

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

In Re: Home Counselors, Inc.)
Appeal of Contract Award of) Decision on Appeal
RFP #201911201 for)
Family Visitation Program)

INTRODUCTION AND BACKGROUND

This appeal hearing resulted from a remand from Superior Court, as explained in more detail below. First, some context and background may be useful.

The Bureau of General Services (the Bureau), a functional unit of the Department of Administrative and Financial Services (DAFS), received and granted a request for hearing of appeal on a contract award decision by the Department of Health and Human Services (the Department) for the State of Maine’s Family Visitation Program. Awards were made as part of a competitive request for proposals (RFP) process conducted in accordance with Division of Procurement Services administrative rule.¹ The request for appeal was timely filed by Home Counselors, Inc. (HCI) under the process defined the Code of Maine Rules.²

The appeal stems from an RFP issued by the Department in 2019, the purpose of which was to obtain proposals from vendors seeking to provide visitation services for the Office of Child and Family Services’ Family Visitation Program. The services listed into the RFP were divided among various geographical districts. HCI submitted bids for Districts 1, 2, 3, and 5.

On August 19, 2020, the Department notified all bidders via email of the outcome of the bid review process. (Original Record at Tab 3). In accordance with the notification letter,

¹ 18-554 C.M.R. ch. 110, Rules for the Purchase of Services and Awards

² 18-554 C.M.R. ch. 120, Rules for the Purchase of Services and Awards (“Chapter 120”)

conditional contract awards were made to Community Care for District I; The Opportunity Alliance for District 2; Home Counselors for District 3; and Community Care for District 5. *Id.* The letter also informed bidders that "[a]ny person aggrieved by these award decisions may appeal the decisions" in accordance with Chapter 120 of the Division of Purchases Rules. *Id.*

HCI appealed the decisions for Districts I, 2, 3, and 5. Community Care intervened as to Districts I and 5. (Original Record at Tab 29 and Tab 43). HCI's request for an appeal for all four districts was initially granted (Original Record at Tab 42), but the Bureau later limited the scope of the hearing to Districts 1 and 2. (Original Record at Tabs 50 and 51). The hearing did not include DHHS's decision to withdraw a conditional award to HCI in District 3. The Bureau further determined that HCI was not entitled to a hearing as to District 5 because HCI missed the deadline to submit its bid and hence failed to submit a qualifying bid. Thus, the Bureau reasoned that HCI was not an "aggrieved person" entitled to an appeal. (See Joint 207-08, DHHS 00356). A hearing was thereafter held on October 21, 2020. (See Original Record at Tab 32 for a transcript of the appeal hearing). On November 12, 2020, the appeal panel issued its ruling, validating the Department's award decisions in Districts I and 2. (Original Record at Tab 35).

Pursuant to 5 M.R.S. § 11001 and M.R. Civ. P. 80C, HCI filed a timely appeal of the panel decision, and of the Presiding Officer's preliminary ruling that limited the scope of the hearing to Districts 1 and 2 alone, to the Superior Court. On June 23, 2022, the Superior Court issued its Decision and Order overturning the appeal panel's ruling with regard to Districts 1 and 2, and remanding this case to the Bureau with directions to hold hearings on Districts 3 and 5. (HCI 009-17.)³

On January 25, 2023, the panel convened to hear evidence with regard to Districts 3 and

³ Following a remand and reconsideration of its previous ruling with regard to Districts 1 and 2, the appeal panel issued a new decision invalidating the awards for those two districts.

5 in accordance with the remand by the Superior Court. The Panel was comprised of three DAFS employees currently assigned to the Bureau of Alcoholic Beverages and Lottery Operations, Office of Information Technology, and Division of Procurement Services.⁴ All members met and participated in the live video conference hearing.

At the hearing, the parties presented witnesses over a live video conference system, where said witnesses were sworn, examination and cross examination occurred, and all parties provided an equal opportunity to participate. At the conclusion of witness testimony, the appellant and respondent agreed to submit written closing statements. The intervenor declined the opportunity to submit a closing argument. On February 22, 2023, the final closing statement was received, and the record was closed.

