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January 24, 2013

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Thomas C. Bradley, AAG
Office of the Attorney General
#6 State House Station
Augusta, ME 04333-0006

RE: Appeal Decision of Award by the Maine Health Data Organization
Health Data Warehouse, RFP # 201207352

Dear Attorneys O'Dea and Bradley:

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. 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, appearing to read 'Donald McCormack'.

Donald McCormack, Director
Bureau of General Services

cc: Michael A. Wenzel, Director, Division of Purchases
Mark Randlett, AAG, Hearing Officer
Paul Stern, Deputy Assistant Attorney General, Civil Litigation Division
Appeal Panelists

Enclosure: DAFS Rule Chapter 120

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

**In Re: Appeal of Award by the Maine Health
Data Organization under RFP #201207352 –
Health Data Warehouse**

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Decision of Appeal Panel

INTRODUCTION

This is an appeal by JAI Software, Inc., (“JAI”) from a decision of the Maine Health Data Organization (“MHDO”) to award a contract to Human Services Research Institute (“HSRI”) for the provision of a secure data warehouse. The Appeal is brought pursuant to 5 M.R.S. § 1825-E and Chapter 120 of the Rules of the Bureau of General Services of the Department of Administrative and Financial Services (“Rules”).

BACKGROUND

In July, 2012 the MHDO issued a competitive Request for Proposals (RFP), which sought a provider of a highly robust and secure data warehouse that would include: an efficient extract, transform, load (ETL) architecture that could support high-volume imports of multiple data files in multiple formats at rapid speeds; a set of common data structures that are used across the data streams and externally available for third parties; and a self-service architecture to support web access to raw data sets, generated queries, and higher-level standard reports based on the data held in the data warehouse (via web services, etc.). Joint Exhibits, Tab 1, page 4. Ten (10) bids were received on or before the 2:00 p.m. August 27, 2012 deadline. A five member evaluation team, each with their own area of expertise, was formed to review the bids. The five members of the team reviewed and scored the proposals using weighted evaluation criteria detailed in the RFP.

The RFP established the following weighted criteria for evaluating the bids:
Organizational Qualifications and Experience (15 points); Specifications of Work to be

Performed (50 points); Cost (30 points); and Economic Impact within the State of Maine (5 points).¹ A consensus based scoring process was used, meaning the evaluators reviewed, but did not score, the proposals in advance. The evaluators met to discuss the proposals and review them against the RFP requirements to arrive at the consensus scores. Scores for the cost criterion were not assigned by the group, but were calculated using a standard formula that assigns the most points to the lowest cost proposal, and a proportionally fewer points to higher cost proposals.² The evaluation team deemed all ten bids submitted as conforming to the requirements of the RFP and scored them accordingly.

As a result of the review and scoring process, the evaluation team determined that HSRI was the best value bidder and the MHDO notified the bidders of the award decision on October 31, 2012. JAI subsequently submitted a timely appeal.

An Appeal Panel (Panel) was selected, comprised of three members from state service. An evidentiary hearing was held on December 28, 2012, at which testimony of witnesses and documentary evidence was presented.

GOVERNING LAW AND STANDARD OF REVIEW

The issue in this case is whether clear and convincing evidence shows that the MHDO's award of the contract (1) was in violation of 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. §§ 1825-D and 1825-E and in the Bureau of General Services' Rules, Chapter 120 – Rules for Appeal of Contract and Grant Awards. The clear and convincing standard requires that the Panel 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 Services, 655 A.2d 1260, 1264 (Me. 1995). The Panel may only decide whether to validate or invalidate the contract award decision under appeal. See, 5 M.R.S. § 1825-E(3) and Chapter 120(4)(1) of the Rules. The burden of proof is on the appellant, JAI.

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

¹ Specifications of Work to be Performed was evaluated by the evaluation team using two scoring categories – Technology and Project Management – worth 25 points each, for the total of 50 points.

² Under the formula, the total number of cost points available (30) was multiplied by the quotient of the lowest cost bid divided by the bidder's total cost.

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).

