

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

Re: Gainwell Technologies LLC }  
Appeal of Contract Award of RFP #202012169, } Decision on Appeal  
Maintenance & Enhancement Services for }  
WIC SPIRIT Software }

**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 (Department) for Maintenance & Enhancement Services for WIC SPIRIT Software. The award was made following a request for proposal (RFP) process conducted under Division of Purchases rule Chapter 110. The request for appeal was timely filed by Gainwell Consulting under the process defined in Division of Purchases rule Chapter 120.

Representatives of the appellant, Gainwell Technologies LLC (Gainwell), and the Department met with the Administrative Hearing Officer (AHO) and Procurement Services staff to discuss the process to be used to complete the hearing.

The AHO determined that the hearing would be held remotely using a video conferencing service (ZOOM). The parties agreed in advance on joint exhibits and one Appellant’s exhibit submitted by Gainwell. The parties presented witnesses over the live video conference system, where witnesses were sworn, examination and cross examination occurred, and all parties participated fully. The parties agreed to written closing statements. These closing briefs were received by close of business on April 4, 2022, ending the hearing and allowing the Panel to begin deliberations.

The Appeal Panel (“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 Department issued a competitive Request for Proposal (RFP), the purpose of which was to obtain proposals for the provision of acquiring a contractor to perform Maintenance & Enhancement Services for WIC SPIRIT Software. The RFP generally provided the scope of work to be performed by a selected bidder, listed the responsibilities of bidders, the evaluation criteria, and the procedure the Department would take to review and score proposals to determine a winning bidder. A Department established question and answer process was used by bidders including Gainwell. Gainwell and several other bidders submitted proposals in response to the RFP.

Proposals were timely submitted by all respondents and were distributed by the Division of Procurement Services to the RFP coordinator at Department. Per testimony, in the regular course of evaluating proposals, the evaluation team was convened for an initial meeting where the RFP coordinator provided an overview of the process and confirmed that no evaluator on the team has a conflict of interest.

Scoring of the qualifying proposals was completed following Department guidelines and the highest scoring bidder selected. Notifications of award and non-award were sent to all respondents.

## GOVERNING LAW AND STANDARD OF REVIEW

The issue in this case is whether Gainwell has met its burden of proof by clear and convincing evidence that Department 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 Gainwell on appeal are discussed below.

**The Department Violated the Law Requiring Preservation of and Access to a Written Record of the Evaluators' Assessments of the Bids, by Instructing Them to Preserve Only Portions of Their Notes and To Destroy Others to Avoid Disclosure Under the Freedom of Access Act.**

Gainwell testified that instructions provided to the Evaluation Team regarding the process for recording individual notes created the opportunity for gaps to be created in the written records of

the Evaluation Team. By their argument, if the full complement of information considered and the rationale for scoring are not “available upon request,” it is impossible to verify the validity of the award. The DHHS scoring process creates formal Notes that ultimately are only a portion of the full record and are carefully curated to support the decision arrived at by the Evaluation Team. All Notes, even those handwritten on paper scraps, should be preserved through the appropriate retention period which does not begin until the procurement, including any potential appeal, has concluded.

**The Evaluation Team’s Award Decision Was Arbitrary and Capricious Due to Scoring Unsupported by the Facts Known to the Team.**

Gainwell noted that CDP’s failure to meet expectations as the incumbent SPIRIT service provider were extensive and well documented. The scoring failed to accurately translate the depth and breadth of these comments and experience into appropriate deductions. Furthermore, the process of limiting attribute scoring to a single category artificially inflated CDP’s score allowing for an arbitrary and capricious that should be invalidated.

**The Evaluation Team’s Failure to Consider CDP’s Failures as the Incumbent Violated Maine Competitive Bidding Law**

As Gainwell identified previously, the RFP scoring failed to properly reflect CDP’s subpar performance as the incumbent. The award should be invalidated as such a criteria was explicitly to be considered. This inaccuracy constitutes a violation of the competitive bidding process.

**DECISION**

The Panel reviewed the documentary evidence, considered the testimony of the witnesses, and read the closing statements of all parties.

The Panel agreed with the appellant, Gainwell, that the award to CDP should be invalidated on several grounds. The selection process was flawed by not preserving and providing access to all the written records created by the individual evaluators. Allowing the destruction of any notes used in the scoring process is inconsistent with BGS rules (18-554

C.M.R. § 110.3(A)(iii)) and the applicable statute (5 M.R.S. § 1825-D(2)) and introduces ambiguity. Thus, there was a violation of law with regards to the preservation and disclosure of notes.

The Panel also believed the award was arbitrary and capricious due to flaws in the scoring process that failed to properly capture CDP’s performance as the incumbent. As prior performance was to be explicitly considered in the scoring process, as per the RFP, the failure to properly score performance here is a violation of competitive bidding law.

For the reasons above, the Panel is convinced a fundamental unfairness or an arbitrary and capricious action by the Department was conducted when the Maintenance & Enhancement Services for WIC SPIRIT Software RFP was awarded to CDP.

Accordingly, the Panel invalidates the Department’s award decision.

**APPEAL PANEL**

Dated: 4/19/2022

DocuSigned by:  
*Jeremy Gray*  
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Jeremy A. Gray, Director of Court Facilities  
Maine Judicial Branch, AOC

Dated: 4/19/2022

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Department of Administrative and Financial  
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Dated: 4/15/2022

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Janet Johnson, Resource Administrator  
Dept. of Agriculture, Conservation & Forestry.

**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.