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October 18, 2010

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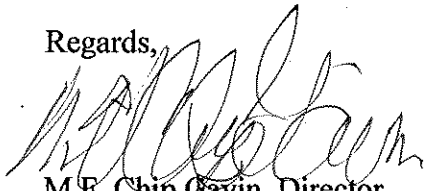
Re: Appeal of Award by the Department of Health and Human Services  
Medical Transcription Services, RFP # 201005694,

Dear Mr. Nicholls, Mr. Winkler, Mr. McNall, Mr. Olsen & Ms. DeMartini:

I am forwarding the Final Decision of the Appeal Panel on the above-referenced appeal. 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.

Regards,



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

cc: Elizabeth Wyman, AAG  
Appeal Panelists  
John McGill, DHHS

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

RE: APPEAL OF AWARD OF MEDICAL ) DECISION OF  
TRANSCRIPTION SERVICES ) APPEAL COMMITTEE  
RFP # 201005694 )

This is an appeal by four bidders from a decision of the Department of Health and Human Services (“DHHS” or “Department”) to award a contract for medical transcription services to Czerenda Court Reporting, Inc., dba Reporters Transcription Center. The four bidders who filed an appeal are: Stone Network, Inc., The Dictation Source, LLC, Brown & Meyers, Inc. and WeType4u. 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 the request for a hearing. The winning bidder, Czerenda Court Reporting Services (“Czerenda”), did not seek status as an intervener in this case.

The Appeal Committee (“Committee”) was comprised of the director of the Division of Purchases and two members of State service who were not affected by the award decision. A presiding officer conducted the hearing but did not have a vote in the decision. A hearing was held on October 1, 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 Committee makes the following findings of fact and conclusions of law.

## FINDINGS OF FACT

In or around May, 2010, the Department issued a request for proposal (“RFP”) seeking proposals to provide medical transcription services for transcripts to be used in the determination of eligibility for disability benefits. At the time the RFP was issued, Czerenda had the contract to provide medical transcription services for the Department.

Part II of the RFP, “Proposal Submission Requirements” contained the following statement under General Provisions paragraph 1.2:

All proposals shall adhere strictly to the instructions and format requirements outlined in this RFP and any written supplements and/or amendments, such as the Questions and Answers, issued by the Department. The proposal must follow the format and respond to all questions and instructions specified in Part IV. Proposal Content – Information Required from Bidders.

The RFP also contained a “Proposal Format” section, which explained in detail how bidders were to prepare their bid packages, including, among other things, specific provisions regarding page numbering, order of attachments, disallowance of any extraneous information or documents and location of bidder names. Paragraph 3.3.h of this section provided:

Proposal Cover Page Required. Complete and submit the proposal cover page provided in Appendix A of this RFP or prepare a facsimile thereof. The cover page must be the first page of the proposal package. **Please do not add any other type of cover or title sheet and please do not use any transmittal letter.** It is important that the cover page show the specific information requested including applicant address(es), amount of money being requested from this RFP and other details listed.

(emphasis in original).

Paragraph 4.2 set forth the “Scoring Weights and Process.” Subparagraph a provided that “[t]he score will be based on a 100 point scale and will measure the degree to which each proposal meets the following criteria. Information gathered as part of reference checks will be included when applicable.” The paragraph set forth the following criteria:

- Organization Qualifications and Experience (25 points)
- Technical Expertise (25 points)
- Customer Service (25 points)
- Cost (25 points)

The RFP explained that a consensus approach would be used to evaluate the bids. In paragraph 4.3 “Selection and Award,” the RFP explained that the final decision regarding the award of the contract would be made by representatives of the Department “subject to approval by the State Purchases Review Committee.” The final sentence in this paragraph stated in bold underlined print that the Department reserved the right to reject any and all proposals.

The RFP also contained a paragraph under the “Proposal Attachments” page that explained how to comply with a Legislative Resolve that requires any individual who will be using contracted service work from abroad to submit information relating to such work, which would be later contained in Rider G of any contract with the State. In responding to questions submitted by bidders, the Department provided the following information:

In any of the transcription volume currently outsourced overseas? Is overseas transcription an option for this RFP?

Currently all of the transcription is outsourced overseas. Overseas transcription is an option as long as all requirements of the RFP are met.

