



STATE OF MAINE
DEPARTMENT OF ADMINISTRATIVE & FINANCIAL SERVICES
BUREAU OF GENERAL SERVICES
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June 1, 2012

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RE: Decision of Appeal Panel, Appeal of Award by the Division of Purchases on behalf of the
Maine Department of Transportation, RFQ 1112200000000569, Heavy Trucks

Dear Attorneys Costello, Courier and Hewes:

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,



Donald McCormack, Director
Bureau of General Services

cc: Greg Im, AAG, Attorney General
Michael A. Wenzel, Director, Division of Purchases
Terry DeMerchant, Division of Purchases
Donald Hutchins, III, MaineDOT
Appeal Panelists

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

In the matter of)	
Appeal of Award of Contract for)	
Maine DOT Fleet Services, Heavy Trucks)	Decision of Appeal Panel
)	
RFQ #1112200000000000569)	

This is an appeal by Hutchins Motor, Inc. d/b/a O'Connor Motor Co. ("O'Connor") from a decision of the Maine Department of Transportation Fleet Services ("MDOT") to award a contract for the purchase of tandem-axle heavy trucks to Daigle & Houghton, Inc. ("Daigle"). O'Connor appealed the award pursuant to 5 M.R.S. § 1825-E and Chapter 120 of the Rules of the Division of Purchases within the Department of Financial and Administrative Services, 18-554 C.M.R. ch. 120. The Director of the Bureau of General Services granted O'Connor's petition for hearing and Daigle's subsequent request to intervene.

A hearing was held on May 10, 2012, at which the parties presented witness testimony and documentary evidence. The appeal was heard by an Appeal Panel ("Panel") comprising three State employees. A presiding officer conducted the hearing but did not have a vote in this decision. After the close of evidence, the parties agreed to submit written closing arguments, and the administrative record was held open until May 17, 2012. After reviewing the evidence and arguments presented by the parties, the Panel invalidates the contract award to Daigle based on the following findings of fact and conclusions of law.

FINDINGS OF FACT

In December 2011, MDOT issued a request for quotations from bidders to provide heavy duty trucks and plows and accessory equipment for its fleet services. The RFQ itemized three single-axle trucks (#1-3), nine tandem-axle trucks (#4-12), and the quantities of each truck

requested. At issue is the contract award for tandem-axle trucks which MDOT intended on awarding as a package to a single bidder. O'Connor and Daigle were among several bidders. O'Connor sells Volvo trucks; Daigle sells International trucks.

The RFQ detailed specifications for all of the trucks requested. In some instances, MDOT specified state-of-the-art components because it believed that the State would benefit from pushing the industry forward instead of resting on the status quo. For the tandem-axle trucks, the RFQ included specifications for frame, wheels, tires, cab wiring, an automatic greasing system, and training. In addition, bidders were required to provide certificates that documented that the trucks complied with 2012 California emission standards. In the RFQ, MDOT "reserve[d] the right to evaluate alternates and determine equivalency." The RFQ also provided a process by which bidders could ask questions about the RFQ, and a process by which MDOT could request "information for clarification" from the bidders.

Two MDOT employees evaluated the bid submissions. For each bidder, they noted the specifications that the proposed trucks did and did not meet.

For the truck frames, the RFQ specified "Heavy duty single channel a minimum of 120,000 PSI with a minimum section modulus of 30.0 and RBM of 3,100,000." Only trucks made by Volvo and Mack met these specifications. For its International trucks, Daigle offered frames with a modulus of 22.12 and RBM of 2,654,400 with a seven-year warranty. The evaluators noted that Daigle did not meet the minimum frame specifications. However, based on prior experience with similar frames, the evaluators believed that the Daigle frames were satisfactory and that the seven-year warranty would protect MDOT in the event of a frame failure. Evidence at the hearing revealed that International only provided a five-year limited warranty and that the evaluators did not know the extent of the limited warranty.

