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November 9, 2012

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RE: Decision of Appeal Panel, Appeal of Award by Public Utilities Commission
RFP # 201106108, Next Gen 9-1-1 Services

Dear Attorneys Costello, McDonald, Hewitt & Smith:

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. §11001, 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: Michael A. Wenzel, Director, Division of Purchases
Greg Im, AAG, Hearing Officer
Eben Albert-Knopp, Bernstein Shur
Jotham D. Pierce, Pierce Atwood LLP
Appeal Panelists

Enclosure: Chapter 120

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

In the matter of)	
Appeal of Second Award by the)	
Public Utilities Commission for)	Decision of Appeal Panel
Next Gen 9-1-1 Services)	
)	
RFP #201106108 (Second bid evaluation))	

Pursuant to 5 M.R.S. § 1825-E and 18-554 C.M.R. ch. 120 (Rules of the Division of Purchases within the Department of Financial and Administrative Services), Intrado, Inc. (“Intrado”) and Oxford Networks (“Oxford”) appeal from a June 6, 2012, decision of the Maine Public Utilities Commission (“PUC”) to award Fairpoint Communications (“Fairpoint”) a contract to provide statewide Next Gen 9-1-1 services. The Bureau of General Services granted Intrado’s and Oxford’s petitions for hearing and Fairpoint’s request to intervene.

A hearing was held on September 26-28 and October 1 and 4, 2012, at which the parties presented witness testimony and documentary evidence to an appeal panel (“Panel”) comprising three State employees. A presiding officer conducted the hearing but did not have a vote in the decision. The administrative record was closed after the parties submitted written closing statements on October 23. After reviewing the evidence and arguments, the Panel invalidates the contract award to Fairpoint based on the findings of fact and conclusions of law herein.

BACKGROUND

In August 2011, the PUC issued a Request for Proposals (“RFP”) for a flexible Internet-based system, commonly known as Next Gen 9-1-1 or NG 9-1-1, through which every person in the State would have an efficient and reliable means of reporting emergencies. The Next Gen system will replace the State’s existing telephony-based Enhanced 9-1-1 (“E 9-1-1”) system. The RFP provided that the proposals would receive scores on three criteria: up to 35 points for

“the technical merits and responsiveness” (“Technical”); up to 35 points for “an Offeror’s integrity, experience, and ability to perform” (“Responsibility”); and up to 30 points for “Cost.” RFP § 1.1.6 (Jt. Exh. 1 at 8). Proposals were to be submitted in two packages—one with the Technical and Responsibility submissions, and one with the Cost submission. RFP § 1.3.2 (Jt. Exh. 1 at 11).

The Cost submission consisted of a Cost Form and a Cost Model. Bidders were required to enter in the Cost Form its unit prices for different components of the Next Gen 9-1-1 system. The final agreement with the successful bidder was to be based on the unit prices offered in the Cost Form. The Cost Model was designed for a bidder to incorporate unit prices from its Cost Form according to its proposed implementation plan so that the PUC would have a representative cost for evaluation purposes. RFP Exh. § 1.6.10 (Jt. Exh. 1 at 145). The Cost Model included line items for the successive deployment of 27 PSAPs (Maine Public Safety Answering Points) over the course of an implementation period. *Id.* Exh. 1.6.10.1 (Jt. Exh. 1 at 150).

The RFP required each bidder to attest “that its proposal represents . . . [p]roduct, price and term offerings that are valid until such date as the State is specifically notified otherwise, but not less than one hundred eighty (180) days from the proposal due date.” RFP Exh. 1.6.13 (Jt. Ex. 1 at 151). By the due date, the PUC received nine proposals. PUC Exh. 1. The PUC issued an award on January 6, 2012. In April 2012, that first award was invalidated on appeal. *Appeal of [First] Award of Contract for Next Gen 9-1-1 Services*, RFP #201106108 (Apr. 20, 2012).

