



STATE OF MAINE
DEPARTMENT OF ADMINISTRATIVE & FINANCIAL SERVICES
BUREAU OF GENERAL SERVICES
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May 5, 2010

Curtis A. Mildner, President
Market Decisions, LLC
75 Washington Avenue, Suite 206
Portland, ME 04101

William Laubenstein, AAG
Attorney General
#6 State House Station
Augusta, ME 04333

Re: Appeal of Award, Maine Commission for Community Service (MCCS), RFP #201001582
Project INVEST Coordination & Evaluation

Dear Mr. Mildner and Attorney Laubenstein:

I am forwarding the Final Decision of the Appeal Panel in the above-referenced matter. 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. 1101, 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.

Sincerely,

M.F. Chip Gavin
Director, Bureau of General Services

cc: Mark Randlett, AAG
Appeal Panelists
Maryalice Crofton, MCCS

Attachment: Decision of the Appeal Panel

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

In Re: Market Decisions
Appeal of Award by the Maine Commission
for Community Service -
Project INVEST
RFP # 201001582

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Decision of Appeal Panel

INTRODUCTION AND BACKGROUND

This is an appeal by Market Decisions from a decision by the Maine Commission for Community Service (“MCCS”) to award a contract to Career Prospects, Inc., for the coordination, implementation and overall evaluation of the final phase of Project INVEST. The appeal is brought pursuant to 5 M.R.S. § 1825-E and Chapter 120 of the Rules of the Bureau of General Services of the Department of Administrative and Financial Services (“Rules”). The Bureau granted Market Decision’s request for a hearing.¹

An Appeal Panel (“Panel”) was comprised of three members chosen from State service. An evidentiary hearing was held on April 29, 2010, at which testimony of witnesses and documentary evidence was presented. After a review of all the arguments and evidence presented by the parties, the Panel makes the following findings of fact.

FINDINGS OF FACT

Project INVEST is a federal project intended to provide higher education career preparation and professional development opportunities for managers of volunteers. MCCS has

¹ Career Prospects, Inc. did not intervene in this appeal.

partnered in this project with three Maine educational institutions; the University of Maine, York County Community College and the University of Southern Maine. Thus far, four courses have been designed encompassing novice, intermediate, advanced and expert levels of competency for volunteer management. These courses are administered through the partner institutions. The Request for Proposals (“RFP”) provided that bidders may not represent or be a tenured member of the faculty at any of the partner institutions.

Any person intending to submit a bid was required to register on the MCCA website. A list was generated that contained the name, mailing address, e-mail address and phone number of the registrants. Market Decisions is shown on the list as having registered on February 8, 2010, and as having provided “bids@marketdecision.com” as its e-mail address.

The RFP established February 11, 2010 as the deadline for the submission of written questions, and provided that responses would be posted on the MCCA website by 5 p.m. on February 12, 2010. Market Decisions did not submit any questions to MCCA.

On February 12th, rather than posting the responses to the questions on its website, MCCA e-mailed the responses to the registrants using the e-mail addresses provided at the time of registration. Included with the response to questions was an attachment titled “The Project INVEST Evaluation Framework.” The address line for the e-mail shows that it was sent to Market Decisions at bids@marketdecision.com. During the appeal hearing, Curtis Mildner, President of Market Design, acknowledged that the response to questions and the attached evaluation were received by his company at its e-mail address, and that Market Decisions did not check its e-mail before submitting its bid.

Two proposals were received by the submission deadline – one from Market Decisions and the other from Career Prospects, Inc., the winning bidder. Tom Broussard, the President of

Career Prospects, Inc., was involved in the development of two of the four courses being used with Project INVEST (the intermediate and advanced courses). However, Maryalice Crofton, Executive Director of MCCS, testified that the purpose of the RFP was to evaluate whether students learned the material and could apply it, not to evaluate the design of the courses themselves. Additionally, Ms. Crofton testified that the federal grant for Project INVEST does not require an independent evaluation. Mr. Broussard did not represent and was not a tenured member of the faculty at any of the partner institutions.

