



STATE OF MAINE
DEPARTMENT OF ADMINISTRATIVE & FINANCIAL SERVICES
BUREAU OF GENERAL SERVICES
BURTON M. CROSS BUILDING
4TH FLOOR, 77 STATE HOUSE STATION
AUGUSTA, MAINE
04333-0077

PAUL R. LEPAGE
GOVERNOR

H. SAWIN MILLETT, JR.
COMMISSIONER

BETTY M. LAMOREAU
ACTING DIRECTOR

July 20, 2011

Brett D. Witham, Esq.
Verrill Dana LLP
One Portland Square, 9th Floor
Portland, ME 04112-0586

Bryan M. Dench & Michael S. Malloy
Skelton, Taintor & Abbott
95 Main Street
Auburn, ME 04210

Paul Gauvreau, DAG
Attorney General
6 State House Station
Augusta, ME 04333-0006

Re: Appeal of Award by the Department of Health and Human Services
Healthy Maine Partnership-Coordinated School Health Program, RFP # 201010788

Dear Attorneys Witham, Dench, Malloy and Gauvreau:

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,

A handwritten signature in cursive script that reads "Betty M. Lamoreau".

Betty M. Lamoreau, Acting Director
Bureau of General Services

cc: Sarah Forster, AAG, Hearing Officer
Appeal Panelists
Andrew Finch, Department of Health and Human Services

Attachment: Decision of the Appeal Panel

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

RE:	APPEAL OF AWARD OF HEALTHY	)	DECISION OF
	MAINE PARTNERSHIPS,	)	APPEAL COMMITTEE
	COORDINATED SCHOOL HEALTH	)	
	PROGRAM (RFP #201010788)	)	

This is an appeal by Regional School Unit #24 ("RSU #24") from decisions of the Maine Department of Health and Human Services to award several contracts to school administrative units to fund health promotion and prevention activities through the Coordinated School Health Program. The appeal is brought pursuant to 5 M.R.S.A. § 1825-E and Chapter 120 of the Rules of the Division of Purchases of the Department of Administrative and Financial Services. The Acting Director of the Bureau of General Services agreed to RSU #24's request for a hearing. Two school units who were awarded contracts, RSU #24 and AOS #91, sought and were granted intervenor status.

The Appeal Committee ("Committee") was comprised of three members of State service chosen at random. A presiding officer conducted the hearing but did not have a vote in the decision. A hearing was held on June 27, 2011, at which the testimony of witnesses and documentary evidence were presented. At the close of the testimony the parties were permitted to submit written closing arguments to the Committee, and the administrative records was held open until 5:00 p.m. on July 5, 2010. After a review of the arguments and evidence presented by the parties, the Committee makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

In November 2010, DHHS issued RFP #201010788 for Healthy Maine Partnerships, Coordinated School Health Programs (“HMP”/“CSHP”). Joint Exhibit¹ (“J.E.”) 1. School districts seeking CSHP funding were required to bundle their applications with one or more of the comprehensive community health coalitions applying for HMP funding in the school unit’s Local Service Area; however, the CSHP proposals were scored and awards were made separately from the comprehensive coalitions. (Testimony, Andrew Finch). The RFP required that awards be made such that at least one CHSP award was made in each Local Service Area, and if additional funds were available after the initial awards, geographic consideration was to play a role in the awarding of secondary awards. J.E. 1, Part I.C.4.5 (p. 22).

DHHS used three teams of evaluators to review the proposals – the North Team, the Central Team and the South Team. (Testimony, Finch; J.E. 6, RFP Review Document p. 5). The North Team evaluated school proposals from the Aroostook, Downeast, and Penquis regions. *Id.* Because of the requirement of geographic diversity in the RFP, since RSU #24 is located in Hancock County, it was competing only with other Hancock County school units in its Local Service Area, including intervenors RSU #25 and AOS #91. (Testimony, Finch).

A team of five reviewers lead by Judith Sipowicz reviewed the Downeast proposals using a consensus based evaluation and scoring process. (Testimony, Finch; Testimony, Sipowicz). Individual reviewers first reviewed the proposals on their own and made notes on individual comment sheets. (Testimony, Sipowicz). Then, the review team met over a several day period to discuss each proposal, by numerical order, and then held a final one day meeting to determine

¹ The exhibits provided by DHHS were agreed upon by all parties and admitted at the beginning of the hearing as joint exhibits.

a group score for each proposal, again, in numerical order. *Id.* The group decided to use the common terms excellent, good, fair and poor in their consensus evaluation of individual areas of the proposals, and ultimately rendered numerical scores to rank the proposals. *Id.*

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. The clear and convincing standard requires the Committee 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 Servs.*, 655 A.2d 1260, 1264 (Me. 1995). The Committee 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.