With respect to the wheels, the RFQ requested “heavy duty 10 hole, 285 mm rims” with specific wheel offsets. For clarification, MDOT asked O’Connor, “Provide model and number for front and rear wheels. Do they meet the required wheel offset?” O’Connor provided the model numbers and confirmed that “they meet spec.” The evaluators consulted with an MDOT tire specialist with expertise in wheels and tires. The specialist looked up the model number for the O’Connor front wheel and found that it was a light duty wheel rated for 7400 lbs/wheel, compared to heavy duty wheels, which are rated for 8000 lbs/wheel. Based on this information, the evaluators concluded that O’Connor did not meet the wheel specification. In the past, O’Connor had provided the same front wheels to MDOT, and MDOT had accepted them because it had mistakenly overlooked the wheels’ weight rating. O’Connor believed that offering the same wheels in this bid would be satisfactory.

The RFQ stated, “Tires shall have aggressive winter tread design suitable for winter usage Bridgestone/Michelin preferred.” Daigle’s bid included Bridgestone tires, but as an option Daigle offered Continental tires, which would reduce its price by \$230/front tire and \$96/rear tire. After consulting with tire specialist, the evaluators accepted the Continental tires as an equivalent to Bridgestone and Michelin and adjusted Daigle’s bid price per truck downward by \$1228. Although Continental tires could be substituted on trucks of all manufacturers, the evaluators did not adjust the prices for other bidders similarly because other bidders did not specifically include Continental tires or any other alternatives in their bids.

For the truck cab wiring, the RFQ specified “Multiplex wiring, minimum of 14 (factory installed) low amperage switches.” Only International trucks are manufactured with Multiplex wiring with fourteen switches, however, Multiplex wiring is generally available from other heavy truck manufacturers, as well as other heavy vehicle applications such as busses. In its bid,

O'Connor did not offer Multiplex wiring and noted, "Manufacturer utilizes conventional wiring." The evaluators considered Multiplex wiring to be state-of-the-art and important because it saves time and costs and it allows easier installation of safety devices and troubleshooting. The evaluators concluded that O'Connor did not meet this specification because the Volvo wiring system is not comparable and requires installation of additional relays and powerstrips.

The RFQ also required trucks to have a "Groeneveld Automatic air-operated greasing system with up to 40 grease points." Daigle is the sole distributor of the Groeneveld system in Maine. O'Connor's bid included the Groeneveld system, but as an option O'Connor offered a "Graco 'Grease Jockey' 34 point Lubrication System ... the direct operational equivalent to Groeneveld," at a cost savings of \$1950 per truck. (The Graco system has a capacity of 40 points, however, as a result of typographical error, O'Connor's bid stated that it provided 34 points.) Through experience and controlled testing, MDOT had determined that the Groeneveld system was superior to other systems. MDOT was willing to consider equivalents; however, MDOT had no experience with the Graco system. As a result, the evaluators were not willing to accept the Graco system as an equivalent to the Groeneveld system.

The RFQ required the successful bidder to provide training for operation and maintenance of the trucks. In its bid, Daigle stated, "If the bid is not awarded as a complete package [for all twelve trucks] the additional cost per truck amounts to \$330 per truck for [training]." It is possible that the evaluators overlooked this statement or that they thought that "complete package" referred to only the tandem-axle trucks. In any event, the evaluators expected that training would be provided at no extra cost, and they did not adjust Daigle's bid

price upward by \$330 per truck. It is not clear whether Daigle was awarded the contract for single-axle trucks.

Daigle did not provide certifications of compliance with California emissions standards as required by the RFQ. Nevertheless, in March 2012, MDOT awarded the contract for tandem-axle trucks contract to Daigle contingent on Daigle providing documentation of emissions compliance. Subsequent to the award decision, Daigle provided Federal EPA certificates of conformity to the satisfaction of the Maine Department of Environmental Protection. The DEP, in turn, communicated to MDOT that the Daigle trucks were emissions compliant and could be legally sold in Maine.

