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December 15, 2010

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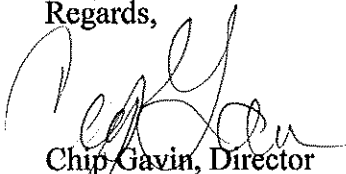
Re: Decision of Appeal Panel - RFP # 200912565, Lottery Gaming System,

Dear Attorneys Dingman, Mahoney, Lipps, Lapine and Robert:

I am forwarding the final decision of the appeal panel in the above referenced matter. The Panel invalidates 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 30 days after receipt of notice of the decision.

Regards,



Chip Gavin, Director
Bureau of General Services

cc: Sarah Forster, AAG, Presiding Officer
Betty M. Lamoreau, Director, Division of Purchases
Michael Boardman, BABLO
Appeal Panelists

Attachment: Decision of the Appeal Panel

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

RE: APPEAL OF AWARD OF CONTRACT) DECISION OF
FOR LOTTERY GAMING SYSTEM) APPEAL COMMITTEE
AND SERVICES)
(RFP #200912565))

This is an appeal by Scientific Games International, Inc. ("SGI") from a decision of the Maine Bureau of Alcoholic Beverages and Lottery Operations (the "Lottery") to award a contract for lottery gaming systems and services to Intralot, Inc. ("Intralot"). The appeal is brought pursuant to 5 M.R.S.A. § 1825-E and Chapter 120 of the Rules of the Division of Purchases of the Department of Administrative and Financial Services. The Director of the Bureau of General Services agreed to SGI's request for a hearing. The winning bidder, Intralot, sought and was granted intervenor status.

The Appeal Committee ("Committee") was comprised of three members of State service chosen at random. A presiding officer conducted the hearing but did not have a vote in the decision. A hearing was held on November 22 and 23, 2010, at which the testimony of witnesses and documentary evidence were presented. At the close of the testimony a request by SGI that the parties present written closing arguments was granted by the Committee, and the administrative records was held open until 5:00 p.m. on December 3, 2010. After a review of the arguments and evidence presented by the parties, the Committee makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

On January 11, 2010, the Lottery issued RFP #200912565 for the lottery gaming system and services. Joint Exhibit ("J.E.") 1. In February and March of 2010, vendors were invited to ask clarification questions regarding the RFP; the Lottery responded to those questions on February 26th and March 17th. J.E. 3, 4.

Timely bids were received from three vendors: Intralot, SGI and GTECH. J.E. 5 (Intralot), 6 (SGI).¹ A five member evaluation committee was established by the Lottery to review the bids comprised of Michael Boardman (chair), Joan Redmond, Johnnie Meehl, Christine Royce, and Timothy Poulin. The evaluation committee worked with a consultant from the independent, non-profit Battelle Memorial Institute ("Battelle"), Michael Huffenberger. Pursuant to Section 5.1 of the RFP, Huffenberger's role was solely to assist the committee in understanding and evaluating the proposals, he was not to score the proposals nor provide an opinion or recommendation as to which proposal best met the Lottery's needs. Huffenberger and the committee members worked through an initial review of the three proposals; committee members took individual notes, some of which² used the so-called "PMIQ" (pluses, minuses, questions, interesting) method of notetaking suggested (and used) by Huffenberger. J.E. 7 (A-C), 8. After the group completed their individual initial reviews of the proposals, the committee met as a group to continue the initial review process, and consulted Huffenberger telephonically to resolve any outstanding questions. The committee took group notes during this stage using the "PMIQ" method; two such sets of notes were created. J.E. 10, 11.

¹ Due to the inclusion of confidential information in the proposals, two versions of each proposal are included in the Joint Exhibits. Joint Exhibits 5(A) and 6(A) have the confidential information removed, while 5(B) and 6(B) have the confidential information included. GTECH's proposal was not submitted as an exhibit by any party.

