

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

BEFORE THE CHIEF PROCUREMENT OFFICER

DECISION

In the Matter of Protest of:)

CASE NO. 2006-166

Senior Solutions)

Materials Management Office)

POSTING DATE:

RFP No. 06-S6993)

DECEMBER 27, 2006

Non-Emergency Transportation Services)

For Medicaid Beneficiaries for the)

Department of Health & Human Services)

This matter is before the Chief Procurement Officer (CPO) pursuant to a letter of protest from Senior Solutions. With this request for proposals (RFP), the Materials Management Office (MMO) attempts to procure non-emergency transportation services for Medicaid beneficiaries on behalf of the State Department of Health and Human Services (DHHS). Prospective offerors were asked to submit proposals to manage (actually to broker) transportation services in six regions of the state. In the letter, Senior Solutions protested MMO's intent to award Region I to Medical Transportation Management (MTM) alleging that MTM did not submit the number of copies of its proposal as required by the RFP and that MTM did not include the cost for the payment bond as required in Appendix D1.

After attempts to resolve the matter failed, the CPO conducted a hearing December 14, 2006. Appearing before the CPO were Senior Solutions, represented by M. Elizabeth Crum, Esq.; MTM, represented by Wade E. Mullins, Esq.; DHHS, represented by Deirdre Singleton and Byron Roberts, Esquires; and the State Procurement Office, represented by Keith McCook, Esq.

NATURE OF PROTEST

The letter of protest is attached and incorporated herein by reference.

FINDINGS OF FACT

The following dates are relevant to the protest:

1. On September 21, 2005, MMO issued the RFP. (Ex. 1)
2. On November 7, 2005, MMO issued Amendment No. 1. (Ex. 2)
3. On November 22, 2005, MMO issued Amendment No. 2. (Ex. 3)
4. On December 7, 2005, MMO issued Amendment No. 3. (Ex. 4)
5. On December 16, 2005, MMO issued Amendment No. 4. (Ex. 5)
6. On January 23, 2006, MMO opened the proposals received. For Region I, MMO received seven proposals. (See Ex. 6 for the bid tabulation.)
7. On November 14, 2006, MMO posted its intent to award. (Ex. 11)

WITHDRAWAL OF PROTEST ISSUE

Senior Solutions withdrew its protest Issue No. 1 regarding the number of copies of its proposal that MTM submitted.

CONCLUSIONS OF LAW

The remaining protest issue (Protest Issue No. 2) alleges, in part:

As a for profit corporation, MTM was required to submit a Payment Bond as part of its Cost Proposal.

MTM did not include the costs for the "Payment Bond" ("Bond") as required in Appendices D1.

The original RFP required all offerors to provide a performance bond "equivalent to 10% of the fixed price of the contract or \$50,000.00 whichever is greater." (Ex. 1, p. 41, Item 25.0 Performance Bond) In Amendment No. 4, MMO replaced the performance bond requirement deleting it entirely and replacing it with a requirement that offerors provide a payment bond. It reads, in part:

Section VII. Terms and Conditions, B. Special, 25.0 Performance Bond (RFP pg. 41 and as previously modified in Amendment #3) is deleted in its entirety and replaced by the following:

- 25.0 Payment Bond
 - The successful Offeror shall furnish within ten (10) calendar days after written notice of award a payment bond. Successful Offeror shall provide and pay the cost of the payment bond. **The cost of the payment bond must not be included as part of the Offeror's total cost, but must be included as a separate part of the Offeror's Cost Proposal and will not be included in the evaluation of the Offeror's Cost Proposal.**
 - The payment bond must be equivalent to 1/12 of the annual contract value. [Ex. 5, p. 2] [Emphasis per the original]

Senior Solutions alleged that “MTM did not include any cost (\$0) regarding the Bond in its Cost Proposal yet MTM acknowledged receiving Amendment 4. MTM’s failure to include the required cost for the Payment Bond for the protection of the transportation system users renders it non-responsive to the material requirement of the RFP.”

In the RFP, MMO required each offeror to complete several schedules, including a Price Proposal, the price actually offered the state to provide the transportation management services. [Ex. 1, p. 59, Appendix D, Price Proposal, Net Region I] Offeror’s were also required to complete a spreadsheet entitled Cost Details for Price Proposal, which required the offerors to itemize their cost (not price per se) for providing the transportation management services for each contract year for numerous cost categories organized as Administrative Costs, Transportation Costs, and Other Costs. [Ex. 1, p. 66] Under the heading of Administrative Costs, MMO included a line for each offeror to enter its cost for a “Payment Bond & Performance Bond.”

