

tabulation indicates Pearce & Pearce is the lowest bidder with a "composite premium" of \$436.55, Heritage Insurance is the next lowest bidder with a bid of \$643.95, and Blue Cross Blue Shield is the third lowest bidder at \$644.33. The three remaining bids are over \$675.00. [Record p. 25]. Notification of Contract Award to Pearce and Pearce, Inc. (Pearce), was issued on April 4, 1996. [Record p. 24]. BCBS filed a protest of the award to Pearce on April 19, 1996. [Record p. 16-17]. Pearce requested clarification from BCBS concerning the issue stated in number four(4) of its protest letter [Record p. 19] and BCBS responded [Record p. 18]. The Chief Procurement Officer (CPO) conducted a hearing and issued a decision denying BCBS's protest. [Record p. 5-15].

CONCLUSIONS OF LAW

BCBS alleges five areas of nonresponsiveness of Pearce's bid in its protest letter. The fifth issue in the protest letter is an attempt to allow BCBS to raise more issues of nonresponsiveness at a later time, which is not permitted under the strict time limits established in Code section 11-35-4210 for filing a protest. Further, BCBS did not raise the issue in its appeal letter to the Panel. Thus, Issue number five (5) of the protest letter is not addressed by the Panel.

At the Panel's hearing, Pearce and General Services made several motions to dismiss prior to opening statements, and BCBS made counter motions to find for BCBS based on the Record. Pearce and General Services made further motions to dismiss at the conclusion of BCBS's presentation of its case. The initial motions to dismiss were granted as to protest issues two and four. The initial motions to dismiss were denied as to protest issues one and three, however the subsequent motions to dismiss these protest issues was granted. The motions to dismiss the protest issues were granted, and BCBS's counter motions were denied, for the reasons stated herein. The motions were

made in relation to the numbered issues in BCBS's appeal letter to the Panel, which is numbered slightly differently from BCBS's protest letter. To avoid any confusion the Panel provides the following information. Number one and two of the appeal letter relates to the corresponding numbers of the protest letter. Numbers three and four of the appeal letter relate to number three of the protest letter. Number five of the appeal letter relates to number four of the protest letter. The Panel refers to the numbered issues in the protest letter, as that document establishes the issues to be determined.

Issue One: Third Party Administrator

The first issue BCBS alleges is that Pearce "is not licensed, as required by Section A1 of Schedule 2, to carry out the administration of the plans as required in Part IV, Section C, p. 58-61, IFB". BCBS's appeal letter cites Part III A, 2 of the IFB, which states, in pertinent part:

By signing and submitting the Invitation for Bid, each bidder acknowledges compliance with these requirements and specifications, and agrees, affirms, or accepts that:... (d.) They are licensed or otherwise legally authorized to provide health insurance coverage or products in the state of South Carolina.
[Record p. 79]

Also cited is Part v B, 1 of the IFB, which states:

Bidders, who are not also the Underwriter for the offered policy (for example, an insurance broker), must be licensed to provide insurance services in the state of South Carolina, and provide documentation of such in their submission.
[Record p. 114]

BCBS submits an affidavit of the South Carolina Department of Insurance (DOI) that indicates "Pearce & Pearce is not a licensed third party administrator in South Carolina." [Record p. 167]. BCBS argues that the IFB requires activities

which are provided by an administrator, which is defined as "any person who collects charges or premiums from, or who adjusts or settles claims on, residents of the State." S.C. Code Ann. section 38-51-10. DOI is the administrative agency authorized to issue and regulate licensing of insurance, as well as penalize persons in violation of insurance licensing regulations and statutes. BCBS does not present any evidence that Pearce is required by DOI to be licensed as a third party administrator to comply with the terms of the IFB. BCBS has failed to meet its burden of proof on the issue of Pearce's failure to be licensed as a third party administrator. The Panel grants the motion to dismiss this issue for failure to meet the burden of proof.

Issue Two: Signature of Officer of Underwriter

The second issue BCBS alleges is that Pearce's bid is "not signed by an officer of the underwriter, as required in Section E of Schedule 1A", dealing with underwriter qualifications.¹ [Record p. 118-119]. Section E of the schedule relates back to the specifications in Part v, B, 3, that states, in pertinent part:

An officer of the underwriting company must certify that the underwriting company 1) agrees to provide the insurance products in accordance with the IFB specifications, and 2) that the information submitted in Schedule 1.A and 1.B is true and correct, and sign the underwriter affirmation on Schedule 1.A and 1.B.