Part IV, "Contract Administrative Conditions," contained paragraph 1.2, which provided:

The Department estimates having the Agreement in place by October 1, 2010. However, we recognize that the actual contract effective date depends upon completion of the RFP process, date of formal award notification, length of contract negotiation and preparation, and approval by the Contract Review Committee. Any appeals to the Department's award decision(s) may further postpone the actual contract effective date, depending upon the outcome. The contract effective date may need to be adjusted, if necessary, to comply with mandated requirements.

(emphasis in original).

The RFP required bidders to comply with confidentiality laws and regulations, including HIPAA.

The Department received 41 proposals. The Department staff person who was facilitating the evaluation process appointed two other individuals who worked for the Department to serve with him on an evaluation committee. The committee agreed to meet over the course of a week, during the morning hours, to evaluate the proposals.

The first decision the committee made was to engage in a process of eliminating proposals that failed to meet basic formatting criteria, such as the use of page numbers, failure to provide required information, or arranging attachments in the required order. Applying a pass/fail checklist, the panel rejected half of the proposals. The evaluation committee was seeking a means to reduce the number of proposals that it would have to evaluate. In following this approach, the committee inferred that a bidder who failed to

follow the RFP directions would not follow directions in doing the actual medical transcription work that was required by the contract.

Seven of the bidders were failed due to not using page numbers. Eight bidders were failed for not submitting the correct number of proposals. Two of the bidders, including Stone Network, were failed due to the addition of a sheet on top of the required cover sheet. The representative for Stone Network explained that it placed an additional top sheet to shield pricing information that was contained on the prescribed cover sheet.

The evaluation committee worked on the remaining 20 or so proposals over the course of five mornings. The committee decided that it would not contact bidders' references unless there was a tie between two or more bidders. For each proposal, each member of the Committee had four type-written pages setting out the four categories of criteria: experience, customer service, technical expertise and cost. On these pages, the committee members wrote sporadic individual notes. For each proposal, the facilitator filled out a master evaluation sheet. This sheet contained the consensus score for each of the categories of criteria, as well as some notes from the committee as a whole.

The scores that are pertinent to the instant appeal are:

- Czerenda received a score of 92.4 out of 100 points
- Brown & Meyers received a score of 90.4 out of 100 points
- The Dictation Source received a score of 88.7 out of 100 points
- WeType4u received a score of 77 out of 100 points

Stone Network did not receive a score. On its score sheet it was noted that Stone Network was "screened out of the evaluation process" due to its failure to follow the cover page requirement.

The Department sent award letters to all of the bidders explaining that the contract had been awarded to Czerenda. The letter stated that the award “is a final decision subject to State Purchases Review Committee approval and the successful negotiation of a mutually acceptable contract.” Four of the bidders filed letters seeking a stay of the appeal award and a hearing on appeal to challenge the contract award. The Bureau of General Services sent a letter to the four bidders, which contained the following statement:

We have received and considered your requests for stay and appeal of the above-referenced award, and your request for an appeal hearing is granted. We have instructed the Department of Health and Human Services that they should not execute a new contract until after the appeal hearing decision is announced. Therefore, a formal stay of award is not needed, and none is granted.

Prior to the hearing, the Vice President for Operations for WeType4u contacted the presiding officer and requested the opportunity to present written arguments rather than appear at the hearing in person. The basis for the request was the expense involved in travel from California, where WeType4u is located. The presiding officer denied the request in a letter to WeType4u, with copies to all the parties in the case. The letter explained that an appellant must appear in person at the hearing to present evidence supporting its appeal. Failure to appeal would be a default and would result in a dismissal of the appeal.

A hearing was held on October 1, 2010, in Augusta. Brown & Meyers appeared with counsel. Stone Network appeared through its representative. WeType4u failed to appear, as did The Dictation Source.

## 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 (“Rules”). 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.

### **II. WeType4u and The Dictation Source Are Defaulted for Failure to Appear.**

Chapter 120 “Rules for the Appeal of Contract and Grant Awards” provides that at the appeal hearing, a petitioner “must present evidence to substantiate the specific grievances stated in the appeal.” Rules, § 3.4. The Rules further provide that witnesses may be called and that such witnesses will be subject to cross examination. Rules, § 3.4.B. In addition, the Rules provide that “[n]o sworn written evidence shall be admitted unless the author is available for cross examination or subject to subpoena, except for good cause shown.” Rules, § 3.8. There is no provision in the Rules for a party to an appeal hearing to present its case solely on written argument. The presiding officer properly defaulted The Dictation Source and WeType4You when they failed to appear at



the appeal hearing to present evidentiary support for the grievances they raised in their appeal letters.

