



STATE OF MAINE
DEPARTMENT OF ADMINISTRATIVE & FINANCIAL SERVICES
BUREAU OF GENERAL SERVICES
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February 18, 2009

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Paul Gauvreau, AAG
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Augusta, ME 04333

Re: Decision of Appeal Panel, Appeal of Award by the Department of Health and Human Services, RFP #200807271 for the Vision Care Volume Purchase Plan

Dear Mr. Dougher, Mr. Wallof, Attorney Dingman and Attorney Gauvreau:

I am forwarding the final decision of the appeal panel with regard to the Department of Health and Human Service's award decision on the above-mentioned RFP. 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. §11001, et seq, and M.R. Civ.P.80C. A party must file a petition for review within 30 days after receipt of notice of the decision.

Regards,

A handwritten signature in black ink, appearing to read "Chip Gavin".

Chip Gavin, Director
Bureau of General Services

Enclosure

cc: William Laubenstein, AAG
Betty M. Lamoreau, Panelist
Alan Henry, Panelist
Tony VanDenBossche, Panelist

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

In the Matter of)	
Hoya Vision Care)	
Appeal of Award by)	
Department of Health and Human Services)	
Office of MaineCare Services)	
)	Decision of Appeal Panel
)	
RFP No. 200807271)	

INTRODUCTION AND PROCEDURAL BACKGROUND

This is an appeal by Hoya Vision Care (“Hoya”) from a decision of the Department of Health and Human Services, Office of MaineCare Services (“Department” or “OMS”) awarding a contract for the Vision Care Volume Purchase Plan (“Purchase Plan” or “Plan”) pursuant to a Request for Proposals issued in September 2008. The appeal is pursuant to 5 M. R. S. A. § 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 Hoya for a hearing. The Bureau granted intervenor status to the successful bidder, Classical Optical Laboratories (“Classic Optical”).

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 February 5, 2009, at which the testimony of witnesses and documentary evidence was presented.

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

FINDINGS OF FACT

The Department issued a Request for Proposals (“RFP”) in September 2008 and provided responses to bidders’ questions in October. The RFP required bidders to submit proposals by 2:00 pm, November 3, 2008. The RFP requested proposals to provide “all eyeglasses (lenses, frames, associated parts, and cases) for the MaineCare Program (including the State Children’s Health Insurance Program), and the Medical Eye Care Program.” The contract for the Purchase Plan would be for a two-year period with an option for two one-year extensions.

The Department stated in the RFP that bidders were to concentrate on conformance with RFP instructions, responsiveness to requirements, completeness and clarity of content. Bidders were advised that if a proposal was presented in a manner that made evaluation difficult or overly time-consuming points could be deducted in the evaluation process. The Department reserved the right to reject any proposals that contained material deviations from the RFP. The RFP directed bidders to identify any prior or existing contracts with the State and to include the contract number and any other identifying information.

The Department asked in the RFP for a Project Management Plan that was to include how the bidder, among other requirements, would approach problem identification, tracking and resolution; and how the bidder would report status and progress. The reporting requirements section of the RFP stated that the successful bidder

or contractor "shall provide such reports with respect to the materials and services provided hereunder as the Department may reasonably require."

The Department included in the RFP forms for submitting cost proposals with the estimated number of units required indicated on the forms. For example, Appendix B, Bid List Lenses, indicated the estimated number of single vision lenses and bifocal lenses. Appendix C, Bid Computations, listed the estimated number of frames for children, adults and infants and the estimated number of safety frames.

With regard to the quality of materials, the RFP stated that lenses were to be of first quality scratch resistant plastic, or polycarbonate, standard-size, single vision, bifocal, trifocal and cataract lenses. Frames were to meet ANSI standards. The successful bidder was to furnish zyl and metal dress eyewear frames of contemporary style. In Appendix A, Bid List-Frames, the Department stated that bidders were to submit a list of "what they feel are suitable zyl (plastic) and metal frames of first quality for men, women, children and infants." It was specifically noted that infant's frames were to be zyl only and that occupational frames were to be zyl safety frames.

The RFP stated that the contractor was responsible for the timely processing and fulfillment of all orders; that orders were to be on an approved form; that all orders were to be date-stamped upon receipt; that "all orders must be in writing; no telephone orders shall be accepted." In support of their ability to perform the requested services, the Department asked bidders to submit "at least three (3) business letters of recommendation, annual financial reports for each of the last two (2) years, and a list of seven (7) references, including at least three (3) customers, three (3) suppliers, and one (1) lending institution."

The RFP stated that bids that passed an initial screening would be evaluated for the ability to meet the requirements identified in the RFP and would be scored: (1) Vendor Qualifications--15 points; (2) Contract Performance & Solution Approach--35 points; (3) References--5 points; (4) Cost, including Project Management & Plan--30 points; and (5) Kit Selection of frames--15 points.

The Department received three proposals. A six member evaluation team reviewed the proposals assisted by a facilitator. The facilitator prepared a consensus evaluation form for each bidder. The record includes evaluator's notes for two of the evaluators. A summary of the scoring submitted by the Department shows that Classic Optical received a total score of 94.25, with 35 points awarded for Contract Performance and 25.25 for cost. Hoya received a total score of 77.6, with 25 points awarded for Contract Performance and 20.4 points awarded for cost. All bidders received the maximum 5 points for references.

