerors were not prejudiced because Harrington raised (rather than lowered) its price and, unlike in a bid situation, Harrington had no knowledge of the other offerors' prices when it made the change. In sum, the Panel finds that Harrington's omission had a trivial or negligible effect on price and could be cured under Reg. 19-445.2080.

CONCLUSION

For all of the reasons stated above, the Procurement Review Panel affirms the April 30, 1990 decision of the Chief Procurement Officer upholding the award to R. E. Harrington, Inc., and dismisses the protest of ACMG, Inc.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT
REVIEW PANEL

By: 

Hugh K. Leatherman, Sr.
Chairman

Columbia, S.C.
May 18th, 1990