

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

In Re: Maximus US Services, Inc.)
Appeal of Contract Award of RFP# 202202017) **Decision of Appeal Panel**
ASPIRE-TANF Services)
)

INTRODUCTION AND BACKGROUND

This is an appeal by Maximus US Services, Inc. (Maximus) from a contract award decision by the Department of Health and Human Services (Department) to award a contract for ASPIRE-TANF Services. 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”). Fedcap, Inc. (Fedcap) timely requested, and was granted, intervenor status. The Bureau granted Maximus’s request for a hearing.

The Appeal Panel (“Panel”) was comprised of three members chosen from within State service. An evidentiary hearing was held on November 18th and 19th, 2022, at which testimony of witnesses and documentary evidence was presented. After a review of all the arguments and evidence presented by the parties, the Panel makes the following findings of fact.

FACTUAL BACKGROUND

The Department issued a competitive Request for Proposal (RFP), the purpose of which was to obtain proposals for the provision of acquiring a contractor to perform ASPIRE-TANF Services. The RFP provided the scope of work to be performed by a selected bidder, listed the responsibilities of bidders, the evaluation criteria, and the procedure the Department would take to review and score proposals to determine a winning bidder.

The Department held an Informational Meeting, via ZOOM, where questions were received but not responded to. Submitted Questions were allowed with a deadline of April 5th, 2022. An “RFP Informational Meeting and Submitted Questions & Answers Summary”, which

responded to both questions received at the Informational Meeting and submitted, was issued on April 22nd, 2022.

Proposals were timely submitted by all respondents by the May 5th, 2022, deadline and were distributed by the Division of Procurement Services to the RFP coordinator at the Department. Several evaluation team meetings were held, scoring proposals following Department guidelines. The highest scoring bidder, Fedcap, was selected and a notice of conditional contract award was sent to all bidders on June 17th, 2022, informing them of Fedap's selection.

GOVERNING LAW AND STANDARD OF REVIEW

The issue in this case is whether Maximus has met its burden of proving by clear and convincing evidence that the Department'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' Rule, 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 of the 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.

In determining whether an award is arbitrary or capricious, the Panel must not substitute its judgment for that of the review 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).

FINDINGS OF FACT

The issues raised by Maximus regarding this appeal are discussed below.

Argument I - The Scoring of the “Organization Qualifications and Experience” was Arbitrary and Capricious and contained Irregularities Creating Fundamental Unfairness

Maximus alleged the Team Consensus Evaluation Notes fail to provide any basis for the score Maximus received under Organizational Qualification and Experience. Maximus also alleged the Team Consensus Evaluation Notes for Fedcap under this section reflected serious issues, yet Fedcap scored more points than Maximus. More specifically, Maximus pointed to a 2019 audit raising performance concerns and Fedcap’s disclosure of pending litigation alleging deficiencies in its management of the Aspire Program. Maximus argues that this constitutes the scoring as being arbitrary and capricious and that it is an irregularity creating fundamental unfairness. Maximus failed to prove, by clear and convincing evidence, that this was the case.

The evidence shows that the evaluation team’s scores for both Maximus and Fedcap on the “Organizational Qualification and Experience” section reflects their consensus based on a consideration of all the factors of the section as a whole. The Team Consensus Evaluation Notes provided comments but did not state if the comments were “negative” or otherwise.

Further, testimony established that the team was satisfied with Fedcap’s responses to the audit; and the team considered the litigation disclosure but determined to let the legal process play out rather than speculate or jump to conclusions regarding the lawsuit’s merits. The team was not required to follow up on the disclosure with Fedcap.

Maximus also claims that the team considered its and Fedcap’s litigation disclosures inconsistently. It points out that the only potential negative comment about Maximus is that it did not indicate any pending litigation, while a Dun and Bradstreet report lists two legal actions. Maximus has not demonstrated whether or how this comment impacted the consensus scoring. Additionally, contrary to Maximus’ contention, the team was not obligated to follow up with Maximus for clarification on the litigation. In contrast, Maximus alleges that the team acted arbitrarily and unfairly because it raised no concerns about a statement contained in Fedcap’s 2021 audited financial statements that it or its parent was engaged in “various lawsuits incidental to its operations,” which, Maximus argues, demonstrates that Fedcap failed to disclose pending

litigation. This argument is not found to be persuasive, however, in that a reference to “various lawsuits” does not necessarily reflect an inconsistency with Fedcap’s disclosure that there were two closed and two open litigation items.