An inspection of MTM’s cost proposal reveals that MTM completed its Price Proposal for Region 1, offering the state a total price over the five-year contract period of \$32,833,656.07. [Ex. 7] MTM also completed the Cost Details for Price Proposal spreadsheet that demonstrated how it planned to spend the \$32,833,656.07 in the performance of the contract for Region 1. [Ex. 7] Under the heading Payment Bond & Performance Bond, MTM entered nothing for year 1, and zero (\$0.00) for each of years 2 – 5.

Senior Solutions alleged that MTM’s omission of its cost for the payment bond makes MTM nonresponsive to the requirement of the RFP that “The cost of the payment bond . . . must be included as a

separate part of the Offeror's Cost Proposal." [Ex. 5, p. 2] Senior Solutions also alleged in the protest letter that MTM's failure to include the cost of the bond is not a minor irregularity and that MMO's waiver of this omission as a minor informality or irregularity under South Carolina Code 11-35-1520(13) was contrary to law and the Code. Senior Solutions alleged in the hearing that the omission indicates that MTM did not intend to provide a payment bond at all.

It is apparent from the procurement file that MMO noted MTM's omission of any cost for the payment bond in its cost details. Janet Watkins, then MMO Supervisor of Procurement Services, noted in a Memo for Record dated March 24, 2006:

- MTM, Inc.: Stated \$0 costs for payment Bond and did not provide a separate cost and is not a public or private non-profit entity.¹

This cost was not part of the evaluation and can be calculated as it is to be equivalent to 1/12 of the annual contract value which can be determined from the offeror's total cost. Therefore, this was considered to be minor informality [under 11-35-1520(13)] for those that did not include it as a separate cost if it was applicable and has been waived. [Ex. 10]

Senior Solutions argues that MMO's waiver was in violation of law.

DETERMINATION

The payment bond requirement of the RFP, as stated in Amendment No. 4, is rather odd. The literal requirements read that:

1. The Successful Offeror (as opposed to every offeror) shall furnish within ten (10) calendar days after written notice of award a payment bond.
2. The Successful Offeror (as opposed to every offeror) shall provide and pay the cost of the payment bond.
3. The cost of the payment bond must not be included as part of the Offeror's total cost (meaning, in this context, the price the offeror would charge the State for providing the transportation management

¹ The RFP only required payment bonds from private, for profit offerors. Governmental entities and private, non-profit offerors were not required to submit a payment bond.

services) . . . and will not be included in the evaluation of the Offeror's Cost Proposal (again, meaning, in this context, the price the offeror would charge the State). (Emphasis added)

4. But, (the cost of the payment bond) was to be shown as a separate part of the Offeror's Cost Proposal (In spite of the fact that the offerors were barred from billing the state for the cost of the payment bond and in spite of the fact the state indicated that the cost of the payment bond would not be considered in the evaluation of the cost proposals).

The RFP misused the term "cost", particularly in Amendment No. 4. The RFP required offerors to submit a "Cost Proposal", a term sometimes misused by the State to mean the offeror's "bid price", not the offeror's "cost."² Amendment No. 4 corrected the use of the term "cost proposal", in part, by requiring each offeror to complete Appendix D – Price Proposal (the actual "price" being offered to the state). However, the Amendment also required each offeror to complete Appendix D1 – Cost Details for Price Proposal - and to provide extensive amounts of invasive information about its "cost" (more correctly, budget) for performing the contract.³

Specific to the payment bond requirement, the Amendment turns even more unusual. It requires the successful offeror to provide a payment bond within 10 days after notification of award, but forbids the successful offeror from charging the state for the cost of acquiring the bond, effectively prohibiting the successful offeror from charging the state for this true cost of providing the services. Then, the Amendment required all offerors to itemize the cost it anticipated paying for the payment bond, in Appendix D1, but stated that the cost of the payment bond would not be included in the evaluation of the offerors' cost proposals (prices).⁴

² What is important to the State's decision in this and every other procurement is what price each offeror will charge the state, not what it costs the offeror to do it.

³ Neither MMO nor DHHS provided the CPO with much in the form of explanation of Appendix D-1. A request for each offeror's "costs" or budget for performing a contract is quite unusual.

Although there was no testimony on this point, the CPO believes the payment bond was not included in the evaluation of the offeror's cost proposals because the RFP did not require all offerors to provide the payment bond. Only for-profit offerors were required to provide the payment bond; not governmental agencies or non-profits organizations.

The payment bond is required of the successful offeror only, not all offerors. [Ex. 5, p. 2] Offerors were not required to submit the payment bond with their proposals. The cost of the bond cannot be charged to the state. It cannot be included as part of the Offerors' total price. [Ex. 5, p.2] According to Amendment No. 4, the cost of the bond "will not be included in the evaluation of the Offeror's Cost Proposal." [Ex. 5, p. 2] Therefore, the cost of the payment bond is irrelevant to the price the successful offeror can charge to the State. Further, the cost of the bond is irrelevant to the determination of award.