The Panel met on February 28, 2023 to discuss the information presented during the 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.

GOVERNING LAW AND STANDARD OF REVIEW

The issue in this case is whether HCI has met its burden of proof by clear and convincing evidence that the Department's award decision was 1.) in violation of law, 2.) contained irregularities that created a fundamental unfairness, and/or 3.) was arbitrary or capricious in nature. This standard is contained in state statute in 5 M.R.S. §§ 1825-D-1825-E and in administrative rule at 18-554 C.M.R. ch. 120. 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,

⁴ Two of the panel members had served on the panel in the fall of 2020 which heard the initial appeal as to Districts 1 and 2. One member of the initial panel has left state government, and the Bureau identified a third individual from the Division of Procurement Services to serve as a panelist for this appeal hearing.

1264 (Me. 1995). The Panel may only decide whether to validate or invalidate the contract award decision(s) under appeal. 5 M.R.S. § 1825-E(3).

In determining whether an award is arbitrary or capricious, the Panel must not substitute its judgement for that of the Department making the contract decision. *International Paper Co. v. Board of Environmental Protection*, 1999 ME 135, ¶ 29, 737 A.2d 1047, 1054.

FINDINGS OF FACT

District 3

The RFP provided that its issuance “in no way constitutes a commitment by the State of Maine to award a contract[.]” (Joint 168.)

On August 19, 2020, the Department Provided “Notice of Conditional Contract Awards” with respect to the RFP. The letter notifying HCI of its conditional contract award as to District 3 expressly provided that the conditional award is subject to execution of a written contract, and stated that: “The Department reserves the right to cancel a Conditional Contract Award for any or all districts at any time prior to execution of a contract.” (Joint Ex. 220).

One week later, Franklin County Children’s Task Force, which had unsuccessfully bid for District 3, filed an appeal of the award pursuant to Chapter 120. (HCI Exhibit 001). The scoring difference between the successful bidder, HCI, and the appealing bidder, Franklin County Children’s Task Force, was extremely close, less than one full point (.55). (Downer Testimony).

On August 31, 2020, the Department advised HCI that it formally withdrew the conditional award, and that it intended to reissue a new RFP. (HCI Exhibit 5). The Department withdrew the conditional award and reissued the RFP because the scoring was so close, and rather than “dragging everyone through an appeal,” it was best for the Department and for the people of Maine to reissue an RFP and issue a new award. The Department determined that by withdrawing

the conditional award and reissuing the RFP, the services would be implemented more quickly. The Department also considered the fact that HCI had the incumbent contract and would continue to provide the services under the existing contract. The Department particularly wanted to get the new contract in place because the new cost structure would better ensure that resources were going where they were needed. (Downer Testimony).

District 5

State of Maine RFP# 201911201, Family Visitation Program, was initially published with a submission deadline of Monday, April 6, 2020. (Joint Exhibit 142). On Tuesday, March 24, 2020, the Department issued Amendment #2 and amended the proposal due date to Monday, July 6, 2020. (Joint Exhibit 6-7; 192 - 194). In addition to posting the amendment on the Division of Procurement website, DHHS sent an email to the prospective bidders, informing them of Amendment No. 2. Subsequently, on Wednesday, July 1, 2020, Amendment #3 and Second Submitted Questions and Answers Summary was published by the Department. Amendment #3, among other things, changed the due date for proposals to Thursday, July 9, 2020. (Joint Exhibit 195). The Department did not send separate emails alerting prospective bidders of this amendment. (See also HCI Exhibit 006).

HCI did not learn of these changes until 3 days before the due date. (La Compte and Hart testimony). HCI had to scramble to make changes to its bid. HCI also faced delays in submitting the bid electronically, as it had previously delivered bids in hard copy. (Hart testimony). HCI submitted timely bids for Districts 1, 2, and 3. It submitted the bid for District 5 last, and that bid arrived at the Department's portal minutes after the 11:59 PM deadline had passed. (Hart testimony). The late bid was not considered. The Department would not even know if a bid was submitted late because DAFS would not submit the bid to the Department for

consideration. (Boynton testimony; Downer testimony).

