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CHAIRMAN, HOUSE WAYS AND MEANS

Written Determination

Matter of: Cancellation of Award to Southeastrans, Inc.

Case No.: 2016-132A

Posting Date: August 31, 2016

Contracting Entity: SC Department of Health and Human Services

Solicitation No.: 5400008382

Description: Transportation Coordinator to Manage the Daily Functions of the South Carolina Non-Emergency Medical Transportation Program

This matter is before the Chief Procurement Officer for Information Technology¹ (CPO) for a second time. The South Carolina Department of Health and Human Services (HHS) requests the CPO to cancel an award to Southeastrans, Inc. (Southeast) under the provisions of §11-35-1520(7) of the South Carolina Consolidated Procurement Code (Code) and Regulation 19-445.2085(C). The Department's request is attached as Exhibit 1.

BASIS FOR THE REQUEST

HHS issued this solicitation under a delegation from the CPO to acquire a transportation coordinator to manage the daily functions of the South Carolina Non-Emergency Medical Transportation Program. It posted an Intent to Award to Southeast on February 26, 2016. The award statement indicates the total potential value of the contract is \$94,660,696.70. LogistiCare,

¹. The Materials Management Officer delegated the administrative review of this request to the Chief Procurement Officer for Information Technology.

Inc. protested the intended award, alleging among other things that Southeast proposed to use its own Quick Response Vehicles in violation of the Request for Proposals and federal regulation 42 CFR 440.170(a)(4)(ii)(B). The CPO denied the protest. On the specific issue of Southeast's proposed use of its own vehicles, HHS argued that an exception in the regulation allowed the transportation coordinator to also provide transportation under certain emergency conditions. (Ex. 2) The CPO relied on this exception in denying this protest ground. Logisticare appealed the decision to the Procurement Review Panel.

Subsequently, HHS sought additional clarification from the Centers for Medicare and Medicaid Services (CMS). CMS responded as follows:

... These exceptions must be approved by CMS and specified in the state plan in order for a state to have the authority for a broker to also be a provider of transportation. Since South Carolina has not submitted a request with documentation to show that such an exception is needed and CMS has not approved such an exception, the state plan does not currently have this authority to permit the broker to also be a provider of transportation.

It should be noted that these exceptions were intended to provide relief in circumstances where the availability of qualified transportation providers is unusually scarce and the area is therefore underserved by transportation providers. Brokers who bid on an NEMT contract are expected to be able to contract with an adequate network of transportation providers. I [*sic*] should be noted that these exceptions were not intended to provide back up for the broker when a qualified provider does not complete the assigned travel request.

(Ex. 3)

As a result, HHS has requested cancellation of the award to Southeast prior to performance, alleging that "the award is in error." The request cites Regulation 19-445.2085(C)(7), which states:

Cancellation of Award Prior To Performance.

After an award or notification of intent to award, whichever is earlier, has been issued but before performance has begun, the award or contract may be canceled and either re-awarded or a new solicitation issued or the existing solicitation canceled, if the Chief Procurement Officer determines in writing that:

(7) Administrative error of the purchasing agency discovered prior to performance....

DISCUSSION

Consistent with the decision in *Appeal by Analytical Automation Specialists, Inc.*, Panel Case No. 1999-1, the CPO advised the Panel of HHS's request. The Panel's response is attached as Exhibit 4. Although the using agency has specifically requested cancellation, the determination whether to grant the request is not one the CPO takes lightly. As the Panel noted in *Analytical Automation Specialists*:

The Panel takes this opportunity to caution agencies to carefully consider before requesting cancellation and resolicitation, especially when a protest has been filed, as the request may appear to be an attempt to circumvent the procurement process. The Panel encourages the CPOs to continue to cautiously and carefully exercise the authority to cancel and resolicit procurements, especially when a protest has been filed.

HHS now considers the proposal by Southeast to be non-responsive, leaving the CPO little choice but to grant the request, and to order resolicitation of the contract. *See Appeal by Blue Cross Blue Shield of South Carolina*, Panel Case No. 1996-3.

DETERMINATION

In order to cancel the award, the CPO determines that the automatic stay shall be lifted pursuant to S.C. Code Ann. § 11-35-4210(7).² Pursuant to Regulation 19-445-2085(C), the award to Southeastrans, Inc., and Solicitation No. 5400008382, are cancelled.



