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ENVIRONMENTAL AND ADMINISTRATIVE LAW

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November 26, 2014

Chief Procurement Officer, Materials Management Office
South Carolina Budget and Control Board
1201 Main Street, Suite 600, Columbia, SC 29201

Via email to protest-mmo@mmo.state.sc.us

cc: Sam Hanvey, shanvey@mmo.sc.gov

cc: Anthony Kester, kester@aging.sc.gov

Re: Protest of terms of RFP, Solicitation 5400008337, S.C. Aging Network Meal Program, Lieutenant Governor's Office on Aging
AGS File No.: 2014-15

Dear Sir:

The Firm represents the South Carolina Association of Council on Aging Directors (SCACAD) and its 40 member organizations, including the Councils on Aging for all 46 counties within the State of South Carolina.¹

Collectively, SCACAD and its members are prospective bidders, offerors, contractors, or subcontractors who are aggrieved in connection with the solicitation of this contract within the meaning of S.C. Code Ann. §11-35-4120. We hereby protest the terms of RFP 5400008337, "S.C. Aging Network Meal Program." This Solicitation was issued on November 14, 2014. This protest is timely.

We note that on November 24, 2014, MMO or the using governmental agency issued Amendment 1, which purported to "suspend" the Solicitation "indefinitely." However, as S.C. Code Ann. §11-35-4120 makes no provision for tolling the fifteen day protest deadline in the event of a "suspension," SCACAD must file its protest to preserve its rights in this matter. The RFP was issued in violation of statutory provisions, made upon unlawful procedure, was clearly erroneous in view of the evidence on the record,

¹ Lexington County has two member organizations, and Charleston has three.

and was arbitrary, capricious and was characterized by an abuse of discretion. We request that the CPO hold a hearing on this matter and declare the RFP invalid for the following reasons.

1. The RFP is contrary to law in that it assesses a “penalty” for nonperformance.

Under basic terms of contract law, assessment of a “penalty” for failure to perform is invalid, regardless of whether it is termed “liquidated damages” or a “penalty.” See S.C. § 36-2-718(1). Under equitable principles, a provision in a contract calling for a sum to be paid upon its breach is unenforceable as a penalty where it is for an arbitrary amount irrespective of the damage sustained, and has no relation to actual damages. See, e.g., *Kirkland Distributing Co. of Columbia, S.C. v. U.S.*, 276 F. (2d) 138 (4th Cir.1960); *Tate v. Le Master*, 231 S.C. 429, 99 S.E. (2d) 39 (1957). On page 40, under Performance Standards, it refers to the assessment of a penalty in an amount double that of the current meal cost for meals not delivered or not delivered within the correct time frame, in proper condition, (not damaged) and at the proper temperature. For non-delivered (or damaged) portions of meals, there is a percentage penalty assessed. See pp.40-41. On page 29, the RFP also states that there may be penalties (in an unspecified amount) for delivery of out of date products in meal boxes.

These penalties are in addition to damages. On pp. 37-8 of the RFP it states that meals “ineligible” for reimbursement (including meals delivered at the wrong temperature, and meals with “unacceptable quality of food standards”) are credited against any sum due to the Contractor. As the contract already makes provisions for making the contracting entity whole for nonperformance, the added “penalties” are invalid as they are arbitrary and have no relation to actual damages.

2. Portions of the RFP are self-contradictory in terms of how they deal with a breach of contract.

On page 40, the RFP states that the contractor must achieve a 95% delivery completion rate or a penalty in the amount of double the meal cost of each affected meal will be assessed and states that to be completed, the delivery must be:

Within the right time frame;
With the right foods, beverages, and condiments in appropriate portions and meal combinations that comply with nutrient and quality specifications;
In the right condition (**no damaged packages, no out of date products**); and
At the right temperature (frozen meals should be in the frozen state). Shelf stable meals at ambient temperatures (less than 75 Fahrenheit).”
(emphasis added)

However, on pp 40-41 the RFP describes a different “penalty” for a non-delivered meal component, a meal component where the seal is broken or where the meal component is out of date- 50% for the entrée or one of two side dishes, and 20% for any other component. Page 29 of the RFP assesses a penalty in an unspecified amount for out of date components.

From reviewing both provisions, it seems that a meal delivered with one damaged, out of date, or non-delivered component could be subject to the double meal price penalty, the 50% or 20% penalty, or both. Putting aside the illegality of the penalty itself, the contract is unclear on what penalty applies. Making matters even more unclear, as mentioned above, on pp. 37-8 of the RFP, it states that damaged/incomplete meals are simply “ineligible” for reimbursement.

On page 30 of the RFP, it provides for a remedy of re-delivery of missed deliveries that are the fault of the contractor without charge. Under the contract, such a missed delivery would then call for a re-delivery, and a penalty twice the cost of the affected meal. Oddly, there are no specific requirements calling for replacement of damaged, out of date, or out of specification meal components.

