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Protest Decision

Matter of: Remand of DSS Group Care Protests

Excalibur Youth Services, LLC, Case 2018-101
Southeastern Children's Home, Inc., Case 2018-103
Avalonia Group Homes, Inc., Case 2018-104
Helping Hands, Inc., Case 2018-108
Windwood Farm Home for Children, Inc., Case 2018-109
New Foundations Home for Children, Inc., Case 2018-110

Posting Date: January 23, 2019

Contracting Entity: South Carolina Department of Social Services

Solicitation No.: 5400013556

Description: Group Care for Children Fixed Price Bid

DIGEST

On remand from the Procurement Review Panel, the Chief Procurement Officer finds no violation of federal law and thus recommends denying legal relief to protestants.

AUTHORITY

By order dated July 11, 2018, the Procurement Review Panel determined that S.C. Code Ann. § 11-35-40(3) (2011) provides an independent basis for challenging a solicitation or award, where a protestant shows a violation of federal laws regardless whether those laws pertain to the procurement process. The Panel denied motions to dismiss the protestants' appeal and remanded the matter to the Chief Procurement Officer (CPO) for additional factual findings. Specifically,

the Panel directed the CPO to determine (1) whether SCDSS even considered the providers' actual costs in setting the fixed price rates; (2) whether the prices established by the FPB violate federal law; and (3) what remedy the protestants may be entitled to under the Procurement Code. On November 5, 2018, the CPO invited the parties and counsel¹ to a meeting to consider information pertinent to these issues. The following findings are based on materials in the procurement file and information provided by the parties at the November meeting.

BACKGROUND

The background of this matter is described in the CPO's previous decision, dated May 1, 2018, and the Panel's Order dated July 11, 2018. Briefly, the Division of Procurement Services issued a Fixed Price Bid (FPB) on behalf of the South Carolina Department of Social Services (DSS) on June 23, 2017. The IFB sought group home providers at three levels of care and stated a price per day that the state was willing to pay for each level.

Eight businesses and two trade organizations timely filed protests of the solicitation with the CPO. After the Panel's July 2018 decision six protesters remain: Excalibur Youth Services, LLC; Southeastern Children's Home, Inc.; Avalonia Group Homes, Inc.; Helping Hands, Inc.; Windwood Farm Home for Children, Inc.; and New Foundations Home for Children, Inc. Their protests, though articulated differently, are similar in that they all allege that the prices in the FPB violate federal law. As the CPO understands it, the protesters base this claim on the following logic. First, some funding for this acquisition is provided by the federal government pursuant to the Child Welfare Act of 1980, 42 U.S.C. §§ 670-679, codified in Title IV-E of the Social Security Act. Second, the Consolidated Procurement Code requires compliance with federal law where such compliance is a prerequisite for receipt of federal assistance. S.C. Code Ann. § 11-35-40(3).² Third, Title IV-E mandates states reimburse group home providers for their

¹ Consistent with the Panel's observation in n. 9 of its order, the CPO also welcomed Palmetto Association for Children and Families, Inc., to the meeting.

² If compliance mandates the use of source selection methods or procedures that are less restrictive than the in the Consolidated Procurement Code, Section 11-35-40(3) requires that "the solicitation must identify and explain the impact of such federal laws on the procurement process, including any required deviation from this code."

“actual costs” of providing specific, enumerated items for the children in the providers’ care. Next, according to the protesters, either the data on which DSS based its fixed prices, or the methodology DSS employed to calculate those prices, resulted in prices that are less than the protesters’ actual costs of providing those services. Thus, the fixed prices themselves violated Title IV-E and the solicitation is infirm because it fails to “comply with federal laws (including authorized regulations) as are mandatorily applicable....”

The CPO held a meeting with the parties on November 5, 2018 to receive information and guidance from the parties. Andrew Johnson, counsel for DSS, offered a brief presentation of the Department’s position. John Strait, who recently retired as Director of audits for DSS after forty-five years of service, reviewed the Department’s efforts through the years to collect and analyze cost information from social services providers, including those providers involved in this protest. Don Grant, chief financial officer for DSS, described the various funding sources for group home services and more recent attempts by the Department to determine if the maintenance payments are “appropriate.”

