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September 12, 2012

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RE: Decision of Appeal Panel, Appeal of Award - BGS
RFP 201205304 - Natural Gas Distribution

Dear Attorneys Witham, Buxton, Costello & Im:

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
William Laubenstein, AAG, Hearing Officer
James I. Cohen, Verrill Dana LLP
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Scott Morelli, City of Gardiner
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Appeal Panelists

Enclosure: Chapter 120

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

In the Matter of	)	
Summit Natural Gas of Maine, Inc.	)	Decision of Appeal
Appeal of Award by	)	Appeal Panel
Bureau of General Services	)	
	)	
RFP No. 201205304	)	

INTRODUCTION AND PROCEDURAL BACKGROUND

This is an appeal by Summit Natural Gas of Maine, Inc. (“Summit”) from a decision of the Bureau of General Services (“BGS”) awarding a memorandum of understanding (the “MOU” or “Contract”) to provide natural gas to State facilities in the Augusta/Gardiner area with capacity to serve the Kennebec Valley region pursuant to a Request for Proposals issued in May 2012. (the “Project”). The appeal is pursuant to 5 M. R. S. § 1825-E and Chapter 120 of the Rules of the Bureau of General Services, Department of Administrative and Financial Services (“Rules”). The Bureau of General Services granted the request of Summit for a hearing. The Bureau granted intervenor status to the successful bidder, Maine Natural Gas (“MNG”), Kennebec Valley Gas Co., LLC (“KVG”), Kennebec Valley Council of Governments (the “Council”), Town of Madison (“Madison”), Town of Winslow (“Winslow”), Town of Gardiner (“Gardiner”) and City of Waterville (“Waterville”).

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 August 1, 2012, at which the testimony of witnesses and documentary evidence was presented. The record was closed on August 24, 2012 upon submission of written closing arguments by the parties.

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

FINDINGS OF FACT

The Bureau issued a Request for Proposals ("RFP") in May 2012 and provided the opportunity for bidders to submit written questions by May 24, 2012 with responses to bidders' questions to be provided within 5 days. There was no bidders' conference. The Bureau received questions from MNG but did not respond to the questions. The RFP required bidders to submit proposals by 2:00 pm, June 1, 2012.

In the Introduction to the RFP, The Bureau stated it was seeking proposals to "...supply natural gas to the Augusta/Gardiner area, with sufficient infrastructure development capacity to continue natural gas supply to the Kennebec Valley region through Madison." The Bureau noted that there was no natural gas pipeline "in these areas currently" and that the State was looking to use natural gas at its facilities "in those areas" to save money on its energy costs.

Under the heading, Scope of Work, the Bureau stated the "...State would entertain proposals that would supply natural gas through the communities and tie into state facilities on the East side of Augusta, and facilities near the capital complex. The proposals should be for a natural gas pipeline and distribution system for State of Maine facilities, located in Augusta and Gardiner...The state facilities in Augusta/Gardiner areas would serve as anchors for this project."

The Bureau stated it could enter into a contract with the selected vendor "if there were demonstrated cost saving to the State through purchasing energy from these projects." Bidders would need to demonstrate a reduction of the cost to the State of providing heating, cooling and electricity to its facilities.

Under the RFP an Evaluation Team would judge the merits of proposals in accordance with the criteria outlined in the RFP and would be scored: (1) Experience, References and Capacity—25% (points); (2) Technical Proposal—25% (points); (3) Job Creation/Economic Impact—5% (points); (4) Fiscal Stability—10% (points); and (5) Cost Savings—35% (points).

The Bureau received proposals from MNG, Summit and Self-Gen, Inc. The Evaluation Team prepared scoring sheets for each bidder and a chart of the scores awarded for each criteria. The record contains consensus notes and notes of individual evaluators. The proposals were scored by consensus. The score chart shows that MNG received a total

score of 94, with 22 points awarded for Experience, References and Capacity, 23 points awarded for Technical Proposal, 4 points for Job Creation/Economic Impact, 9 points for Fiscal Stability and 35 points for Cost Savings. Summit received a total score of 92.09, with 23 points awarded for Experience, References and Capacity, 23 points awarded for Technical Proposal, 4 points for Job Creation/Economic Impact, 9 points for Fiscal Stability and 33.09 points for Cost. Self-Gen received a total score of 67.09, with 17 points awarded for Experience, References and Capacity, 15 points awarded for Technical Proposal, 4 points for Job Creation/Economic Impact, 3 points for Fiscal Stability and 28.09 points for Cost.

