



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

RICHARD W. ROSEN
COMMISSIONER

GILBERT M. BILODEAU
INTERIM DIRECTOR

September 20, 2016

Charles F. Dingman
PretiFlaherty
P.O. Box 9546
Augusta, ME 04332-9546

Nancy Macirowski, AAG
Assistant Attorney General
#6 State House Station
Augusta, ME 04333-0006

RE: Decision of Appeal Panel, Department of Labor
RFP # 201602042, Community Based Blindness Rehabilitation Services

Dear Mr. Dingman & Ms. Macirowski:

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,

A handwritten signature in blue ink, reading "Gilbert M. Bilodeau".

Gilbert M. Bilodeau, Interim Director
Bureau of General Services

cc: Sarah Forster, Assistant Attorney General, Presiding Officer
Kevin Scheirer, Director, Division of Purchases
Julie Rabinowitz, Director of Communications, Department of Labor
Appeal Hearing Panelists

Enclosure: DAFS Rules Chapter 120

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

RE:	APPEAL OF AWARD OF CONTRACT)	
	FOR COMMUNITY BASED BLINDNESS)	DECISION OF
	REHABILITATION SERVICES)	APPEAL COMMITTEE
	(RFP #201602042))	

This is an appeal by The Iris Network (“Iris”) from the decision of the Department of Labor (“DOL”) to award a contract pursuant to RFP #201602042 for community based blindness rehabilitation services to Catholic Charities Maine (“CCM”). 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 Director of the Bureau of General Services agreed to Iris’ request for a hearing over DOL’s objection. CCM did not request intervenor status, and did not participate in the appeal.

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 August 25, 2016, at which the testimony of witnesses and documentary evidence were presented. At the close of the testimony, the parties were permitted to present written closing arguments and the administrative record was held open until 5:00 p.m. on September 8, 2016. 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 April of 2016, DOL issued RFP #201602042 for community based blindness rehabilitation services. DOL Ex. 1.¹ DOL held a bidders' conference on April 19, 2016, and allowed bidders to submit written questions until April 22, 2016. DOL Ex. 23. DOL published its responses on April 26, 2016. DOL Ex. 24. The deadline for submitting proposals was May 3, 2016. DOL Ex. 1. Two providers submitted proposals: CCM and Iris. DOL Exs. 21-22.

As described in the RFP, the proposals were evaluated in four areas: Organization Qualifications and Experience (30 points), Specifications of Work to be Performed (30 points), Cost Proposal (30 points), and Economic Impact within the State of Maine (10 points). DOL Ex. 1 at 12. The first two areas were evaluated using a consensus scoring model. *Id.* The third area – cost – was scored pursuant to a mathematical formula. *Id.* at 12-13. The fourth area – economic impact – was the sum of two sub-parts, recent economic impact and projected economic impact, and was based on the dollar amounts supplied by the bidders using a formula that awarded the highest dollar amount the full number of points (5 in each area) with the other bid receiving a percentage of the 5 points reflecting the difference between their dollar amount and the highest dollar amount. *Id.* at 13.

DOL notified the bidders of its decision to conditionally award the contract to CCM on June 1, 2016. DOL Exs. 9-10. Of the 100 available points, CCM received 91.9 and Iris received 90.2 – a difference of 1.7 points. DOL Ex. 4. With respect to Economic Impact, CCM received the full 10 points, and Iris received 5.7. *Id.* With respect to Organizational Qualifications and Experience, Iris received the full 30 points and CCM received 29. *Id.* Iris challenged the award

¹ The evidentiary record in this matter consists of DOL Exhibits 1-25 and Iris Exhibits 1-5, 9, 11-17, 19-23 and 26-35. The page number references to the DOL exhibits refer to the numbers printed on the top of the pages.

by petition on June 16, 2016.² DOL Ex. 13. BGS granted Iris' petition over DOL's objection on June 29, 2016. DOL Ex. 15.

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 in regulations of the Division of Purchases at 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.

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 award to CCM must be invalidated.

In its appeal, Iris presents several reasons that the award to CCM should be invalidated. First, Iris complains that the RFP violated the law as the "recent economic impact" section of the RFP failed to result in an award to the best-value bidder as required by 5 M.R.S. § 1825-B(7).

² Iris also sought and obtained a stay of the conditional award to CCM. DOL Exhs. 11-12.

Second, Iris complains that scoring of the “recent economic impact” section created a fundamental unfairness as the 4.2 points awarded to CCM were unrelated to the determination of the best-value bidder. Finally, Iris complains that the award was arbitrary and capricious because the proposals were not scored fairly or consistently against the RFP or as compared to one another.

For the reasons explained below, the Committee finds that the award to CCM must be invalidated.

A. The economic impact section of the RFP was not designed to result in an award to the best value bidder.

Maine law requires that contracts subject to competitive bidding, such as the award at issue in this matter, “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.” 5 M.R.S. § 1825-B(7). Executive Order 2012-004 requires consideration of “the responding bidder’s economic impact on the Maine economy and State revenues.” DOL Ex. 20. The Executive Order does not alter the foundational legislative mandate that purchases be made “in a manner that best secures the greatest possible economy.” 5 M.R.S. § 1825-B(1). Rather, it directs State agencies to recognize, in the context of competitive bidding, “that the value of services performed may have an impact on the economic health in both the public private and public sectors” – *i.e.* the potential indirect economic benefit of performing work in-state. DOL Ex. 20.

