



July 3, 2019

Thomas J. Kenny  
Kutak Rock LLP  
1650 Farnam Street  
Omaha, NE 68102-2103

Re: *RFP 5995 Z1, Full Service Case Management for Child Welfare Services  
Protest of Award*

Mr. Kenny:

We are in receipt of your letter dated June 14, 2019, regarding your protest of the Intent to Award in connection with RFP No. 5995 Z1. After careful review and consideration of your protest, supporting materials, and arguments on behalf of PromiseShip, we find as follows:

1) It is alleged by PromiseShip that the State failed to adequately review the cost proposals, "arbitrarily inflating" them, and that St. Francis' cost proposal was unrealistic, that it was not a responsible bidder and that it could not provide the services at the amount of funding bid.

As required by Neb. Rev. Stat. § 81-161, and as set forth in the Evaluation Criteria published with the RFP, cost must be considered as part of the overall assessment of this competitive proposals. Recognizing that the subjective determination of the state agencies is enshrined in Nebraska law, the Nebraska Supreme Court noted that "a public body has broad discretion in the awarding of public contract." *Rath v. City of Sutton*, 267 Neb. 265 (2004). This includes "passing upon the question of the responsibility of bidders." *Id.*, quoting *State ex. Rel. Nebraska B & I Co. v. Board of Com'rs of State Institutions of Nebraska*, 105 Neb. at 573 (1921). ("Public Administrative bodies possess a discretionary power in awarding contracts...and in determining questions of public advantage and welfare." *Best v. City of Omaha*, 138 Neb. 325 (1940)). "The term 'responsible' as used in the statute is not limited in its meaning to mere financial responsibility, but includes within its purview the general ability and capacity of the bidder to perform the work, his facilities and suitability for the task, and those qualities which he must necessarily have in order that he be able to perform the contract strictly in accordance with its terms." *State v. Board of Commissioners*, supra. Courts cannot make independent determinations of responsibility, as this "is a job for elected officials." *Rath*, supra. This authority was also recognized in *Best* and *Board of Commissioners*.

Our review shows that the State did, in fact, adequately review the cost proposals along with the technical proposals, considering the cost as a portion of the overall determination of whom to award. Cost proposals were assigned 880 of the 3526 total points available, or approximately 25%. The bulk of the points available under the scoring criteria in this RFP were scored based on qualitative elements. 1700 points were allocated to the technical proposal, a qualitative review of how the bidders were proposing to provide case management services. 300 points were assigned to the Corporative Overview section, assessing the bidder's responsibility, past contract performance,

Doug Carlson, Materiel Administrator & Deputy Director

Department of Administrative Services | MATERIEL DIVISION

1526 K Street, Ste. 130  
Lincoln, Nebraska 68508

OFFICE 402-471-0972  
FAX 402-471-2089

[das.nebraska.org](http://das.nebraska.org)

financial statements, and personnel approach, among other factors. Individuals specifically knowledgeable of financial aspects of case management service provision reviewed the financial requirements section, which was assigned 200 points, and which provided a qualitative assessment of how bidders would handle the financial requirements of providing case management services. Furthermore, after receiving the cost and technical proposals, the State elected to conduct oral interviews. For oral interviews, an additional 446 points were allocated, during which time a team of DHHS financial officers questioned both vendors on costs, cost management, and other financial particulars, assessing them qualitatively on their responses.

Assessing cost in addition to qualitative elements of service is a wide practice among state procurement agencies nationwide, especially where it is important to assess how a vendor will perform services. See Conway, Danielle. *State and Local Government Procurement* p 196 (“Generally, [in state and local procurement] the award is made to the responsible offeror whose proposal is determined to be the most advantageous considering price, the evaluation factors set forth in the request for proposals, and the results of any discussions conducted with responsible offerors.”) Indeed, this is required by Neb. Rev. Stat. § 81-161.