DECISION

I. Governing Law and Standard of Proof

When appealing a contract award made through a competitive bid process, the petitioner has the burden to 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) arbitrary or capricious. 5 M.R.S. §§ 1825-D, 1825-E; 18-554 C.M.R. ch. 120, § 3(2). Proof by clear and convincing evidence requires the petitioner to convince the Panel that the truth of its factual assertions was highly probable, not just more probable than not. *Pine Tree Legal Assistance, Inc. v. Dep't of Human Servs.*, 655 A.2d 1260, 1264 (Me. 1995). An award is arbitrary or capricious “when it can be said that [the award] is unreasonable, has no rational factual basis justifying the conclusion or lacks substantial support in the evidence. *Cent. Me. Power Co. v. Waterville Urban Renewal Auth.*, 281 A.2d 233, 242 (Me. 1971). However, an “action is not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached. *Id.* In determining whether an award

is arbitrary or capricious, the Panel must not substitute its judgment for that of the awarding agency. *Int'l Paper Co. v. Bd. of Env't'l Prot.*, 1999 ME 135, ¶ 29, 737 A.2d 1047, 1054. The action of the Panel is limited to validating or invalidating the award. 5 M.R.S. § 1825-E(3); 18-554 C.M.R. ch. 120, § 4(1).

II. Discussion

MDOT may solicit proposals for vehicles that represent ideal, state-of-the-art equipment and specify name brands such as Multiplex and Groeneveld. When an RFQ identifies an article by trade name, “the term ‘or approved equal’ if not inserted with the identification, is implied.” 5 M.R.S. § 1825-B(5). Consistent with the statute, the RFQ provided that MDOT “reserve[d] the right to evaluate alternates and determine equivalency.” None of the bidders responding to this RFQ were able to meet all of the specifications requested. Presented with these bids, MDOT had to determine which bid offered the best value to the State based on the equipment offered, cost, and other factors. If that determination was arbitrary or capricious, fundamentally unfair, or in violation of law, then the award must be invalidated.

A. Frame

O'Connor contends that MDOT violated the law by accepting a lighter frame without notifying the other bidders of a change in the RFQ. *See* 18-554 C.M.R. ch. 110, § 2(A)(iv)(cc) (“No alterations or changes to any . . . specification within the original RFP can be made without notifying all bidders . . .”). However, MDOT did not accept the Daigle frame as meeting the specification. Rather, it accepted the lighter frame based on previous experience and the seven-year warranty without changing the RFQ’s frame specification. Consequently, MDOT was not required to notify other bidders, and there was no violation of law.

Nor was it fundamentally unfair for MDOT not to reject Daigle's bid for not meeting the frame specifications. None of the bidders met all of the specifications. Along with cost, MDOT considered which bidder best met the specifications and offered the best value to the State. All of the bidders were treated equally in this regard.

MDOT's acceptance of the Daigle frame was based, in part, on its assumption that the Daigle's warranty would have covered frame failures occurring during MDOT's use of the trucks. However, the warranty was a limited warranty, the details of which were not provided in Daigle's bid. Although the evaluators were confident that the warranty would be satisfactory, they did not know what the limited warranty covered. MDOT's conclusion that Daigle's warranty would compensate for Daigle's frame not meeting specifications lacked substantial factual support, and therefore MDOT's acceptance of the Daigle frame was arbitrary or capricious. *See Cent. Me. Power Co.*, 281 A.2d at 242.

B. Wheels

When compared to the detailed specifications for the frame, the RFQ's request for wheels that are "heavy duty" is arguably vague. However, this specification was presented to all of the bidders, who had an opportunity to ask questions to clarify what "heavy duty" meant. MDOT might be faulted for not providing a more detailed specification, and O'Connor might be faulted for assuming that a wheel previously accepted by MDOT met the specifications of this RFQ. However, the Panel does not find clear and convincing evidence that the "heavy duty" specification was an irregularity that created a fundamental unfairness.

Furthermore, MDOT's conclusion that O'Connor's proposed wheels were not heavy duty was based on facts researched by MDOT's tire specialist. Regardless of whether that conclusion

was erroneous, the conclusion was not arbitrary or capricious because it had a rational factual basis and was reached honestly and upon due consideration. *Id.*

C. Tires

After determining that Continental tires were a suitable equivalent for the preferred Bridgestone/Michelin brands, MDOT adjusted Daigle's cost downward by \$1288 per truck. O'Connor contends that it was fundamentally unfair for MDOT not to extend this adjustment to all bidders because the less expensive Continental tires could be used on all manufacturers' trucks. However, the RFQ only expressed a preference for Bridgestone or Michelin tires, and all bidders had the opportunity to propose other comparable tires. Moreover, it would not be reasonable to apply the same \$1288 adjustment to all bidders without knowing each bidder's cost and markup of their proposed tires and the Continental tires. There was no fundamental unfairness related to the issue of tires.