DECISION

After a review of all the arguments and evidence presented by the parties, the Panel finds that JAI has not met its burden of proving by clear and convincing evidence that the MHDO's award was arbitrary; that it contained an irregularity creating a fundamental unfairness; or that it was in violation of law. Accordingly, the Panel denies the appeal and validates the contract award to HSRI.

REASONS FOR DECISION

The issues in this appeal fall into five categories – whether the evaluation team failed to properly score JAI with respect to Organization Qualifications and Experience; whether the evaluation team failed to properly score JAI with respect to Specifications of Work to be Performed; whether error resulted from the application of the cost scoring formula; whether the evaluation team erred in scoring the economic impact criterion; and whether the method used by the evaluation team to assign scores in each category was erroneous. The Panel does not find error with respect to any of these issues.

1) Organizational Qualifications and Experience

JAI challenges the scoring for bidder organizational qualifications and experience, arguing that the evaluation team did not consistently consider the experience of third parties, i.e., the bidders' partners. Specifically, JAI argues that the team either discounted or failed to consider the experience of JAI's two individual partners, Jon Harvell and J. Andrew Hathaway, as well as that of another partner, Teradata.

In the RFP, bidders were asked to describe their organizational experience with the deliverables sought in the RFP, and to describe five projects in the past five years which

reflected their experience and expertise in discharging the functions identified in the Scope of Services portion of the RFP. Joint Exhibits, Tab 1 at pages 23, 24. The RFP allowed bidders to propose the use of subcontractors and describe their relevant experience, but if subcontractors were to be used, the RFP also required the bidders to describe the subcontractors' organizational capacity and qualifications. Joint Exhibits, Tab 1 page 23.

Organizational Qualifications and Experience was worth up to 15 points. The evaluation team scored JAI as "mostly responsive" in this category, awarding it 10 points. In their consensus notes explaining the score, the evaluation team commented, in pertinent part, "projects listed for reference did not include APCD or medical claims work (note that JAI has staff with experience in these areas but does not reference projects where the companies worked in these domains)..." Even though the JAI proposal described the medical claims experience of Mr. Harvell and Mr. Hathaway, Karynlee Harrington, Acting Executive Director of the MHDO testified that the RFP was looking for *organizational*, as opposed to *individual*, experience – noting that an individual is not equivalent to an organization as a person may leave or become otherwise unavailable. The Panel does not find the evaluation team's distinction between individual and organizational experience in scoring this category to be erroneous, particularly in light of the instructions in the RFP and the fact that the successful bidder would be providing services under a 10-year contract.

As for Teradata, JAI's proposal did not describe or give examples of that company's experience in health claims data processing.

The Panel is not convinced that the evaluation team failed to properly consider the organizational qualifications and experience of JAI or its business partners. Moreover, the Panel

finds that the evaluation team scored other bidders in this category consistently and in accordance with the scoring rubric the team developed.³

2) Specifications of Work to be Performed

The Specifications of Work to be Performed criterion was divided into two categories worth 25 points each – Technology and Project Management. In the Technology category, JAI was scored as mostly responsive and received 16.67 points. The evaluation team’s notes explaining this score state “[w]ithin ETL process, some indication that some business rules/edits would be hard coded. Bidder did not provide a description of how data submitters could override ETL warnings and how those justifications would be captured in metadata.” JAI claims its score in this category should have been higher because it fully responded to the RFP requirements.

a. Hard Coding

The RFP provided that it was critical “that bidders not consider solutions where file validations are in any way “hard-coded” into the system.” Joint Exhibits, Tab 1 page 9. Ms Harrington testified that JAI’s proposal caused the evaluation team to believe that certain complex business rules would be hard coded. Specifically, she pointed to language on page 39 of JAI’s proposal stating “[f]or more complex business rules a portion of our code/database library can be made open to MHDO/OIT technical staff to update and maintain.” The evaluation team, therefore, sought clarification from JAI during a Finalist Interview Process, asking JAI to answer the following question: “Can you clarify where in your proposal you indicate that edits

