



STATE OF MAINE
DEPARTMENT OF ADMINISTRATIVE & FINANCIAL SERVICES
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July 21, 2010

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Re: Appeal of Award, Department of Economic and Community Development RFP
#201004649 Call Center Fulfillment Services

Dear Sirs:

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: Liz Wyman, AAG
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 CALL CENTER FULFILLMENT) APPEAL PANEL
SERVICES CONTRACT)
RFP number 201004649)

This is an appeal by Direct Mail of Maine, Inc., (“DMM”) from a decision of the Maine Department of Economic and Community Development, Office of Tourism (“Department”) to award a contract for call center fulfillment services to MPX Business Solutions (“MPX”). 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 (“Rules”). The Director of the Bureau of General Services agreed to DMM’s request for a hearing. The winning bidder, MPX, sought and was granted intervenor status.

The Appeal Panel (“Panel”) 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 July 12, 2010, at which the testimony of witnesses and documentary evidence were presented. After a review of the arguments and evidence presented by the parties, the Panel makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

In April, 2010, the Department issued a request for proposal (“RFP”) seeking bids to provide the following services: inbound mail, email and call center inquiry processing, database/list management, individual fulfillment services, bulk fulfillment services,

warehousing/inventory management and other related services for the Office of Tourism's marketing programs. DMM had provided these services for a period of 12 years prior to the issuance of the RFP. The RFP made clear that subcontracting was allowed for the provision of services so long as the proposals provided information regarding the subcontractor and its qualifications to perform the work.

The RFP set forth "Selection Criteria," asking the bidders to provide information in 16 specific areas. The following are particular inquiries included in the list of 16:

4. Explain your call center training practices and procedures.
6. Show Vendor's documented experience of providing inbound call center services for at least three years with annual call volume of at least 25,000 for clients that market using both print and electronic media.
8. Include previous experience in related areas, including reference and client list.
12. Explain technical facilities and capabilities, a description of telecommunications and computer systems, including call distribution, call volume capacity, and data storage capabilities.
14. Explain your database storage and management practices including systems for data transmission and report generation.

In the section of the RFP designated "Selection Process," the Department explained that the proposals would be evaluated by a committee using selection criteria as follows:

Understanding of the Scope of Services based upon presentation of a clear and concise explanation of fulfillment methods, procedures, inventory control, staff training and reporting as outlined in items 1-4 of the Selection Criteria. (35 points)

Experience in providing fulfillment and call center services as outlined in items 5-11 of the Selection Criteria. (15 points)

Explanation of technical capabilities and systems capability as outlined in items 12-15 of the Selection Criteria. (15 points)

Cost for providing services as outlined in item 16 of the Selection Criteria. (25 points)

There were 10 bidders who submitted proposals in response to the RFP. The Department set up a review committee of three individuals who worked within the Department. These individuals reviewed each of the bids separately and made notes. Then the committee met to conduct consensus based scoring of the proposals. MPX received a score of 92 points. DMM received a score of 86 points. Five of the bidders received scores ranging from 17 to 64. The three remaining bidders received scores of zero because their proposals were considered non-responsive or not qualified to submit a bid and were thus rejected.

The Department sent notices to all the bidders of the award of the contract to MPX. DMM filed the instant appeal.

REASONS FOR 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 of the Rules for Appeals of Contract and Grant Awards. The clear and convincing standard requires the Appeal Panel 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 Panel 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.

II. The Contract Award Must Be Validated.

A. The Scoring of the Proposals Was Not Arbitrary.

In its appeal DMM does not argue that there was an error of law or an irregularity in the process that resulted in fundamental unfairness. Rather, DMM argues that the scoring of the proposals was arbitrary and capricious in that the scores awarded to DMM, as well as the scores awarded to MPX, did not reflect the reality of the information presented in the two proposals. The Law Court has defined arbitrary and capricious conduct by an administrative agency as “willful and unreasoning action, without consideration of facts or circumstances.” *Help-U-Sell, Inc. v. Maine Real Estate Comm’n*, 611 A.2d 981, 984 (Me. 1992) (quoting *Central Maine Power Co. v. Waterville Urban Renewal Auth.*, 281 A.2d 233, 242 (Me. 1971)).

The Appeal Panel concludes that DMM has failed to show by clear and convincing evidence that the review committee’s scoring of the DMM and MPX proposals was arbitrary. In its appeal, DMM focused on five of the 16 selection criteria that were set forth in the RFP, arguing that DMM’s responses to these inquiries were far more detailed than the responses provided by MPX, demonstrating superior qualifications for performing the terms of the contract. Yet, DMM argues, the review committee scored MPX higher than DMM in these categories.

