



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

H. SAWIN MILLETT, JR.
COMMISSIONER

BETTY M. LAMOREAU
ACTING DIRECTOR

October 3, 2011

James H. Page, PhD, CEO
James W. Sewall Company
136 Center Street, PO Box 433
Old Town, Maine 04468-0433

Mark Randlett, AAG
Attorney General
6 State House Station
Augusta, ME 04333-0006

Re: Decision of the Appeal of Award by the Office of Information Technology
Statewide Orthoimagery 5-Year Program, RFP # 201104076

Dear Mr. Page and Attorney Randlett:

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.

Regards,

Betty M. Lamoreau, Acting Director
Bureau of General Services

cc: Sarah Forster, AAG, Hearing Officer
Michael A. Wenzel, Acting Director, Division of Purchases
Appeal Panelists
Michael Smith, OIT

Attachment: Decision of the Appeal Panel

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

RE: APPEAL OF AWARD OF OFFICE OF) DECISION OF
INFORMATION TECHNOLOGY,) APPEAL COMMITTEE
STATEWIDE ORTHOIMAGERY 5 YR.)
PROGRAM (RFP #201104076))

This is an appeal by the James W. Sewall Company (“Sewall”) from a decision of the Maine Office of Information Technology/Maine GeoLibrary Board (“OIT”) to award a contract to acquire orthoimagery for the State of Maine over a five year period. 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 Sewall’s request for a hearing.

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 September 23, 2011, at which the testimony of witnesses and documentary evidence were presented. 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 May 2011, OIT issued RFP #201104076 for orthoimagery of the State. Joint Exhibit¹ (“J.E.”) 2. The cost portion of the RFP required all applicants to fill out the Cost Schedule attached to the RFP as Exhibit B. That Schedule breaks the costs down into a “baseline cost schedule” and a “buy-up cost schedule.” The “baseline cost schedule” represented the cost of

¹ The parties stipulated that the exhibits provided by each party could be submitted as Joint Exhibits. The exhibits provided by OIT are labeled “Section [number]” while the exhibits provided by Sewall are labeled “[letter] [number].” This decision will cite the OIT exhibits by number and the Sewall exhibits by letter and number.

creating a baseline statewide orthoimagery collection, with costs broken down based on three area ranges and two ground sample distances. (Testimony of Michael Smith (“Smith”)). The “buy-up cost schedule” was described in Appendix B as “additional cost per square mile to buy up orthoimagery from [the] baseline program” and represented the cost of creating custom orthoimagery as might be requested by, for example, a city or town. *Id.* While there is no way of knowing in advance exactly what custom imagery might be requested, the buy-ups to be priced contained a number of options of ground sample distances, map scale and horizontal accuracy levels, three area ranges, and the addition of infrared. *Id.* The buy ups also contained options based on whether a suitable digital terrain model (DTM) or digital elevation model (DEM) already existed for the requested area. *Id.*

Unlike the RFP’s other scoring components, which were evaluated by a team of reviewers using a consensus scoring model, the cost scoring was done by Michael Smith using a formula that gave the proposal with the lowest cost in each cell the full 25 points, the proposal with the highest cost 0 points, and the proposals in between scores that reflected their relative distance from the lowest cost. *Id.* OIT considered the baseline and the buy-ups to be of equal value and thus each contributed a maximum of 12.5 points toward the overall cost score. *Id.*

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. Sewall's appeal advances only the second contention, irregularities creating a fundamental unfairness.

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.

II. The Award Made By OIT Is Validated.

In its letter of appeal, Sewall raised six points of contention that it then streamlined at the hearing into two main issues. Sewall explicitly stated that it was not waiving any of the six points raised in the letter, all will be addressed below within the framework of the two issues as presented at the hearing. Counsel for Sewall stated at the hearing that Sewall was not contesting the use of the scoring formula.

For the reasons explained below, the Committee finds that there was no irregularity in the scoring of the baseline costs. The costs associated with the alternative minimum bounding rectangle ("MBR") submitted by Sewall, which OIT viewed as compliant and similar to the plans submitted by other bidders, did not deviate from the costs proposed for Sewall's initial MBR plan.

In addition, the Committee finds that there was no confusion among either OIT or the bidders regarding the calculation of the buy-up costs that would constitute an irregularity. Smith explained that when he reviewed the cost schedules submitted by the bidders, he was concerned that Sewall had priced the buy-ups independently of the baseline costs, as opposed to in addition to the baseline costs, and as a result, he contacted Sewall and every other bidder to confirm that the buy up costs on the schedules constituted only the additional costs. He then made the

necessary adjustments to the bidders' cost schedules to ensure that he was comparing "apples to apples." None of the other concerns raised by Sewall constitute an irregularity as all of the bidders had to address the same uncertainties inherent in the buy-up portion of the RFP.