³ Two bidders receiving fully responsive scores in the Organization Qualifications and Experience category had evaluator’s notes indicating that their proposals did not reference Agile projects. HSRI, which received a mostly responsive score in this category, was also noted to not have referenced Agile experience. However, even though the RFP stated that vendors should submit their proposals based on Agile technology (Joint Exhibits, Tab 1 page 14), it was not an RFP requirement. The MHDO stated in response to the bidders’ written questions that it would consider a methodology other than Agile in a proposed solution (Joint Exhibits, Tab 3 page 10).

will be configurable by non-technical staff and that these validations are not hard-coded in the system.” Joint Exhibits, Tab 9. JAI’s responded, by indicating, inter alia, that “[t]he JAI solution will provide non-technical staff the ability to manage edits, parameters, and file validations where ever possible at the direction of MHDO.” Id. JAI’s response did not, however, point to any part of its proposal where this information was contained. The evaluation team, therefore, did not take JAI’s response into account as a basis for altering JAI’s score because, as Ms. Harrington testified, the team did not consider information outside of the bidders’ original proposals. According to Ms. Harrington, the purpose of the interview process was to allow bidders an opportunity to clarify where certain information was actually contained within the proposal itself. This approach was consistent with instructions the MHDO received from the Division of Purchases that scoring decisions had to be based upon the original proposals submitted by bidders. The evaluation team acted within its discretion in restricting its scoring decisions to the information contained in the written proposals of the bidders.⁴

b. Overrides and Metadata

The RFP also provided that “Data submitters should be able to override warnings but not failures. When warnings are overridden the ETL should record the override information as part of the metadata held in the warehouse about specific uploads.” Joint Exhibits, Tab 1 page 9. According to Ms. Harrington, it was important to MHDO that data submitters be able to override a warning at the point of submission. JAI’s proposal states, with respect to the data submission, that “[i]f there are issues with the data, an email will be sent to the original user to specify what

⁴ JAI argues that bidder Pluralsoft’s score was changed to reflect clarifications delivered during the interviews and online demonstrations, and question why JAI was given the same benefit. However, the evaluation team revised the score awarded to Pluralsoft because that bidder was able to clarify that its written submission did contain descriptions of the bidder’s relevant experience with ACPDs, medical claims, and other Scope of Work deliverables identified in the RFP. The evaluation team did not consider information outside Pluralsoft’s written proposal and, therefore, did not treat it differently than JAI or any other bidder.

the problem is so that it can be corrected.” Joint Exhibits, Tab 4 page 24. The JAI proposal also states “the ETL platform will process the file validation routines in real time and provide immediate feedback to data submitters via the web application, thereby enabling submitters to immediately correct errors and resubmit.” Joint Exhibits, Tab 4 page 25. Ms. Harrington testifies that the ability to correct and resubmit is different from the ability to override. She pointed out that the word override can be found on page 28 of JAI’ proposal (“[t]he warehouse will maintain information about ETL processing (e.g., submitters, number of submissions, source files, warnings overridden, etc.)”) but commented that it was out of context. Thus, it was not clear to the evaluation team that submitters could override warnings. Again, the evaluation team sought clarification from JAI during the Finalist Interview Process, asking JAI to indicate where in its proposal it described that functionality. Joint Exhibits, Tab 9. JAI’s responded “[t]he functionality will be included in the utility described on pages 21-22 of our response where we present the utility to be installed on the submitter computer.” Id. However, there is no description of an override process on those pages; and JAI conceded at hearing that there is no specific description in its proposal as to how its solution would allow for an override. As indicated above, the purpose of the interview was to allow the bidders an opportunity to clarify where certain information was actually contained within their proposals. Again, the evaluation team acted within its discretion in restricting its scoring decisions to the information that was contained in the written proposals of the bidders.⁵

The Panel is not convinced that the evaluation team’s scoring of JAI in the Technology category of the Specifications of Work to be Performed criterion was improper.

⁵ JAI argued that the override function was fully demonstrated during the online demonstration. However, as indicated above, the evaluation team did not consider information outside of the bidder’s original proposals.