DECISION

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

District 3

HCI failed to establish any criteria set forth in Chapter 120 that supports invalidating the Department's decision to withdraw the conditional award. The decision to withdraw the conditional award is not a violation of law. A conditional award is just that, conditional, and does not create any legal rights unless and until an agency enters into a contract. No law or rule limits the authority of an agency to withdraw a conditional award and to reissue an RFP. Furthermore, this decision was not an irregularity, much less an irregularity creating a fundamental unfairness. It is not unusual for a state agency to withdraw a conditional award and to issue a new RFP. Furthermore, HCI was in the same position as any other entity, as it then had the opportunity to bid on the newly issued RFP. Finally, the decision was not arbitrary and capricious, but was based on the sound decision to avoid the time and resources of an appeal, which, given the closeness of the scores, was likely to result in an invalidated award and the need to reissue the RFP in any event. The panel finds that the closeness of the scores made it likely that the conditional award would be overturned on appeal, as a relatively minor misstep in the RFP procedure or scoring could have made a difference in the award decision. The Department's decision was reasonable, not arbitrary or capricious.

HCI's argument, that an agency must go forward with an appeal and wait for a decision, would mean that the State is required to spend time and resources with an appeal, even in instances in which the State recognizes a problem in the RFP or in the scoring, or when the State

determines that a new and modified RFP would better serve the people of Maine. The panel soundly rejects this argument. While state agencies must follow state procurement law and rule before entering into a contract, it does not necessarily follow that once an agency engages in the RFP process, and issues a conditional award, it must enter into a contract.

Accordingly, the Panel validates the Department's award decision as to District 3.⁵

District 5

The Panel is bound by the Superior Court's decision. (HCI Exhibit 006). In its decision the Superior Court noted that HCI did not learn of the changes made to the RFP - including the extension of the deadline for submissions from July 6 to July 9, 2020 - "until nearly a week after the amendment was posted." (HCI Exhibit 009). Those changes to the RFP were deeply important: "it changed what had been a standardized billing rate to individual rates that had to be reformulated, separately, on a district- by-district basis." (HCI Exhibit 009). As the court further observed, "deadlines engender reliance interests. Not only do people schedule their lives around deadlines, but altering a deadline will often affect other timelines. That happened here." (HCI Exhibit 0013). In its decision, the Superior Court noted that "[w]here the State's own actions frustrate timely submission ... that untimeliness cannot be used to find a lack of standing." (See HCI Exhibit 006 at 018).

The panel notes that bidding deadlines are hard and fast. This case, however, presents unique circumstances, described above. Based upon its careful consideration of the Superior Court decision, the panel finds in these unique circumstances that the failure to consider the late submission was an irregularity of the process that led to fundamental unfairness.

Accordingly, the Panel invalidates the Department's award decision as to District 5.

⁵ The Panel further notes that it does not address the Department's argument that the decision to rescind the contract as to District 3 is moot. The Superior Court remanded this issue for hearing, and thus the Panel is obligated to make a determination on the merits.

APPEAL PANEL

Dated: 3/9/2023

DocuSigned by:
Michael Boardman
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Michael Boardman, Deputy Director
Bureau of Alcoholic Beverages and Lottery
Operations, Department of Administrative and
Financial Services

Dated: 3/9/2023

DocuSigned by:
Lindsey Kendall
FE74G0BDCED142F...
Lindsey Kendall, Procurement Analyst II
Division of Procurement Services, Department of
Administrative and Financial Services

Dated: 3/9/2023

DocuSigned by:
Joseph Zrioka
EA843478402243C...
Joseph Zrioka, Director of IT Procurement
Division of Procurement Services, Department of
Administrative and Financial Services

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.