The PUC selected an evaluation team (“Team”) of four employees to rescore the proposals. The Team met on May 21-23 and scored the Technical and Responsibility submissions on a consensus basis. The Team had no expectation that they would score cost

submissions. During a preliminary review of the proposals, the Team determined that all of the proposals had deficiencies, but they decided to score all of them.

After the Technical and Responsibility submissions were scored, the PUC asked Lucretia Smith, a certified public accountant employed by the PUC, to review the Cost submissions. Before scoring the Cost submissions, Smith reviewed the Cost Models for compliance with the RFP instructions and concluded that three of the proposals did not comply. *See* PUC Exh. 1. Smith shared the results of her review with PUC general counsel Joanne Steneck and PUC Chairman Thomas Welch. Based on Smith's review, Smith, Steneck, and Chairman Welch agreed that the three noncompliant proposals would be disqualified and would not receive cost scores. Smith scored the remaining Cost submissions by applying a mathematical formula. PUC Exh. 1. Fairpoint had the highest total score and received a notice of award on June 6, 2012. This second award is the subject of this appeal.

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). 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 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

A. The PUC's scoring of the Responsibility submissions without evaluating whether each bidder's implementation plan could meet the required timeline disregarded an important criterion of the RFP in violation of the purchasing statutes.

Because the existing E 9-1-1 system is aging, timely changeover from to Next Gen 9-1-1 is critical to the continuity of 9-1-1 services in the State. Accordingly, the RFP established timeline milestones and required the migration from E 9-1-1 to Next Gen 9-1-1 be complete by August 31, 2013. RFP § 2.9.2.4, Exh. 1.6.21 (Jt. Exh. 1 at 79, 152). During the evaluation process, the Team recognized that none of the proposals could meet the August 2013 migration deadline. The consensus review notes for eight proposals included the following entries:

Does the Offeror's implementation plan meet the timeline of the Bureau?

Unable to determine.

Other: **Unable to evaluate timelines and deadlines due to delay caused by appeal(s).**

The consensus review notes for Oxford read:

Does the Offeror's implementation plan meet the timeline of the Bureau?

Stated plan appears to exceed original project completion date by nearly a year. However, unable to evaluate timelines and deadlines due to delay caused by appeal(s).

Other

(PUC Exh. 1).

Title 5 M.R.S. § 1825-B(7) provides that contract awards made by State agencies "must be awarded to the best-value bidder, taking into consideration the qualities of the goods or

services to be supplied, their conformity with the specifications, the purposes for which they are required, the date of delivery and the best interest of the State.”

After recognizing that none of the bidders could meet the August 2013 migration deadline, the Team could have reviewed the proposals with the understanding that the August 2013 deadline would change and that the timelines in the proposals would be shifted accordingly. *See* RFP Exh. 1.6.21 (Jt. Exh. 1 at 152) (tying milestones in the implementation scheduled to the date of final contract execution). As the consensus notes reflect, however, the Team did not do that. Instead, by concluding that it was “unable to evaluate timelines and deadlines,” the Team gave no consideration to the timelines of the submitted implementation plans. As a result, the Responsibility scores failed to distinguish the proposals in this regard. This failure is highlighted by the fact that the Team was “unable to evaluate” Oxford’s implementation plan timeline even though it “appears to exceed original project completion date by nearly a year.”

The RFP gives the PUC discretion to “recognize and waive minor informalities and irregularities in any Proposal.” RFP § 1.1.4 (Jt. Exh. 1 at 8). Disregarding substantive requirements of the RFP, such as the implementation timelines, does not fall within this discretion. The Panel concludes that, in determining the best value bidder, the Team failed to consider how the proposals conformed to an important RFP specification, which included the timing of delivery of services, and that this failure constitutes a violation of law. 5 M.R.S. § 1825-B(7).