When one views these contradictions it is clear that the RFP was not properly thought out in terms of stated remedies for breach.

3. The RFP is inconsistent on the required content of the meals.

Pages 22-3 and Appendix A are contradictory. On pp 22-3 it requires the meal to contain an entrée, two side dishes, one of which must be a vegetable, a fruit, a dessert, and a beverage. However, it says that fruit or fruit juice can “count” as dessert. The appendix allows a fortified fruit or vegetable juice to substitute as the beverage. A contractor could eliminate the fruit and dessert portions of the meal and satisfy the terms of the contract by providing two fruit beverages instead. The Contractor could satisfy the “beverage” portion of the contract with a third (fortified) fruit beverage. The terms of the RFP must be clarified.

4. The RFP violates provisions of the Older Americans Act.

Portions of the funding for the Meal Program come from federal sources and are subject to the Older American’s Act, 42 U.S.C. §3030(e) and (f). Grants under 42 U.S.C. §3030(e) (sometimes referred to as Title III C1) are referred to as “congregate” meals and must consist of hot meals served in congregate settings and include nutrition education and other services. Grants under 42 U.S.C. §3030(f) (sometimes referred to as Title III C2) are for home delivered meals. Page 24 of the RFP states that the target population is a “subset of group dining, geographically isolated clients that qualify for group dining nutrition services.” The RFP intends to take individuals who qualify for congregate meals and instead feed them at home. Title III C1 grant money cannot be used for these purposes. The OAA created Congregate Nutrition Services as a separate category of service, “**to promote socialization of older individuals** [and] to promote the health and well-being of older individuals by assisting such individuals to gain access to nutrition and other disease prevention and **health promotion services** to delay the onset of adverse health conditions resulting from poor nutritional health or **sedentary behavior.**” 42 U.S.C. 3030(d)(emphasis added).

The RFP proposes to serve Title III C1 eligible individuals in a manner that will increase their isolation, and eliminate their access to services available at senior centers, which include socialization, nutrition education, health promotion, disease management, and other activities.

5. The RFP represents a reduction in quality from the current model of services in that it will force many recipients to receive shelf stable meals.

Pages 19 and 25 of the RFP state that individuals who lack sufficient freezer space will be delivered shelf stable meals. These are clearly inferior to the current hot meals being delivered by the various Councils on Aging. Further, they are exempted from sodium restrictions (see RFP, page 24), which can be very dangerous for individuals with high blood pressure and other medical conditions. A significant number of the individuals our members serve do not have sufficient freezer space to accommodate a 5 or 7 meal shipment as per the RFP. Again, this indicates the RFP was developed without the input of the agencies responsible for administering the program.

6. The RFP requires the Client to inspect shipments and call to report deficiencies.

Page 30 of the RFP states that the Clients are to inspect food shipments, and either reject them on the spot, or to call the AAA (not the contractor) within 24 hours to report missing components, broken components, items out of temperature, and items that are out of date. Many of the clients served by this program are blind, physically infirm, have problems with cognition, or are otherwise unable to make judgments on things like the temperature of food delivered or expiration dates. Some of them are illiterate. A significant percentage of them do not have telephones or access to a telephone. This is yet another indication that this RFP was developed without the input of the agencies that interact with this population. Further, the AAA is responsible for fielding all complaints and interacting with the Contractor, but has no authority to settle disputes with the Contractor.

7. The RFP is inconsistent in that it explicitly prohibits subcontracting, but also allows subcontracting.

Page 48 of the RFP prohibits subcontracting and the RFP calls for a single contractor to serve the entire state. However, in several portions of the contract subcontracting is allowed. First, on page 23, the contractor has the option of “producing frozen meals in-house; purchasing the meals custom packed from a company specializing in this activity; or purchasing meal components in the open market place and assembling the meals in-house.” The purchase of custom packed meals from a third party or custom components from a third party constitutes subcontracting. Second, on page 30, for Door to Door delivery, it states that the “...delivery method for routine meal delivery is for the Contractor to make, **or arrange to have made**, weekly deliveries of frozen or shelf stable meals directly to the client door within all of the 10 PSAs.” (emphasis added). The fact that the Contractor can “arrange” for some third party to deliver meals presupposes a subcontractor.

Conclusion

Based upon the foregoing, SCACAD and its members request that MMO hold a hearing, declare the RFP invalid and instruct the Lieutenant Governor's Office on Aging to issue a new RFP. Alternately the Lieutenant Governor's Office on Aging could simply cancel the RFP.

We thank you for your consideration.

Sincerely,

A handwritten signature in black ink that reads "Alex Shissias". The signature is written in a cursive, slightly slanted style.

Alexander G. Shissias