[Record p. 114]

BCBS argues that Catherine Pulaski signed Schedule 1.A as "President, Managed Care Concepts of Delaware, Inc." [Record p. 142], not as agent for

¹ BCBS's appeal letter raises the issue of Ms. Pulaski being a non-resident agent which is not authorized to sign as an agent for Lamar in South Carolina, but BCBS's protest letter does not raise this issue. Pearce moved to have these arguments stricken from the record as a new issue raised in the appeal letter that is not in the protest letter. The Panel granted the motion to strike such references, as only issues raised in the protest letter can be considered by the Panel. The Panel further notes that if Lamar or Ms. Pulaski is in violation of insurance regulations because Ms. Pulaski is a non-resident agent, the South Carolina Department of Insurance is the administrative agency with jurisdiction to address any violation.

Lamar Life Insurance Company (Lamar), Pearce's underwriter and thus, has not legally bound herself individually or Lamar to the State.

Pearce counters that Ms. Pulaski is an agent of Lamar, as evidenced by her agent license issued by DOI. [Record p. 144]. Pearce further argues that by Ms. Pulaski signing Schedule 1.A, which lists Lamar as the underwriter, Lamar has complied with the signature requirement through the signature of its agent, Ms. Pulaski. Pearce further contends that the letter from the Senior Vice President of Life Insurer's Group, which includes Lamar, indicates that Lamar agrees to provide the insurance and further certifies the accuracy of Schedule 1A, which complies with the specification. [Record p. 143].

The Panel agrees with Pearce's arguments. Clearly Ms. Pulaski is a licensed agent of Lamar and is signing Schedule 1.A concerning the underwriter with the full knowledge and permission of Lamar. Where an agent-principal relationship exists, an agent may legally bind a principal. Lamar specifically references Schedule 1A in its letter and certifies that the information is true and correct and binds itself to provide insurance. [Record p. 143]. Ms. Pulaski's title would raise questions only if the information concerning her status as agent to Lamar, and Lamar's role as principal, were not provided with the bid. While a person may sign documents in different capacities that bind different entities, as argued by BCBS, Lamar's letter to Ms. Pulaski and Schedule 1.A, clearly naming Lamar as the underwriter, indicate that Ms. Pulaski is acting as the agent of Lamar. The fact that Ms. Pulaski lists her title as President of Managed Care Concepts of Delaware, Inc., on the schedule does not change the agent-principal relationship that binds Lamar to perform. The Panel finds that Pearce's bid, on its face, complies with the requirements of Section E of Schedule 1A.

BCBS also argues that the letter from Lamar to Ms. Pulaski is a facsimile and does not contain an original signature. The letter from Lamar is part of the

bid submitted by Pearce, which is using Lamar as its underwriter for the bid. Failure of a bidder to provide an affidavit of affiliates is an example of a minor informality or irregularity. Also, even if a bidder does not sign a bid, it can be waived as a minor informality in circumstances where other signed materials related to the bid indicate the bidders intention to be bound. See, S. C. Code Ann. section 11-35- 1520(13). Similarly, in this case, the letter to Ms. Pulaski from Lamar, stating Lamar's intentions to be bound by the IFB, contains a signature, but it does not have an original signature. However, Ms. Pulaski, a licensed agent of Lamar, has signed Schedule 1.A, indicating Lamar's intention to act as underwriter and be bound by the terms of the IFB. The Panel finds that Lamar's letter to Ms. Pulaski, sent by facsimile, that does not contain an original signature, is a minor informality under S. C. Code Ann. section 11-35-1520(13). The Panel grants General Services' motion to dismiss, and denies BCBS's counter motion to dismiss based on the documents.

Issue Three: Underwriter Certification Limited

The third issue BCBS alleges is that the "underwriter did not certify to the State that it would provide the insurance products required by the terms of the IFB for the duration of the prescribed contract period", which makes Pearce nonresponsive. [Record p. 16]. Pearce argues that the letter from Lamar signed by Howard Robinson, Senior Vice President, Life Insurer's Group, contains the exact language required by the specification. BCBS argues that the letter is addressed to Ms. Pulaski rather than the State, and since Ms. Pulaski signed Schedule 1.A as President of Managed Care Concepts of Delaware, Inc., Lamar has not certified to the State, only to Ms. Pulaski, that it will provide insurance according to the IFB and the information submitted in the schedules of the IFB are accurate. The discussion of issue two is incorporated here. Ms. Pulaski is a licensed agent of Lamar. Lamar's letter to Ms. Pulaski shows that Ms. Pulaski is