B. With respect to remaining issues on appeal, Intrado and Oxford have not demonstrated by clear and convincing evidence that there was a violation of law, an irregularity creating a fundamental unfairness, or arbitrary or capricious conduct.

1. The PUC's creation of subcategories for consensus scoring.

The RFP provided that the proposals would be scored on three categories and that each category had a maximum possible point score. RFP § 1.1.6 (Jt. Exh. 1 at 8). The RFP categories/points were (1) Technical/35 points; (2) Responsibility/35 points; and (3) Cost/30 points. *Id.* The PUC provided the Team with a Master Scoring Document and Rating Forms to be used in the consensus scoring. Oxf. Exh. 5 at FOAA 11, 20-22. The Rating Forms divided "Responsibility" into two subcategories valued at 15 and 20 points, and "Technical" into three subcategories valued at 15, 10, and 10 points. *Id.* at FOAA 21, 22. The PUC employee who created the subcategories and their point values did not participate in the consensus scoring.

The RFP set forth the overall weights for the three scoring categories. Nothing in the RFP precluded the PUC from guiding the Team as to the weight of criteria within a scoring category as long as the overall weights were not changed. Because the weighting of subcategories on the Rating Forms was consistent with the RFP, there was no violation of law. In addition, the subcategories were applied uniformly to all proposals; therefore, no fundamental unfairness was created. *See Appeal of Award by DHHS for the Family Reunification Program, RFP #201009774 – District 6 & District 7* at 4-5 (June 10, 2011) (upholding a review team's use of subcategories for scoring where they were applied equally to all bidders and did not alter the overall weights in the RFP).¹

¹ Note that *Family Reunification* is factually distinguishable because, there, the evaluation team created the subcategories for scoring.

2. The evaluation of proposals after 180 days from the proposal due date.

As part of its proposal, each bidder attested that “its proposal represents . . . [p]roduct, price and term offerings that are valid until such date as the State is specifically notified otherwise, but not less than one hundred eighty (180) days from the proposal due date.” RFP Exh. 1.6.12 (Jt. Exh. 1 at 151); Jt. Exh. 2 at 1; Jt. Exh. 3 at 5; Jt. Exh. 4 at 1A. The Team scored the proposals on May 21-23, 2012. This was more than 180 days from the proposal due date of November 22, 2011. RFP Amend. 12 (Jt. Exh. 1 at 164). All proposals, however, remained valid because no bidder notified the State that its proposal was no longer valid. The 180-day provision only fixed the time period during which bidders could not withdraw their proposals.

In addition, because all proposals remained valid, it was within the PUC’s discretion to rescore them instead of amending or reissuing the RFP and waiting for bidders to resubmit proposals. Any necessary changes to the implementation schedule could be effected in the final contracting process. 18-554 C.M.R. ch. 110, § 3(A)(ii).

3. Application of pass/fail criteria by the evaluation Team.

The RFP did not contain specific pass/fail criteria. At the outset of its review, the Team determined that every bid had deficiencies but that they all should be scored. It is not improper that the Team’s consensus notes do not document this threshold determination that was not required by the RFP.

4. Public disclosure of proposal contents.

The RFP provided, “The contents of all Proposals . . . will be considered public information when the award decision is announced.” RFP § 1.3.7 (Jt. Exh. 1 at 12). Despite this provision, the PUC later determined that the Technical submissions were not “public records” pursuant to Maine’s Freedom of Access Act (FOAA). This did not create a fundamental

unfairness to bidders that may have decided not to include confidential information in their proposals in reaction to the disclosure provision of the RFP. All bidders had notice of the disclosure provision, and if a bidder included confidential information in its proposal, it did so at its own risk.

5. Recordkeeping obligations.

“Written records must be kept by each person [directly] reviewing or ranking proposals.” 18-554 C.M.R. ch. 110, § 3(A)(iii); 5 M.R.S. § 1825-D(2) (requiring the Division of Purchases to adopt this rule). Lucretia Smith was the person charged with directly reviewing the Cost submissions. Smith complied with the Rule by summarizing her review of the Cost submissions in a memorandum dated June 5, 2012. (PUC Exh. 1.) Neither the Rule nor the statute requires that all drafts of records be kept.