For years DSS has required detailed financial reporting from its providers. After awarding the previous contracts for group home services in 2011, the Department retained a certified public accountant to assist with reviewing cost reports and the amount of maintenance payments. Beginning in January 2013 DSS made reporting more uniform and, according to the reporting instructions, more detailed and complicated. DSS decided to require a second round of reports in January 2015, and a third in January 2017.

The reporting requirements yielded mixed results. Mr. Strait and his staff were concerned about the accuracy of the reports, and observed that many providers were simply not capable of furnishing the granular information DSS required. Despite the level of detail required, there was little consistency or explanation how costs were allocated among different service levels. DSS’ review of reports through 2014 revealed a number of issues that Mr. Strait acknowledged:

- the requirements were complex

- differences between providers' accounting systems and the reporting format led to inaccurate reporting
- some contractors submitted reports late
- since fiscal year-end reporting varied, it was difficult to correlate the costs to a specific year

In 2015 the Department began offering assistance to providers in reporting. By mid-2015 it concluded that the cost information was fundamentally inaccurate and the reporting requirements were not accomplishing the Department's intent. By the end of 2016 DSS announced it would not require contractors' cost reports, and would find some other process to review rates.

Mr. Johnson represented that DSS based the fixed prices in the 2017 FPB on information submitted in January 2013 and 2015 reporting period. The last comprehensive reporting round was in January 2015, and would necessarily have covered costs only through the end of 2014. The 2017 FPB rates were thus based primarily on cost data that was at least two years old, and which DSS had concluded was "universally unreliable." The Department is apparently transitioning from a determination of appropriateness based on cost reports to one driven by outside review, including information generated by a multi-state organization which DSS has joined. In fact, Mr. Grant advised the CPO that DSS has engaged a consultant to review historical rate experience for group home care. DSS expects the consultant to begin its review in December 2018.

Representatives of four protesters offered financial statements for their organizations.³ Each organization claimed different "costs" for providing similar levels of care. Although Title IV-E specifies what costs must be reimbursed,⁴ there is no clear correlation between the cost categories reported in the financial statements and those in the statute. None of the organizations

³ New Foundations Home for Children, Inc., Southeastern Children's Home, Helping Hands, Inc., and Windwood Farm Home for Children.

⁴ Food, clothing, shelter, daily supervision, school supplies, personal incidentals, liability insurance, reasonable travel to home and school, and the reasonable administration and operating costs of the institution providing care. 42 U.S.C. § 675(4)(A).

explained how it allocates costs between “allowable” and “non allowable” items. It is not clear how each organization determined the number of days used to calculate its claimed daily costs. There is no information before the CPO whether the broad categories of expenses that clearly do not fall into the specific categories for the child’s care are, in fact, “reasonable costs of administration and operation” of the institution. The CPO has a total of undefined, disparately named, and sparsely explained expenses, with a denominator determined somehow, which yield a capitation cost rate. The CPO—and presumably the Department—has no meaningful evidence of the “cost of (and the cost of providing) food, clothing, shelter, daily supervision, school supplies, a child’s personal incidentals, liability insurance with respect to a child, reasonable travel to the child’s home for visitation, and reasonable travel for the child to remain in the school in which the child is enrolled at the time of placement.”

ANALYSIS

The Panel first requires the CPO to determine whether SCDSS considered the providers’ actual costs in setting the fixed price rates. It clearly did, based on the description of reporting requirements and the reports of audits DSS conducted of the information submitted by the care providers. For the reasons expressed in the immediately preceding paragraph, though, it is unclear whether this inquiry and its answer are particularly helpful in deciding these protests.

The last complete cost reporting DSS has is from 2014--information DSS has concluded is “universally unreliable.” Further complicating matters is an apparent resolution of federal litigation which requires, among other things, that DSS significantly reduce the number of children committed to foster care. That, of course, means a smaller “denominator” for the capitation calculation and a resulting increase in the providers’ daily costs of care. Even absent any violation of federal law or the Consolidated Procurement Code, consideration of the fixed price rates requires more work. The CPO remains unconvinced, though, that the administrative review process in Article 17 is the appropriate way to address these issues.

Next, the Panel asks the CPO to determine whether the prices established by the FPB violate federal law. For reasons implicit in the April 2018 decision, as more fully explained below, the CPO finds no violation of federal law.