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 set forth 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 Panel 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. § 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 Evaluation Team. *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. Discussion. The Panel has determined that Summit has met its burden of proving by clear and convincing evidence that the award of the contract was in violation of law, contained irregularities creating fundamental unfairness or was arbitrary or capricious.

A. Request for Proposals/Scope of Work. Chapter 110 of the Rules for the Purchase of Services and Awards, 18-554 C.M.R. ch. 110, § (2) (A), states that a request of proposals "... must contain at a minimum a clear definition (scope) of the project, the evaluation criteria and relative scoring weights to be applied..." Even a cursory review of the RFP in this case shows that the BGS failed to clearly define the scope of the project. This is a violation of law.

The introduction to the RFP stated that BGS was seeking proposals to "...supply natural gas to the Augusta/Gardiner area, with

sufficient infrastructure development capacity to continue natural gas supply to the Kennebec Valley region through Madison.” Immediately thereafter, under the heading Scope of Work, BGS stated it would entertain proposals to supply natural gas to state facilities “on the East side of Augusta, and facilities near the capital complex.” BGS then went on to state the proposals should be for a natural gas pipeline for state facilities located in Augusta and Gardiner, and a distribution system sized to enable future expansion in the Kennebec Valley. In addition, BGS stated the state facilities in the Augusta/Gardiner area would serve as anchors for the Project and that the selected vendor would be responsible for installing the pipeline and “making connections to the Augusta/Gardiner area and providing an adequately sized pipeline and distribution system to enable expansion.”

Even if the Scope of Work, and not the introduction, defines the Project as BGS and MNG argued, the plain language of the Scope of Work can reasonably only be interpreted to define the Project as providing natural gas to state facilities in the Augusta/Gardiner area. The plain language does not support the argument made by BGS and MNG that BGS was looking for proposals to serve only state facilities located in Augusta. Furthermore, the chart on page 2 of the RFP, while lending some support to the position of BGS and MNG, it appears to have been provided primarily for the purpose of calculating cost savings and does not clarify the definition of the Project as suggested by BGS and

MNG. In addition, not only does the failure of the RFP to include a clear definition of the scope of work, constitute a violation of law, but also the lack of a clear definition resulted in a fundamentally unfair and arbitrary or capricious determination of job creation and cost.

B. Cost Determination. The RFP stated that proposals would be scored on Cost Savings and that bidders were to use the information in the chart of page 2 of the RFP in presenting their cost proposal. The chart indicated that in calculating cost savings, bidders were to assume the current cost of fuel oil to the State was \$3.21 per gallon; supply costs of natural gas were to be based upon "NYMEX costs as of May 25, 2012." Upon review of the proposals, it was noted that Self-Gen used a fuel oil supply cost of \$3.51 per gallon. Assuming, wrongly as it turned out, that it was therefore not possible to fairly calculate cost savings, unit cost was used for assigning a score for cost savings.¹ The unit cost used was the delivered cost of natural gas.

Standing alone, the decision to use unit cost to score cost savings may not have been fundamentally unfair or arbitrary or capricious. However, the evidence showed that using unit cost only compounded the error of using an evaluation criteria not defined in the RFP as required by Chapter 110. This is because NYMEX costs vary depending on the time period selected and the RFP did not specify the time period to be used by

¹ The testimony at the hearing revealed that \$3.51 was a typographical error and that Self-Gen had used \$3.21 in its calculation of cost savings but the Evaluation Team did not attempt to ascertain whether Self-Gen had in fact used the wrong cost of fuel oil.

the bidders.² Notwithstanding that this created, once again, the impossibility of fairly evaluating the cost proposals, since each bidder was left to decide what time period to use, cost scores were awarded on the basis of unit cost. In the case of Summit and MNG, the unit cost used was taken from their proposals; in the case of Self-Gen, an extrapolated unit cost was used.³

Based on the evidence set forth above—the use of unit cost rather than cost savings, the switch to unit cost without fixing the time period to be used and the failure to recognize that Self-Gen had not used the incorrect figure of the cost of fuel oil-- the Panel has concluded that the scoring of the cost proposals was fundamentally unfair and arbitrary or capricious.

