



MISSISSIPPI DIVISION OF
MEDICAID

July 15, 2022

VIA ELECTRONIC TRANSMISSION AND U.S. MAIL

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Re: MedImpact Healthcare Systems, Inc., RFP#20210813/3120002771

Dear Mr. Kidd:

As you know, the Division of Medicaid (DOM) requested Judge James D. Bell to conduct a hearing on June 22, 2022 pursuant to Section 5-203.01 of the *Mississippi Public Procurement Review Board Office of Personal Services Contract Review Rules and Regulations*. The sole issue to be considered at that hearing was whether the Solicitation for RFP# 20210813/3120002771 contained any potential violation of the law due to MedImpact Healthcare Systems, Inc.'s (MedImpact) failure to comply with Miss. Code Ann. § 31-7-417(2) and Sections 3-203.01(f) and (g); 3-203.12; and 3-204.01.3 of the *Mississippi Public Procurement Review Board Office of Personal Services Contract Review Rules and Regulations* regarding "de-identification" of Solicitation proposals and, if so, whether any such violation required cancellation of the Solicitation.

On July 2, 2022, Judge Bell issued the enclosed Recommendation. As detailed in that Recommendation, Judge Bell found that the mistaken inclusion of MedImpact's name in one attachment to its proposal was immaterial and did not violate Mississippi law. In addition, Judge Bell found that DOM had authority to excuse any irregularity stemming from the immaterial, one-time inclusion of MedImpact's name in its proposal. Accordingly, Judge Bell concluded that MedImpact should be awarded the contract. Following receipt of Judge Bell's recommendation, DOM consulted with the DFA Special Assistant Attorney General as required by Section 5-203.01.

After reviewing the Recommendation and consulting with the DFA Special Assistant Attorney General, I am adopting the recommendation of the Judge Bell with the following additional comments:

1. This action by DOM is limited to the facts and circumstances presented by the particular matter at issue here and should not be read to create any binding or persuasive authority that could apply to other RFPs issued by DOM.
2. Section 3-204.03.4 of the *Mississippi Public Procurement Review Board Office of Personal Services Contract Review Rules and Regulations* provides “[m]istakes shall not be corrected after award of the contract except when the Agency Head finds that it would be unconscionable not to allow the mistake to be corrected.” For the reasons cited in Judge Bell’s Recommendation, I find that it would be unconscionable not to correct the inclusion of MedImpact’s name in a single exhibit to the Solicitation proposal. In addition, I find that it would be unconscionable to deprive the State of the lowest and best bid for these services, particularly where the facts developed at the hearing demonstrate that there was no contamination of the blind scoring process caused by this mistake.

Any questions regarding this matter should be directed to Laura Gibbes, DOM’s Chief Legal Counsel, at 601-359-6541. Pursuant to Rule 5-203.01, you have a right to appeal this decision.

Sincerely,

A handwritten signature in blue ink that reads "Drew Snyder". The signature is fluid and cursive, with the first name "Drew" and last name "Snyder" clearly legible.

Drew L. Snyder
Executive Director

Enclosure: Judge James Bell Recommendation

RECOMMENDATION

To: Drew L. Snyder, Executive Director
Division of Medicaid

From: James D. Bell, Hearing Officer

Hearing Date: June 22, 2022

Date: July 2, 2022

IN RE: Division of Medicaid – MedImpact Notice of Rescission of Solicitation
Cancellation Notice

Counsel: Sterling Kidd, Esq.
Janet McMurtray, Esq.

SUMMARY

The Division of Medicaid (DOM) sought a vendor to develop and manage certain drug lists. After an extensive blind bid process, DOM issued its notice of intent to award the contract to the lowest and best bidder, MedImpact. The bid price is roughly half what DOM previously paid and will save DOM millions of dollars. Thereafter, the Office of Personal Services Contract Review (OPSCR) examined the several hundred-page bid package and found a single reference to the name of the bidder on a data line in a spreadsheet. This was an error that no one previously noticed. OPSCR believes this means the project must be re-bid. The present contract will expire before the project can be re-bid. As discussed below, the error was immaterial, and MedImpact should be awarded the contract.

FACTS

In 2021, DOM sought a vendor to “develop and manage the Universal Preferred Drug List, administer the Supplemental Drug Rebate program, manage the Rate Setting of Covered Outpatient Drugs, and perform programmatic review and assessment of core components of the pharmacy program as assigned by DOM.” Consistent with applicable law, DOM (1) obtained approval to issue a Request for Proposal instead of using a request for bids, (2) published the RFP, and (3) sent notice to prospective “offerers.” Hearing Transcript at pgs. 35-39. Change Healthcare (Change) and MedImpact were the only offerers who submitted proposals, and the procurement team reviewed the proposals to confirm whether they (1) addressed the issues presented in the RFP, and (2) had blinded technical and cost sections. *Id.* at 52-56.

The procurement team determined: (1) Change’s purportedly “blinded” sections contained over thirty instances of identifying information, (2) that improperly revealed Change’s identity, and (3) the references could not be removed/redacted without changing the proposal’s substance. *Id.* at 108, 56. Accordingly, DOM decided that Change had to be disqualified, and notified Change. *Id.* at 109. Change did not challenge the decision or otherwise argue the decision was flawed. *Id.* at 110.