A violation of law exists where there is a deviation from the law governing the competitive bid process, the rules governing the competitive bid process or the RFP. *Pine Tree Legal Assistance*, 655 A.2d at 1263. 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. The Awards Made in the Downeast Region and in the “Third Tier” Must Be Invalidated.

In its appeal, RSU #24 presents four reasons that the awards should be invalidated. First, RSU #24 argues that DHHS's decision not to penalize proposals that omitted or altered the budget forms required by the RFP was arbitrary and against the law. Second, RSU #24 argues that the failure of DHHS to retain copies of the individual notes of one of the reviewers (identified at the hearing as Reviewer #49) is a *per se* violation of law that renders the award invalid. Third, RSU #24 asserts that, from the reviewer notes that were provided and the testimony at the hearing, it appears that one or more reviewers did not follow the instructions to evaluate the proposals individually; that certain individuals were absent from the consensus scoring process; and that the notes that were purportedly the individual notes from the reviewers were later altered during the consensus scoring process leaving no accurate record of each reviewer's notes, thereby creating a fundamental unfairness. Finally, RSU #24 argues that DHHS applied a "tiered" scoring system after the initial round of awards that was not contained in the RFP, again creating a *per se* violation of law.

For the reasons explained below, the Committee finds that the failure to retain the notes from Reviewer #49, exacerbated by the fact that Reviewer #49 was not present for one of the days that the Committee engaged in the consensus evaluation process, constitutes a violation of law as well as an irregularity that created a fundamental unfairness as RSU #24 was deprived of required information that formed the basis of the agency's decisions.

In addition, the Committee finds that the absence of two reviewers on two different days of the consensus evaluation and scoring process are inconsistent with the RFP's statement that the "[m]embers of the review team . . . will arrive at a consensus as to the assignment of points on each category of each proposal." The failure of the group notes to disclose the absence of the reviewers as well as the alteration of some of the individual notes to correspond with the

consensus determinations constitute an irregularity that created a fundamental unfairness as RSU #24 was deprived of a full consensus review process and the ability to review accurate information that formed the basis of the agency's decisions.

The Committee also finds that the rescoring of certain proposals in order to make the third round of awards was inconsistent with the terms of the RFP as further explained in the responses to questions from bidders.

Finally, the Committee rejects RSU #24's contention that DHHS acted improperly in instructing the reviewers not to penalize proposals that omitted or altered the budget forms.

A. The absence of records from each individual who reviewed the proposals constitutes a violation of law and as well as an irregularity creating a fundamental unfairness.

State purchasing law requires that "written records be kept by each person directly reviewing or ranking bids." 5 M.R.S.A. § 1825-D(2). The corresponding regulation echoes the statutory requirement and further requires their disclosure upon request: "Written records must be kept by each person reviewing or ranking proposals. These records must be made available upon request." 18-554 CMR Ch. 110, § 3(A)(iii). DHHS does not dispute, and several witnesses at the hearing readily acknowledged, that the individual notes from Reviewer #49 for the RSU #24 and RSU #25 proposals were not made available, as they could not be located. Shelley Reed, who was Reviewer #49, testified that she did make individual notes for the RSU #24 and RSU #25 proposals, but that she was unable to attend the consensus scoring meeting on the day the RSU #24 and RSU #25 proposals were being discussed and thus gave her notes to the team leader, Judith Sipowicz. She further testified that she was present for the final day when the consensus scoring of all the proposals was completed by the review team – she actually served as

the team's scribe – and that she believes the consensus scoring accurately reflects her views. DHHS argues, in effect, that given these facts, the absence of the individual records for one reviewer for two proposals should be excused as harmless.

