STATE OF SOUTH CAROLINA	)	BEFORE THE SOUTH CAROLINA
	)	PROCUREMENT REVIEW PANEL
COUNTY OF RICHLAND	)	

ORDER

IN RE:	)	
	)	
Protest of Express Scripts, Inc.;	)	
Appeal of Medco Health Solutions, Inc.,	)	Case No. 2005-8
the Employee Insurance Program, and	)	
Express Scripts, Inc.	)	

STATEMENT OF THE CASE

This matter came before the South Carolina Procurement Review Panel for a hearing on September 13, 2005. The Panel heard requests for review of the August 5, 2005, written determination of the Chief Procurement Officer (CPO). The CPO's order followed a hearing of a protest filed by Express Scripts, Inc. (Express Scripts) after an Intent to Award was issued to Medco Health Solutions (Medco). The CPO reversed the award to Medco and ordered that the matter be resolicited.[1]

The CPO's order was appealed to the Panel by Medco, the Employee Insurance Program (EIP), and Express Scripts. Medco and EIP requested review because the CPO ruled that Medco was nonresponsive and therefore, Medco should not have been the awardee. Express Scripts filed its request for review as to the resolicitation remedy in the August 5th order. Express Scripts contends it should have received the award once Medco was determined to be nonresponsive. At the hearing before the Panel, the parties were represented by counsel as follows: Medco by Marc Manos, Esquire, and David Black, Esquire; EIP by Craig K. Davis, Esquire, and James Flanagan,

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[1] The CPO initially issued an order on August 1, 2005 which overturned the award to Medco and gave it to Express Scripts. However, after a Motion for Reconsideration was filed, the CPO re-issued his order changing only the remedy and allowing for resoliciation.

Esquire; Express Scripts by John Schmidt, Esquire, and Melissa Copeland, Esquire; and the Chief Procurement Officer by Keith McCook, Esquire.

FINDINGS OF FACT

On March 31, 2005, EIP issued a Request for Proposals (RFP) seeking pharmacy benefit management services for the State Health Plan. On April 28, 2005, the only amendment to the RFP was issued. On May 17, 2005, EIP opened the proposals received. Along with its full proposal, Medco's proposal contained the following language on the page immediately following the cover letter:

> The terms outlined in the Proposal Materials will not be binding on Medco or any subsidiaries until an agreement between EIP and Medco is executed by all parties.
>
> This proposal is valid for 90 days. However, Medco reserves the right to modify or withdraw this offer at any time, if necessary, to meet changing conditions.

David Quiat, procurement officer with EIP, determined that Medco appeared to be responsive to all of the requirements in the Request for Proposal. Mr. Quiat found that Medco "...confirmed, numerous times throughout their proposal response, that it was fully responsive to EIP's Request for Proposal and that it would comply with all terms as outlined in the RFP." Also, he determined, "Because of Medco's universal declaration that it would either meet, exceed or comply with all requirements, terms and conditions outlined in the RFP, the two (2) statements located prior to the Table of Contents appear to be inadvertent unintended language." R. at 325.

On May 24, 2005, David Quiat of EIP sought clarification from Medco of those two statements he thought were inadvertent and unintended by sending an e-mail to Glenn Taylor and Bill Lagos, both of Medco. The language of the e-mail is quoted below:

Mr. Taylor,

I am writing to request clarification concerning the following two (2) statements which appear in the proposal submitted by Medco Health Solutions. These statements are located on the page prior to the Table of Contents.

> The terms outlined in the Proposal Materials will not be binding on Medco or any subsidiaries until an agreement between EIP and Medco is executed by all parties.
>
> The proposal is valid for 90 days. However, Medco reserves the right to modify or withdraw this offer at any time, if necessary, to meet changing conditions.
>
> R. at 325.

Medco responded the next day, May 25, 2005. Medco removed this language from its proposal in its entirety and replaced it with a general copyright statement, which had been a section of the withdrawn page. The proposals were then evaluated with the evaluations being finalized on June 3, 2005. R. at 166. On June 10, 2005, EIP posted the Intent to Award to Medco.

CONCLUSIONS OF LAW

This Request for Proposal is governed by the provisions of S.C. Code Ann. §11-35-1530, the code section governing competitive sealed proposals. S.C. Code Ann. §11-35-1530 (9) provides, "Award must be made to the responsive offeror whose proposal is determined in writing to be the most advantageous to the State...." Obviously, responsiveness is a key component of an award.

Clearly, Medco was responsive after it removed the language at issue on May 25, 2005. The Panel finds it unnecessary to answer the precise question whether Medco was responsive when the proposals were initially opened. It is undisputed that Mr. Quiat sought clarification based on the statute allowing clarification of apparent responsive offerors. It is also undisputed

that the offending language was removed as a result of the clarification. Therefore, what is at issue before the Panel is whether Mr. Quiat should have sought clarification pursuant to S.C. Code Ann. §11-35-1530 (6). That section provides,

> As provided in the request for proposals, discussions may be conducted with apparent responsive offerors for the purpose of clarification to assure full understanding of the requirements of the request for proposals. All offerors, whose proposals, in the procuring agency's sole judgment, need clarification shall be accorded such an opportunity.

The decision whether to seek clarification is within the discretion of the procuring agency and that decision should not be overturned unless it is clearly erroneous, arbitrary, capricious, or contrary to law.