The Child Welfare Act of 1980 created Title IV-E of the Social Security Act. Title IV-E allows states to receive partial reimbursement from the federal government for maintenance payments for foster care. The current reimbursement rate ranges from fifty to eighty-three percent. There is no federal minimum nor maximum foster care maintenance payment rate. Congressional Research Service, *Child Welfare: A Detailed Overview of Program Eligibility and Funding for Foster Care, Adoption Assistance and Kinship Guardianship Assistance under Title IV-E of the Social Security Act* (October 26, 2012) at 17. To qualify for reimbursement, the State must meet three requirements. First, it must have a plan that has been approved by the Secretary of Health and Human Services. 42 U.S.C. § 671. DSS has an approved plan. The plan appears in the Panel's Record on Appeal at PRP57 through PRP290.

Second, the plan must require state payment of "foster care maintenance payments" on behalf of each child placed in foster care, provided specific conditions are met. 42 U.S.C. § 672. DSS' plan specifically provides for such payments, and includes language taken verbatim from Title IV-E's definition of those payments. PRP88-89.

Third, the Plan must provide for a periodic review to assure continued appropriateness. 42 U.S.C. § 671(a)(11) and 45 C.F.R. § 1356.21(m).

DSS' plan provides for the periodic review as follows:

The agency reviews at reasonable, specific, time limited periods established by the State/Tribe:

1. the amount of the payment made for foster care maintenance and adoption assistance to assure their continued appropriateness; and
2. the licensing or approval standards for child care institutions and foster family homes.

PRP234-235. The plan's language mirrors that of the statute and regulation. The law does not specify the frequency of the rate review; the scope of the review; a rate setting methodology,

calculus, or rubric; and the only required result is to assure the continuing appropriateness of the maintenance payments. The law leaves the period for review to the discretion of the agency. There is no guidance or definition of what is “appropriate” leaving the determination of appropriateness to the discretion of the agency. DSS initially opted to look at actual cost data from the providers in reviewing the rates for appropriateness. DSS decided to forgo the collection and analysis of cost data from the providers in January 2017, opting instead to retain an independent third party to assist in rate setting. DSS anticipates a preliminary report from its consultant this month, and the third party review will begin after January 2019. As the CPO stated in his prior decision:

No party claims that the State’s plan has not been approved by the Secretary, or that it no longer complies with 42 U.S.C. § 671(a). In fact, both Southeastern and New Foundations admit that the State has used the same methodology to determine and review payment rates since at least 2015. Neither alleges that the State has failed to properly administer the plan. Essentially, they complain that the plan approved by the federal government includes an unreasonable cost methodology. The CPO is unconvinced that a government contractor’s opinion concerning the cost methodology is a reason to question—much less invalidate—the Secretary’s continuing approval of South Carolina’s plan.

April 23, 2018, Protest Decision, PRP3, 9. DSS has complied with the plain requirements of Title IV-E. Nothing in that statutory scheme dictates a minimum rate of maintenance payments. DSS’s rate review protocol is clearly sub-optimal. The CPO cannot say, however, that it is illegal.

Like the CPO’s previous finding, this answer does little to remedy the problems with the current solicitation. Section 11-35-4210 is intended to address violations of the Code and Regulations. It is entirely inappropriate for making social policy. To understand how the parties reached this point a review of the solicitation’s history is helpful.

DSS awarded contracts for residential services for children through a fixed price solicitation on July 1, 2011. The solicitation established the daily rates for three levels of care to be provided.

Group Care

Level 1 – up to \$85.00 per day

Level 2 – up to \$97.00 per day*

Level 3 – up to \$130.00 per day plus an additional amount up to \$20 per day for non-Medicaid counseling services

These were one-year contracts with four one-year renewals. The contracts would end on June 30, 2016. DSS requested cost data and a copy of the provider's latest audited financial report on January 31, 2013. These reports reflected the providers' costs to provide the services for their fiscal year ending in 2012. There were issues and concerns with the accuracy of the provider data. While DSS reviewed other reports such as the USDA Cost of Raising a Child, these reports were not considered in establishing the DSS rates. DSS modified the rates for these contracts on March of 2014.