DHHS's argument is unavailing as it is insufficient under the plain language of the statute and regulation to simply create the records. At least one Superior Court decision has found that the records must also be available to the aggrieved because "an aggrieved person prevented from examining such records that are involved in the review process is clearly prejudiced." *Western Maine Center for Children v. DHHS*, No. Civ.A. AP-03-02, 2003 WL 23576268, *12, (Me. Super., June 6, 2003) (dismissing agency testimony that records were in fact made and seen by the reviewers, and requiring that records actually be made available to the aggrieved party). "Only by observing and obtaining clear knowledge of all of the records in the process, can an aggrieved person be aware whether the application of [the purchasing] rule is in compliance with the [purchasing] statute." *Id.* While not precedential, RSU #24 also cites to several decisions of appeal panels that have invalidated contract awards based, *inter alia*, on the failure to keep records.²

Two other arguments raised by DHHS on this point bear mention. First, DHHS suggests that in the appeal panel decisions cited by RSU #24, there was always another basis for invalidating the award, *i.e.* it was more than an issue of missing notes. To the extent that is true, the Committee notes that in this case, the lack of Reviewer #49's notes was compounded by the

² *E.g.* Appeal of Contract Award for Visitor Tracking and Advertising Effectiveness Research by the Department of Economic and Community Development, p. 6, (February 14, 2001) ("the failure to sufficiently create and keep documentation of the final scores is a violation of [law]"); In the Matter of Hoya Vision Care, RFP No. 200807271 p. 8 (February 17, 2009); Appeal of Award of Contract for Computer Aided Dispatch System Contract RFP no. 200912570, p. 6, (August 30, 2010); In the Matter of Downeast Health Services, Inc., p. 3, (September 25, 2000); *but see* In re: Bowe Bell & Howell Appeal of Award by Central Services for Postal Service Sorters RFQ #091106 * 449, p. 4 (March 8, 2010) (document written by one reviewer with input from another sufficient).

absence of Reviewer #49 from the consensus meeting on the date the RSU #24 and RSU #25 proposals were discussed and the notes were referenced instead. Second, to the extent DHHS argues that the significance of the individual reviewers' notes are diminished in whole or in part by the adoption of a consensus based scoring process and the maintenance of group notes supporting the consensus score, the Committee believes that it is up to DAFS and the Division of Purchases to evaluate whether a statutory or regulatory change is appropriate given the manner in which proposals are being scored.

B. The review committee failed to adhere to the consensus evaluation and scoring process described in the RFP, a further irregularity creating a fundamental unfairness.

Beyond the violation of law and irregularity creating a fundamental unfairness described above, the awards by the North Team for the Downeast region also suffered from additional legal infirmities. Initially, RSU #24 questioned the consistency on the individual evaluation sheets of Reviewers #44 and #30: both used the same terminology (poor, fair, good, excellent), appeared to make alterations on their sheets that caused them to align, and had comments that were strikingly similar if not identically phrased. RSU #24 posited that the two reviewers must have collaborated during the initial stage of the review when they were supposed to be working individually. At the hearing, Judith Sipowicz testified that she did not believe that the two reviewers collaborated; rather, she recalled that Reviewer #44 had applied the poor, fair, good, and excellent labels during his individual review. She stated that it was her belief that other reviewers may have changed or amended their individual comment sheets to conform to the consensus scoring. Ms. Sipowicz further testified that Reviewer #44 was not present for the final

day of the consensus process when the actual scoring was done.³ Combined with the absence of Reviewer #49 on the day the RSU #24 and RSU #25 proposals were discussed, it is clear that the consensus scores for the Downeast region did not reflect the input of all of the reviewers as described in the RFP. In addition, the documentation of the consensus scoring process never indicated the absence of any of the reviewers. *See* J.E. 9(B) pp. 7-11 (RSU #24 score sheets indicating 5 reviewers). This combination of absent reviewers, misleading or inaccurate records, and altered individual records in order to reflect the consensus comments and scores deprived RSU #24 of the consensus scoring process described in the RFP as well as the ability to obtain accurate information about how the awards were made and the bases for the awards.⁴

C. DHHS deviated from the RFP when it rescored proposals in the third round of awards.

Contrary to RSU #24's contention, the RFP did contemplate more than one round of awards providing that at least one CSHP award was made in each Local Service Area. *See* J.E. 1, Part I.B.4.5 (p. 22). The Q & A from the bidders' conference reinforced this point by explaining that "scoring criteria will be the same for all CSHP criteria. Secondary awards will be based upon highest scoring applications, considering geographical distribution." J.E. 2, p. 62 (#237). Testimony at the hearing from Andrew Finch explained that a second round of awards was made, and that it did follow essentially the same process as the first as described in Part III.F.1 of the RFP. However, after the second round of awards, there was only enough money left to fund two additional awards. Mr. Finch testified that in order to be fair to all the remaining

³ The Committee is concerned that the evaluation of all of the proposals followed by the scoring of all of the proposals is inconsistent with the guidelines provided by the Bureau of Purchases, attached hereto as Exhibit A for reference, which recommend completing the review and assigning points to each bid before continuing on to the next bid and recommends that DHHS consult with Purchases on the consensus review process.