The Panel heard much debate from the parties about the definition of 'apparent' in the statute. Specifically, the argument centered on whether 'apparent' means 'seeming' or 'obvious.' Both are definitions of 'apparent' according to reputable authorities cited by the parties. However, we do not find it is necessary to adopt one definition or another for the word 'apparent.' Using either definition, Mr. Quiat's reading of the proposal affirms his decision that Medco's proposal was apparently responsive. He found that the proposal met all requirements on scope of work, minimum qualifications and terms and conditions. Mr. Quiat did see the language at the beginning of the document and believed it did not fit with the proposal as a whole. He believed it was placed there inadvertently. In Mr. Quiat's discretion, Medco appeared to be responsive, but he needed to clarify that one part with them to assure full understanding of the requirements. This decision was not clearly erroneous, arbitrary, capricious, or contrary to law.[2]

[2] We take pains to note here that a procuring agency is not required to seek clarification under this statute. The decision to seek clarification is, by statute, in the agency's sole discretion. Once it does so, the agency is obligated to act on the information received from the bidder. Protest of Midwest Maintenance, Inc., Appeal of Midwest Maintenance, Inc., Case No. 2004-3. Offerors whose proposals are determined to be unresponsive without clarification should not be empowered by this decision to appeal a failure to seek clarification.

Further, we turn our attention to the procurement regulations in the South Carolina Code of Regulations. Regulation 19-445.2070 provides a number of circumstances under which bids ordinarily shall or may be rejected.[3] Specifically, in Section D of the regulation, it is provided that a bid ordinarily should be rejected when "the bidder attempts to impose conditions which would modify requirements of the invitation for bids or limit his liability to the State...." The section then goes on to give examples of situations where such a modification or limitation might be found.

The CPO's Motion for Summary Judgment points out the language of Reg. 19-445.2070 (D)(6) calling for a rejection of bids if the bidder "limits the rights of the State under contract clause." It is the qualifying language after that sentence that the Panel finds especially pertinent to the situation. After stating that bids should normally be rejected if they limit the rights of the State under any contract clause, the regulation provides that, "Bidders may be requested to delete objectionable conditions from their bids provided that these conditions do not go to the substance, as distinguished from the form, of the bid or work an injustice on other bidders." The language on the page in question – an unnumbered cover page -- went to the form of the bid and not the substance. The substance of the proposal, such as price and scope of work, were clear.

Also, we point out that the regulation by its own language is written because "... to allow the bidder to impose such conditions would be prejudicial to other bidders." S.C. Code Regs. 19-445.2070 (D). Likewise, previous cases of the Panel have been careful to ensure bidders and offerors were treated fairly and not prejudiced by changes made after submission. The facts of the case before us do not reveal any unfairness or prejudice to other offerors. While we certainly

[3] S.C. Regulation 19-445.2070 is made applicable to competitive sealed proposals by S.C. Regulation 19-445.2095 (G).

uphold the principle that fairness must be at the forefront of State procurement decisions, we find this case distinguishable from the other cases cited to us in briefs and argument where bids were involved and conditions caused prejudice to other bidders. In Re: Protest of United Testing Systems, Inc., Case No. 1991-20; In Re: Protest of Miller's of Columbia, Inc., Case No. 1989-3; In Re: Protest of Abbott Laboratories; Appeal by Abbott Laboratories, Case No. 1997-4; In Re: Protest of Brantley Construction Co.; Appeal by Brantley Construction Co., Case No. 1994-6.

In those cases, a potential for abuse was present because the bidder who was found to be nonresponsive would have been the winning bidder but for the nonresponsiveness. "Once bids are opened and it becomes clear that a certain bidder is the winner but for an ambiguous provision in his bid, clarification would allow that bidder to manipulate his bid to insure that he receives award of the contract." In Re: Protest of United Testing Systems, Inc., Case No. 1991-20, at 5.

We give great importance to the fact that this matter was clarified before the proposal went to the evaluators. Neither Mr. Quiat nor Medco knew at the time of the clarification whether Medco would ultimately have the winning proposal. There was no opportunity in this case for Medco to manipulate its proposal in order to ensure the winning bid.

ORDER

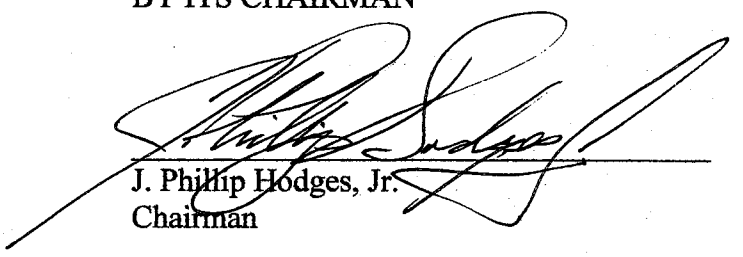
Based on the above Findings of Fact and Conclusions of Law,

IT IS HEREBY ORDERED that Medco's proposal for the pharmacy benefit management services for the State Health Plan was responsive and that the Intent to Award to

Medco is affirmed.

AND IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT REVIEW PANEL
BY ITS CHAIRMAN



J. Phillip Hodges, Jr.
Chairman

This 6TH day of October, 2005