In this case, the economic impact component of the RFP was not designed to lead to the best-value bidder. The economic impact component was divided into two sub-parts – recent economic impact and projected economic impact. DOL Ex. 1 at 13. With respect to recent

economic impact, the RFP directed the bidders to complete a table in Appendix E that asked for information about salaries to Maine residents, payments to Maine-based subcontractors, Maine state and local tax payments and Maine licensing fees within the past 24 month period. DOL Ex. 1 at 25. Unlike a second table in Appendix E for projected economic impact, which was limited to impact “only from awarded contract,” the calculation of recent economic impact bears no relation to the services sought in the RFP – it simply measures the bidder’s overall size or economic footprint within Maine. *Id.* James Phipps of Iris testified that while CCM is a large organization with a variety of worthy programs around the State, such as food banks and child care programs, that are unrelated to the services sought in the RFP, Iris is a small organization focused solely on providing vision rehabilitation services and has provided the services that are the subject of the RFP for decades. After applying the scoring formula required by the RFP, CCM received the maximum 5 points and Iris received only .8 point solely because CCM is a much larger organization. In the end, the Committee is left with no connection between the relative size of the two in-state bidders and the competitive value of their bids. Unlike the recent decision in *Department of Health and Human Services RFP #201506114, Crisis Mobile Resolution and Stabilization Unit Services* (March 29, 2016) which involved an identical economic impact formula, the difference of 4.2 points in this instance was enough to potentially lead to an award to a bidder other than the best value bidder. As such, the award must be invalidated.

B. The evaluation of the proposals was arbitrary and capricious because the proposals were not scored or evaluated consistently.

Sections I and II of the bidders’ proposals were scored using a consensus scoring model. Unlike the formulaic scoring for cost and economic impact, the scoring in these two sections was subjective. While the Appeal Committee is well aware that its role is not to substitute its

judgment for that of the agency, it is responsible for determining whether the scoring process was fair, *i.e.* that it was not arbitrary and capricious. In this case, while there is certainly no evidence of intent on the part of DOL to be anything but fair, a review of the scoring process with respect to organization qualifications and experience indicates that the proposals were not scored or evaluated consistently.

The organization qualifications and experience section of the RFP required bidders to “attach documentation of Vision Rehabilitation Therapists certification by the Academy for Certification of Vision Rehabilitation & Education Professionals (ACVREP).” DOL Ex. 1 at 10. (referred to throughout the RFP as “CVRTs”). Harold Lewis and Brenda Drummond of DOL, as well as Mr. Phipps, all testified that CVRTs were central to the provision of services sought by the RFP. Iris complied with the requirement by attaching certificates for its current employees. DOL Ex. 22 at 225-237. CCM did not submit any certificates. Instead, CCM submitted a list of all of the individuals in Maine who hold ACVREP certification, including all of the individuals who currently work for Iris. DOL Ex. 21 at 167-68; testimony of James Phipps. Mr. Phipps testified that based on his knowledge of the few individuals in Maine who have this certification, he did not believe any CVRT currently worked for CCM. Despite this obvious distinction, both bidders were awarded 25 of the 30 available points as baseline points for meeting the requirements of the RFP.

It was clear from the testimony of Ms. Drummond and Kevin Scheirer, Director of the Division of Purchases, that DOL and Purchases were concerned that it would be an unfair advantage to the current contractor to differentiate between having the certified individuals on staff versus having a plan to obtain them given their view that if someone other than Iris received the contract, the CVRTs would leave Iris and seek employment with the contract winner.

However, the RFP was structured to make just that distinction given the requirement in the *organizational qualifications and experience* section that the bidder submit the certificates. Having put that requirement in place, DOL could not ignore it or render it meaningless by giving the same number of points (and a quarter of all of the available points) to both a bidder who submitted certificates reflecting a roster of certified therapists, and a bidder who had none. The Committee notes that there was a separate section of the RFP – Section II – that gave the bidders an opportunity to describe their plan for how they would perform the work. That section gave CCM the opportunity to discuss how they would hire and train CVRTs, and CCM received an extra point over and above the baseline score for their response in this area, while Iris did not.³

CONCLUSION

Iris has demonstrated by clear and convincing evidence that the RFP failed to comply with the governing law, and that the evaluation and scoring of the proposals was arbitrary and capricious. The Committee therefore invalidates the awards made by DOL.

Dated: 9.19.16

Deborah B. Farrell
Deborah Farrell
Department of Transportation

Dated: _____

Andrew Giroux
Central Services

Dated: _____

Scott Goulette
Department of Corrections

³ Iris also complained that the proposals were not fairly scored with respect to: the award of an extra point to CCM for homemaker services; the award of an extra point to CCM for the inclusion of extraneous materials; and, the failure to deduct additional points from CCM for the inclusion of an additional expenditure line in the cost proposal. The Committee finds that the first two decisions were within the discretion of the evaluation team and that the overage in the cost proposal was adequately captured in the deduction of points pursuant to the cost scoring formula.

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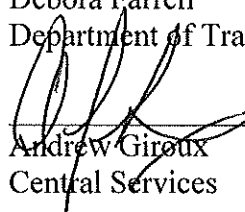
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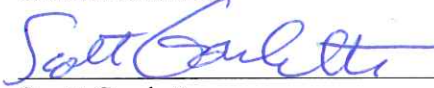
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STATEMENT OF APPEAL RIGHTS

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.