A scoring committee consisting of four individuals assessed both bids and assigned consensus scores. As a result of the review and scoring process, the committee determined that Career Prospects was the best value bidder and selected it for the award of the contract. Market Decisions filed a timely appeal.

GOVERNING LAW AND STANDARD OF REVIEW

The issue in this case is whether Market Decisions has met its burden of proving by clear and convincing evidence that MCCS' award of the contract (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 truth of the assertions of the appeal 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 scoring 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).

DECISION

The Panel determines that Market Decisions has not met its burden of proving by clear and convincing evidence that any of the statutory criteria have been met so as to invalidate the contract award to Career Prospects. Market Decisions raised several points of appeal during the hearing, discussed in more detail below.

Market Decisions claimed that, by sending the responses to questions by e-mail, M CCS violated a provision in the RFP that responses to questions about the RFP would be posted on M CCS' website. The Panel does not find this to be a violation of law, as the failure to post the responses on the website violated neither state purchasing statutes nor the Division of Purchases' rules. The Panel does, however, find the failure to post the responses in the manner provided in the RFP to be an irregularity, but does not find that this irregularity resulted in any fundamental unfairness. M CCS submitted timely responses the questions to all prospective bidders by e-mail, using the e-mail addresses provided by all those who registered in the M CCS website. The recipients of the e-mail included Market Decisions, which acknowledged that the e-mail was, in fact, received. Therefore, even though not posted on M CCS' website, the information was delivered to the prospective bidders by a method fairly designed to ensure it would be received.

Market Decisions next argued that it was inherently unfair to award the contract to Career Prospects in light of Mr. Broussard's (Career Prospects' President) prior involvement with

MCCS and Project INVEST. In making this argument, Market Decisions stressed that the evaluation of the program needed to be independent. Mr. Broussard neither represented nor was he a tenured member of the faculty at any of the partner institutions. As such, he was not disqualified from bidding under the terms of the RFP. Further, the purposes of the RFP are to evaluate whether students are learning the material and can apply it, not to evaluate the design of the courses themselves; and there is no evidence in the record that Career Prospects could not perform this evaluation in a fair manner. Finally, the federal grant for Project INVEST does not require an independent evaluation. The Panel does not find any error in this regard.

It was alleged that the bidders were not on a level playing field. Specifically, Market Decisions claimed that Career Prospects had access to information, such as the responses to questions and the project evaluation framework, which was not provided to Market Decisions. The Panel finds no merit in this argument. The evidence clearly shows that MCCS' provided the same information to all prospective bidders who registered with the MCCS website when it sent the e-mail on February 12, 2010. Market Decisions admitted it did not check its e-mail before submitting its bid. Any lack of information was the result of Market Decisions' own failure, not the actions of MCCS.


Finally, Market Decisions claimed that the information in both the RFP and the responses to questions was deliberately vague and that MCCS did not make a sincere attempt to provide everyone with the information needed to submit a proper bid. The Panel finds no merit in these arguments. There is no evidence in the record that MCCS was intentionally vague; and the testimony of Market Decisions in this respect was purely speculative. Moreover, there was sufficient information available to all prospective bidders. The RFP, as a whole, adequately described the scope and intent of the contract and the requirements for bid submission. Further,

the RFP informed prospective bidders that additional information on Project INVEST was available on MCCS' website. And, to the extent Market Decisions believed the RFP was vague, it could have sought clarification by submitting questions, but chose not to do so. Finally, the responses to questions, while concise and to the point, provided answers to the questions asked with adequate clarity and detail. The Panel does not find any error in this regard.


Accordingly, the Panel validates the contract award to Career Prospects.

APPEAL PANEL ON CONTRACT AWARD

Dated: 5/7/10


Betty M. Jamoreau
Division of Purchases

Dated: 5/5/10


Chad Lewis
Department of Health and Human Services

Dated: _____

Kathy Plante
Department of Corrections

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.

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APPEAL PANEL ON CONTRACT AWARD

Dated: _____

Betty M. Lamoreau
Division of Purchases

Dated: _____

Chad Lewis
Department of Health and Human Services

Dated: 5/6/10

Kathy Plante
Kathy Plante
Department of Corrections

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