A. The scoring of the baseline costs contained no irregularities.

Sewall complains that the MBR required by the RFP significantly increased the cost of the project and that it proposed an alternative MBR that the State declined to consider. J.E. G. The alternative plan proposed by Sewall is similar to the MBRs included in the proposals of other bidders. *See* J.E.s I, J, K. Michael Smith testified that he viewed both Sewall's initial and alternative MBR as well as the MBRs of the other bidders to be compliant with the terms of the RFP. (Testimony, Smith). There is no irregularity in Smith's interpretation of the RFP, and the consequent scoring of the competing baseline cost proposals. Based on the evidence presented to the Committee, the only entity that believed the MBR required was the large rectangle contemplated by Sewall's initial MBR was Sewall. Moreover, the issue of which MBRs are RFP compliant quickly becomes moot -- the cost schedule submitted by Sewall using their alternative plan *is the same for every one of the required cells* as the cost schedule for the initial MBR they believed was necessary to comply with the RFP. Therefore, the RFP's evaluation process and outcome would be the same regardless of which MBR approach is used. J.E. H.

The only other argument raised by Sewall in its letter regarding the baseline costs is little more than conjecture on Sewall's part. Sewall asserts that despite the three area ranges requested in Appendix B, the >1000 square miles range was the one that was most applicable to the project as defined in the RFP and thus should be the only one of the three areas considered in order to make a true "apples to apples" comparison. Appendix B was clear that prices were to be given

for all three ranges.² Sewall's decision to concentrate on providing the lowest cost for one of the three ranges is a strategic decision on their part that fails to constitute an irregularity in the scoring process.

B. The scoring of the buy-up costs contained no irregularities.

Sewall's complaints about the uncertainties surrounding the buy-up costs fail to indicate an irregularity. First and foremost, during the appeal hearing Sewall complained that the uncertainty around the buy-ups was so pervasive it rendered the bidders unable to understand what they were being asked to provide. The testimony at the hearing from Smith, as well as the documentary evidence in Joint Exhibits Q and 3 point to one major concern with respect to the buy-ups, potential confusion over whether the buy-up prices submitted by the bidders represented only the cost to be added to the baseline price. Smith testified that based on the numbers submitted by Sewall, he thought there might have been a misunderstanding leading some bidders to artificially inflate their buy-up costs due to inadvertently double-counting the baseline costs, and that as a result, he contacted every bidder, obtained clarification on that point, and allowed corrected numbers to be submitted where the double-counting had accidentally occurred. Testimony, Smith. The revised Cost Schedules were then scored. J.E. 8. Contrary to what James Page described in his testimony as an opportunity to "rebid" the buy-ups, the only changes made to the cost proposals were the clarifications described in J.E. 8 to ensure that all bidders had treated the costs as additional.

While it is fair to say that some of the emails contained in the Joint Exhibits, as well as some of the questions from the bidders' conference, suggest that many of the bidders had concerns about bidding on the buy-ups because of the uncertainty over if, and what, actual buy-

² In response to a bidder's question about whether they could modify or revise the three categories, OIT responded that "vendors must stick to the categories provided." J.E. O and 3, p. 2.

ups would be requested, that does not render OIT's request for buy-up pricing an irregularity. All bidders had the same level of risk and uncertainty, and all bidders were forced to put their best bids forward nonetheless. Sewall's complaint about variety of costs associated with DTMs and DEMs is a good example. In the end, Sewall made the decision to, in their words, price conservatively. That was their strategic decision; that it was unsuccessful does not render the process irregular.

Finally, Sewall objects to the qualifications placed in two of the other bids – one that assumed a 5-year program contract, when the RFP indicated that there was no guarantee of funding for the full five year cycle, and another that set a minimum dollar amount for buy-ups. Sewall argues that these conditional bids made the playing field uneven as Sewall's prices were based on a year-by-year scenario with no minimum. Smith testified that in evaluating the cost proposals, he disregarded the conditions the bidders placed on their bids as being in conflict with the terms of the RFP, and further testified that in the event that the winning bidder had an unacceptable condition, the State would refuse to include it in the contract offered, and if the bidder was unwilling to proceed on those terms, the State would move to the next highest scoring bidder. There is nothing irregular in that approach.

CONCLUSION

Sewall has failed to establish by clear and convincing evidence that the award made by OIT contained an irregularity that created a fundamental unfairness. The award made by OIT is therefore VALIDATED.

Dated:

9/30/11



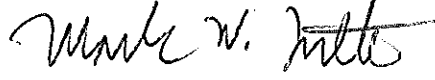
Peter Beringer
Department of Conservation

Dated: 9/28/11



Chad Lewis
Department of Health and Human Services

Dated: 9/28/11



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.