Michael B. Spicer
Chief Procurement Officer for Information Technology

² The CPO infers that the head of the using agency concurs with this action, since the agency has requested cancellation.

Exhibit 1

Dear Mr. Spicer,

The South Carolina Department of Health and Human Services (SCDHHS) hereby requests cancellation of award prior to performance for proposed Contract No. 4400012490 resulting from Solicitation No. 5400008382–Transportation Coordinator to Manage the Daily Functions of the South Carolina Non-Emergency Medical Transportation Program. The total potential value of the proposed contract award is \$94,660,696.70.

After award but prior to performance, the Centers for Medicare and Medicaid Services (CMS), the federal agency that administers the Medicaid program and approves the South Carolina Medicaid State Plan (State Plan), informed SCDHHS that the current State Plan does not include the authority to permit a broker to also be a provider of transportation. A copy of the correspondence from CMS dated August 3, 2016, is attached. Since the intended awardee, Southeastrans, proposed that it also serve as a provider of transportation when conditions warranted, the award is in error.

SCDHHS therefore requests cancellation of the award prior to performance in accordance with Regulation 19-445.2085(C), (7), that reads,

C. Cancellation Of Award Prior To Performance.

After an award or notification of intent to award, whichever is earlier, has been issued but before performance has begun, the award or contract may be canceled and either re-awarded or a new solicitation issued or the existing solicitation canceled, if the Chief Procurement Officer determines in writing that:

(7) Administrative error of the purchasing agency discovered prior to performance

Since the intended award is currently under appeal and scheduled to be heard by the Procurement Review Panel on August 31, 2016, time is of the essence.

Thank you for your consideration of this request.

Sincerely,

John Stevens
/Administrative Manager II/
John.Stevens@scdhhs.gov <mailto:John.Stevens@scdhhs.gov>
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If you have received this in error, please notify us immediately and destroy the related message.

Exhibit 2



Nikki R. Haley GOVERNOR
Christian L. Soura DIRECTOR
P.O. Box 8206 > Columbia, SC 29202
www.scdhhs.gov

March 25, 2016

Via email mspicer@mmo.sc.gov

Mr. Michael B. Spicer
Chief Procurement Officer
Materials Management Office
1201 Main Street, Suite 600
Columbia, South Carolina 29201

Dear Mr. Spicer:

This is the Department of Health and Human Services' ("Department's") response to your request of March 18, 2015. LogistiCare Solutions, LLC ("LogistiCare") filed a protest to the award of Solicitation 5400008382 for Transportation Coordinator to Manage the Daily Functions of the South Carolina Non-Emergency Medical Transportation Program by the Department. In the protest, LogistiCare alleged the selected offeror, Southeastrans, Inc. ("Southeastrans") failed to provide a contingency plan as its only proposed solution violates the RFP and governing federal law, thereby making Southeastrans non-responsive. The Department disagrees.

LogistiCare's allegation that Southeastrans' proposal for the contingency plan violated the solicitation misrepresents the RFP. The scenario presented in the solicitation asks for the offerors to describe their contingency plans for how they will handle unexpected peak transportation demands and back-up plans when notified that a vehicle is excessively late or unavailable. These scenarios are unusual situations outside of the development of the transportation provider network and very important considerations to ensure that the most vulnerable citizens of South Carolina are able to reach their medical appointments. Additionally, Section 3.3.6 of the RFP contemplates the Transportation Coordinator operating its own vehicles and specifically permits it.

3.3.6 Control The Use of Transportation Coordinator Operated Vehicles

Only operate vehicles to provide NEMT services in limited circumstances, as provided in 42 CFR 440.170(a)(4)(ii)(B). If the Transportation Coordinator meets any of these limited circumstances, prior to use by the Transportation Coordinator, the vehicles must be inspected and the drivers must be credentialed using the same requirements applied to the contracted transportation providers.

