



STATE OF MAINE
DEPARTMENT OF ADMINISTRATIVE & FINANCIAL SERVICES
BUREAU OF GENERAL SERVICES
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March 9, 2010

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Washington, DC 20004-1454

Re: Appeal of Award by Central Services for Postal Service Sorters, RFQ # 091106*449

Dear Attorneys Dingman, Bateman, & Wierzba:

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
William Laubenstein, AAG
Betty M. Lamoreau, Director, Division of Purchases
Dwain E. McKenney, Director, Central Services Division
Appeal Panelists

Attachment: Decision of the Appeal Panel

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

In Re: Bowe Bell & Howell
Appeal of Award by Central Services for
Postal Service Sorters
RFQ #0911060...0449

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Decision of Appeal Panel

INTRODUCTION AND BACKGROUND

This is an appeal by Bowe Bell & Howell (“Bowe”) from a decision by Central Services to award a contract for two postal service sorters to Pitney Bowes (“Pitney”). 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”). Pitney timely requested and was granted intervenor status. The Bureau granted Bowe’s request for a hearing.

An Appeal Panel (“Panel”) was comprised of three members chosen from State service. An evidentiary hearing was held on February 26, 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

On November 6, 2009, Central Services issued a Request for Quotes (“RFQ”) for the lease or rental of two multi-line optical character readers (or “MLOCR’s”). The RFQ contained written specifications and terms and conditions for both MLOCR’s and provided that bids would be accepted until November 17, 2009. Two responses to the RFQ were received, from Bowe and Pitney respectively.

This was the second RFQ issued for the lease or rental of the MLOCR's. The first RFQ resulted in an award that was not approved due to irregularities that are not relevant to this appeal. Bowe requested, and received, documents concerning the first RFQ, including Pitney's bid. Bowe had this information available to it while preparing its bid for the second RFQ.

The RFQ provided that the bids would be evaluated using the following criteria: price – 50% of the score; service – 25% of the score; and equipment – 25% of the score. The bids were reviewed by two members of the State Postal Service using a consensus based scoring process. The evaluators determined that both bids met the minimum RFQ requirements and awarded 25 points each to both Bowe and Pitney in the service and equipment categories, making price the determining factor. Bowe's proposed cost was \$64, 505.25, compared to Pitney's proposed cost of \$55, 266.41. Using a standard cost evaluation formula that multiplied the number of points available against the quotient of the lowest total cost divided by the bidder's total cost, Pitney was awarded 50 points and Bowe was awarded 42.84 points.

As a result of the review and scoring process, the evaluation team determined that Pitney was the best value bidder and decided to award the contract to Pitney.

GOVERNING LAW AND STANDARD OF REVIEW

The issue in this case is whether Bowe has met its burden of proving by clear and convincing evidence that Central Services' 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 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 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 Bowe has not met its burden of proving that any of the statutory criteria have been met so as to invalidate the contract award to Pitney.

Bowe alleged that, in assigning scores, the evaluators improperly considered attributes of the MLOCR's proposed by the bidders that were not specified in the RFQ. Specifically, Bowe pointed to notations contained in the justification and scoring document (Joint Exhibit 8) that compared certain features of the proposed equipment such as speed, bin size, floor space requirements, the ability to run flat size pieces, single sided versus double sided operation, and the ability to slow the through-put down. Andy Giroux, manager of the State's mail services, was one of the evaluators. Mr. Giroux testified that the notations concerning these features were included in the justification and scoring document to point out the positive attributes of both proposals. He stated that no points were awarded based on any of these features but, rather, that each proposal met the minimum bid requirements and that the maximum score of 25 points was awarded to Bowe and Pitney in both the service and equipment categories on that basis. There is

no evidence that the evaluators considered features not specified in the RFQ in assigning scores and the panel does not find any error in this respect.

Bowe alleged that the evaluators failed to keep notes of their scoring in violation of Chapter 110, § 3(A)(iii) of the Division of Purchases Rules. Chapter 110, § 3(A)(iii) requires that “written records must be kept by each person reviewing or ranking proposals.” In this case, Mr. Giroux testified that he and the other evaluator met and scored the proposals on a consensus basis; and that he subsequently prepared the justification and scoring document with input from the other evaluator. Betty Lamoreau, Director of the Division of Purchases, testified that her understanding of the purpose of the record keeping requirement of the rule was to have something in the record that documented the reasoning of the evaluators in granting the award. She also stated that summary notes of consensus based scoring processes have been found to satisfy the record keeping requirements of the rule in prior RFP’s. Here, the justification and scoring document is fairly detailed and describes the rationale for the scores assigned by the evaluators. Although the document was written by Mr. Giroux, the other evaluator participated in its creation by reviewing it and provided input on its content. Bowe has not shown by clear and convincing evidence that the rule has been violated; and the panel does not find a violation of law or other error in this regard.

Finally, Bowe alleged that the evaluators engaged in improper ex parte communications with Pitney. In making this argument, Bowe pointed to e-mail communications between Mr. Giroux and representatives of Pitney (Joint Exhibit 6). The e-mails include a request by Mr. Giroux for clarification of certain aspects of Pitney’s proposal; and a request by Mr. Giroux for additional references. With regard to clarification, the request concerned only the details of Pitney’s bid and did not provide any clarifying information to Pitney concerning the RFQ

specifications or alter the RFQ specifications. With regard to the request for additional references, the RFQ reserved the right to the State to contact any of the bidder's clients for reference checks, whether or not they were included on the list provided with the bid. Bowe has not shown by clear and convincing evidence that there was any error in this regard.

Accordingly, the Panel validates the contract award to Pitney.

APPEAL PANEL ON CONTRACT AWARD

Dated: March 8, 2010

Tracy Poulin
Tracy Poulin
Department of Public Safety

Dated: _____

Jeff Mao
Department of Education

Dated: _____

Norm Marcotte
Department of Environmental Protection

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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Accordingly, the Panel validates the contract award to Pitney.

APPEAL PANEL ON CONTRACT AWARD

Dated: _____

Tracy Poulin
Department of Public Safety

Dated: 3/8/10



Jeff Mac
Department of Education

Dated: _____

Norm Marcotte
Department of Environmental Protection

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Accordingly, the Panel validates the contract award to Pitney.

APPEAL PANEL ON CONTRACT AWARD

Dated: _____

Tracy Poulin
Department of Public Safety

Dated: _____

Jeff Mao
Department of Education

Dated: 3/08/10



Norm Marcotte
Department of Environmental Protection

STATEMENT OF APPEAL RIGHTS

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