



STATE OF MAINE
DEPARTMENT OF ADMINISTRATIVE & FINANCIAL SERVICES
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November 28, 2011

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Re: Decision of the Appeal of Award by DHHS, RFP # 201101010
Local Administrative Agency Rental Assistance Programs and BRAP

Dear Attorneys Davis, Silk and Gauvreau:

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

Sincerely,

Joseph Ostwald, Acting Director
Bureau of General Services

cc: Michael A. Wenzel, Director, Division of Purchases
Sarah Forster, AAG, Hearing Officer
Appeal Panelists
Sheldon Wheeler, 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 DEPARTMENT)	
OF HEALTH AND HUMAN SERVICES,)	DECISION OF
LOCAL ADMIN. AGENCY RENTAL)	APPEAL COMMITTEE
ASSISTANCE PROGRAM SHELTER PLUS)	
CARE AND BRAP RFP #201101010)	

This is an appeal by York County Shelter Programs ("YCSP") from a decision of the Department of Health and Human Services' Office of Adult Mental Health Services ("DHHS") to award a contract for the regional administration of two rental assistance programs targeted to persons with psychiatric and related disabilities. 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 YCSP's request for a hearing. The winning bidder, Shalom House, Inc., requested and was 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 November 7, 2011, at which the testimony of witnesses and documentary evidence were presented; the record remained open until November 14, 2011 by agreement of the parties in order to allow time for submission of written closing arguments. 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

On April 17, 2011, DHHS published notice of RFP #201101010 for the regional administration of rental assistance programs targeted to persons with psychiatric and related

disabilities in the Kennebec Journal. Joint Exhibit¹ (“J.E.”) 1.A, 1.C. The notice ran for three days. The cover page of the RFP stated that the deadline for written questions was April 22, 2011 at 4:00 p.m. and that completed proposals were due on May 5, 2011. J.E. 1.A. After concerns were raised by, among others, YCSP, about the short amount of time allotted for submitting proposals, DHHS amended the RFP to extend the deadline for submitting proposals until June 15, 2011. J.E. 1.B., 12. YCSP also requested an extension of the deadline for written questions; DHHS did not extend that deadline. Testimony of Donald Gean (“Gean Test.”)

The only region where competing proposals were received was York County. A team of reviewers, led by Sheldon Wheeler, reviewed the competing proposals. The team used a consensus scoring process where individual reviewers first reviewed the proposals on their own and made notes of their impressions, and then the team met as a whole to evaluate and score the proposals. Testimony of Sheldon Wheeler (“Wheeler Test.”); J.E. 7.A., 8.A. That scoring process included a second set of notes that supported the scores. J.E. 7.B., 8.B. The cost portion of the RFP was scored based on a formula – which proved to be of little consequence as both proposals sought the same amount of funding – and a narrative. Wheeler Test.

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

¹ The parties stipulated that the exhibits provided by each party could be submitted as Joint Exhibits. The exhibits provided by DHHS are labeled as Tabs 1-11; the Exhibit provided by YCSP was designated #12 at the hearing.

Chapter 120. YCSP's appeal advances the second contention, irregularities creating a fundamental unfairness, as well as the third, an award that was arbitrary or capricious.

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). 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).

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.

II. The Award Made By DHHS Is Validated.

In its appeal YCSP alleges that the limited time period for asking questions relating to the RFP, the lack of a bidders' conference, and the short time for the submission of proposals constitute irregularities that created a fundamental unfairness as it gave Shalom House, who had done the work for nearly two decades, an unfair advantage over newcomers such as YCSP. YCSP further alleges that the review process was arbitrary and capricious as the results appeared inconsistent with one reviewer's initial comments, and the process failed to take into account in kind services (free rent) offered by YCSP.

For the reasons explained below, the Committee finds that there was no irregularity in the timelines contained in the RFP or the decisions made regarding the bidders' conference or the extension of the question/answer period. In addition, the Committee finds that there was nothing arbitrary or capricious about the scoring of the proposals as the reviewers followed the RFP in

assigning the scores on a consensus basis, which could differ from the initial individual views of the participating team members, and followed the formula for assigning points for the cost portion of the proposals.