### **III. The Contract Award Must Be Validated.**

#### **A. Brown & Meyers' Arguments.**

In its appeal, Brown & Meyers raises four issues. First, Brown & Meyers questions whether the contract award was ripe for appeal because it had not been approved by the State Purchases Review Committee. Section 2 of Chapter 120 provides the criteria by which the Director of the Bureau of General Services shall grant an appeal hearing. That section specifically provides that “[a] hearing will not be granted if the contract award is not approved by the State Purchases Review Committee.” At the hearing, counsel for the Department of Health and Human Services stipulated to the fact that the contract award on appeal had not been approved by the State Purchases Review Committee. Brown & Meyers argue that this is a violation of law that requires invalidation of the award.

Brown & Meyers' argument is misplaced. While the rule states that a hearing shall not be granted if the contract award is not approved by the State Purchases Review Committee, the record shows that the request for a hearing was, in fact, granted. The letter sent to the parties informed them of the date and time for the hearing and also informed them of the fact that there would be no need for a formal stay in light of the Department's agreement not to execute a contract while the appeal was pending. There was no evidence presented as to how or why the contract award was handled in this manner or why the Bureau of General Services granted the hearing in the absence of approval by the Contract Review Committee.

In any event, to the extent there was a violation of the rule, the violation had no bearing on the process that is under appeal. Indeed, the RFP itself informed the parties that the contract start date could be delayed by appeal processes as well as the time that could be involved in negotiation as well as approval by the Contract Review Committee. The Department was thus assuming that final approval of the contract would not take place until after any appeals were completed. Brown & Meyers made no showing that this violation of the rule had any impact on the selection process or prejudiced them in any manner.

Brown & Meyers' second point on appeal is that the selection process for the contract should have been conducted as an adjudicatory proceeding pursuant to the Maine Administrative Procedures Act. It specifically argues that the failure to make a recording of the selection process pursuant to 5 M.R.S.A. § 9059(2) was a violation of law. Brown & Meyers misconstrues the law with respect to how the State engages in the competitive process for purchasing services. Chapter 110 "Rules for the Purchase of Services and Awards" sets forth the process for requests for proposal, evaluation of proposals and granting of an award. Nowhere in this Chapter is there a requirement that the process be conducted as an adjudicatory proceeding. In fact, it is Chapter 120, which governs the appeal of contract awards that provides for a hearing. The Department did not violate the law by failing to conduct an adjudicatory proceeding during the selection process.

Brown & Meyers' third argument on appeal is that by failing to call references, the Department violated the procedures it had set up in the RFP. While the RFP did suggest that reference checks would be a part of the selection process, the selection committee deemed it unnecessary except in the event of a tie. In the absence of a tie, the

committee saw no need to consult references. There is no requirement in the law for references to be checked. This argument fails.

Brown & Meyers' fourth argument on appeal was that the scoring was arbitrary. Brown & Meyers points out that the notes taken by the selection committee were not properly identified by the evaluators' names and were insufficient in their content. The statute governing the competitive purchasing process provides that the rules to be used in reviewing competitive bids must include the requirement that written records be kept by each person directly reviewing or ranking bids. 5 M.R.S.A. § 1825-D(2). Chapter 110 "Rules for the Purchase of Services and Awards" does, indeed, contain that requirement at section 3.A.iii.

In the instant case, each individual member of the evaluation committee had a sheet to fill out during the individual review of the proposals. While the notes are sporadic and not detailed, they do show that the selection committee was making individual notes during their morning review sessions. Moreover, the score sheets that were used for the consensus scoring process contain cumulative notes from the committee as they worked on scoring the 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 notes demonstrate sufficient support for the scores awarded by the selection committee.

Brown & Meyers also argues that the scores were arbitrary on the ground that it received 24 out of 25 points for experience. Brown & Meyers believes that this score

does not reflect its fifteen years of experience in the medical transcription field. Brown & Meyers further argues that the scoring on HIPAA compliance was arbitrary. It received the same score as Czerenda, which Brown & Meyers considers implausible in light of the fact that Czerenda's work is done overseas while Brown & Meyers' work is done in Maine.

