



JANET T. MILLS
GOVERNOR

STATE OF MAINE
BUREAU OF GENERAL SERVICES
77 STATE HOUSE STATION
AUGUSTA, MAINE 04333-0077

DEPARTMENT OF
ADMINISTRATIVE & FINANCIAL
SERVICES

KIRSTEN LC FIGUEROA
COMMISSIONER

BUREAU OF GENERAL SERVICES

WILLIAM LONGFELLOW
DIRECTOR

March 1, 2024

Via Electronic Mail: karyn.madore@jsi.com

Karyn Dudley Madore
Communications Director JSI-NH
JSI Research and Training Institute, Inc.
501 South Street, 2nd floor
Bow, NH 03304

SUBJECT: Request for Appeal of Award – RFP# 202306124
OPTIONS Public Health Campaign

Dear Karyn Madore:

I am forwarding the Final Decision of the Appeal Panel for the above-referenced appeal. The Panel validates the award for the reasons set forth in the attached decision.

This represents final agency action in this matter and as such may be eligible for judicial review. Any person aggrieved by this decision may appeal to Maine's Superior Court in the manner provided in 5 M.R.S.A. 11001, et seq, and M.R. Civ. P. 80C. A party must file a petition for review within thirty days after receipt of notice of the decision.

Regards,

DocuSigned by:

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William Longfellow, Director
Bureau of General Services

cc: Richard Thompson, Administrative Hearing Officer
Stanley Abraham, AAG
Brendan Kreckel, AAG
Michelle Philbrook, Intervenor
Appeal Hearing Panelists

Attachment: Decision of the Appeal Panel

**MAINE DEPARTMENT OF ADMINISTRATIVE
AND FINANCIAL SERVICES
BUREAU OF GENERAL SERVICES**

Re: JSI Research and Training Institute, Inc.	}	
Appeal of Contract Award of	}	Decision on Appeal
RFP# 202306124 for OPTIONS Public	}	
Health Campaign	}	

INTRODUCTION AND BACKGROUND

The Bureau of General Services received and granted a request for hearing of appeal on a contract award decision by the Department of Health and Human Services (DHHS) for OPTIONS (Overdose Prevention Through Intensive Outreach, Naloxone and Safety) Public Health Campaign. The award was made following a request for proposal (RFP) process governed by Division of Purchases promulgated rule, Chapter 110. The request for appeal was timely filed on November 6, 2023, by JSI Research and Training Institute, Inc. (JSI) under the process defined in Division of Purchases rule Chapter 120. A request for intervenor status was subsequently filed by Mishmash, Inc., the recipient of the conditional award for the RFP on November 20, 2023.

JSI was represented by Brann & Isaacson, Mishmash represented themselves, and the Attorney General's Office represented DHHS. All parties received a communication on December 18, 2023, notifying them of the hearing. A request for continuance was submitted by DHHS on December 22, 2023, and was subsequently granted on January 5, 2024.

The Administrative Hearing Officer (AHO) determined that the hearing would be held remotely using a video conferencing service (ZOOM). The parties agreed in advance on joint exhibits related to the procurement process, communications, scoring, and documentation by the review team. DHHS also submitted an additional exhibit with no objections from the appellant or intervenor.

The hearing was held on Thursday, February 1, 2024, where the parties presented witnesses over the live video conference system, witnesses were sworn, examination and cross examination occurred, and all parties presented allowable evidence in accordance with Chapter 120. The parties agreed to written closing statements. The hearing was adjourned upon receipt of written closing statements. The Appeal Panel ("Panel") was comprised of three members chosen from within state service who participated in the live video conference hearing. After a review of all the evidence and arguments presented by the parties, the Panel makes the following findings of fact and decision on appeal.

