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DEPARTMENT OF ADMINISTRATIVE & FINANCIAL SERVICES
BUREAU OF GENERAL SERVICES
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February 5, 2009

Ethan Strimling, Executive Director
Portland West
181 Brackett Street
Portland, ME 04102

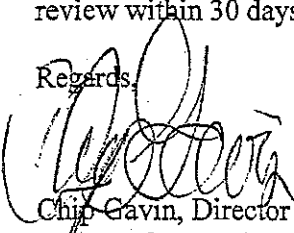
Re: Decision of Appeal Panel, Appeal of Award by the Department of Corrections, Maine Juvenile Justice Advisory Group (JJAG) to RFP #200810320 for the Alternative to Detention Projects

Dear Mr. Strimling:

I am forwarding the final decision of the appeal panel with regard to the Maine Juvenile Justice Advisory Group's award decision on the above-mentioned RFP. 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. §11001, et seq, and M.R. Civ.P.80C. A party must file a petition for review within 30 days after receipt of notice of the decision.

Regards,


Chip Gavin, Director
Bureau of General Services

Enclosure

cc: William Laubenstein, AAG
Martha Hallisey-Swift, AAG
Betty M. Lamoreau, Panelist
Earle Pease, Panelist
David Maxwell, Panelist

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

In the Matter of	)	
Portland West	)	
Appeal of Award by	)	
Department of Corrections	)	
Maine Juvenile Justice Advisory Group	)	
	)	Decision of Appeal Panel
	)	
RFP Nos. 200810319, 200810320 & 200810321	)	

INTRODUCTION AND PROCEDURAL BACKGROUND

This is an appeal by Portland West from a decision of the Department of Corrections, Maine Juvenile Justice Advisory Group ("Department" or "JJAG") awarding grants under the Formula Grants Program ("Grants Program") pursuant to a Request for Proposals issued in November 2008. The appeal is pursuant to 5 M. R. S. A. § 1825-E and Chapter 120 of the Rules of the Bureau of General Services of the Department of Administrative and Financial Services ("Rules"). The Bureau of General Services granted the request of Portland West for a hearing.

The Appeal Panel ("Panel") was comprised of three members chosen from state service. A presiding officer conducted the hearing but did not have a vote in the decision. A hearing was held on January 30, 2009, at which the testimony of witnesses and documentary evidence was presented.

After reviewing the arguments and the evidence presented by the parties, the Panel makes the following findings.

FINDINGS OF FACT

The Department issued a Request for Proposals ("RFP") in November 2008 and provided responses to bidders' questions in December 2008 that included responses provided in September 2008 to an earlier identical RFP. The RFP required bidders to submit proposals by 2:00 pm, November 21, 2008. The RFP was for programs in three program areas: (1) Alternatives for Detention; (2) Juvenile Delinquency Prevention; and (3) Alternatives to School Suspension and Expulsion. For each program area there was a separate RFP; however, the total of funds available for all programs was \$225,000. Grant awards were to be made to the highest rated proposals submitted in response to the RFP within available funds.¹ The projects selected were to be funded for two years beginning December 12, 2008 and ending on December 11, 2010.

The Department stated in the RFP that JJAG supports evidenced-based practices and programs and that priority would be given to proposals to implement programs that have been identified as "Blueprints for Violence Prevention, Model Programs or Promising Practices." The RFP provided that public and private entities were eligible to receive a grant but that direct funding for private agencies would only be permitted if an agency had applied for local government funding and been denied. The Department stated in the RFP that because research shows that initiatives with broad based community involvement are most likely to succeed in reducing delinquency, it was seeking proposals that incorporated "cross-system multi-disciplinary collaboration."

The Department provided bidders with a document titled Application Instructions and Forms ("Instructions"), which among other things, required that bidders identify resources needed to carry out their proposal. With regard to support to be provided "in

¹ The term "Request for Proposals" or "RFP" is used in this decision to refer to the three RFPs collectively.

order for the project to be successful," the Instructions required bidders to submit a Memorandum of Understanding ("MOU") indicating the willingness and ability of the supporting entity to provide the indicated support.

The RFP stated that a comparative scoring process would be used to measure the degree to which each proposal met the scoring criteria, which were: (a) Need for project, clarity of project description and goals and relationship between identified need and choice of program activities (25 points); (b) Quality of proposed program, including activities, outputs and relationship to delinquency prevention and JJAG goals, with priority given to Blueprint or model programs (25 points); (c) Strength of program to measure desired outcomes (25 points); (d) Clarity and appropriateness of budget items and their connection to proposed activities (25 points).

The Department received twenty-one (21) proposals. There were five (5) proposals submitted for funding for Alternatives to Detention; Portland West submitted a proposal for this program. The proposals were reviewed by three (3) separate teams of evaluators, one team for each of the three program areas. The evaluation team selected to review the proposals for Alternatives to Detention included an employee of Broadreach Family & Community Services ("Broadreach"); Broadreach submitted a proposal for funding under Juvenile Delinquency Prevention. The review process included a check for any disqualifying factors; independent review and scoring by each evaluator; a meeting of evaluators to "compare" the individual results of the evaluations; an adjustment of individual scores based the comparative process; and, then a totaling of the individual scores for each proposal followed by calculation of the average score. The Department described this as "consensus" scoring. The scores awarded for the proposals

for Alternatives to Detention ranged from 33.33 to 52 (Portland West). The scores for the proposals for Juvenile Delinquency Prevention ranged from 35 to 95. The scores for the proposals for Alternatives to School Suspension and Expulsion ranged from 87.25 to 91.