For their part, Steneck and Chairman Welch relied on Smith’s work to determine how to deal with noncompliant proposals. Because Steneck and Chairman Welch did not review or rank the proposals, they were not required to keep written records. 5 M.R.S. § 1825-D(2).

6. Appointment of an individual to review Cost submissions.

The RFP provided the PUC with discretion in selecting who would score the Technical, Responsibility, and Cost submissions. “Such reviews shall be conducted by individuals selected by the Bureau.” RFP § 1.5.2 (Jt. Exh. 1 at 14). There was nothing improper about the PUC selecting Smith to review the Cost submissions after the other two submissions had been scored by consensus.

7. Oxford’s Cost submission.

The RFP’s Cost Model Instructions required that recurring monthly costs for ESI-Net (Emergency Services IP Network infrastructure) from the Cost Form were to be entered in the

Cost Model for the month of the first PSAP deployment and all following months of the implementation plan. RFP Exhs. 1.6.10, 1.6.10.1 (Jt. Exh. 1 at 144, 145, 146, 148, 150). The ESI-Net monthly costs were not to be prorated by call volume percentage. *See id.* (Jt. Exh. 1 at 145, 148, 150). Although Oxford entered \$34,515 as its monthly ESI-Net charge on its Cost Form, Oxford entered prorated ESI-Net monthly charges for the implementation period on its Cost Model. Jt. Exh. 2 at 61, 63.

The Instructions also required that monthly PSAP charges during the implementation period were to be based on the cumulative total of charges for all PSAPs deployed. RFP Exh. 1.6.10.1 (Jt. Exh. 1 at 145, 146, 150). This requirement was made clear in the narrative Instructions, the text in the Cost Model (e.g., “plus PSAPs 3, 4”; “plus PSAPs 5, 6.”), and the figures provided for illustration in the RFP Cost Model. *Id.* In its Cost Model, Oxford entered PSAP unit prices in each month of deployment, but it did not include cumulative totals for all PSAPs as they were deployed. Jt. Exh. 2 at 63.

The RFP also required that “LNG must be priced as a separate line item on the proposal.”² The Panel finds that Oxford’s entry of \$0 in the Cost Model for NG 9-1-1 Services was consistent with its entry of \$0 unit prices for LNG and Total NG Services in the Cost Form. If awarded a contract, however, Oxford would be bound to the \$0 unit prices entered in its Cost Form.

Nevertheless, Oxford did not comply with the Cost Model Instructions with respect to ESI-Net and PSAP charges. The PUC’s determination that Oxford’s Cost submission did not comply with the RFP was neither arbitrary nor capricious.

² The LNG (Legacy Network Gateway) component makes existing E 9-1-1 (or “legacy”) calls compatible with Next Gen 9-1-1 services. RFP § 2.5.7 (Jt. Exh. 1 at 44).

8. The PUC's discretion to disqualify proposals.

Because Oxford's Cost submission was noncompliant, the PUC disqualified Oxford's proposal. (PUC Exh. 1.) The RFP provided, "Nothing in this RFP shall prevent the Bureau from rejecting Proposals which do not conform to the requirements of this RFP, either before or after scoring has taken place." RFP § 1.5.11 (Jt. Exh. 1 at 16). Because the Cost submission review was conducted apart from the Technical and Responsibility review, section 1.5.11 of the RFP gave the PUC discretion to reject a proposal before the Cost scoring took place. It did not matter that the RFP established no pass/fail items for the Cost submissions. The PUC's discretion to reject a proposal pursuant to section 1.5.11 existed notwithstanding anything else in the RFP.