Argument II - The RFP and the responses to the Bidder Q&A provided insufficient guidance and clarity to permit Maximus to submit a competitive proposal

Maximus argues the Department did not provide enough guidance to bidders regarding the budget allotment for ASPIRE-TANF services. It also appears to allege that, because Fedcap was engaged in negotiations for an extension of the existing contract for ASPIRE-TANF services, which included the budget, it had an unfair advantage. The Appeal Panel is not convinced that either claim constitutes an arbitrary and capricious award or an irregularity creating a fundamental unfairness.

The Department gave the same budget guidance to all bidders. And, while Fedcap may have been involved in negotiations to extend the existing contract, the RFP sought a suite of services not provided for in the existing contract; and the bidders were to propose how they would provide all of the services outlined in the RFP. Specifically, the RFP stated:

The Department expects the ASPIRE-TANF services outlined in this RFP will be conducted using innovative approaches and evidence-based practices in designing, constructing, and operating the program. ASPIRE-TANF services shall:

- *Incorporate OFI’s core beliefs (Exhibit 1);*
- *Align with the goals and objectives (Exhibit 2);*
- *Implement the service delivery model (Exhibit 3); and*
- *Be tailored to the unique characteristics of the State and its Participants.*

The RFP directed Bidders to provide their cost for the services they are proposing to offer in accordance with these requirements should they be awarded the contract. Further, the RFP, as stated in the above section, sought “innovative approaches and evidence-based practices” which allowed bidders to present their proposed solutions to address this requirement. Thus, the bidders had sufficient information available to develop their proposals. Moreover, there was no evidence presented to show it is a requirement for the Department to release budget information in an RFP. While Maximus pointed to several prior RFPs where budget information was disclosed,

this in no way demonstrated it was a requirement.¹ Given the difference in services sought in the RFP, as compared to the existing contract, the Appeal Panel is not convinced that Fedcap obtained an unfair advantage from the contract extension negotiations.²

Argument III - Maximus was penalized based on factors and/or requirements that were not contained within the RFP

Maximus alleged it was fundamentally unfair and arbitrary and capricious for them to have been “penalized based on unwritten expectations and requirements that were not clearly expressed within the RFP” – specifically requirements pertaining to caseload ratios and location of facilities. The Appeal Panel is not convinced of any irregularity or arbitrary or capricious award in either of these regards.

With respect to caseloads, the RFP, in PART II, F. (Page 22 of the RFP), provided bidders with estimated monthly caseloads on a statewide basis and directed bidders to provide “Adequately staff ASPIRE-TANF operations in order to meet or exceed the requirements outlined in this RFP”. It was not irregular or arbitrary and capricious for the evaluation team to consider whether the caseload ratios proposed by Maximus satisfied this requirement.

With respect to facility location, the RFP, in PART II, B. (Page 13 of the RFP), provided bidders with a link to District Office locations and informed bidders of the RFP’s expectations that bidders would “Operate strategically-located facilities *throughout the State*, ensuring Participants *have access to services Statewide . . .*” (emphasis added). It was not irregular or arbitrary and capricious for the evaluation team to consider whether Maximus’ proposal to use strategically located facilities was adequate to meet this requirement.

¹ Even assuming the response to budget questions in the RFP Informational Meeting and Submitted Questions & Answers Summary, directing bidders to the current contract, to be irregular, the Appeal Panel does not find that this created a fundamental unfairness.

² Furthermore, contract extension negotiations with incumbent vendors, while an RFP for a new contract for those services is pending, is sometimes necessary to allow for continuation of services and does not, in itself, constitute an irregularity.

“Maximus was unfairly penalized for not using Subcontractors, even though the RFP did not require that Bidders use Subcontractors”

Maximus alleged they were “penalized” for the lack of subcontractors in their proposal submission whereas Fedcap was “repeatedly praised for its use of subcontractors”. Maximus further alleged this created a fundamental unfairness and was arbitrary and capricious as the RFP did not express a preference for the use of subcontractors. Maximus has not met its burden of proof in either regard.