Brown & Meyers failed to produce clear and convincing evidence that the evaluation committee's scores with respect to experience or HIPAA compliance were arbitrary. The RFP made clear that outsourcing of work was allowed. Indeed, Czerenda has been providing transcription services to the Department for several years using transcriptionists working outside of the United States. There was no showing that Brown & Meyers' compliance with HIPAA was superior by virtue of it being performed in the United States. Since both companies scored so highly, the selection committee obviously believed they were both fully prepared to comply with HIPAA requirements. In any event, it is not the purpose of the appeal panel to rescore the proposals or to substitute its judgment for that of the review team. *See International Paper Co. v. Board of Environmental Protection*, 1999 ME 135, ¶ 29, 737 A.2d 1047, 1054. The fact that Brown & Meyers believed that Czerenda should have received a lower score is not evidence that the evaluation team's score was arbitrary.

**B. Stone Network's Arguments.**

Stone Network raises two arguments on appeal. The first argument is that the selection committee committed error when it rejected its bid for the technical reason that it had attached an additional cover sheet. Although Stone Network concedes that the addition of this sheet was not in compliance with the instructions, it argues that it was not

in the State's interest to reject its proposal, which could have provided the Department with a less expensive contract.

The Department was candid in admitting that it took a narrow approach in applying a pass/fail checklist to all the bidders so as to eliminate any proposals that did not meet the technical requirements of the RFP. Following this approach, the Department eliminated half of the proposals from the selection process, which saved it considerable time. According to the Department's representative, however, the selection committee was not merely interested in saving time. The selection committee believed that the failure to follow directions in responding to the RFP was an indication that a bidder would not follow directions in performing under the contract.

While the appeal panel is troubled by the selection committee's harsh pass/fail approach, it concludes that it was not a violation of law. The statute governing purchases of services requires that purchases by competitive bidding be done "in a manner that best secures the greatest possible economy consistent with the required grade or quality of the goods or services." 5 M.R.S.A. § 1825-B(1). The statute further provides that contracts must be awarded "to the best-value bidder, taking into consideration the qualities of the goods or services to be supplied, their conformity with the specifications, the purposes for which they are required, the date of delivery and the best interest of the State." *Id.* § 1825-B(7).

In the instant case, the RFP made clear that adherence to the technical requirements of the RFP was important. The addition of a cover page was particularly emphasized as being prohibited. The Department also made clear in the RFP that it reserved the right to reject proposals that failed to comply with RFP requirements. While

the pass/fail checklist had harsh consequences, the evidence showed that the checklist was applied consistently to all the bids. The Department may have eliminated proposals that offered a lower price than the price of the winning bidder. But the selection committee believed it was in the State's interest to eliminate proposals in which the bidder failed to demonstrate an ability to follow directions in submitting uniform proposals. This approach did not violate the law.

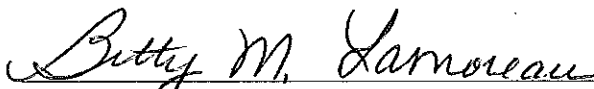
Stone Network's second argument on appeal is that the selection committee failed to calculate the number of lines that the winning bidder, Czerenda, produced on an annual basis. The evidence at the hearing showed, however, that the selection committee properly gave Czerenda credit for the number of lines of medical transcription it produced. The fact that Czerenda was performing under the existing contract with the Department is further indication that Czerenda was capable of producing the quantity of work required by this contract. Stone Network failed to produce clear and convincing evidence that the selection committee's scores were arbitrary.

### **DECISION**

In light of the foregoing findings of fact and conclusions of law, the appeal panel concludes that the appellants have failed to meet their 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 medical transcription services to Czerenda Court Reporting Inc., dba Reporters Transcription Center is validated.

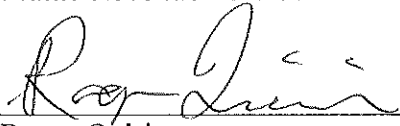
Appeal Committee:

  
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Betty M. Lamoreau  
Division of Purchases

10/18/10  
Date

  
\_\_\_\_\_  
Christopher Batson  
Maine Revenue Services

10/18/2010  
Date

  
\_\_\_\_\_  
Roger Quirion  
Office of Information Technology

10/14/10  
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.