The Cost Model was designed for cost comparison purposes. Because the total price of the Cost Model was not intended to reflect the contract amount or a fixed price offer, it was important for the PUC to be assured that each bidder completed the Cost Model correctly and applied the unit prices from the Cost Form accurately. In exercising its discretion to reject proposals, it was appropriate for the PUC to review the Cost submissions for compliance with the Instructions before assigning scores for cost.

As discussed above, Oxford's Cost Model did not comply with the Instructions. As a result, it did not produce a final figure that was suitable for comparison to other Cost submissions. Although Ms. Smith made efforts to "save" Oxford's proposal, (Jt. Exh. 6 at FOAA 323), the PUC was not obligated to reconstruct Oxford's Cost Model. It was within the PUC's discretion provided by the RFP to disqualify Oxford's bid for failing to conform to the requirements of the Cost Instructions. RFP § 1.5.11 (Jt. Exh. 1 at 16).

9. The PUC's decision not to disqualify the Synergem proposal.

Oxford contends that the PUC should have disqualified a proposal submitted by Synergem because its Cost Model did not include any ESI-Net monthly charges. Oxford argues that it was fundamentally unfair for the PUC to disqualify Oxford, but not Synergem, for failing to include ESI-Net charges in the Cost Model implementation period.

In its Cost Form, Oxford stated its ESI-Net monthly charges to be \$34,515, but, contrary to the Cost Instructions, it entered prorated monthly charges in the Cost Model. Jt. Exh. 2 at 63. By contrast, Synergem stated its ESI-Net monthly charges to be \$0, and, consistent with the Cost Instructions, it entered \$0 in the Cost Model. Jt. Exh. 6 at 333, 335.

Oxford also argues that it was disqualified, in part, for entering a \$0 unit price for its LNG costs, but that Synergem was not disqualified for entering a \$0 unit price for its ESI-Net costs. Smith, however, distinguished LNG and ESI-Net costs because she interpreted the RFP as requiring LNG, but not ESI-Net, to be priced as a separate line item. Her interpretation was supported by the terms of the RFP. RFP § 2.5.7.2 (Jt. Exh. 1 at 46) (“The LNG must be priced as a separate line item on the proposal.”). The decision not to disqualify the Synergem cost submission was neither arbitrary nor capricious and it did not create a fundamental unfairness.

10. Bias.

It was not demonstrated by clear and convincing evidence that the selection process was tainted by bias on the part of the PUC or anyone participating in the selection process.

11. Other issues.

With respect to other issues raised by Intrado and Oxford, the Panel does not discern a violation of law, an irregularity creating a fundamental unfairness, or arbitrary or capricious conduct.


CONCLUSION

Intrado and Oxford have established by clear and convincing evidence that the evaluation process for this RFP violated the law. Accordingly, the Panel invalidates the contract award to Fairpoint.

[Signature page(s) to follow]

By the Appeal Panel:

Dated: 11-5-12


Michelle Fournier
Division of Purchases

Dated: _____

Andrew Giroux
Central Services

Dated: _____

John Harker
Department of Agriculture, Conservation and Forestry

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. A party to this proceeding must file an appeal within 30 days after receipt of this decision. 5 M.R.S. § 11002.

By the Appeal Panel:

Dated: _____

Michelle Fournier
Division of Purchases

Dated: 11-5-12

Andrew Giroux
Central Services

Dated: _____

John Harker
Department of Agriculture, Conservation and Forestry

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By the Appeal Panel:

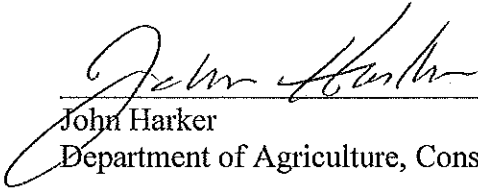
Dated: _____

Michelle Fournier
Division of Purchases

Dated: _____

Andrew Giroux
Central Services

Dated: 11/5/2012



John Harker
Department of Agriculture, Conservation and Forestry

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