The Award Justification Letter for this RFP does include a statement about the use of subcontractors by Fedcap. This document, however, is a high-level summary and not a part of the scoring documents. Individual reviewer notes also reference the use or exclusion of subcontractors by the bidders. However, these documents capture reviewer’s impressions of proposals to aid them in the consensus scoring. The Team Consensus Evaluation Notes are the only documented findings by the evaluation team which is the basis of the assigned scores. Maximus failed to prove information contain in those documents created an irregularity creating a fundamental unfairness or arbitrary and capricious decision.

Argument IV - Maximus was unfairly penalized for its Cost Proposal

Maximus alleged “It was fundamentally unfair, contrary to the terms of the RFP, and arbitrary and capricious to mark down Maximus for including a profit element in its cost proposal where that fee was already factored into the mathematical scoring of total cost” and “the review team applied a scoring criterion that was not specified in or permitted by the RFP”. The Appeal Panel finds that Maximus has proven these claims by clear and convincing evidence.

The cost scoring component of the RFP contained two parts: 1) a standard cost scoring provision valued at a maximum of 25 points assigned on a pro-rated basis, with the lowest bidder receiving the full 25 points; and 2) an additional 5 points based on an evaluation of the budget narrative. RFP, PART V. B. 3. (Page 31-32 of the RFP). Specifically, the RFP describes the 5-point budget narrative scoring as follows:

“The remaining five (5) points allocated to the Cost Proposal will be used to evaluate the responsiveness of the narrative material and supporting documentation contained with

this section including: accuracy and reasonableness (assumptions used in calculating the costs), budget and financial stability (Appendix G). The evaluation team will use a consensus approach to evaluate and score the budget narrative.”

The Appeal Panel interprets this statement as allowing the evaluation of the budget to ensure that the calculations and information provided in the budget validated the proposed costs given by the bidders and that the proposed costs accurately reflected the services being proposed.

In this case, Maximus included a profit fee in its cost proposal. This fee was included in the total proposed cost that was scored in the 25-point scoring component under Part V.B.3 of the RFP (Scoring Weights and Process). However, the amount of the Profit Fee was also factored in the budget narrative scoring and resulted in a reduction of the score for this component in that the evaluation team viewed the fee as “high” and reduced Maximus’ points accordingly. The Appeal Panel finds that scoring Maximus’ proposal in this way was inconsistent with the description of the scoring of the budget narrative discussed above, as it went beyond evaluating the budget to ensure that the calculations and information provided therein validated Maximus’ proposed costs and that the proposed costs accurately reflected the services being proposed.

The RFP is a legal document and applying scoring criteria in a manner not specified in the RFP is a violation of law. Therefore, the Appeal Panel finds that consideration of the reasonableness of the profit fee in the evaluation of budget narrative to be a violation of law.

Argument V - The failure of one reviewer to keep notes is a further Violation of Law that independently justifies overturning the award.

Finally, Maximus alleged that a reviewer’s failure to keep notes regarding her review of Fedcap’s Qualification and Experience section constitutes a violation of law. MRS Title 5, §1825-D (2) provides that, when reviewing competitive bids, written records must be kept by each person directly reviewing or ranking bids. This requirement does not provide to what detail these written records must be kept, simply that a written record be kept by each person directly reviewing or ranking bids. Evidence presented at the hearing shows that the evaluator did keep notes. Even if notes were not taken regarding the evaluator’s review of one discreet section of the proposal, that fact would not convince the Appeal Panel of a violation of law. In any event,

the evidence showed that the evaluator did, in fact, keep notes on her review of all parts of Maximus' proposal as required by law, but that the notes on one section were lost due to a computer error. The loss of partial notes due to computer error does not constitute a violation of law.

CONCLUSION

Due to the violation of law as found stated in the section **Argument IV - Maximus was unfairly penalized for its Cost Proposal**, the award to Fedcap has been invalidated.

APPEAL PANEL

Dated: 12/6/2022 _____

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STATEMENT OF APPEAL RIGHTS

This decision constitutes a 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 the receipt of this decision.