working with Lamar in relation to this IFB. Ms. Pulaski has the authority to act as Lamar's agent in relation to this IFB, and Ms. Pulaski signs Schedule 1.A as Lamar's agent. Lamar is bound to the State by this principal-agent relationship. Lamar's letter to Ms. Pulaski clearly indicates that Lamar intends to perform and provides the required certification with the exact language stated in the IFB at Part v, B, 3, as cited above. The Panel finds that Pearce's bid, on its face, provides the required certification to the State, and grants General Services' motion to dismiss this issue, and denies BCBS's counter motion to dismiss.

BCBS further argues that the IFB requires a two year commitment and Lamar has made only a one year commitment, making Pearce's bid nonresponsive. The reference line of Lamar's letter states "1996/97 USC/Clemson School Year". The letter then states that "Lamar Life Insurance Company agrees to provide the insurance products in accordance with the IFB specifications for the above captioned risk". BCBS contends that the reference line of Lamar's letter indicates only one year of performance and Lamar's letter specifically references that one year period in its statement that Lamar will provide insurance products. Pearce contends that the reference line is simply a shorthand reference to the IFB under discussion by Ms. Pulaski and Lamar. The reference line of a business letter usually indicates the subject of the letter, and any references to it in the body of the letter are to reinforce that the referenced subject is being discussed. Although the reference to the 1996/97 school year is troublesome in that it does not accurately reference the term of the contract under the IFB, it does not limit Lamar's commitment to the full term as provided in the IFB. Lamar's statement "in accordance with the IFB specifications for the above captioned risk" indicates it's compliance with the IFB. Also, Ms. Pulaski, Lamar's agent, commits Lamar to provide the products solicited by the IFB, again committing Lamar to compliance with the IFB. The IFB states that "[t]he

initial contract period for both the A&I Plan and the Voluntary Plans will be for two years (August 15, 1996 through August 14, 1998)." [Record p. 64]. The Panel finds that Lamar has bound itself to provide insurance products for the two year term of the IFB, and is not nonresponsive for limiting the period of its performance. The Panel further finds that BCBS failed to carry its burden of proof on this issue of nonresponsiveness, and the Panel grants General Services' motion to dismiss and denies BCBS's counter motion to dismiss.

Issue Four: Compliance With Age Guidelines of Federal Laws

The fourth issue BCBS raises is that the rates quoted by Pearce "in Schedule 3A do not comply with the age rating guidelines of the Equal Employment Opportunity Commission, or with certain regulatory sources cited in the IFB" at Part III A 2 C, which makes the bid nonresponsive. [Record p. 17 & 18]. The IFB in Part III A 2 C requires bidders to affirm that:

[a]ll insurance products and associated plans and policies comply with the requirements of Title IX of the Education Amendments Act of 1972; Section 504 of the Rehabilitation Act of 1973; the Age Discrimination Act of 1975; the Civil Rights Restoration Act of 1988; the Americans with Disability Act of 1990; and other applicable federal laws, rules, or regulations.

[Record p. 79]

Pearce made a motion that this issue be dismissed as vague. BCBS's protest letter as well as its letter in response to a request to clarify this issue, state a broad allegation that Pearce's bid is not in compliance with age rating guidelines of the Equal Employment Opportunity Commission and other laws cited in part III A 2 C of the IFB. This part of the IFB cites five federal Acts.

The Panel, in Case No. 1987-3, In re: Protest by J&T Technology, held that protestants must "state their grievance with enough specificity to put all parties on notice of the issues to be decided." Further, in Case No. 1993-16, In

re: Protest of NBS Imaging Systems, Inc., the Panel states that the larger the solicitation, "the more specific a protestant will need to be to state its grievance and give notice of the issues of protest." BCBS does not specify how Pearce's bid is not in compliance, nor does it specify what parts of the law to which Pearce's bid is not in compliance. The Panel grants Pearce's motion to dismiss as vague the issue of Pearce's bid violating age rating guidelines in federal law.

For the foregoing reasons, the Panel denies and dismisses the protest of Blue Cross and Blue Shield of South Carolina.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT
REVIEW PANEL

BY: 
Gus J. Roberts, Chairman

Columbia, SC

July 5, 1996.