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 of the Rules for Appeals of Contract and Grant Awards. The clear and convincing standard requires the Committee 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.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. Discussion. The Panel has determined that Hoya 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 and was arbitrary or capricious.

In its request for an appeal hearing, and in subsequent submissions and oral argument, Hoya alleged that the evaluation process was fundamentally unfair and tainted by prejudice or bias because of the evaluators' misinterpretation of Hoya's cost proposal. In support of these allegations, Hoya pointed out that its cost proposal was based on the number of double-lenses required to meet the estimated required units included in the RFP; that the RFP did not state whether the Department was asking for double-lens or single-lens pricing; that in an RFP issued in 2004 the Department stated it was seeking double-lens pricing. Hoya noted that it received a negative comment because it did not offer on-line ordering even though the RFP stated all orders must be in writing; that it was marked down because project management was limited to the implementation page even though its bid set forth a complete project management plan; and that it lost points

because it did not propose reporting to the state but only to providers although the RFP only required such reports as required by the Department.

The Department responded that a careful reading of the number of units estimated for lenses and the number of units estimated for frames would show clearly that the Department was asking for single-lens pricing; that Hoya's proposal did not track the outline of requirements in the RFP, which made it difficult to evaluate and that this could have served as a basis to disqualify the bidder; and that, in addition, when the evaluation team had some concerns in other areas, the team gave the benefit of the doubt to Hoya because it was the current provider.

The Department acknowledged, however, that it was probably unfair to give substantial weight to on-line ordering when the RFP did not state it was seeking on-line ordering; that it was unfair to mark down Hoya's proposal for not providing a report to the state when the RFP did not require it; and that the Department had not experienced any project management problems during the last four years that Hoya provided the vision care services.

(1) Single-lens/double-lens pricing. The Panel is not persuaded that there were any errors in the scoring for cost. Although the RFP did not specifically state that the Department was seeking single-lens pricing, a careful reading of the cost forms would show that the Department was seeking pricing for twice the number of units for lenses than for frames. In addition, Hoya admitted that different people prepared the cost sheets for frames and for lenses and that no one compared the total costs being proposed. Such a comparison would have shown that there was an irregularity in its cost proposal.

(2) Prejudice or bias. The Panel is not persuaded that the evaluation process was tainted by prejudice or bias. To the contrary, the evaluation team voted not to disqualify Hoya even though it believed it could have because Hoya's proposal was poorly organized and information difficult to locate making the evaluation difficult. In addition, the Panel finds that Hoya did not establish by clear and convincing evidence that somehow the evaluation of references was fundamentally unfair, particularly because all bidders received the maximum points available for references.

(3) Evaluators Comments. The Panel finds that it was fundamentally unfair and arbitrary or capricious to mark down Hoya for not offering on-line ordering. The RFP did not require or request on-line ordering; to the contrary, the RFP stated that all orders must be in writing. This error was highlighted by the testimony that on-line ordering was a significant factor in the scoring of the proposals. If the Department deemed on-line ordering to be significant, it should have so stated in the RFP.

(4) Other scoring issues. The Panel finds it was fundamentally unfair to mark down Hoya for not offering to provide a report to the State since the RFP did not indicate what reports would be required. The Panel does not find the evidence supports the argument that evaluators should have marked down Classic Optical for not offering the right selection of frames. The RFP only specified the type of frame for infants and occupational. Otherwise, bidders were to submit a list of what they felt were suitable zyl and metal frames. With regard to project management, the testimony was mixed. On the one hand, the Department acknowledged that it had not experienced project management problems with Hoya; on the other hand, the Department pointed out that Hoya's proposal was lacking in detail on project management. Lastly, the Department and Classic Optical

argued that Classic Optical's proposal over-all was far superior to Hoya's; that the Department in the RFP was asking bidders to make their best offer with regard to services to be provided. The Panel rejects this argument. First, it is not the Panel's job to re-evaluate the proposals; and, second, neither the RFP nor the testimony supports the argument that the Department was seeking creative or innovative proposals. The RFP, in large measure, tracked the RFP issued in 2004 and included many identical provisions and was very specific with regard to the services to be provided.

(5) Evaluation Process. Chapter 110 of the Rules for the Purchase of Services and Awards provides that: "Written records must be kept by each person reviewing or ranking proposals." The record in this case shows that of the six evaluators, only two kept a written record. This is a violation of law.

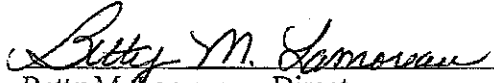
CONCLUSION

Hoya Vision Care established by clear and convincing evidence that the awarding of the contract for the Vision Care Volume Purchase plan was in violation of law, fundamentally unfair, or arbitrary or capricious.

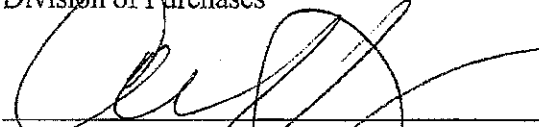
The Panel therefore invalidates the award made by the Office of MaineCare Services.

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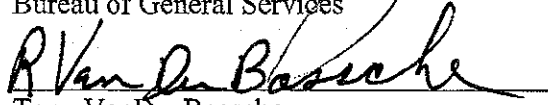
Dated: 2/17/09


Betty M. Lamoreau, Director
Division of Purchases

Dated: 2/17/09


Alan Henry
Bureau of General Services

Dated: 2/17/2009


Tony VanDenBossche
State Planning Office

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.