In its protest, LogistiCare cites responses to several questions which were asked as a part of the procurement process. The response to question 41 mirrors the language provided in the Code of

Mr. Michael B. Spicer
March 25, 2016
Page 2

Federal Regulations (“CFR”) at 42 CFR 440.170(a)(4)(ii)(B). The responses to question 33, specifically subsections a – d, were answered by the Department based on the conditions which were existing at the time of the responses and did not limit or speak to any potential future environment. Additionally, the response to question 33, subsection e, briefly and broadly restated contractual requirements, rather than proposal requirements. It confirms that as a part of the contract, the Transportation Coordinator will have a transportation provider network for adequate access for Members. If during the term of the contract, any area is determined to have inadequate access, a recruitment plan must be developed and implemented. These responses do not require “approval on a case by case basis” as LogistiCare alleges. The language in the responses cited did not alter the language of the RFP.

In fact, the language mirroring 42 CFR 440.170(a)(4)(ii)(B) is broad related to a contingency plan, specifically the third exception which allows the Transportation Coordinator to operate its own vehicles if the availability of qualified participating transportation providers is insufficient to meet the need for the demand. It is clear to the Department that the scenarios for which the contingency plan is requested squarely fit into the third exception, allowing the Transportation Coordinator to provide services itself if the number of participating qualified providers “is insufficient to meet the need for transportation.”

As for the response to question 33, the response reiterates that a contingency plan is necessary to address unexpected changes. Neither the Department nor federal law prohibits the Transportation Coordinator from operating its own vehicles as a part of its contingency plan for unexpected peak demands or back-up situations.

As discussed above, the response to question 41 and the RFP language, itself, reflect federal law, as presented in the CFR. Federal law allows Southeastrans the latitude to provide Quick Response Vehicles for unexpected peak transportation demands and as a back-up when notified that a vehicle is excessively late or otherwise unavailable because such times reflect periods where participating qualified providers is insufficient to meet the transportation need.

Additionally, LogistiCare misrepresents Southeastrans’ proposal, including the description of its contingency plan. As a part of the contingency plan, Southeastrans does propose transportation providers take responsibility for the trips they are assigned by assisting with back-up service when that transportation provider fails to perform. The Department expects the Transportation Coordinator to hold its transportation provider network accountable, so having Southeastrans look to the original transportation provider to whom the trip was originally assigned for resolution of a failure scenario is a viable contingency plan method. Southeastrans also proposes using its *InSight* Mobile Application, which allows dispatchers to identify the vehicles in the area to determine whether another transportation provider can meet the unexpected peak demand or provide back-up service for a late or unavailable vehicle. Both of these methods are also a part of Southeastrans’ contingency plan proposal, in addition to the possibility of using their Quick Response Vehicles, which are the vehicles owned and operated by Southeastrans.

Mr. Michael B. Spicer
March 25, 2016
Page 3

LogistiCare's contention that Southeastrans is able to provide its "own vehicles in other places because of the way Medicaid programs are set up in those other states" fails because all Medicaid programs are required to follow the federal law, which includes the CFR requirements related to the circumstances under which transportation brokers (called Transportation Coordinator in this solicitation) may use their own vehicles to provide service. Southeastrans' model in other states, or as presented for South Carolina, is not contrary to federal law, nor the solicitation. LogistiCare's protest takes issue with the validity of Southeastrans' contingency plan, but whether the contingency plan is valuable to the State is a scoring issue, not a responsiveness issue.

For the reasons presented above, the Department believes Southeastrans' proposal to be responsive and not contrary to federal law. The Department respectfully requests that the protest of LogistiCare be dismissed and that the award to Southeastrans be re-instated.

Sincerely,



Vicki Johnson
Deputy General Counsel

VJ/b

cc: Keith McCook - via email
Dixon Robertson - via email
Wade Mullins - via email
Butch Bowers - via email
Missy Copeland - via email
John Schmidt - via email

Exhibit 3

Deirdra Singleton

From: Drake, Maria (CMS/CMCHO) <Maria.Drake@cms.hhs.gov>
Sent: Wednesday, August 03, 2016 4:19 PM
To: Deirdra Singleton
Cc: Sheila Chavis
Subject: SC Broker Authority