Group Care

Level 1 – up to \$86.12 per day

Level 2 – up to \$98.27 per day*

Level 3 – up to \$131.71 per day

These rates were to remain in effect until the next review scheduled for January 2015. The Providers filed a contract controversy with the CPO alleging that these modified rates did not reflect the actual cost of providing the required services. DSS again collected cost data and a copy of the provider's latest audited financial report on January 31, 2015. These reports reflected the providers' costs to provide the services for their fiscal year ending in 2014. There were still issues and concerns with the accuracy of the provider data and DSS' consideration of the data. In May of 2016, the parties settled the contract controversy setting new daily rates for Levels 1 and 3 retroactive to April 7, 2015. This contract expired on June 30, 2018. The daily rate for Level 2 providers was not changed, but six providers received a lump sum incentive payment totaling \$120,000. The settlement rates were:

Group Care

Level 1 – up to \$101.03 per day
Level 2 – up to \$98.27 per day*
Level 3 – up to \$176.82 per day

DSS issued a new fixed-price solicitation for these services on June 23, 2017. This is a one-year contract with two one-year renewals. The new solicitation required the provision of services that were not included in previous solicitations. The rates set in the new solicitation are as follows:

Level 1 – \$101.03 per day
Level 2 – \$110.27 per day
Level 3 – \$176.82 per day

Emergency* (All levels) - \$75.00 per day in addition to above rates (max 14 calendar days)

The rates for Levels 1 and 3 are the same rates that were agreed to in May of 2016 which were based on the Providers' cost to provide the 2015 services during their fiscal year ending in 2014.⁵ As discussed above, there is no useful, reliable evidence of the actual cost of providing the required services.

The approved plan required the agency to review the rates at reasonable, specific, time limited periods established by the State. DSS indicated that it would review rates every two years. DSS reviewed provider cost data in 2013 and 2015 and adjusted the rates as appropriate. DSS did not collect provider cost data in 2017 as it transitions to an independent third party review of the rate structure which will not begin until at least January 2019. DSS published a new solicitation in 2017 with the same rates for Levels 1 and 3 as those set after the 2015 review⁶. The new solicitation apparently requires services in addition to those required in the 2015 contract. There is no indication DSS reviewed the rates from the 2016 settlement, prior to issuing the current

⁵ The providers continue to provide the services at the 2016 rates pending the award of new contracts.

⁶ DSS provided no information to indicate how it arrived at the rate for Level 2 services.

solicitation. The combination of bad data reported by the providers, and DSS's consequent inability to ascertain accurate cost information, has led to a fixed price bid that satisfies no one.

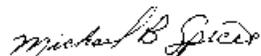
RECOMMENDATION

DSS reviewed cost information reported by group home providers. It met its statutory obligation to periodic review the amount of maintenance payments. Even if the CPO found some violation of law or regulation, the protesters failed to offer reliable and meaningful information about the cost of care for the children accepted to their group homes. Because there is no violation of the Code, the CPO remains convinced that the protests should be denied.

The Panel's third charge to the CPO was to determine what remedy should be granted. Because he would deny the protests, the CPO cannot grant any legal relief to these protesters.

Additionally, neither the CPO nor the Division of Procurement Services has the program expertise resident at DSS. Even if we had the authority to set fixed prices for this solicitation, we will not substitute our judgment for the agency's. The CPO recommends that DSS exercise its superior business judgment to determine appropriate rates of foster care maintenance payments. Depending on the Panel's disposition of this appeal, the CPO further recommends the FPB be reissued or amended to reflect those rates.

For the Materials Management Office



Michael B. Spicer
Chief Procurement Officer

STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW

Protest Appeal Notice (Revised June 2018)

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

(6) Finality of Decision. A decision pursuant to subsection (4) is final and conclusive, unless fraudulent or unless a person adversely affected by the decision requests a further administrative review by the Procurement Review Panel pursuant to Section 11-35-4410(1) within ten days of posting of the decision in accordance with subsection (5). The request for review must be directed to the appropriate chief procurement officer, who shall forward the request to the panel or to the Procurement Review Panel, and must be in writing, setting forth the reasons for disagreement with the decision of the appropriate chief procurement officer. The person also may request a hearing before the Procurement Review Panel. The appropriate chief procurement officer and an affected governmental body shall have the opportunity to participate fully in a later review or appeal, administrative or judicial.

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 2018 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
1205 Pendleton Street, Suite 367, 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.