

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

In Re: J. W. Sewall Co.)
Appeal of Contract Award of RFP #) Decision on Appeal
201910190 for Geographic Information)
Systems Data Enhancement)

INTRODUCTION AND BACKGROUND

The Bureau of General Services received and granted a request for hearing of appeal on a contract award decision by the Public Utilities Commission (PUC) for Geographic Information Systems Data Enhancement for the State of Maine (State). The award was made following a Request for Proposals (RFP) process conducted under Division of Procurement Services (formerly Division of Purchases) rule Chapter 110. The request for appeal was timely filed by J. S. Sewall Company under the process defined in Division of Procurement Services rule Chapter 120.

Representatives of the appellant, J. W. Sewall Company (Sewall), the awarded bidder DATAMARK of Michael Baker International, Inc. (DATAMARK) as Intervenor, and the PUC met with the Administrative Hearing Officer (AHO) and Division of Procurement Services staff to discuss the process to be used to complete the hearing based on the restrictions imposed by The Governor of the State of Maine and national response to the COVID 19 pandemic.

The AHO issued an order to all parties, instructing all to submit written prehearing briefs as opening statements for the Appeal Panel (Panel) in advance of the hearing. The parties agreed in advance on joint exhibits and other documents were considered at the hearing. The parties presented witnesses over a live video conference system, where witnesses were sworn, examination and cross examination occurred, and all parties participated fully. Short closing

statements (briefs) were allowed followed by written closing statements of not more than eight (8) pages. These closing briefs were received by close of business on April 24, 2020, ending the hearing and allowing the Panel to begin deliberations.

The Panel was comprised of three members chosen from within State service. All members met and participated in the live video conference hearing. After a review of all the arguments and evidence presented by the parties, the Panel makes the following findings of fact and decision on appeal.

FACTUAL BACKGROUND

The PUC issued a competitive RFP, the purpose of which was to obtain proposals for the provision of acquiring a contractor to perform Geographic Information System Enhancement. The RFP scope of work to be performed by the awarded bidder, listed the responsibilities of bidders, the evaluation criteria and the procedure the PUC would take to review and score proposals to determine the awarded bidder. Sewall and seven other firms submitted proposal for review under this process.

Proposals by all bidders were timely submitted and considered within the scoring process. The PUC evaluated all proposals individually against the published scoring rubric as follows: Organization Qualifications and Experience worth up to 35 points, Proposed Services worth up to 40 points, and Cost Proposal worth up to 25 points. The evaluation was conducted by a review team of PUC staff and a GIS professional from the Office of Information Technology (OIT). Each reviewer made notes about the individual proposals and then met collectively to assign final scores using a consensus scoring process. The review team elected to not reject any of the proposals but to score each individually. The Master Score Sheet for the

bidders ranged 73 out of a possible 100, down to 19 points. DATAMARK was the highest scoring firm at 73 points. SEWALL scored 70 points and was ranked second in overall score. The cost of the proposals varied from as high as \$3,125,000 (VNuIT) to a low of \$77,516.15 (DSM GEODATA LIMITED). The DATAMARK proposal cost was \$944,645 and SEWALL'S proposal cost was \$266,560. The cost component of the scoring was calculated by a mathematical formula described in the RFP, the cost of the low bid proposal divided by the cost of the proposal being rate, times the possible number of points equals the score assigned.

Notifications of award and non-award were sent to all bidders.

GOVERNING LAW AND STANDARD OF REVIEW

The issue in this case is whether SEWALL has met its burden of proof by clear and convincing evidence that PUC's award decision (1) was in violation of law, (2) contained irregularities that created a fundamental unfairness, or (3) was arbitrary or capricious. 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 appeal'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 judgement 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 SEWALL on appeal are discussed below.

Failure to prescreen proposals:

SEWALL claimed the PUC failed to ensure the appropriate quality and responsiveness of proposals by any prescreening or assessment process. Instead, the PUC evaluators reviewed and scored each proposal by a consensus process regardless of its suitability or conformance with requirements or specifications. SEWALL contends that DSM GEODATA LIMITED (DSM) and REDLEAF TECHNOLOGIES PRIVATE LIMITED (Redleaf) failed to be fully responsive to the requirements of the RFP.

Through testimony and the scoring exhibits, the PUC described that the review team chose to disqualify no bidders. The review team evaluated what it had for responses within each proposal and through consensus assigned scores they determined to be appropriate for the proposal responses given. The scoring under Organization Qualifications and Experience had Redleaf at 6 points and DSM at 17 points. SEWALL was awarded 31 points in this category and the awarded bidder, DATAMARK received 34 points. This process resulted in neither DSM or Redleaf being the highest scoring overall bidder when all weighted criteria were calculated (See Scoring matrix below on next page).