⁴ This language might appear harsh. The Committee wants to be clear that it in no way finds that the team leader or any of the reviewers involved intended any harm from their actions – they were trying to do their best to efficiently review and score the proposals within a short window of time.

applicants, given that the three regional evaluation teams had been internally consistent yet produced scores that could not be equitably compared against each other, a separate review team was convened that rescored the highest scoring remaining proposals from each of the three regions and two awards were made. The RFP made no provision for the rescoring of awards, and the decision to empanel a separate review team, while understandable given the real problem of comparing scores across the three initial teams, was inconsistent with the description of the scoring contained in the RFP.

DHHS argues that the issue of the tiered scoring is moot with respect to RSU #24, as RSU #24's score was not high enough to qualify it for the rescoring in subsequent rounds. This argument is unpersuasive given the Committee's determination that the awards must be invalidated based on the infirmities identified in subsections A and B above.

D. DHHS was within its rights to instruct the reviewers not to deduct points for the failure to submit the budget forms.

Finally, SAD #24 complains that DHHS improperly instructed reviewers not to deduct points for proposals that failed to contain the budget forms that were required to be submitted as part of the proposals. Andrew Finch testified at the hearing that upon receipt of the CSHP proposals, DHHS discovered that approximately half did not include the budget forms. In addition, testimony at the hearing suggested that certain school unit applicants submitted their budget information on modified forms (the RFP did include the ability to reproduce the forms), while others submitted the budget forms as part of the related community proposals instead of with their CSHP application. Moreover, Mr. Finch explained, the actual numbers contained on the budget forms were of little significance to the overall application, as the allocation of the

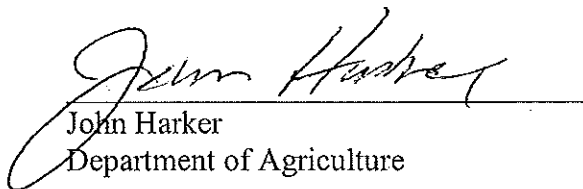
\$70,000 in funding for each proposal was up to \$66,500 toward the salary and benefits for a School Health Coordinator, and \$3,500 for related programming.

Part III.A.7 of the RFP permitted DHHS "at its sole discretion . . . the right to recognize and waive minor informalities and irregularities for proposals received in response to [the] RFP." Mr. Finch testified that in waiving the requirement for the budget forms, the reviewers were still instructed to consider all of the budget information provided, via the forms or the narrative, in arriving at the proposal's score in that area. In effect, DHHS elected in the face of obvious confusion leading applicants to include some, all, or modified budget forms not to place form over substance and to focus on the overall quality of the budget information provided in scoring the proposals. Notably, DHHS did *not* change the total points assigned to the budget subcategory. The Review Committee finds no merit to SAD #24's contentions in this area.

CONCLUSION

RSU #24 has established by clear and convincing evidence that the awards made in the Downeast region were made in violation of law and contained irregularities that created a fundamental unfairness. The awards made in the Downeast region as well as in the "third tier" are therefore INVALIDATED.

Dated: 7/18/2011


John Harker
Department of Agriculture

Dated: _____

Michael Wenzel
Acting Director, Division of Purchases

Dated: _____

Thomas A. Wood

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CONCLUSION

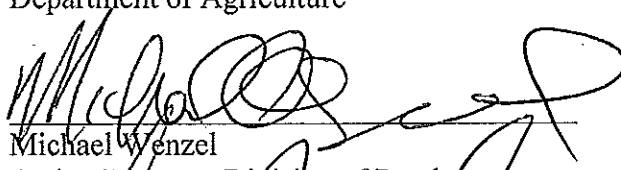
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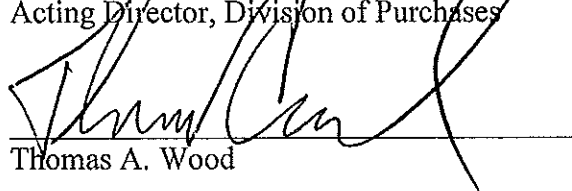
Dated: 7/18/2011

Dated: 7/19/2011

John Harker
Department of Agriculture



Michael Wenzel
Acting Director, Division of Purchases



Thomas A. Wood

Department of Conservation

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.