The procurement team also determined MedImpact’s blinded sections included two references to MedImpact but determined those could be removed/redacted without changing the proposal. *Id.* at 74. DOM, however, overlooked one other instance of MedImpact’s name in the 113-page technical portion of its proposal. *Id.* at 75. MedImpact’s name appears in the middle of a line on a spreadsheet. The procurement team was not alone in overlooking the inconspicuous reference; nobody on the Committee disclosed that they noticed it (they were required to disclose the reference if

they had noticed it), and it was never discussed during the Committee's evaluation. *Id.* at 77. Put more plainly, the Committee did not know they were reviewing MedImpact's technical proposal; the Committee merely knew "they were only evaluating one proposal, but they didn't know which one." *Id.* at 76-77; 110. Further, the Committee's scoring and overall evaluation had nothing "at all to do with any improper motive or any personal relationship or anything of that nature." *Id.* at 103, 111. Finally, the single inclusion of MedImpact's name had no impact on the quality of MedImpact's proposal. *Id.* at 109.

Ultimately, the Committee and the procurement office suggested that DOM award the contract to MedImpact. The Executive Director approved the recommendation and DOM published to the public that (1) it intended to award the contract to MedImpact, and (2) the amount of the contemplated contract. DOM then submitted the contract to OPSCR.

However, OPSCR noticed the stray reference to MedImpact and determined that the lone, isolated reference required that the contract be re-solicited. OPSCR did not determine whether the Committee discussed, considered, or even noticed the reference. OPSCR also (1) offered no response when DOM's Executive Director informed OPSCR that the name had not been a factor in Committee's decision, and (2) refused to attend this hearing despite being subpoenaed to do so.

I. DOM complied with the plain text of Miss. Code Ann. 31-7-417(2) because it did not "reveal" MedImpact's identity to its evaluation committee.

The question presented is whether DOM improperly "reveal[ed]" MedImpact's "name and corresponding identifying information" within the meaning of Miss. Code Ann. § 31-7-417(2). The one-off inclusion of MedImpact's name in the lengthy technical

proposal did not cause MedImpact's identity to become generally known to the Committee.

Section 31-7-417 requires (1) DOM "keep the names of the offerers and their identifying numbers or letters, or combination thereof, in a . . . secure location until factors not requiring knowledge of the name of the offeror have been evaluated and scored" and (2) "[i]f the designated person reveals the names of the offerers and the corresponding identifying information before such time [i.e., before the factors not requiring knowledge of the name of the offeror have been evaluated and scored], the procurement process shall be terminated and the proposal or qualifications resolicited." DOM complied with the first requirement, and the second requirement does not apply.

With respect to the first requirement, Kayla McKnight testified that DOM's designated person (1) assigned MedImpact a unique identifier and placed that on a register and (2) did not disclose the register or MedImpact's identity to the Committee. Hearing Transcript at pg. 87-89; *see also* Exhibit "A" ("The designated person from the Division didn't reveal names from the register.") And the second requirement does not apply, because DOM did not "reveal" MedImpact's identity to the Committee. That MedImpact's name was included one time in a 113-page technical proposal—buried in an exhibit—does not mean the name was "reveal[ed]" as that term is used in the statute. The point is proven by three interrelated principles of law.

First, the statute does not define "reveal", so it is appropriate to rely on a dictionary definition. *Taylor Constr. Co., Inc. v. Superior Mat Co., Inc.*, 298 So. 3d 956, 959 (Miss. 2020), *reh'g denied* (Aug. 6, 2020) ("In the past, members of this Court have resorted to such compendia of knowledge as dictionaries, often the Merriam-Webster Dictionary, to

determine these common and ordinary meanings.") The Merriam-Webster Dictionary, in turn, provides that to "reveal" something is "**to make (something secret or hidden) publicly or generally known.**" (parentheses in original).

Ms. McKnight confirmed that: (1) the Committee never discussed MedImpact's identity and (2) nobody on the Committee disclosed they had noticed MedImpact's name. Moreover, the Committee: (1) already knew from the conflict process (discussed below) that MedImpact and the incumbent Change were the offerers, (2) knew one offerer was not being scored, and (3) due to their familiarity with Change as the incumbent, likely knew that the materials being reviewed were MedImpact's, and not Change's. Hearing Transcript at pgs. 61-62 (confirming, among other things, that the evaluators "know how [Change] work[s]").)

Second, statutes should be construed to avoid absurd results and to honor legislative intent. *In re B.A.H.*, 225 So. 3d 1220, 1237 (Miss. Ct. App. 2016). Rejecting the proposal leads to an absurd result, because it requires that the State reject a proposal that would save the State millions of dollars based on inclusion of a name that the Committee did not notice, consider, or discuss. The record evidence is that even if both proposals had been scored, Change could not have prevailed absent a nearly perfect score on the technical and management proposals because Change's price was nearly double MedImpact's. Hearing Transcript at 116-117. The interpretation is also inconsistent with the legislative intent of "coordinat[ing] and promot[ing] efficiency and economy in the purchase of commodities by the agencies of the state." Miss. Code. Ann. § 31-7-3.