² Committee member Redmond highlighted the proposals themselves. J.E. 7(D). Committee member Meehl used sticky notes on the proposals and then removed them as she participated in the group review.

After the initial review process was complete, the committee met over a several day period in August 2010 to conduct the technical scoring of the proposals pursuant to Section 5.4 of the RFP. Section 5.4 identifies nine technical evaluation criteria and the weights (available points) for each, with a total of 1,200 technical points available. J.E. 1, pp. 101-02. The RFP makes no representation that all 1,200 points will be awarded to any proposal. The committee used a document entitled Technical Proposal Scoring Guidelines (the "Guidelines") provided by Battelle to calculate the scores for each of the nine technical evaluation criteria. J.E. 12 and attached hereto as Exhibit A.

Pursuant to the Guidelines, an initial award was determined for each of the nine technical evaluation criteria based on whether a proposal was compliant with all requirements of the criterion with no significant deficiencies, or compliant but with one or more significant deficiencies. *Id.* If a proposal was compliant with no significant deficiencies, it was initially awarded 90% of the available points for that technical criterion. *Id.* If a proposal was compliant with one significant deficiency, it was initially awarded 80% of the available points, with two significant deficiencies 70%, and a proposal with several significant deficiencies (more than two) was initially awarded 60% of the available points. *Id.* A proposal that was "non-compliant or so severely flawed as to render an essential element of the proposed solution unworkable" would receive an initial award of less than 60%. *Id.* After the initial award, pursuant to the Guidelines the committee could make adjustments up or down for positive features and/or minor deficiencies, but in no case could the adjustment be more than to the next level above or below – *i.e.* ten percent in either direction. *Id.* During the scoring process, individual members of the committee took notes, J.E. 13, but the basis for the committee's consensus final scores for each technical category was recorded separately for each proposal. J.E. 14 (A-C).

After the technical scoring was completed, the cost proposals were scored using the mathematical formula contained in Section 5.6 of the RFP. (J.E. 1, p. 103). The RFP states that the lowest cost proposal will receive all 800 available points. The technical and price scores were then combined to give the total scores. IntraLot scored the highest number of total points and was awarded the contract. J.E. 15.

DECISION

I. Governing Law and Standard of Review

When there is an appeal of an award of a contract made through the bidding process, the petitioner must show by clear and convincing evidence that the award was (1) in violation of the 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.A. §§ 1825-D and 1825-E and Chapter 120. The clear and convincing standard requires the Committee be convinced that the truth of the assertions on appeal are highly probable, as opposed to more probable than not. *Pine Tree Legal Assistance, Inc. v. Department of Human Servs.*, 655 A.2d 1260, 1264 (Me. 1995). The Committee may only decide whether to validate or invalidate the award decision that is under appeal. 5 M.R.S.A. § 1825-E(3); Chapter 120(4)(1)(A) & (B) of the Rules.

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

II. The Award to Intralot Must Be Invalidated.

In its appeal, SGI presents three reasons that the award to Intralot should be invalidated. First, SGI complains about the Technical Proposal Scoring Guidelines used by the evaluation committee. Second, SGI argues that the Intralot proposal did not comply with the mandatory requirements of the RFP and should therefore have been rejected outright by the Lottery. Finally, SGI asserts that the Intralot proposal contained material misstatements which lead the committee to give it inaccurate scores.

For the reasons explained below, the Review Committee finds that the scoring process contained in the Technical Proposal Scoring Guidelines used by the evaluation committee constituted an irregularity that created a fundamental unfairness in that the Guidelines failed to adequately distinguish between technically superior and technically inferior proposals. In addition, the Review Committee finds that the award was in violation of the law because the documentation provided by the Lottery fails to contain “substantive information that supports the scoring” required by Section 3(A) of Chapter 110 of the Rules of the Division of Purchases in that the consensus scoring documentation does not adequately evidence the application of the Guidelines to the competing proposals. The Review Committee rejects SGI’s arguments that the Lottery was required to reject the Intralot proposal for failing to comply with the RFP, and that the Intralot proposal contained material misstatements that lead to an arbitrary or capricious award.