Portland West, as indicated above, submitted a proposal for funding under Alternatives to Detention. The Portland West program was to serve the Lewiston/Auburn community. On the first page of the proposal form, Portland West showed \$85,214 in matching funds from MaineCare. The RFP, however, did not require that bidders provide matching funds. Portland West stated on the Grant Proposal Summary Sheet under Resources that referrals for services would be "generated by JCCOs, Court staff, case managers, school staff, and other providers." Portland West included with its proposal a Memorandum of Understanding between Portland West of the Department of Corrections for Region I and Region II. The proposal also included a letter from the City of Auburn stating that the City was unable to fund Portland West's request for funding.

The Evaluation Team reviewed the proposals and scored the proposals as indicated above and award grants to six bidders; three of the awards went to priority programs. Portland West was not awarded a grant.

On December 15, 2008, the Department notified the bidders of the results of the evaluation process. Portland West, by letter dated December 30, 2008, requested an appeal hearing. The Bureau of General Services granted the request for an appeal hearing.

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. The clear and convincing standard requires the Committee be convinced that the truth of the assertions on appeal is highly probable, as opposed to more probable as not. *Pine Tree Legal Assistance, Inc. v. Department of Human Servs.*, 655 A.2d 1260, 1264 (Me. 1995). The Panel 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.

In determining whether an award is arbitrary or capricious, the Panel must not substitute its judgment for that of the Committee. *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).

II. Portland West Appeal. The Panel has determined that Portland West has met its burden of proving by clear and convincing evidence that the granting of the awards was in violation of law, contained irregularities creating fundamental unfairness and was arbitrary or capricious.

In its request for an appeal hearing, and as elaborated upon at hearing, Portland West charged that the award process was fundamentally unfair and arbitrary and alleged that the scores awarded by the review team were inconsistent with the notes on the score sheets and the criteria in the RFP; that the scores were dramatically inconsistent with recent scores for a proposal from Portland West for the same services under an earlier identical RFP; and that the JJAG Board changed the focus of the RFP with regard to the type of programs it was seeking to fund. The testimony elicited by Portland West, and the documentary evidence presented at the hearing showed, in addition, that there were violations of law and that the review process may have been affected by a conflict of interest.

(1) Scores in consistent with notes. The score sheets were divided into different categories; each category included questions on whether the basic criteria of the RFP were met and had space for reviewers' comments. Portland West argued that because, for the most part, the questions on its score sheets were checked with a "Y" or "Yes" it should have been awarded a higher point total in each category so marked. The Panel finds, however, that the "Y" only indicates that the basic RFP requirement has been met and is not an indication of the quality of the proposal. Nevertheless, the Panel finds that the score sheets in general insufficiently document the reasons for the scores given as required by Chapter 110 of the Rules of the Division of Purchases; and, in particular, do not document the reasons for the changes made in the scores by the individual reviewers. This is a violation of law.

In addition, some of the score sheets indicate that points were deducted because an MOU was not included for DHHS and schools that would be referring clients to

Portland West. Portland West testified that it did provide MOUs with the Department of Corrections, the agency with which it would be partnering, and whose support would be needed for the project to be successful. Portland West did not understand the RFP or the Instructions to require an MOU from an organization or entity that would be making referrals and pointed out that JJAG was mistaken that only DHHS had case managers that could make referral. The Panel finds that the RFP is unclear with regard to when an MOU was required, rendering arbitrary or capricious any deduction in scoring on that basis.

(2) Scores inconsistent with those awarded on prior RFP. Portland West presented testimonial, but no documentary evidence, in support of its argument that the RFP at issue was identical to an earlier RFP and that its proposal for the first RFP was scored dramatically higher even though it was the same services were being offered, with some alleged improvements. The Panel is not persuaded either that earlier scores are relevant or that on its face this shows there was anything fundamentally unfair about the second RFP process. The Panel agrees, however, that the scoring was fundamentally unfair, but for a different reason: the wide discrepancy in the range of scores for the three program areas indicates that the reviewers for each program were applying a different standard against which the proposals were being evaluated. This is the result of assigning different reviewers for each of the three program areas. In order to assure that all bidders for the available funds are applying the same standard of review, it is necessary that the same reviewers review all proposals.

The Panel also finds that the review process, while conducted in good faith, was inherently flawed because one of the reviewers for the Alternatives to Detention program

was an employee of Broadreach Family & Community Services, which submitted a bid for the Juvenile Delinquency Prevention program, and was therefore in competition with Portland West for the \$2225,000 in available funding. This presented a conflict of interest and renders the RFP process fundamentally unfair.

(3). JJAG Board changed the focus of the RFP. Portland West argued that a JJAG representative stated to an employee of Portland West that JJAG had decided to focus on "school-based" programs. JJAG refuted this argument and made clear that the remark made was with regard to the results of the review process, and not with regard to any change in the focus of the services being sought. The Panel therefore finds no merit in this argument.

CONCLUSION

Portland West established by clear and convincing evidence that the awarding of grants under the Formula Grants Program was in violation of law, fundamentally unfair, or arbitrary or capricious.

The Panel therefore invalidates the awards made by the Juvenile Justice Advisory Group,

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Dated: 2/4/09

Betty M. Lamoreau

Betty Lamoreau, Director
Division of Purchases

Dated: _____

Earl Pease
Employee Health and Benefits

Dated: 2/4/09

David Maxwell

David Maxwell
Office of Information Technology

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 with 30 days of receipt of this decision.

Dated: _____

Betty Lamoreau, Director
Division of Purchases

Dated: 2.4.09



Earle Pease
Employee Health and Benefits

Dated: _____

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