D. Multiplex Wiring

O'Connor contends that because only International could meet the specification of Multiplex wiring with fourteen switches, the RFQ was biased in favor of Daigle, thus creating a fundamental unfairness in the process.¹ It was reasonable for MDOT to request what it considered to be state-of-the-art equipment. Pursuant to the terms of the RFQ and section 1825-B(5), bidders were not strictly required to provide Multiplex brand wiring. Any bidder could have proposed an equivalent product and satisfied this specification. As a result, the specification for Multiplex wiring was not an irregularity that created a fundamental unfairness.

¹ It could be similarly argued that the RFQ was biased in favor of O'Connor because only Volvo and Mack trucks could meet the frame specifications.

E. Groeneveld Greasing System

O'Connor argues that Daigle had an unfair competitive advantage because the Groeneveld greasing system was only available through Daigle, Groeneveld's sole Maine distributor. As with the Multiplex specification, all bidders could have proposed an equivalent product and satisfied this specification. This specification was not an irregularity that created a fundamental unfairness.

O'Connor also asserts that the Graco system that it offered should have been considered an equivalent to the Groeneveld system. However, O'Connor's bid stated that the Graco system provided 34 lubrication points instead of the 40 points specified in the RFQ. Although "34 points" was a typographical error, it was the information presented to the evaluators. Furthermore, MDOT had previously determined through testing that the Groeneveld system was superior to other systems, but it had no experience with the Graco system. Based on the fact that the Graco system as presented did not provide 40 lubrication points and MDOT's lack of experience with the Graco system, MDOT's conclusion that the Graco system was not an equivalent of the Groeneveld system was not arbitrary or capricious.

F. Training

O'Connor argues that Daigle's cost should have been adjusted upward to incorporate \$330 per truck—the extra cost for training that Daigle stated it would charge if it were not awarded the complete package. The evaluators did not consider the extra training costs because he expected training to be included. It is unclear whether this was because Daigle was awarded the package for all of the trucks or because the evaluators considered the "complete package" to be the tandem-axle truck package instead of the package for all of the trucks. O'Connor did not

prove by clear and convincing evidence that the award should be invalidated on the basis of Daigle's training costs.

G. Emissions

Daigle did not submit certificates of compliance prior to MDOT's conditional award. Nonetheless, MDOT awarded the tandem-axle trucks contract to Daigle on condition that Daigle provide certificates of compliance with required emissions standards. No other bidders were given a similar opportunity to supplement their original bids. In the RFQ, MDOT "reserve[d] the right to request information for clarification." This did not include allowing a bidder to supplement its bid with information that should have been provided in the first instance. Allowing Daigle to supplement its bid with required documentation after the bid submission date was an irregularity creating a fundamental unfairness to other bidders.

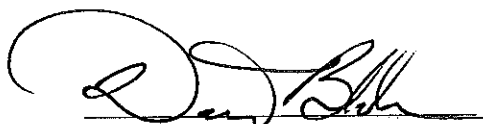
CONCLUSION

O'Connor has established by clear and convincing evidence that the contract award to Daigle resulted from a decision that was arbitrary and capricious and a selection process that was fundamentally unfair. Accordingly, the panel invalidates the contract award to Daigle.

[Signature page to follow]

By the Appeal Panel:

Dated: 6-1-12



David Blake
Department of Public Safety

Dated: _____

Andrew Giroux
Central Services

Dated: _____

Mark Lutte
Division of Purchases

STATEMENT OF APPEAL RIGHTS

This decision constitutes final agency action. Any aggrieved party may appeal this decision by filing a petition for review in the 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 the activity which is the subject of this proceeding is located. Any such appeal must be filed within 30 days of receipt of this decision.

By the Appeal Panel:

Dated: _____

David Blake
Department of Public Safety

Dated: 6-1-12

Andrew Giroux
Central Services

Dated: _____

Mark Lutte
Division of Purchases

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By the Appeal Panel:

Dated: _____

David Blake
Department of Public Safety

Dated: _____

Andrew Giroux
Central Services

Dated: 6/1/2012

Mark W. Lutte

Mark Lutte
Division of Purchases

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