A. The application of the Technical Proposal Scoring Guidelines constituted an irregularity that created a fundamental unfairness.

SGI’s appeal raises several concerns regarding the evaluation committee’s use of the Technical Proposal Scoring Guidelines. While the Review Committee does not find that the Lottery was required to disclose its scoring rubric in the RFP itself, and does not find that the

Guidelines conflicted with the RFP's disclosure that 1,200 points were available for the nine technical criteria (but were not required to be awarded to one or more proposals), the Review Committee does find that the application of the Guidelines constituted an irregularity that created a fundamental unfairness. By starting every compliant proposal without a substantial deficiency at 90% of the available points and then limiting the amount that the review committee could deviate from that initial 90% score to 10% in either direction, the Guidelines failed to allow the committee to distinguish between technically superior and technically inferior proposals. The initial 90% award for compliant proposals without a significant deficiency had the effect of taking 80% of the available points "out of play" at the outset, as the evaluation committee could not raise an initial award of 90% above 100% or reduce an initial award of 90% any lower than 80% of the available points. With this limited amount of leeway to adjust up and down from the initial award percentage, any significant distinctions in quality were reduced by the Guidelines to a handful of percentage points in one of nine technical subcategories.³

This irregularity becomes even more apparent when applied to the competing proposals in the instant case. Mr. Boardman testified that the review committee initially awarded 90% of the available points to every technical criterion of every proposal with the exception of one: Intralot received an initial award of 80% for Section 3.7. That initial award had the effect of leaving only the last 20 percentage points available, ten up and ten down, in every case except for the one Intralot criterion, for the committee to differentiate between what several witnesses acknowledged to be exceedingly complex, intricate technical proposals made by bidders who are both experienced in the lottery industry and regularly compete in the design of state lottery systems. That is simply not enough leeway to create a fair technical competition between the

³ The Guidelines also forced the committee to treat every significant deficiency in the same manner regardless of whether the committee viewed the deficiencies as being of equal significance, and prevented the committee from going below an additional 10% reduction regardless of the number of minor deficiencies identified.

proposals. In reaching this determination, the Review Committee is *not* seeking to substitute its own judgment for that of the evaluation committee. Rather, the Review Committee finds that the use of the Guidelines prevented the evaluation committee from being able to fully and fairly exercise their judgment in distinguishing between the proposals.

- B. The evaluation committee failed to provide substantive information that supported its application of the Technical Proposal Scoring Guidelines to the competing proposals.**

Beyond the irregularity creating a fundamental unfairness described above, the award by the Lottery also suffers from a violation of law. Section 3(A) of Chapter 110 states that the contracting agency "shall document . . . substantive information that supports the scoring." While the Joint Exhibits before the Review Committee contain significant documentation of the evaluation committee's initial review process, the only documentation that supports the consensus scoring of the competing proposals is contained in Joint Exhibit 14.⁴ Given the testimony of Mr. Boardman about the application of the Guidelines by the committee, Joint Exhibit 14 fails to contain adequate substantive information to support the scoring. Nothing in Joint Exhibit 14 evidences the initial award process that was the first step in determining the technical scores for each criterion. Nowhere is it documented that every proposal received an initial award of 90% in every technical category with the sole exception of Section 3.7 of the Intralot proposal, which Mr. Boardman testified received an initial award of 80% due to the location of the Database Administrator outside of Maine. *Compare* Lottery Exhibit 8 (chart prepared as for the appeal hearing listing the initial award percentages). The notation in the comments about Intralot's location of the DBA does not adequately substantiate the reduction of

⁴ Mr. Boardman testified that the individual notes taken during the consensus scoring process did not support the consensus scores, but rather constituted the individual reviewers' thoughts and opinions.