FACTUAL BACKGROUND

The Department issued a competitive Request for Proposal (RFP), for the purpose of contracting with a single vendor to provide a public health information campaign to help reduce fatal drug overdoses, decrease stigma, and connect individuals to recovery. The RFP provided details and instructions for participating in a written question and answer process to seek further clarification and for submitting proposals. In addition, the RFP generally noted the key process events and the application evaluation and selection procedures. Proposals were timely submitted

by eight bidders and were distributed by the Division of Procurement Services to the RFP coordinator for review and scoring by the selected review team. Proposals were offered by the eight bidders in response to the specific requirements of DHHS, including details of their cost proposal as prescribed within the RFP and related amendment.

GOVERNING LAW AND STANDARD OF REVIEW

The issue, in this case, is whether JSI has met its burden of proof by clear and convincing evidence that the DHHS award decision (1) contained irregularities creating a fundamental unfairness, or (2) was arbitrary or capricious. No violation of law was asserted. This standard is contained in the law at 5 M.R.S. § § 1825-D and 1825-E and in the Bureau of General Services' Rule, Chapter 120 – Rules for Appeal of Contract and Grant Awards. The clear and convincing standard requires that the Panel be convinced that the appellant's assertions are highly probable, as opposed to more probable than not. *Pine Tree Legal Assistance, Inc. v. Department of Human Services*, 655 A.2d 1260, 1264 (Me. 1995). The Panel may only decide whether to validate or invalidate the contract award decision under appeal. *See*, 5 M.R.S. § 1825-E (3) and Chapter 120 (4) (1) of the rules.

In determining whether an award is arbitrary or capricious, the Panel must not substitute its judgment for that of the Review Team. *International Paper Co. v. Board of Environmental Protection*, 1999 ME 135, ¶ 29, 737 A.2d 1047, 1054. There is a presumption that the team's actions were not arbitrary or capricious. *Central Maine Power Co. v. Waterville Urban Renewal Authority*, 281 A.2d 233, 242 (Me. 1971)

FINDINGS OF FACT

The issues raised by JSI on appeal are as follows:

DHHS was alleged to have violated the appeal criteria by penalizing JSI for proposing a cost of more than \$500,000 in paid advertising and media buys.

In the Amendment #1 and Question and Answer Summary Document (J-0030), it is stated: *“The evaluation team will use a consensus approach to evaluate and score the proposed Paid Advertising and Media Buys considering its equitability for the expected outcomes and allowed minimum cost of \$500,000. Members of the evaluation team will not score Paid Advertising and Media Buys individually but, instead, will arrive at a consensus as to assignment of up to ten (10) points for the Paid Advertising and Media Buys.”* In the Question and Answer Summary document (J-0037), the Department’s response to question 23 stated that *“The \$500,000.00 allowance must be inclusive of all costs [for paid advertising and media buys for the initial period of performance].”* The RFP included a spreadsheet for bidders to complete for evaluation of this category. This form had two instructions to bidders:

Instructions: The Department anticipates an allowance of a minimum of \$500,000 for paid advertising and Media Buys for the initial period of performance. The Bidder must provide a detailed account of how available funding for campaign expenses will be utilized.

The second instruction was part of line six where total cost was to be placed:

Total Cost: This total cost must not exceed \$500,000

Simply put, JSI did not follow the instructions for allowed cost. In addition to this, JSI had an opportunity to ask questions and chose not to, testifying that this was a “strategic decision”. The total cost proposed by JSI in this form was \$662,585 for this category, citing it had the current contract and that it was necessary to have these funds to maintain the current level of media. DHHS countered that this was clear, the winning bidder would be assured of a minimum

\$500,000 for media/advertising but that for comparison purposes the services to be listed on the form must not exceed \$500,000.

JSI claims that the award was Arbitrary and Capricious on the grounds that there was no relationship in the scoring of the Proposed Services section and the Cost Proposal section.

JSI highlighted the awarding of points by a mathematical calculation, where the lowest cost bidder receives the full 30 points available and each other bid was scored in comparison to the low bid. There was no judgement made of what services were offered in that awarding of points for cost for these 30 points.