Third, statutes should be construed to avoid injustice and unfairness. *In re Guardianship of Duckett*, 991 So. 2d 1165, 1182 (Miss. 2008). Yet, DOM and MedImpact both have explained that re-solicitation would give Change an unfair advantage because it now knows MedImpact's pricing and the plan MedImpact used to achieve that pricing.

II. DOM has the authority to excuse the irregularity stemming from the one-time inclusion of MedImpact's name.

Immaterial errors may be excused. DOM has the authority to waive the irregularity that occurred when MedImpact's name was included once in the blinded technical proposal. As a threshold matter, DOM stated in its RFP that it reserved the right to excuse such irregularities.¹ Further, the inclusion of the name had no impact on the evaluation process.

On at least three similar occasions, the Mississippi Supreme Court has held that state entities may excuse immaterial errors and proceed to award a contract. *Mississippi State Port Auth. at Gulfport v. Eutaw Constr. Co., Inc.*, No. 2020-IA-00881-SCT, 2022 WL 2070948, at *9 (Miss. June 9, 2022); *Landmark Structures, Inc. v. City Council for City of Meridian*, 826 So.2d 746, 749 (Miss. 2002); *Hill Bros. Const. & Engineering Co., Inc. v. Mississippi Transportation Commission*, 909 So.2d 58 (Miss. 2005).

In *Eutaw Constr.*, the winning offerer (W. C. Fore Trucking, Inc.) made three errors in its original bid: (1) it used the wrong form, such that it incorrectly stated the amount of raw material; (2) made incorrect calculations within the bid; and (3) incorrectly stated the

¹ The RFP stated that “[a]s a precautionary measure, DOM will review the proposals for any additional identifying information prior to distribution to the evaluation committee for the evaluation process. DOM reserves the right to remove identifying information found in the Proposals if the removal of the information will not affect the substance of the submission. Both the removal of identifying information and the decision as to whether a Proposal including identifying information may proceed in the bidding process will be made at DOM’s discretion.”

total amount of its bid. *Id.* The Mississippi State Port Authority permitted Fore to correct these errors and awarded the contract to Fore. Another bidder challenged the award, but the Supreme Court rejected the challenge, ultimately holding that the relevant regulations permitted the Port Authority to waive or allow correction of “minor informalities are matters of form rather than substance evident from the bid document, or insignificant mistakes that can be waived or corrected without prejudice to other bidders; that is, the effect on price, quantity, quality, delivery, or contractual conditions is negligible.” Applying *Eutaw Constr.* to the present facts, DOM had the authority to determine that the disclosure of MedImpact’s name was an “insignificant mistake” that could be “waived . . . without prejudice to other bidders”.

In *Landmark Structures*, the Supreme Court explained:

to secure economy in . . . the expenditures of public funds for materials and supplies needed by public bodies; to protect the public from collusive contracts; to prevent favoritism, fraud, extravagance, and improvidence in the procurement of these things . . . and to promote actual, honest, and effective competition to the end that each proposal or bid received and considered for the construction of a public improvement, the supplying of materials for public use, etc., may be in competition with all other bids upon the same basis, so that all such public contracts may be secured at the lowest cost to taxpayers.

Id. at 749 (internal cite omitted).

Finally, *Landmark Structures* explained the city council had reserved the rights to waive informalities in its solicitation, 826 So. 2d at 749, just as DOM reserved the right to decide “whether a Proposal including identifying information may proceed in the bidding process[.]”

In *Hill Bros.*, the Supreme Court similarly held the Mississippi Transportation Commission had authority to waive an irregularity contained in the low bid that “did not alter the bidding process, did not provide any bidder with an advantage or benefit over

any other bidder, did not prejudice the rights of any other bidder or the public, did not alter the price, quality or quantity of its bid, and the waiver of the irregularity did not provide an opportunity for fraud or favoritism or affect the integrity of the competitive bidding process." 909 So. 2d at 68.

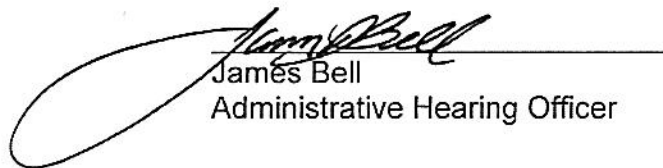
The Court further explained that disqualifying the low bidder "would have done a disservice to taxpayers of this State and would have also been contrary to the very purpose of competitive bidding." *Id.*

The inclusion of MedImpact's name in the technical proposal had no impact on the process, did not give MedImpact an advantage, did not prejudice Change, did not impact the quality/quantity of the proposal, and did not lead to anyone even noticing MedImpact's identify, much less cause fraud or favoritism. Further, re-soliciting proposals would do a disservice to the taxpayers and would be contrary to the purposes of Chapter 31 of the Mississippi Code.

CONCLUSION

The error found by OPSCR was immaterial. The contract should be awarded to MedImpact.

Respectfully submitted this the 2nd day of July 2022.


James Bell
Administrative Hearing Officer