Using cost in part to determine the best value is not arbitrary, but is an essential aim of public procurement, considering “competitive bidding...is a fundamental time-honored procedure that assures the prudent expenditure of public money...” and that the procurement statutes “are enacted for the benefit of taxpayers.” *Anderson v. Peterson*, 221 Neb. 149 (1985). Indeed, “[b]y mandating that contracts be awarded to the lowest responsible bidder, the Nebraska Legislature is seeking to protect taxpayers, prevent favoritism and fraud, and increase competition in bidding by placing bidders on equal footing.” *Rath v. City of Sutton*, supra.

PromiseShip cites no authority for its conclusions that scoring cost proposals separately from technical proposals, as a portion of less than 25% of overall points, constitutes an “arbitrary” practice. PromiseShip also does not provide how this process could have prejudiced it—their argument assumes that evaluators would have scored the proposal from Saint Francis lower knowing what its total costs were, despite the fact that all technical elements of the proposal were reviewed for quality. Besides lacking authority, this premise is speculative. This argument also ignores that a set amount of funds (\$300,000) were allocated separately from the cost proposals to provide for any necessary startup costs. These provide additional funding in the first year of the sub award and would be available to a new vendor of the services.

The review of the proposals provided an assessment both of the quality of the services provided by each bidder, and the costs for providing that service. Quality, overall, was weighted more heavily. The requirements and technical approach were scored by multiple evaluators based on the quality of the proposal and the approach. PromiseShip ultimately scored higher in every category than Saint Francis (excepting oral interviews) but failed to make up the difference in cost, even though cost only constituted approximately 25% of the total available points. PromiseShip’s failure to score higher in the qualitative sections of the RFP sunk its bid, because the costs were substantially higher than Saint Francis’. Not only was including cost to some degree required by law, but it was well within the state’s discretion to include the overall costs of service for 25% of the points awarded.

2) PromiseShip’s second main argument attempts to impose standards from the Federal Acquisition Regulations and Federal Court of Claims on this state procurement. This RFP, however, was conducted pursuant to the standards set forth above, and in accordance with Nebraska state law. Under federal law, while this procurement involves federal funds, pursuant to 45 C.F.R. § 75.326, Nebraska must follow its own procurement requirements.

Again, the quality of the proposals provided, both through written proposals and oral interviews, constituted 75% of the total points awarded. Contrary to PromiseShip’s argument, this does not convert into a “lowest-price technically acceptable procurement.” Lowest-price, technically acceptable method of procurement involves the scoring of qualitative factors for minimum acceptability, not the qualitative review with assigned and weighted points conducted here. In lowest-price, technically acceptable bidding, contrarily, “[n]o additional credit or weight is given to proposals that exceed the minimum acceptable requirements.” Conway, p 191.

The qualitative review involved the factors set forth in Neb. Rev. Stat. § 81-161, and specifically the factors that the State, in its discretion, set as essential for the provision of the child welfare case management services; the bulk of points were assigned based on the quality of the bidders' proposals, based on the judgment of the evaluators. PromiseShip points to no authority, Nebraska or otherwise, finding that this method was contrary to Nebraska law, or was done "arbitrarily, or from favoritism, ill will, or fraud." *Rath*, supra, quoting *State ex. Rel. Nebraska B & I Co. v. Board of Com'rs of State Institutions of Nebraska* at 573. Indeed, not considering cost as any sort of factor would likely violate state procurement law.

3) In its third argument, PromiseShip points to several particular facets of the Saint Francis proposal that PromiseShip claims render the proposal unresponsive.

PromiseShip first points to the case load requirements, indicating that the Saint Francis proposal should have been rejected because it proposes different case management ratios contrary to Neb. Rev. Stat. § 68-1207. Saint Francis' proposal noted along with its case managers a "target case load of 25" in page 93 of its proposal. Saint Francis also noted throughout its proposal that a Family Support Worker would also be providing case management services. On its face, the State has not found the Saint Francis proposal to be non-responsive, however, the State has sought clarification of Saint Francis' case management ratios to ensure that once services are provided, case management ratios fall within statute. Saint Francis provides as follows:

"Within our proposal we have identified a total of 116 Bachelor's level staff whose primary responsibility is case management based upon the population served. The numbers below allow for Saint Francis Ministries to meet the intent of the statute without additional cost to our proposal.