Importance: High

Hello,

42 CFR 440.170(a)(4)(A)(ii) prohibits the non-governmental broker from also being a provider of transportation unless certain exceptions exist. The prohibitions described at clause (A) of this paragraph do not apply if there is documentation to support that: (1) Transportation is provided in a rural area, as defined at § 412.62(f) (which defines a rural area as being outside of a metropolitan statistical area) and there is no other available Medicaid participating provider or other provider determined by the State to be qualified except the non-governmental broker; (2) Transportation is so specialized that there is no other available Medicaid participating provider or other provider determined by the State to be qualified except the non-governmental broker; or (3) Except for the non-governmental broker, the availability of other Medicaid participating providers or other providers determined by the State to be qualified is insufficient to meet the need for transportation. These exceptions must be approved by CMS and specified in the state plan in order for a state to have the authority for a broker to also be a provider of transportation. Since South Carolina has not submitted a request with documentation to show that such an exception is needed and CMS has not approved such an exception, the state plan does not currently have this authority to permit the broker to also be a provider of transportation.

It should be noted that these exceptions were intended to provide relief in circumstances where the availability of qualified transportation providers is unusually scarce and the area is therefore underserved by transportation providers. Brokers who bid on an NEMT contract are expected to be able to contract with an adequate network of transportation providers. It should be noted that these exceptions were not intended to provide back up for the broker when a qualified provider does not complete the assigned travel request.

Fran

--Maria--

Maria Drake, MSW | Health Insurance Specialist | Centers for Medicare & Medicaid Services (CMS) | Division of Medicaid and Children's Health Operations | Atlanta Regional Office | 61 Forsyth St. S.W., Suite 4T20 | Atlanta, GA 30303-8909 | 404-562-3697 Phone | 443 380-5814 Secure Fax | Maria.Drake@cms.hhs.gov

Any opinion expressed in this email communication does not represent the opinion of the agency and will not bind or obligate CMS. CMS has relied on the facts and information presented and if any material facts have not been disclosed, any opinion/advice is without force and effect. Any advice is limited to the facts presented and is part of informal discussions of the issues raised.

Exhibit 4

South Carolina Procurement Review Panel

HON. MARK HARTLEY
HON. WILLE D. FRANKS
VICE CHAIRMAN
HON. GLENNITH C. JOHNSON

PAMELA GILLINS
BUSINESS MANAGER

SOLOMON BLATT BUILDING
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HON. C. BRIAN MCLANE, SR.
CHAIRMAN

HON. MARGARET A. COLLINS
HON. MELISSA E. DAWSON
HON. BARBARA DERRICK

CHRISTIE M. EMANUEL
ATTORNEY

August 23, 2016

Via E-mail and U.S. Mail

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Bruner Powell Wall & Mullins, LLC
P.O. Box 61110
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W. Dixon Robertson, III, Esquire
Counsel for SFAA
P.O. Box 11608
Columbia, SC 29211

Re: Appeal by LogistiCare, Inc.
Panel Case No. 2016-7

Dear Counsel:

The Panel Chairman has received and considered the CPO's request for guidance on how to proceed with the South Carolina Department of Health and Human Services' request that he cancel the award which is the subject of an appeal to the Panel and scheduled for a hearing on Wednesday, August 31, 2016. In considering the CPO's request, the Chairman has considered the applicable Procurement Code provisions, the Panel's precedent, and the written submissions of counsel for Southeastrans, Inc., and LogistiCare, Inc.

The Chairman finds that the circumstances here, where the Department has requested the cancellation and the CPO has asked for the Panel's guidance, are almost identical to those present

in the case of *Protest of Analytical Automation Specialists, Inc.*, Panel Case No. 1991-1. In addition, the Chairman recognizes that any decision the CPO makes regarding the Department's request will directly impact the issues on appeal before the Panel. For these reasons, and in the interest of judicial economy, the Chairman concludes that the CPO should proceed with his review of the Department's request and issue a written determination at his earliest convenience.

While the CPO considers the Department's request, the Panel's proceedings will be continued until he has reached a decision. I have included with this letter a notice canceling next Wednesday's hearing. In light of this cancellation, Southeastrans' objection and motion to quash and LogistiCare's request for hearing attendance subpoenas will be held in abeyance until such time a new Panel hearing is scheduled.

The Chairman is confident that the CPO will conduct his review of the Department's request in accord with the provisions of the Procurement Code and expresses no opinion on the question of whether or not the award to Southeastrans should be canceled.