C. Job Creation/Economic Impact. The RFP required bidders to provide the number of jobs to be created in the first, third and fifth year of the project. The proposals were to include the methodology used to calculate the number of jobs to be created so that the number could be verified independently. Summit calculated the number of jobs, both direct and indirect, for the first, third and fifth year of the Project, which it defined as providing natural gas the Augusta/Gardiner area with a distribution system reaching to Madison. MNG calculated the number of

² It is significant in this regard that MNG asked BGS what the time period was to be used but BGS did not answer that question or any other question. This was contrary to the statement in the RFP that bidders would have the opportunity to ask questions and that answers would be provided.

³ The testimony at the hearing showed that Summit made a typographical error that resulted in the use of the wrong unit cost assigning a score to Summit although a quick check on the components that made up the number would have shown the error.

direct jobs in the first and second year and “in year 3 and beyond” of the project, which it defined as providing natural gas to state facilities in Augusta. Self-Gen calculated the number of jobs in the first, third and fifth year of the Project, which it defined as providing natural gas to Augusta, Gardiner and the Kennebec Valley to Madison.

Notwithstanding the three bidders calculated the number of jobs using varying definitions of the Project, and that Summit included direct and indirect jobs and MNG only direct jobs, the Evaluation undertook to award scores for Job Creation/Economic Impact. In addition, the Evaluation Team used the job numbers provided by Summit and MNG but adjusted the job numbers of Self-Gen because its estimates were high. For reasons that remain unclear, BGS scored Job Creation/Economic Impact on the basis of jobs to be created by MNG in year one, by Summit in year two and on the basis of an adjusted number for Self-Gen. In addition, BGS looked at the methodology used by each bidder in making a judgment as to the validity of the number of jobs.

Based on the evidence set forth above—failure to score jobs created in the first, third and fifth year, the use of direct jobs for MNG and direct and indirect jobs for Summit, the adjustment of the number of jobs proposed by Self-Gen-- the Panel has concluded that the scoring of the Job Creation/Economic Impact was fundamentally unfair and arbitrary or capricious.

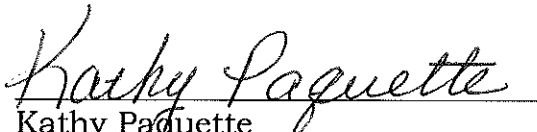
D. Other issues. The Panel does not find any merit in the argument that the RFP and award process was contrary to law, fundamentally unfair or arbitrary or capricious because BGS may or may not have used the appropriate guidelines for evaluating the proposals.

CONCLUSION

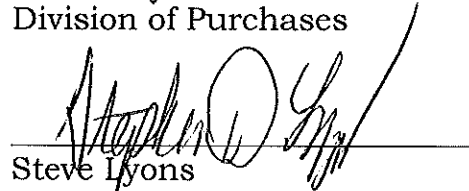
Summit has established by clear and convincing evidence that the awarding of the contract to provide natural gas service to the Augusta/Gardiner area to MNG was in violation of law, contained irregularities that created a fundamental unfairness, and was arbitrary or capricious. The Panel therefore invalidates the award made by the Bureau of General Services.

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Dated: 9-10-12


Kathy Paquette
Division of Purchases

Dated: 9/7/2012


Steve Lyons
Department of Economic and
Community Development

Dated: _____

Steve Turner
Department of Health and
Human Services

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: _____

Kathy Paquette
Division of Purchases

Dated: _____

Steve Lyons
Department of Economic and
Community Development

Dated: 9/7/2012



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