SCORESHEET FOR RFP #: 201910190							
Geographic Information Systems Data Enhancement							
PROPOSAL SUBMITTED BY:		DataMark		DSM		GeoComm	
COST:		Cost:	944,645	Cost:	77516.15	Cost:	723,226
EVALUATION ITEM		POINTS AVAIL.					
Section I: Organization Qualifications and Experience		35	34	17	30	31	
Section II: Proposed Services		40	37	10	23	32	
Section III: Cost Proposal		25	2	25	3	7	
TOTAL		100	73	52	56	70	
PROPOSAL SUBMITTED BY:		Redleaf		Sanborn		VNuit	
COST:		Cost:	98,793	Cost:	677,712.75	Cost:	3,125,000
EVALUATION ITEM		POINTS AVAIL.					
Section I: Organization Qualifications and Experience		35	6	17	9		
Section II: Proposed Services		40	10	17	9		
Section III: Cost Proposal		25	20	3	1		
TOTAL		100	36	37	19		

Evaluation Team Failed to Follow Public Bidding Procedures and Standards: SEWALL

asserted that the review team's failure to reject the proposals of DSM and Redleaf was improper, citing the requirement in Chapter 110 of the Division of Purchases rule requirement that "an award must be made to the highest rated proposal which conforms to the requirements for the state as contained in the RFP". The RFP in this case warned bidders that they risked disqualification if they failed to respond to all instructions and questions. SEWALL identified through testimony and documentation where both of the lowest cost bidders did not provide complete responses or failed to answer one or more qualification requirements of the PUC¹. These factors were directly noted within the individual reviewers' notes and the consensus scoring documentation. SEWALL claimed the proposals should have been eliminated due to

¹ It was noted by the PUC and Intervenor that SEWALL only did this evaluation against the two bidders with the lowest cost, and not for the other bidders' proposals. The highest cost proposal received the lowest cumulative points in the categories other than cost. The Panel did not consider this issue in any way during its deliberation.

these factors. SEWALL also questioned the OIT witness, a member of the review team, and the decision to score or disqualify proposals. The OIT witness reported he did not believe it was his role to disqualify the proposal, and his comments and participation on the consensus scoring led to reduced score where appropriate.

PUC countered that the review team was free to consider all proposals and scored them accordingly using a consensus process. PUC points to this notice to bidders from the RFP:

“The Department, and its evaluation team for this RFP, has sole discretion to determine whether a variance from the RFP specifications should result in either disqualification or reduction in scoring of a proposal.”²

The review team followed the RFP definition of the process, allowing all proposals to continue through the review process and assigned scores commensurate to the level supported by each bidder’s proposal. The review team highlighted areas of individual proposals, including weaknesses and strengths, to support the consensus scoring process.

Failure to disqualify bids skewed the results and ultimately did not result in an award that was in the “Best Value for the State of Maine:

In this case, SEWALL contends failure to disqualify and to allow these very low-cost proposals that were deficient to continue as viable bids harmed SEWALL and made the process irregular and unfair. SEWALL described through testimony and a demonstrative aid that, had the two lowest cost bidders been disqualified, the cost portion of the score would have allowed SEWALL to receive a full 25 points score instead of 7 points and as a result they would have had

² Page 13, Part IV Proposal Submission Requirements, first paragraph.

the highest total score of all remaining bidders. SEWALL points to the cost of DATAMARK, the current awardee at \$944,645 and their cost at \$266,560 represents best value in this instance.

The PUC countered that it used the cost scoring rubric sanctioned by the Division of Procurement Services that was specifically described in the RFP. The final award decision was to the highest ranked proposal in the other two sections of the proposal and that it was the cumulative total score that determined the best value.

DECISION

The Panel reviewed the prehearing briefs, documentary exhibits, considered the testimony of all witnesses, and read the closing briefs of all parties.

The Panel was not clearly convinced that the absence of a prescreening process was irregular or arbitrary in this instance. The RFP was silent to such a process. It is clear that the PUC and the review team could have disqualified a bidder but not required to do so. The review team ranked all bidders against the information in their proposal. It was clear from the evidence and testimony that weaknesses and missing or unaddressed requirements were noted and the consensus scores by the review team appear to this Panel to be reasonable.

SEWALL claims that the award was in violation of the rules by not awarding to the highest rated proposal which conforms to the requirements of the State as contained in the RFP. Allowing the DSM and Redleaf proposals to continue through the process was specifically described in the RFP and the process was followed as described. The Panel is not convinced there was a violation of the Chapter 110 rule.

Finally, SEWALL claims that the award was not made to the best value bidder due to the higher cost of the DATAMARK proposal over its own proposal. Further, if the other proposals

had been disqualified, SEWALL would have won. The Panel agrees that the recalculation would have changed the award if the two lowest cost bidders were disqualified, but they were not. The Panel finds no evidence that the PUC acted irregularly or arbitrarily in its deliberations and final award decision.

For the reasons above, the Panel finds no evidence of an irregularity that created a fundamental unfairness or arbitrary and capricious action by the PUC in the consideration of the proposals and scoring process. A review of the scoring documents appears consistent and the scoring process was applied reasonably.

Accordingly, the Panel validates the PUC award decision.

APPEAL PANEL

Dated: 5/12/2020

DocuSigned by:
Jaime Schorr
Jaime Schorr, Chief Procurement Officer
Department of Administrative & Financial Services

Dated: 5/13/2020

DocuSigned by:
Mark Lute
Mark Lute, Chief Operating Officer
Department of Health & Human Services/OADS

Dated: 5/13/2020

DocuSigned by:
Debra Downer
Debra Downer, Deputy Director
Department of Health & Human Services/DCM

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.