3) **Cost Scoring Formula**

JAI alleges that the formula used to score costs was inherently flawed and fundamentally unfair because it rewarded any proposal that contained unrealistic and/or intentionally low estimates of costs. The formula used in this RFP, which is the standard formula used to score RFP proposal costs, assures that the lowest cost bid will receive the highest number of possible points and that higher cost bids will receive proportionally fewer points. In this case, the evaluation team determined that all of the bid proposals satisfied the basic RFP requirements and scored them each accordingly. The cost scoring formula was applied consistently to all of the bidders to arrive at their scores in the cost category.

Further, even though JAI opined that the lowest cost bid in this RFP was unrealistically low, there is no evidence in the record that that bidder did not, in fact, intend to perform the services at the cost stated in its bid. Indeed, bidders were admonished in the RFP that they were expected to provide their best value pricing in their proposals. Joint Exhibit, Tab 1 page 34. Successful bidders will be held to their cost proposals in the contract.

Accordingly, the Panel does not find any error in the evaluation team's use of the standard cost scoring formula in this case.

4) **Economic Impact**

JAI argues that the evaluation team's interpretation and application of the provision relating to economic impact was inconsistent with the Executive Order and was fundamentally unfair. The Panel does not make either finding.

The Order, reproduced in the Joint Exhibit at Tab 12D, requires that "[a]ll service contracts expected to exceed \$100,000 in total value advertised for competitive bid shall include scoring criteria evaluating the responding bidder's economic impact on the Maine economy and

State revenues.” The Order further provides that “[s]uch criteria shall be determined jointly by the Department of Administrative and Financial Services, Division of Purchases and the agency seeking proposals.” In this case the MHDO consulted with Division of Purchases staff to establish a scoring criterion in the RFP worth up to five points to evaluate the economic impact of the bidders to the State. Joint Exhibits Tab 1, page 34. The RFP included the Division of Purchases’ standard definition of the term “economic impact” to mean “any activity that is directly performed by or related to the Bidder and has a direct and positive impact on the Maine economy and public revenues within the State of Maine” Joint Exhibits Tab 1, page 32. There is nothing about the scoring criteria, or the definition of economic impact contained in the RFP, that is inconsistent with the Executive Order.

Further, the manner in which the evaluation team scored the bids with respect to economic impact did not result in error. According to the testimony in the record, the team credited the full 5 points to any bidder based in Maine; 3.33 points (or 2/3rds of the total five points) to any bidder that was not based in Maine, but had Maine employees or committed to hire Maine residents for the purposes of the contract; 1.67 points (or 1/3rd of the total 5 points) if the company was not based in Maine and didn’t have Maine employees, but would travel to and incur expenses in Maine in connection with its performance under the contract; and 0 points for any bid that was completely unresponsive or was disqualified. The evaluation team scored economic impact consistently for all of the bidders. There is nothing in the evaluation team’s chosen method for assigning points for economic impact that is inconsistent with the Executive Order.

Moreover, the evaluation team’s scoring notes adequately support the scores assigned in this area. For example, JAI received the full 5 points available. The evaluation team’s scoring

notes explain that JAI got the highest score because its bid was fully responsive – it is a Maine based company. Joint Exhibits Tab 7, page 6. Conversely, HSRI is not a Maine based company. Accordingly, the evaluation team noted that HSRI was mostly responsive, based on its commitment to hire at least one staff person in Maine, and awarded it with 3.33 points. Joint Exhibits Tab 7, page 5. Explanations similarly exist for the scores provided to other bidders.⁶

5) Method of Scoring

For the purposes of its consensus scoring, the evaluation team adopted a rubric that assigned points to each evaluation criteria using a scale that gave 100% of the available points to bid responses that fully complied with every RFP requirement in a clear, concise and direct manner, with declining allocations of one-third of the available points for each bid response that was mostly responsive, partially responsive and non-responsive, respectively. JAI argues that this method was erroneous because it failed to provide the evaluators with “sufficient flexibility or discretion ...to dissect the important nuances between proposals.” The Panel finds no such error.

