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RE: Decision of Appeal Panel, Appeal of Award by the Public Utilities Commission
RFP # 201106108, Next Gen 9-1-1 Services

Dear Attorneys McDonald, Costello, Hewitt and Smith:

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

Alan Henry, Acting Director
Bureau of General Services

cc: Michael A. Wenzel, Director, Division of Purchases
Mark Randlett, AAG
Maria Jacques, Public Utilities Commission
Appeal Panelists

Attachment: Decision of the Appeal Panel

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

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In Re: Appeal of Award by the Public)	
Utilities Commission for)	Decision of Appeal Panel
RFP #201106108, Next Gen 9-1-1 Services)	
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INTRODUCTION

This is an appeal by Oxford Networks (“Oxford”) and Intrado, Inc. (“Intrado”) from a decision of the Maine Public Utilities Commission (“PUC”) to award a contract to Fairpoint Communications (“Fairpoint”) for the provision of statewide Next Gen 9-1-1 services. 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”). Fairpoint requested and was granted intervenor status. The Bureau granted Oxford and Intrado’s requests for hearing and consolidated them for this appeal.¹

BACKGROUND

In August, 2011 the PUC issued a competitive Request for Proposals (RFP), which sought a provider of a flexible internet based system, commonly known as Next Gen 9-1-1, through which every person in the state would have an efficient and reliable means of reporting emergencies. Nine (9) bids were received on or before the 2:00 p.m. November 2, 2011 deadline. A five member evaluation team, each with their own area of expertise, was formed to review the bids. Four of the team members consisted of staff from the PUC’s Emergency Services Bureau and the Office of Information Technology. The fifth member was an employee of L.R. Kimball, who was contracted by the PUC to assist with the RFP process as a technical

¹ Prior to the hearing Fairpoint moved to dismiss Oxford’s appeal as untimely. Fairpoint’s motion also requested dismissal of both Oxford and Intrado’s appeals on the grounds that they failed to comply with applicable law. This decision does not address that motion. A February 23, 2012 prehearing order determined that granting the requested relief would exceed the authority of the presiding officer and the Appeal Panel under Chapter 120 of the Division of Purchases’ Rules for Appeal of Contract and Grant Awards.

consultant. A former employee of the Division of Purchases assisted the team as a facilitator. The five members of the team reviewed and scored the proposals using weighted evaluation criteria detailed in the RFP.

The RFP established the following weighted criteria for evaluating the bids: the technical merits and responsiveness of the proposal (“Technical”) – 35 points; the bidder’s integrity, experience and ability to perform (“Responsibility”) – 35 points; and the cost of the proposal (“Cost”) – 30 points, for a total of 100 points possible. A consensus based scoring process was used, meaning the evaluators reviewed, but did not score, the proposals in advance. The evaluators met over a period of four days to discuss the proposals and review them against the RFP requirements to arrive at the consensus scores. Scores for the cost criterion were not assigned by the group, but were calculated using a standard formula that assigns the most points to the lowest cost proposal, and a proportionally fewer points to higher cost proposals.² The team deemed all nine bids submitted as conforming to the requirements of the RFP and scored them accordingly.

As a result of the review and scoring process, the evaluation team determined that Fairpoint was the best value bidder and the PUC notified the bidders of the award decision on January 6, 2012. Oxford and Intrado subsequently appealed.

An Appeal Panel (Panel) was selected, comprised of three members from state service. An evidentiary hearing was held on March 15, March 16, 2012, and March 19, 2012 at which testimony of witnesses and documentary evidence was presented.

GOVERNING LAW AND STANDARD OF REVIEW

The issue in this case is whether clear and convincing evidence shows that the PUC’s 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’ Rules, 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 on appeal are highly probable, as opposed to more probable than not. Pine Tree Legal Assistance, Inc. v. Department of Human Services,

² Under the formula, the total number of points available (30) was multiplied by the quotient of the lowest cost bid divided by the bidder’s total cost.