Please do not hesitate to contact me if you have further questions.

Respectfully yours,

A handwritten signature in blue ink that reads "Christie M. Emanuel". The signature is written in a cursive, flowing style.

Christie M. Emanuel

Enc.

cc: Mr. Michael B. Spicer (e-mail only)
Mr. Karl S. Bowers, Jr. (e-mail only)
Ms. Melissa J. Copeland (e-mail only)

STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW

Written Determinations Appeal Notice (Revised May 2016)

The South Carolina Procurement Code, in Section 11-35-4410, subsection (1)(b), states:

(1) Creation. There is hereby created the South Carolina Procurement Review Panel which shall be charged with the responsibility to review and determine de novo:

(b) requests for review of other *written determinations*, decisions, *policies*, and *procedures* arising from or concerning the procurement of supplies, services, information technology, or construction procured in accordance with the provisions of this code and the ensuing regulations; except that a matter which could have been brought before the chief procurement officers in a timely and appropriate manner pursuant to Sections 11-35-4210, 11-35-4220, or 11-35-4230, but was not, must not be the subject of review under this paragraph. Requests for review pursuant to this paragraph must be submitted to the Procurement Review Panel in writing, setting forth the grounds, within fifteen days of the date of the written determinations, decisions, policies, and procedures.

(Emphasis added.) See generally *Protest of Three Rivers Solid Waste Authority by Chambers Development Co., Inc.*, Case Nos. 1996-4 & 1996-5, *Protest of Charleston County School District*, Case No. 1985-5, *Charleston County School Dist. v. Leatherman*, 295 S.C. 264, 368 S.E.2d 76 (Ct.App.1988).

Copies of the Panel's decisions and other additional information regarding the protest process is available on the internet at the following web site: <http://procurement.sc.gov>

FILE BY CLOSE OF BUSINESS: Appeals must be filed by 5:00 PM, the close of business. *Protest of Palmetto Unilect, LLC*, Case No. 2004-6 (dismissing as untimely an appeal emailed prior to 5:00 PM but not received until after 5:00 PM); *Appeal of Pee Dee Regional Transportation Services, et al.*, Case No. 2007-1 (dismissing as untimely an appeal faxed to the CPO at 6:59 PM).

FILING FEE: Pursuant to Proviso 111.1 of the 2015 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...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 financial hardship, the party shall submit a completed Request for Filing Fee Waiver form at the same time the request for review is filed. The Request for Filing Fee Waiver form is attached to this Decision. If the filing fee is not waived, the party must pay the filing fee within fifteen days of the date of receipt of the order denying waiver of the filing fee. Requests for administrative review will not be accepted unless accompanied by the filing fee or a completed Request for Filing Fee Waiver form at the time of filing." PLEASE MAKE YOUR CHECK PAYABLE TO THE "SC PROCUREMENT REVIEW PANEL."

LEGAL REPRESENTATION: In order to prosecute an appeal before the Panel, business entities organized and registered as corporations, limited liability companies, and limited partnerships must be represented by 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); and *Protest of PC&C Enterprises, LLC*, Case No. 2012-1 (Proc. Rev. Panel April 2, 2012). However, individuals and those operating as an individual doing business under a trade name may proceed without counsel, if desired.

**South Carolina Procurement Review Panel
Request for Filing Fee Waiver
1105 Pendleton Street, Suite 209, Columbia, SC 29201**

Name of Requestor

Address

City

State

Zip

Business Phone

-
1. What is your/your company's monthly income? _____
 2. What are your/your company's monthly expenses? _____
 3. List any other circumstances which you think affect your/your company's ability to pay the filing fee:

To the best of my knowledge, the information above is true and accurate. I have made no attempt to misrepresent my/my company's financial condition. I hereby request that the filing fee for requesting administrative review be waived.

Sworn to before me this
_____ day of _____, 20_____

Notary Public of South Carolina

Requestor/Appellant

My Commission expires: _____

For official use only: _____ Fee Waived _____ Waiver Denied

Chairman or Vice Chairman, SC Procurement Review Panel

This _____ day of _____, 20_____
Columbia, South Carolina

NOTE: If your filing fee request is denied, you will be expected to pay the filing fee within fifteen (15) days of the date of receipt of the order denying the waiver.