

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

In Re: Hart Consulting)
Appeal of Contract Award of RFP #) Decision on Appeal
202003066 for Evaluation of the Pediatric)
Mental Health Care Access Program)

INTRODUCTION AND BACKGROUND

The Bureau of General Services received and granted a request for hearing of appeal on a contract award decision by the Department of Health and Human Services, Maine Center for Disease Control (MCDC) for Evaluation of the Pediatric Mental Health Care Access Program. The award was made following a request for proposal (RFP) process conducted under Division of Purchases rule Chapter 110. The request for appeal was timely filed by Hart Consulting under the process defined in Division of Purchases rule Chapter 120.

Representatives of the appellant, Hart Consulting (HART), and the MCDC met with the Administrative Hearing Officer (AHO) and Division of Purchases staff to discuss the process to be used to complete the hearing based on the restrictions imposed by The Governor of the State of Maine and national response to the COVID 19 pandemic.

The AHO determined that the hearing would be held remotely using a video conferencing service (ZOOM). The parties agreed in advance on joint exhibits and one Appellant’s exhibit submitted by HART. The parties presented witnesses over the live video conference system, where witnesses were sworn, examination and cross examination occurred, and all parties participated fully. The parties agreed to written closing statements of not more than four (4) pages. These closing briefs were received by close of business on July 31, 2020, ending the hearing and allowing the Panel to begin deliberations.

The Appeal Panel (“Panel”) was comprised of three members chosen from within state service. All members met and participated in the live video conference hearing. After a review of all the arguments and evidence presented by the parties, the Panel makes the following findings of fact and decision on appeal.

FACTUAL BACKGROUND

The MCDC issued a competitive Request for Proposal (“RFP”), the purpose of which was to obtain proposals for the provision of acquiring a contractor to perform Evaluation of the Pediatric Mental Health Care Access Program. The RFP generally provided the scope of work to be performed by a selected bidder, listed the responsibilities of bidders, the evaluation criteria and the procedure the MCDC would take to review and score proposals to determine a winning bidder. MCDC established a question and answer process which was used by bidders including HART. HART and several other bidders submitted proposals in response to the RFP.

Proposals were timely submitted by all respondents and were distributed by the Division of Purchases to the RFP coordinator at MCDC. This person testified that in the regular course of evaluating proposals, the evaluation team is convened for an initial meeting where he provides an overview of the process and confirms that no evaluator on the team has a conflict of interest. After this initial meeting, the proposals, *with the exception of* the “Cost Proposal Form,” are provided to the evaluation team. The person designated as the cost reviewer is provided with the Cost Proposal Form and the cost portion of each bidder’s response.

In this case, the financial expert on the Evaluation Team was Mr. Alan Henry. He contacted the coordinator after the initial meeting regarding an issue with the Cost Proposal Form submitted by Hart Consulting. The coordinator determined this would need to be resolved

by the entire Evaluation Team on a consensus basis. A separate meeting was held where Mr. Henry explained to the full Evaluation Team that HART's cost Proposal Form did not include a proposed cost for the second renewal period. The Evaluation Team then collectively discussed how to proceed. The Evaluation Team decided on a consensus basis that Hart Consulting's Cost Proposal Form failed to provide all requested information and to exercise its discretion and disqualify the proposal. The non-cost components of the HART proposal were not scored and no final score for HART was calculated. The Evaluation Team determined that Hart Consulting's zero-dollar bid for Renewal Period #2 and the additional statement that other services could be added for a cost later was nonresponsive to the Department's request for a cost proposal that covered that all periods, including the second renewal period.

The Evaluation Team's decision to disqualify Hart Consulting's proposal was solely based on its nonconforming Cost Proposal Form. It pointed to the RFP where the MCDC expressly reserves the right, at its sole discretion, to determine whether a variance from the RFP specifications requires disqualification. (DHHS 13.) The Evaluation Team determined that the only way to avoid a fundamental unfairness was to exercise this authority and disqualify Hart Consulting's proposal.

Scoring of other the remaining qualifying proposals was completed and the highest scoring bidder selected. Notifications of award and non-award were sent to all respondents.

GOVERNING LAW AND STANDARD OF REVIEW

The issue in this case is whether HART has met its burden of proof by clear and convincing evidence that MCDC award decision (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 appeal's assertions 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 judgement 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 team'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 HART on appeal are discussed below.

The Hart proposal met all RFP “Proposal Submission Requirements” and “Cost Proposal Form Instructions” and should have been reviewed.

HART testified it submitted a proposal in response to the RFP that followed the required outline and included all required documents, attachments, attestations, narratives, and cost estimates. HART described the disqualification of its proposal as based on the content they submitted and not due to completeness as described in the RFP:

DHHS – 0113. “Part IV Proposal Submission Requirements. Failure to use the outline specified in this section, or to respond to all questions and instructions throughout this document, may result in the proposal being disqualified as non-responsive or receiving a reduced score.”

HART pointed to its proposal and specifically the “renewal period 2” cost required within the cost proposal form. HART inserted a zero (0) in this renewal section. It also conditioned its response as follows:

“To meet the evaluation needs for the grant program periods, we included the costs of data analysis and preparing the reports due 60 days after June 30, 2022 within the initial period costs and those deliverables due 60 days after project end on June 30, 2023 within the Renewal Period #1.