Underlying DMM’s argument is the knowledge that DMM has, in fact, handled the work of the contract in issue for 12 years and has extensive experience in providing the services that the Department set out for bid. In addition, it is clear from the proposal

submitted by DMM as well as the evidence presented at the hearing that DMM has technology and expertise that could be described as state of the art. DMM handles numerous large-volume customers and has the capacity to provide services to customers that far exceed the nature of the contract that is in issue in this case.

The RFP, however, was not limited to high-capacity vendors with superior technology or experience. The contract in issue is not overly large in volume nor is it terribly complex. The Office of Tourism staff member who prepared the RFP testified that the Department intentionally removed a minimum volume requirement from the RFP to open the bidding process to smaller capacity vendors. The Department understood that its contract could be handled by a smaller vendor and desired to make the process open to bids from a broader array of vendors. For example, the RFP required a minimum of three years experience in warehousing and inventory management, as well as a minimum of three clients for whom it has handled call center and mail fulfillment services. The RFP selection criteria did not place a premium on experience or capacity.

On appeal, DMM focuses on the five selection criteria set forth in the findings of fact above. With respect to each of these criterion, DMM believes that its proposal was more responsive and informative than MPX's proposal. In particular, DMM emphasized its response to inquiry numbers 12 and 14, which focused on technical capability and computer systems. The review committee scored DMM 12 of 15 points for this category noting that "Technical capabilities and systems are fairly basic." DMM presented evidence, including expert testimony, that its computer systems and technical capabilities are of the highest quality available in this line of business. To describe its capabilities as

“basic” is, in DMM’s view, “preposterous” and not representative of the information that was provided.

DMM may be correct that its technology is superior to MPX or any other bidder. When evaluating bids, the review committee does not conduct a comparison of each bidder’s proposal to the other proposals but rather measures the proposal against the terms of the RFP to determine whether the proposal is responsive to what is being requested. Therefore, while the scoring sheets may seem to suggest a comparison, the scoring itself was not conducted on such a basis and thus cannot be read in that context.

Moreover, and more important for purposes of the instant appeal, the Appeal Panel is not to second-guess the decisions of the review committee on its scoring of the proposals. The Appeal Panel’s role is to examine the selection process itself and determine if it was compliant with the law and the rules. It is not the purpose of the Appeal Panel to review and rescore the proposals. DMM must show by clear and convincing evidence that the scoring of DMM’s proposal with respect to its responses on technology issues was arbitrary and capricious. It has failed to meet this burden.

DMM scored 12 out of 15 for this category. The consensus scoring sheet indicates that the technical capabilities and systems “appear fairly basic.” The reviewers were not computer experts and were not qualified to review the proposals from a highly technical standpoint. Rather, they were required to ascertain whether the bidder demonstrated capability to handle the technical aspects of the contract. The individual notes of the reviewers indicate that they believed DMM’s technical capabilities met the requirements of the RFP but they also expressed some minor concerns. One reviewer noted that the “on-line ordering and web portals seem old-fashioned.” Another noted that

DMM “didn’t provide much insight into the types of reports they could generate and how the client would view them or access them.” Therefore, while the score was high, there were issues with DMM’s response. The scoring sheet reflects these concerns and is thus not arbitrary and capricious.

The same analysis applies to DMM’s argument with respect to the other criteria on which it focuses its appeal. For example, DMM touts its experience with multiple clients and its ability to handle international mailing. Those facts are not in dispute. The issue is whether DMM, through its proposal, was able to communicate its capabilities in these areas in a manner that showed the review committee that it was entitled to the highest scores available. The evidence shows that with respect to each category, the review committee conducted a review of both DMM’s and MPX’s proposals and determined whether they were responsive to the RFP and met the needs of the contract. The scores given to both MPX and DMM reflect that review and are sufficiently supported so as to negate any suggestion that they were arbitrary.

DECISION

In light of the foregoing findings of fact and conclusions of law, the Appeal Panel concludes that Direct Mail of Maine, Inc. has failed to meet its burden of proving by clear and convincing evidence the statutory criteria requiring an invalidation of the award. *See Pine Tree Legal Assistance, Inc. v. Department of Human Servs.*, 655 A.2d at 1264.

WHEREFORE, the Department’s decision to award the contract for call center fulfillment services to MPX Business Solutions is validated.

Appeal Panel:

Betty M. Lamoreau
Betty Lamoreau
Division of Purchases

7-21-10
Date

Richard Soules
Richard Soules
Department of Education

7-19-10
Date

Troy Varney
Troy Varney
Department of Corrections

7-21-10
Date

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 any 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 the activity that is the subject of the proceeding is located. Any such appeal must be filed within 30 days of receipt of this decision.