A. The process outlined in the RFP contained no irregularities.

YCSP's complaints about the short timelines and the lack of a bidders' conference fail at the outset as there is no demonstration of an irregularity: DHHS fully complied with both the rules of the Division of Purchases and its own rules and internal policies governing RFPs. There is no legal requirement that a period for questions about an RFP be offered, or that a bidders' conference be convened. The notice of the RFP ran for three days in the Kennebec Journal, and bidders had at least 15 calendar days to submit proposals in accordance with Chapter 110 of the rules of the Division of Purchases. Chad Lewis, the individual at DHHS who is responsible for oversight of the Department's RFP process, testified that as a result of a statutory requirement of performance based contracting for direct client services, DHHS classifies RFPs as either administrative or direct service, and requires question and answer periods and bidders' conferences only for RFPs that are deemed to be purchasing direct services. Testimony of Chad Lewis "Lewis Test.". While YCSP alleges that the short timeframes and the lack of a bidders' conference operated to the advantage of the incumbent and as an impediment to newcomers, there is no evidence of an *irregularity* in DHHS's process upon which to base YCSP's claim of fundamental unfairness.

It is undisputed that DHHS elected to extend the deadline for the submission of proposals by one month resulting in bidders having more than six weeks to prepare their proposals. At the same time, DHHS elected not to extend the period for questions about the RFP. Mr. Gean testified at the hearing that YCSP would have asked questions about the computation of correct

amount for the required bond, and would have sought more detail about what DHHS expected to see in the work plan.² Regarding the bond, Sheldon Wheeler testified that the computation was straightforward based on the estimated numbers of vouchers contained within the RFP and the instruction to assume 100% capacity. Wheeler Test. As for the desire for additional information about what DHHS was looking for in the work plan, Wheeler testified that the RFP contained not only the “two paragraph” description that Mr. Gean pointed to as unsatisfactory, but included references back to another section of the RFP which in turn referenced the program manuals for the two rental programs. Gean Test.; Wheeler Test. Moreover, to the extent that YCSP was, in effect, looking for information about what DHHS wanted to see in a winning proposal, that was not a question that DHHS was going to answer as the point of the RFP was to evaluate and judge the bidders’ competing work plans.³ In sum, even if an irregularity had been shown to have occurred, the unfairness to YCSP described in the testimony did not constitute any more than what it typically experienced in a situation where one bidder is the incumbent, and as such has a better idea of what it takes to actually do the work.

B. The scoring decisions were not arbitrary or capricious.

YCSP first alleges that the scoring decisions were arbitrary and capricious because the individual notes of Sheldon Wheeler regarding Section 1.3 of YCSP’s proposal were inconsistent with the consensus scoring for that section. Wheeler testified that in his initial review of the proposal, he viewed it through the lens of someone who had an established professional relationship with YCSP and knew what good work they could do; once in the team setting, he was persuaded by others that the proposal itself did not justify his initial assessment, and he

²Gean testified that while YCSP had notice of the RFP on Monday (4/18), he had only “skimmed” the 20 page RFP by the Thursday deadline (4/22) for questions and was unprepared to pose any.

³To the extent that YCSP argues it would also have asked questions about a particular certification required by the RFP, the testimony at the hearing indicated that the certificate provided by YCSP did not include *any* specifics as to the certification obtained by the named individual. Wheeler Test.

agreed with the consensus score. To the extent that it is appropriate to get into the “mind of the reviewer” in the appeal process, far from being evidence of arbitrariness or capriciousness, the Wheeler testimony is evidence of exactly how a consensus based process would be expected to function. In addition, to the extent that YCSP suggests in its appeal that DHHS, and particularly Wheeler, was biased in favor of the incumbent or against YCSP with respect to this RFP, the testimony of Wheeler evidenced neutrality, or, as in the example above, a favorable view of YCSP and its work.

YCSP further argues that the scoring of the cost proposal was arbitrary and capricious as it failed to take into account what YCSP characterizes as \$10,000 worth of in kind services based on providing free rent. DHHS used a scoring formula to evaluate the cost proposals, which proved to be of little import as both proposals sought the same amount and thus received the same score under the formula. Wheeler Test. To the extent that the YCSP proposal included rent-free office space, there is no evidence that the RFP either sought or contained a mechanism for evaluating in kind contributions beyond the information contained on the budget worksheet about the breakdown of costs and in the narrative, both of which were duly considered by the team of reviewers. Wheeler Test. In the end, given the scope and substance of the services requested in the RFP, it appears that the reviewers viewed the rent issue as immaterial. There is simply no evidence of an arbitrary or capricious award.

CONCLUSION

YCSP has failed to establish by clear and convincing evidence that the award made by DHHS contained an irregularity that created a fundamental unfairness, or that the scoring process was arbitrary or capricious. The award made by DHHS is therefore **VALIDATED**.

Dated: _____

11/28/11



Peter Beringer
Department of Conservation

Dated: _____

Wayne Gallant
Office of Information Technology

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 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: _____

Peter Beringer
Department of Conservation

Dated: 11/23/11

Wayne Gallant
Office of Information Technology

Dated: 11/22/2011

Mark W. 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 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.