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 Evaluation 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

After a review of all the arguments and evidence presented by the parties, the Panel finds that Oxford and Intrado have met their burden of proving by clear and convincing evidence that the PUC's award was arbitrary; that it contained an irregularity creating a fundamental unfairness; and that it was in violation of law. Accordingly, the Panel invalidates the contract award to Fairpoint.

REASONS FOR DECISION

The errors alleged in this appeal fall into four broad categories – a violation of record keeping requirements, scoring errors, failure to check references or conduct bidder interviews, and conflict of interest. The Panel finds one element of the scoring process to be both arbitrary and an irregularity creating a fundamental unfairness; and finds a violation of law with respect to record keeping. The Panel does not find any error with respect to the remaining issues.

1) The failure of each reviewer to keep written records constitutes a violation of law.

A violation of law exists when there is a deviation from the law governing the competitive bid process (5 M.R.S. § 1825 et. seq.), the rules governing the competitive bid process (Chapter 110), or the Request for Proposal (RFP). See, Pine Tree Legal Assistance, Inc. v. Department of Human Services, 655 A.2d 1260, 1263 (Me. 1995).

Title 5 M.R.S. § 1825-D(2) requires that written records be kept by each person directly reviewing or ranking bids. Chapter 110, Section 3.A.iii of the Division of Purchase's Rules for

the Purchase of Services and Awards also contains this requirement and further provides that those records must be made available upon request. The Division of Purchases has “Guidelines for Evaluation Team Meetings” (Intrado Exhibit #4) which are consistent with this statute and rule. The Guidelines emphasize that notes must be kept by each reviewer and specifically provide that:

The facilitator or lead reviewer will take notes on the important points raised during the discussion of each bid. The notes will appear on the point-sheets prepared by the facilitator or lead reviewer; and

The rules require each reviewer to take notes, which will assist you in remembering items for purposes of discussion. Be sure to (1) save the notes because they must be preserved by the Department, (2) write legibly, and (3) use only appropriate wording (e.g., no slang).

These statements not only highlight the mandatory nature of the record keeping requirement, they express a rationale for the requirement beyond documenting the reasoning of the evaluators in granting the award – the notes may help individual evaluators to remember important aspects of the bids for the purposes of their participation in scoring discussions.

In this case, the hearing record shows that no written notes were kept by Byron Smith, the L.R. Kimball employee who was a member of the evaluation team. Mr. Smith reviewed the bids and was directly involved in the consensus scoring process. As such, he was required to keep notes in accordance with the statute and rule, and his failure to do so results in a violation of law.

The Panel has taken into consideration prior decisions of the Division of Purchases where other RFP Appeal Panels validated contract awards even though notes were not kept by each individual reviewer. The Panel is not persuaded by those decisions. In *Appeal of Award of Contract for On Site Physical Therapy and Disability Prevention Services* (August 7, 2000), the appeal panel held that the failure of one reviewer to take individual notes did not violate the record keeping requirement, stating that “[t]he scoring information created by the consensus process was the record in the case.” *On Site* at 8. In *Appeal of Award by Central Services for Postal Service Sorters* (March 9, 2010) the appeal panel validated an award where one member of a two member review team prepared a detailed justification and scoring document describing the rationale for the scores assigned by the evaluators. In that appeal, although the document was written by one team member, the other team member participated in its creation by reviewing it and providing input on its content. To the extent that the *On Site* and *Postal Sorters*

appeals involved facts similar to those on the record in this case they appear to be wrongly decided. The plain language of 5 M.R.S. § 1825-D(2) and Chapter 110, Section 3.A.iii is clear and unambiguous – “written records *must* be kept by *each* person reviewing or ranking proposals” (emphasis added). There is no exception in the statute or the rule for record keeping when a consensus scoring process is used.

2) The disparity in scoring between Oxford and Fairpoint with respect to the use of subcontractors was arbitrary and an irregularity creating a fundamental unfairness.