MMO declared MTM's failure to list the cost of the payment bond on Appendix D1, its cost details, a minor informality or irregularity. Regarding such a determination, the Code reads:

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 or negligible 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. Such communication or determination shall be in writing.
[11-35-1520(13)]

MMO's action was appropriate. MTM's omission was a matter of form only. Since the cost of the payment bond cannot be included in any offeror's price, it has no affect on the total bid price. The requirement was unclear. Aliana Macia, President and CEO of MTM, stated that MTM intended to provide the payment bond, but she understood the requirement to mean that the state did not want offerors to include the cost of the payment bond in their cost proposals so she did not.

Failure by MTM to provide the payment bond to the state would be relevant to the quality of services being provided, but such a determination would be premature at this time. MMO has not waived the requirement that MTM provide the bond at no cost to the state within ten days after receipt of the award. That prospect has not been proven. Senior Solutions argued correctly that the payment bond was required to ensure that the winning offeror pays the local providers who will actually transport eligible beneficiaries.

Until a successful offeror is determined, announced, and ten days have passed; however, this argument is premature.

Senior Solutions certainly has not proven by the preponderance of the evidence that MTM does not intend to provide the payment bond. Senior Solutions has only proven that MTM did not list its cost of providing the bond in a supporting schedule.

The provision of a payment bond is a performance requirement, not a bidding requirement. It is not even required of offerors in the submission of their proposals. As a performance requirement, yet to be required, it cannot be used in determining MTM nonresponsive without clear evidence that MTM took exception with the requirement. No such exception is apparent in MTM's proposal. MTM affirmed its intent to provide the payment bond: (1) by signing the proposal and the amendments thus agreeing to be bound by them [Ex. 7], (2) by agreeing to the general instructions to offerors [Ex. 1, p. 5], and (3) by providing a certification in its proposal, which reads, in part, "we will provide the services under this RFP for the duration of the contract at this stated price." [Ex. 7, p. 2]

If MTM is declared the successful offeror, the State will know within ten days if MTM provides the payment bond required. If MTM fails to provide the payment bond as require by the RFP, the State must cancel the contract for cause and move on to the next highest ranked offeror.

The protest is denied.

Voight Shealy

R. Voight Shealy
Chief Procurement Officer
for Supplies and Services

December 27, 2006

Date

Columbia, S.C.

STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW

The South Carolina Procurement Code, in Section 11-35-4210, subsection 6, states:

(6) Finality of Decision. A decision under subsection (4) of this section shall be final and conclusive, unless fraudulent, or unless any person adversely affected by the decision requests a further administrative review by the Procurement Review Panel under Section 11-35-4410(1) within ten days of posting of the decision in accordance with Section 11-35-4210(5). The request for review shall be directed to the appropriate chief procurement officer, who shall forward the request to the panel, or to the Procurement Review Panel and shall be in writing, setting forth the reasons why the person disagrees with the decision of the appropriate chief procurement officer. The person may also request a hearing before the Procurement Review Panel.

Additional information regarding the protest process is available on the internet at the following web site:
www.procurementlaw.sc.gov

FILING FEE: Pursuant to Proviso 66.1 of the 2005 General Appropriations Act, "[r]equests for administrative review before the South Carolina Procurement Review Panel shall be accompanied by a filing fee of two hundred and fifty dollars (\$250.00), payable to the SC Procurement Review Panel. The panel is authorized to charge the party requesting an administrative review under the South Carolina Code Sections 11-35-4210(6), 11-35-4220(5), 11-35-4230(6) and/or 11-35-4410(4). . . . Withdrawal of an appeal will result in the filing fee being forfeited to the panel. If a party desiring to file an appeal is unable to pay the filing fee because of hardship, the party shall submit a notarized affidavit to such effect. If after reviewing the affidavit the panel determines that such hardship exists, the filing fee shall be waived." 2005 S.C. Act No. 115, Part IB, § 66.1. PLEASE MAKE YOUR CHECK PAYABLE TO THE "SC PROCUREMENT REVIEW PANEL."

LEGAL REPRESENTATION: In order to prosecute an appeal before the Panel, a business must retain a lawyer. Failure to obtain counsel will result in dismissal of your appeal. *Protest of Lighting Services*, Case No. 2002-10 (Proc. Rev. Panel Nov. 6, 2002) and *Protest of The Kardon Corporation*, Case No. 2002-13 (Proc. Rev. Panel Jan. 31, 2003). Copies of the Panel's decisions are available at www.state.sc.us/mmo/legal/paneldec.htm