

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

In Re: eComply Solutions.)
Appeal of Contract Award of RFP #) Decision on Appeal
201909163 Davis-Bacon Act)
Compliance Software)

INTRODUCTION AND BACKGROUND

The Bureau of General Services received and granted a request for hearing of appeal on a contract award decision by the Maine Department of Transportation (MDOT) to Elation Systems (ELATION). The award was made following a request for proposal (RFP) process conducted under Division of Purchases rule Chapter 110. The request for appeal was timely filed by eComply Solutions (ECOMPLY) under the process defined in Division of Purchases rule Chapter 120.

Representatives of the appellant ECOMPLY and the MDOT met with the Administrative Hearing Officer (AHO) and Division of Purchases staff to discuss the process to be used to complete the hearing based on the restrictions imposed by The Governor of the State of Maine and national response to the COVID-19 pandemic.

The AHO determined that the hearing would be held remotely using a video conferencing service (ZOOM). The parties agreed in advance on joint exhibits. The parties presented witnesses on August 18, 2020 over ZOOM, where witnesses were sworn, examination and cross examination occurred, and all parties participated fully.

The Appeal Panel (“Panel”) was comprised of three members chosen from within state service. All members met and participated in the live video conference hearing. After a review

of all the arguments and evidence presented by the parties, the Panel makes the following findings of fact and decision on appeal.

FACTUAL BACKGROUND

The MDOT issued a competitive Request for Proposal (“RFP”) for Davis-Bacon Act Compliance Software as a Service for use in tracking payroll and payments for Federal and State funded projects for MDOT and the Department of Environmental Protection.

The RFP, issued in January of 2020, generally provided the scope of work to be performed by a selected bidder and listed the detailed responsibilities of bidders regarding submission, the evaluation criteria and the procedure the MDOT would take to review and score proposals to determine a winning bidder. MDOT established a question and answer process during the open submission period which was used by bidders including ECOMPLY, to clarify the MDOT RFP requirements. Six proposals were received in response to the RFP, five receiving a final score and one disqualified.

Both ECOMPLY and ELATION were given opportunities for a demonstration to the evaluators. This was done virtually in recognition of the restrictions created by the State of Maine’s response to COVID-19. ECOMPLY was the only bidder given a second opportunity to demonstrate to the MDOT regarding its proposal prior to final scoring.

The scoring process began with individual evaluators reading and making notes about the proposals and then meeting as a team to assign consensus scores to the qualitative criteria. The Cost score was assigned by a mathematical calculation where the lowest cost proposal received the highest score and a mathematically lower score was calculated for the higher cost proposals. ECOMPLY was the lowest cost proposal and received the full available score of 25 points. ELATION received a score of 10 points for the cost proposal.

ELATION was the highest overall scoring proposal (79 points) according to a team established by MDOT and substantiated in a master score sheet and other documentation. ECOMPLY was ranked second, with a score of (76 points).

The scoring was summarized with corresponding notes and the highest scoring bidder selected. Notifications of award and non-award were sent to all respondents.

GOVERNING LAW AND STANDARD OF REVIEW

The issue in this case is whether ECOMPLY has met its burden of proof by clear and convincing evidence that the MDOT award decision (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 appeal's assertions 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 judgement 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 team's actions were not arbitrary or capricious. *Central Maine Power Co. v. Waterville Urban Renewal Authority*, 281 A.2d 233, 242 (Me. 1971).

FINDINGS OF FACT

The issues raised by ECOMPLY on appeal are discussed below.

ECOMPLY's proposed cost was 38% of ELATIONS Proposal

ECOMPLY highlighted the significant difference in cost between the selected bidder and their proposal, suggesting that awarding the contract to a competitor at the higher cost is unjustifiable. ECOMPLY's proposal was using the latest technology and that it appears from the high cost that ELATIONS system might require modification, though their proposal claims it did not. ECOMPLY claims it is unreasonable to pay a higher price when a superior alternative is \$849,178 lower in cost.

MDOT did not dispute that ECOMPLY had the lowest cost proposal, confirmed in the scoring summary under the Cost Proposal scoring criteria. ECOMPLY received the maximum score for its lowest cost proposal. This was accurately calculated and applied. MDOT summarized that it was the sum of all criteria that determined the final award, not just the cost proposal.

3 Points separate the final scores of ECOMPLY and ELATION

ECOMPLY had a total score of 76 points, just three points less than the score of the winning proposal from ELATION. They pointed to "apparent misunderstandings" on several key issues and that clarification of these would likely increase their score:

Organization Qualifications and Experience – ECOMPLY pointed to comments in the summary scoring notes, highlighting they were a very new company of three years, due to a split from another company that has twenty years of experience. During testimony, they pointed to

MDOT concern over financial capability and pointed to its RFP response as demonstration of their viability.