The score sheet for Oxford contains two comments pertaining to services under the contract to be performed by entities other than Oxford (i.e., subcontractors). Under “Experience” there is the notation that the “[p]roject manager is not from the proposed offeror.” Under “Ability to Perform” it is noted that “[s]ome operational elements of the project have been delegated to a subcontractor.” When asked whether Oxford received a downgrade in its score because operational elements were delegated to a subcontractor, Maria Jacques, a member of the evaluation team, testified that “it appears so.” According to Oxford, the services under the contract were to be performed by Oxford and its “consortium partners,” although the RFP specifically allowed for the use of subcontractors.

Like Oxford, Fairpoint’s bid also proposed to use a project manager who was not employed by Fairpoint.³ Also like Oxford, Fairpoint’s bid anticipated that other entities, referred to by Fairpoint as its “partners,” would be responsible for certain operational elements of the contract.⁴ However, unlike Oxford, no negative comments appear on Fairpoint’s score sheet on either of these two points. The record contains no justification for this difference in treatment.

The extent of the impact of the comments or the lack thereof on the scores cannot be determined from the consensus notes. More detailed notes might have been helpful in this regard. In any event, the Panel is convinced, based on the record, that the evaluation team treated Oxford and Fairpoint differently with respect to their reliance on subcontractors (or partners); and that this disparity in treatment between the two bidders was both arbitrary and an irregularity that was fundamentally unfair.

³ Fairpoint named Nate Wilcox as the program manager. Joint Exhibit 3, page 30. Mr. Wilcox is employed by Wilcox Strategic Services of Island Pond, Vermont. Joint Exhibit 3, page 56.

⁴ Such services would be provided by GeoComm, Solacom and 911 DataMaster. Joint Exhibit 3, page 10-11.

3) The evaluation team acted within its discretion in deciding not to check references or conduct bidder interviews.

Intrado alleged the evaluation team committed error by failing to check references or conduct bidder interviews. However, reference checks and oral presentations are optional, not mandatory, under the RFP (see, RFP Section 1.5.6. “The Bureau *shall have the right* to contact individuals...identified as references by the Offeror. The Bureau reserves the right to contact some, but not all, of the references named by the Offeror”; and RFP Section 1.5.4. “The Bureau *may require* an Offeror to make an oral presentation concerning the Proposal it has submitted” (emphasis added)). Moreover, it was the bidders’ responsibility to provide all of the information required by the RFP in their bids, and the RFP put the bidders on notice that they should not assume they would be given an opportunity to improve or otherwise revise their proposals (RFP Section 1.1.5).

According to the testimony, the evaluation team determined that the information contained in the proposals was sufficient for them to make an award decision; and the Panel does not second guess that determination or the team’s decision to forego reference checks and oral presentations.

Therefore, the Panel does not find that a violation of law, an irregularity creating a fundamental unfairness, or an arbitrary or capricious award resulted from the evaluation team’s decision not to check references or conduct bidder interviews.

4) A conflict of interest has not been shown.

Intrado alleged that the inclusion of Byron Smith on the evaluation team was a conflict of interest that flawed the process. Mr. Smith is an employee of L.R. Kimball, one of Intrado’s business competitors. However, other than a general allegation of conflict based on this relationship, there is no evidence of any specific bias or prejudice on the part of Mr. Smith. L.R. Kimball was not a competing bidder for this RFP. Moreover, although he participated in the consensus scoring process, the evidence was that Mr. Smith did not take the lead in suggesting any score.

Therefore, the Panel does not find that a violation of law, an irregularity creating a fundamental unfairness, or an arbitrary or capricious award resulted from the inclusion of Mr. Smith on the evaluation team or his participation in the consensus scoring process.

5) Other alleged scoring errors.

The appellants alleged several other miscellaneous scoring errors. The Panel does not find a violation of law, an irregularity creating a fundamental unfairness, or an arbitrary or capricious award with respect to any of those claims.

Appeal Panel on Contract Award

Dated: April 19, 2012

Kevin Scheirer

Kevin Scheirer
Division of Purchases

Dated: 4.19.2012

Tracy Poulin

Tracy Poulin
Department of Public Safety

Dated: 4/19/12

Chad Lewis

Chad Lewis
Department of Health and Human Services

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 within 30 days of receipt of this decision.