According to the testimony of Ms. Harrington, the evaluation team spent a considerable amount of time thinking about how to assess points in each scoring category fairly and in a way that applied the same measurement to each bidder. The goal was to be consistent and fair and, to that end, the team developed the scoring rubric described above. Moreover, according to Ms. Harrington, she consulted with the Division of Purchases to determine whether the evaluation team’s chosen method caused any concern and was advised that it was reasonable and fair. The scoring method was applied to all of the bids in a consistent manner.

JAI points to the Kennebec County Superior Court’s decision in *Intralot, Inc., v. Ellen Jane Schneider, et al.*, AP-10-66, to support its argument. However, the facts in *Intralot* are

⁶ JAI argues that the testimony of Ms. Harrington to the effect that the score was also based upon the previous economic effects of PCG, a subcontractor of HSRI, was inconsistent with the notes and undermined their purpose. Even assuming this issue was properly raised at the time of the hearing, the Panel is not convinced of any error. As indicated above, the evaluation team’s scoring notes adequately reflect a basis for the score assigned to HSRI for this criterion in light of the scoring method they used – that is, that a mostly responsive score would be given to a company that was not based in Maine but had Maine employees or committed to hire Maine residents for the purposes of the contract. While Ms. Harrington’s testimony may relate to additional considerations of the evaluation team on the issue of the economic impact of HSRI’s bid, that evidence is immaterial to the issue of whether the notes adequately explain their scoring determination – which the Panel finds they do.

distinguishable from the present case. In *Intralot*, the Superior Court upheld the decision of an Appeal Panel decision invalidating an RFP award where that Panel found that the scoring method did not give the evaluation team the ability to distinguish between technically superior and technically inferior proposals. Specifically, in that case a two-step scoring process was used. In the first step the Intralot evaluation team determined the bidders' eligibility for a certain percentage of the total points available in each category based on the bidders' degree of compliance with the RFP requirements. Thereafter, the bids were adjusted up or down, but in no case could that adjustment be more than to the next level above or below, i.e., ten percent in either direction. By limiting the adjustments in that way, the Appeal Panel found that any significant distinctions in quality were reduced to a handful of percentage points in one of the RFP's nine technical subcategories.


In the present RFP, the scoring method compared the responsiveness of the bids to the requirements of the RFP in each of the subjective scoring categories. The elements in each of the scoring tiers – fully responsive, mostly responsive, partially responsive and non-responsive – were detailed and allowed the evaluation team the flexibility to distinguish the superior and inferior qualities of each bidder's proposal. For example, a fully responsive score was awarded only where the bid provided responses for *every* RFP requirement in a clear, concise and direct manner; the proposed solutions met the RFP specifications in *all* cases with minimal explained variation; the bidder demonstrated solid experience and understanding in/of *all* the functional and technical areas listed in the RFP; and the bidder clearly described the relationship and role of subcontractors if identified. Conversely, a mostly responsive score was awarded where the bid provided responses to *most* RFP requirements in a clear, concise and direct manner; the proposed solution may not have met the RFP specifications in minor functions; the bidder demonstrated solid experience and understanding in/of a *majority* of the functional and technical areas of the RFP; and the bidder clearly described the relationship and role of subcontractors if identified. Joint Exhibits, Tab 7, page 1. The two remaining scoring tiers contained the same level of detail. In short, unlike in *Intralot*, the scoring method used in this RFP allowed the evaluation team to adequately compare and score distinctions in quality among the bids in a reasonable and consistent manner.

CONCLUSION

In Conclusion, the Panel does not find a violation of law, an irregularity creating a fundamental unfairness, or an arbitrary or capricious award with respect to any of JAI's claims. Accordingly, the contract award to HSRI is validated.

Appeal Panel on Contract Award

Dated: 1/23/13



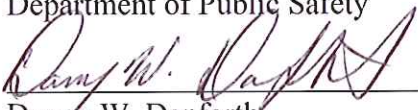
Kevin Scheirer
Division of Purchases

Dated: 1/23/13

/s/ Scott Jones

Scott Jones
Department of Public Safety

Dated: 1/24/13



Danny W. Danforth
Central 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 within 30 days of receipt of this decision.