The DHHS witness testified that the sections for Proposed Services and Cost Proposal are scored independently of each other per the RFP guidelines, the total score is meant to be a comprehensive reflection of the evaluation team's consensus considerations of the proposal. In this specific RFP, the scoring was outlined as follows:

Section I – Preliminary Information (No Points)

Section II – Organization Qualifications and Experience (30 points)

Section III – Proposed Services (30 Points)

Section IV – Cost Proposal (30 and 10 Points)

The scoring sections were designed this way so that proposals could be considered against the RFP requirements and not just each other. The goal of this procurement method was to provide the best value to the State of Maine, meaning that the awarded bidder has a good balance of Qualifications and Experience, Proposed Services, and Cost. If a bidder does not meet the minimum requirements of a section, the department reserves the right to disqualify them for that section or give them a zero.

Per testimony from the Department witness, the Organization Qualifications and Experience

and Proposed Services sections were scored prior to the evaluators viewing the Cost Proposal(s). This was to ensure that there was no bias towards proposals dependent on their proposed cost one way or the other. Both bidders in this appeal have experience with this program and have performed services as directed by the DHHS, JSI as the incumbent provider, and Mishmash as the contractor prior to JSI.

DECISION

The Panel reviewed the documentary evidence, considered the testimony of the witnesses, and listened carefully to the closing arguments by the parties.

The argument that the 10 point cost evaluation of proposed services was irregular was found non-persuasive to the panel. This does not constitute a violation of any of the appeal criteria by the Department. JSI argue that one of the evaluators, Grace Roy, made a note that JSI “met” the \$500,000 ‘minimum’, however, during the DHHS testimony, it was admitted that this was an error or mistake on the part of the evaluator, and in any event was considered in the team consensus scoring portion of the RFP for this category. In their closing argument, JSI claims that “[in addition to JSI] another well-respected bidder, Broadreach [proposed more than \$500,000 for a media budget]. (J-0042), which reinforces the conclusion that most bidders understood that the \$500,000 was a minimum, not a maximum.” In fact, contrary to the claim made in JSI’s closing, the remaining six of the seven bidders all stayed under the \$500,000 maximum. It is important to note that the difference in score for this category between the winning bidder and the appellant was 2 points. The Panel is not convinced these are violations of the appeal criteria. JSI also argued that only cost determined the winning bidder due to the proportional formula used to score the cost component of the bids and that it was irregular and unfair because the proposed services were not considered. The scoring matrix shows that for

Section II – Qualifications and Experience, JSI scored 22 points and Mishmash scored 23 points, while for Section III – Proposed Services, JSI scored 20 points and Mishmash scored 13 points, a clear recognition of the difference in the proposed services. The DHHS recognized the differences and made the award recommendation to the bidder with the highest *combined* total score. This was in keeping with the instructions in the RFP.

The Panel was not convinced that the actions or inactions of DHHS in this area were irregular to the point of unfairness and were not arbitrary.

The Panel looked at the issues raised on appeal by JSI and the issues in their totality. The Panel was not clearly convinced that there was an irregularity that created a fundamental unfairness or an arbitrary or capricious award. The Appellants have not met the burden of proof necessary to invalidate the award. Accordingly, the Panel validates the DHHS award decision.

APPEAL PANEL

Dated: 2/29/2024

DocuSigned by:
Helen Michaud
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Helen Michaud, Business Systems Manager
Bureau of Revenue Services, DAFS

Dated: 2/28/2024

DocuSigned by:
Kara Ware
6BA59444A295401...
Kara Ware, Assistant to the Commissioner
Office of the Commissioner, DOL

Dated: 2/23/2024

DocuSigned by:
Michelle Johnson
195F3C295F9143C...
Michelle Johnson, Procurement Analyst
Division of Procurement Services, DAFS

Statement of Appeal Rights

This decision constitutes a final agency action. Any aggrieved party may appeal this decision by filing a petition for review in Superior Court for the County where one or more of the parties reside or have their principal place of business, where the agency has its principal office, or where activity which is the subject of this proceeding is located. Any such appeal must be filed within 30 days of the receipt of this decision.