MDOT countered that they evaluated the proposal and had valid concerns with the strength of the new company on a system that is of such importance to their compliance with federal regulations. MDOT stood by its analysis of the financial capability. The score received by ECOMPLY was 15 out of 20 points, ELATION had 19.

Misunderstanding of solution's reliance on reports – MDOT evaluators commented that the ECOMPLY solution was “overly reliant on reports over UI (*user interface*) screens which slows down the user.” ECOMPLY stated the feature was shown multiple times at the first demonstration. This misunderstanding or mistaken belief was an irregularity that cost ECOMPLY points in the proposed services category.

MDOT provided one and a quarter pages of comments related to the ECOMPLY evaluation in this one scoring criteria. There were positive comments and comments that were critical of one factor or another in the proposed solution. This is only one factor in the total score for the proposed services category. The evaluators were consistent and agreed with the summary comments regarding reporting.

Concern over Wage Decision Work Flow – ECOMPLY pointed to the consensus scoring summary sheet and highlighted the MDOT statement that they “strongly dislike Wage Decision and similar wage rate management work flow functionality”...“Vendor will not allow the Department to enter wage rates for wage decisions.” MDOT confirmed this during the demonstrations. ECOMPLY offered its service of entering wage rates to assure accuracy and to be audit ready. ECOMPLY confirmed this process twice when asked by MDOT and did not offer an option to allow MDOT staff to perform the function as they currently do. They claim it was

only certain members of the review team, whose day to day jobs involved this work, who were critical of their process. ECOMPLY learned during a debrief (after notification of award to ELATION) of this concern and after confirming twice at the demonstrations to the MDOT it would not allow an exception to their protocol, they offered an exception.

MDOT countered that it had the experience and capability to perform this function and its strong preference was to maintain that responsibility, which was within their prerogative to do so.

Inaccurate understanding about offline field inspection – ECOMPLY pointed to notes related to scoring of Proposed Services which stated, “*According to demo, we cannot capture manual interviews within system in a way that allows for validation against CPR.*” ECOMPLY claimed this is untrue and was touched upon in the demonstration and during the debrief session.

DECISION

The Panel reviewed the documentary evidence, considered the testimony of the witnesses, and met to deliberate on this final decision.

The Panel looked closely at the cost proposals and the calculation of score in this criterion. The Panel finds no irregularity in the MDOT assessment of score and indeed, ECOMPLY, as the lowest cost proposal, received the maximum point score available. There is a significant difference in cost between ECOMPLY and the other qualified bidders, but the Panel is not clearly convinced that the MDOT handling of the score or the ultimate award to a higher cost bidder is an irregularity that created a fundamental unfairness.

The Panel carefully considered the issues raised by ECOMPLY around the scoring of all criteria and the small point difference (3 points) in the final total scores. There were four criteria

with relative scoring weights published in the RFP and used by the MDOT to evaluate the individual proposals. ECOMPLY received the highest possible score on their Cost proposal but was scored below the ELATION bid in all other categories.

It is not the responsibility of this Panel to substitute its judgement over that of the evaluators. MDOT requested a proposal that matched or was similar to the way it does business today. The current service provider (ELATION) has experience providing service to the MDOT. ECOMPLY claims their system and process is based on new technology and its solution is best suited for MDOT's present and unrealized future needs.

MDOT scored the proposals based on its requirements as they were written and understood by their evaluators. A consensus of evaluators was used to score the proposals. ECOMPLY highlighted several areas that might have been misunderstood or in which it disagrees with the MDOT conclusions. The Panel is not clearly convinced that any of these claims rise to the level of an irregularity that created a fundamental unfairness. In fact, MDOT gave ECOMPLY a second demonstration to be sure it understood the proposal.

Further, the RFP, resulting questions and answers, and demonstration processes gave reasonable opportunity for all participants to understand the MDOT requirements. The Panel is not clearly convinced any actions taken by the MDOT or the resulting award were arbitrary and capricious.

For the reasons above, the Panel is not clearly convinced of an irregularity that created a fundamental unfairness or an arbitrary and capricious action by the MDOT in its award decision to ELATION.

Accordingly, the Panel validates the MDOT award decision.

APPEAL PANEL

Dated: 9/1/2020

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Maine Information Technology, DAFS

Dated: 9/1/2020

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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.