- 62 to provide serve to children in out of home placement
- 30 to provide Case Management to youth placed in Kinship Homes
- 24 to serve children maintained in their own homes"

Second, PromiseShip claims that Saint Francis' bid was non-responsive because it failed to demonstrate compliance with Neb. Rev. Stat. § 43-4204. In both of these claims, PromiseShip's complaints boil down to their own review of the Saint Francis proposal and its claim that the proposal does not provide enough detail about how the requirements were going to be met. Nowhere does PromiseShip point to a refusal by Saint Francis to comply with either the corporate governance (§ 43-4204(2)(a)) or limitation of direct provision of services requirements (§ 43-4204(2)(c)). Section Vi.2.a of the RFP considers this in noting that "[a]ny new entity created will have to execute all final contractual documents, but the entity does not have to be created unless awarded the subaward."

As well, the bidder was assessed, qualitatively, on the nature of its plan. The State provided the option to reject plans, and thus bids, in its discretion. Consistent with that discretion, under the terms of the RFP, and as set forth in Business Requirements Traceability Matrix, bidders under the RFP "should" provide a response to how they would comply with Neb. Rev. Stat. § 43-4204. The use of "should" here is essential. As defined the RFP's glossary, "should" means "expected; suggested, but not necessarily mandatory." PromiseShip wants to convert this into a "must" requirement (glossary: "an order/command; mandatory") and thus reject Saint Francis' proposal, but doing so is within the state's discretion, not required.

Indeed, both of these requirements under Neb. Rev. Stat. § 43-4204 were assessed as part of the points assigned to the Technical Requirements (RFP Attachment 6, FIN-2, page 3) and assessed based on the quality of the plan that Saint Francis put forward. These were scored and included in the total points.

PromiseShip's argument, claiming that the plan for subcontractors provided by Saint Francis was also fatally flawed, fails for a similar reason as its argument regarding Neb. Rev. Stat. § 43-4204. This, too, according to the terms of the RFP "should" be provided, and was in turn scored by the evaluators for quality.

The same flaw in PromiseShip's argument is contained in its contention that the items in the Appendix of the Protest render the bid not responsive.

Furthermore, the requirement under the RFP for transportation services offers the same kind of speculation. PromiseShip's argument anticipates that Saint Francis will not be able to meet the requirements of the Public Service Commission and provide transportation. This amounts to PromiseShip predicting that somehow Saint Francis will not comply with a contract, once executed. Yet, as with the requirements of Neb. Rev. Stat. § 43-4204, this is not ripe—PromiseShip here is shoehorning the claim that its competitor's bid is non-responsive because, in its judgment, it feels that its proposal was not realistic or likely to succeed.

4) Finally, in Section D of PromiseShip's protest, PromiseShip attempts to substitute its own judgment on what the state should have considered in determining the requirements of responsibility under Neb. Rev. Stat. § 81-161, ignoring the requirements in the RFP itself. It seems to veer toward claiming that Saint Francis failed to specifically disclose some kind of action required under RFP § VI.A.2.b, but then drops the argument—not making any allegation of specific failures to disclose under the terms of the RFP—for a general litany of claimed failures of St. Francis on various fronts, asserting that this renders the proposal non-responsive. Nowhere, however, does PromiseShip describe how simply ignoring the criteria for scoring and the particular facets of the Corporative Overview (300 points) and rejecting St. Francis' proposal based on a totally subjective—and contrary to the criteria the state set forth in the RFP—analysis after receipt of proposals would be proper and consistent with state law. Rather, the State followed a process defined before proposals were received, consistent with past practice and practice nationwide, and consistent with the structure set forth in the RFP.

In evaluating an RFP, the State must consider and evaluate the information received. If a contract results from a vendor's proposal, the vendor is then expected to uphold its obligations under the contract. Any failure on the part of a vendor to do so, can and will be resolved through the terms of the resultant contract.

Based on our careful consideration and review of all relevant information we find that there is no reason to overturn the award. Thus it is our determination that the contract award will stand and the protest submitted by PromiseShip is hereby denied.

Sincerely,



Doug Carlson, Materiel Administrator and Deputy Director  
Department of Administrative Services

cc: Annette Walton, SPB Buyer  
DHHS

jls