10% in the initial score as distinguished from the remaining comments that were presumably considered in the subsequent adjustments to the initial score.

Additionally, Joint Exhibit 14 does not explain the percentage or points added or subtracted after the initial award other than to list in the comments certain factors that the committee considered in reaching the final score. In fact, it is unclear given the testimony of Mr. Boardman whether or not the committee adhered to the Guidelines' instruction that the initial award *percentage* be adjusted up or down or whether the committee actually added or subtracted from the number of *points* that resulted from the initial award percentage. This distinction is significant given the Lottery's decision to allocate varying number of points to the nine technical criteria. Joint Exhibit 14 simply gives the final point score for each of the nine technical criterion and a list of comments for each criterion. This might well be an acceptable method of substantiating a consensus scoring process absent the use of the Guidelines. But having chosen to utilize a highly formulaic approach to calculating the technical scoring, the Lottery was obligated to provide documentation to substantiate the application of that scoring process to the competing proposals.

C. The Lottery was not required to reject the Intralot proposal as non-responsive.

SGI argues that the Intralot proposal failed to comply with the mandatory requirements of the RFP, and should therefore have been rejected outright by the Lottery. Specifically, SGI points to Intralot's failure to locate its Database Administrator in Maine as required by Section 3.7.1(3) of the RFP and its proposed use of the Photon terminal which was not, at the time of the submission of the proposal, operational in some North American lottery environment as required by Section 1.15 of the RFP.

At the outset, it is clear from the RFP itself that the Lottery reserved the right under Section 1.23 to elect not to reject a non-compliant proposal. Section 1.23 states that “proposals that do not meet all material requirements of this RFP . . . *may* be rejected as non-responsive.” (emphasis added) With respect to the Database Administrator, the Lottery was within the parameters of the RFP when it decided to accept Intralot’s proposal even with the Database Administrator located out-of-state and penalize Intralot for that choice through a technical scoring reduction: Mr. Boardman testified that Intralot’s initial award for staffing was 80% of the available points, reflecting a significant deficiency. Regarding the Photon terminal, Section 1.15 of the RFP contains an exception for “improved newer releases or models” from the requirement that the equipment be operational in a North American lottery environment. Intralot described the Photon as the next generation of the Coronis HEE (an existing terminal) and SGI failed to demonstrate by clear and convincing evidence at the hearing that the review committee erred in accepting that characterization. Finally, the notes of the consensus scoring suggest that the review committee did appreciate that the Photon was not yet field tested and imposed some scoring reduction based on that fact.

D. The Intralot proposal did not contain material misstatements leading to arbitrary and capricious scoring.


Finally, SGI argues that the Intralot proposal contained “inaccurate, misleading, and contradictory representations” that caused the Lottery to score the proposal on the basis of factors that did not exist leading to an arbitrary and capricious score. SGI referenced several such representations during the hearing, including the so-called “Catalina solution,” the ability to offer “Failsafe” keyless validation, statements about Intralot’s ability to make a problem-free conversion, and Intralot’s history with other lotteries. In each instance, the testimony presented by SGI at the hearing failed to establish that the representations by Intralot in its proposal were

inaccurate at all, or at a bare minimum, inaccurate at the time that the proposal was submitted to the Lottery. The Review Committee finds no merit to SGI's contentions in this area.

CONCLUSION

SGI has established by clear and convincing evidence that the awarding of the contract for lottery gaming systems and services to Intralot was in violation of law and contained irregularities that created a fundamental unfairness. The Panel therefore invalidates the award made by the Lottery.

Dated: 12/14/10



Chad Lewis
Department of Health and Human Services

Dated: _____

Tony VanDenBossche
Maine State Planning Office

Dated: _____

Michael Wenzel
Division of Purchases

STATEMENT OF APPEAL RIGHTS

This decision constitutes 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 with 30 days of receipt of this decision.

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