We did not put any new costs in Renewal Period #2, as it is after the grant period ends. Should the Department require additional evaluation services and HRSA allows funding to be used in the stated Renewal Period #2, we would be happy to meet those needs and will provide an estimate based on the added deliverables.”

HART explained it relied on the HRSA Grant which was referenced in the RFP to determine the scope of the engagement and considered the scope ended at the end of the grant period, June 30, 2023. Hart also explained that there was a 60 day close out requirement after the end of the grant period and that this cost was included in renewal period 1, even though that work must be done after June 20, 2023.

MCDC countered that the Evaluation Team read the explanation on the Cost Proposal Form cover sheet and understood that the zero-dollar bid was not a mistake or omission, but Hart Consulting’s bidding strategy. It was the judgment of the Evaluation Team that the HART response was nonresponsive to the Cost Proposal Form warranting disqualification of the proposal to avoid fundamental unfairness to other bidders.

The DHHS proposal evaluation team did not follow its standard process.

HART pointed to MCDC testimony that the standard proposal review process separates the review into two components - content and cost review. The content review component has a group of reviewers with program expertise evaluate the narrative proposals provided by bidders. Reviewers typically do not see the cost proposals until their content review has been completed and scores calculated. The cost proposals are handled separately, in this case they were under the custodial care of Alan Henry, a financial analyst. Upon discovery of the Hart Consulting proposed \$0 cost in the second renewal period, the reviewers were convened to ask that the

HART proposal be disqualified before they had an opportunity to review the content of the full proposal.

HART claims that by holding the discussion about the merits of its proposal prior to reading it, reviewers were only speculating about the proposed services and their qualifications. If the proposal had the deficiencies that they had assumed, those deficiencies surely would have been reflected in the final score after a thorough review of the content. In fact, the RFP document recognizes that deficiencies in proposals may be reflected in a lower score and not necessarily lead to disqualification.

DHHS – 0013. *“The Department, and its evaluation team for this RFP, has sole discretion to determine whether a variance from the RFP specifications should result either in disqualification or reduction in scoring of the proposal.”*

MCDC testified that in light of instructions in the RFP, the Evaluation Team determined that Hart Consulting’s zero-dollar bid for Renewal Period #2 was nonresponsive to the Department’s request for a cost proposal that covered all periods. HARTS Cost Proposal Form clearly had a narrative condition that HART would provide a cost if additional work was required. The MCDC took that into consideration when determining its decision to disqualify the HART proposal.

MCDC pointed out two places in the RFP where the Department expressly reserves the right, at its sole discretion, to determine whether a variance from the RFP specifications requires disqualification. The Evaluation Team determined that the only way to avoid a fundamental unfairness was to exercise this authority and disqualify Hart Consulting’s proposal

The RFP document has internal inconsistencies in the timeframes and the evaluation requirements, leading a bidder to conclude the evaluation services were focused on evaluating the grant funded Pediatric Mental Health Care Access Program.

HART testified the RFP had inconsistencies within the document and provided mixed information about what services it is seeking and for what time period. In its “Purpose and Background” section, it describes the services sought under the RFP as related to the federal grant program and did not mention continuation of programmatic work or evaluation requirements beyond June 23, 2023 federal period for reporting.

DHHS – 005. *“The evaluation services sought under this RFP will ensure the Department fulfills the Pediatric MHCAP requirements and deliverables under the U.S. Health Resources Services Agency (HRSA) notice of funding opportunity [HRSA-19-096](#) through the entire grant period ending June 30, 2023.”*

The RFP contract terms extends a renewal period one year beyond the June 30, 2023 end of the federal grant period. But nowhere in the “Purpose and Background” or any other part of the document did it describe that it intends to continue the programmatic work beyond the end of the grant period nor does it describe evaluation deliverables to cover the non-grant funded period. MCDC’s witness provided his personal thoughts about what services were implied, but could not point to any place in the RFP that clearly stated the work and deliverables carried beyond the federal grant period. Furthermore, the required reports section does not mention program work beyond the federal project period. In the Q&A, DHHS – 0033, a question on reporting requirements is answered, “The grant requires annual evaluation reports as well as a cumulative report.” It does not mention any “post grant period” report or other requirements.

DHHS-006 and DHHS – 007. “D. Contract Terms

Contract Renewal: Following the initial term of the contract, the Department may opt to renew the contract for two (2) renewal periods, as shown in the table below, and subject to continued availability of funding and satisfactory performance.”

“Period	Start Date	End Date
Initial Period of Performance	7/1/2020	6/30/2022
Renewal Period #1	7/1/2022	6/30/2023
Renewal Period #2	7/1/2023	6/30/2024”

DHHS – 0010. 2. Submit all the required reports to the Department in accordance with the timelines established in **Table 3:”**

Table 3 – Required Reports Timelines			
Name of Report		Period Captured by Report	Due Date:
a.	Program Data Report	Annually	January 28 th
b.	Evaluation Report	Entire project	Annually, sixty (60) days after the end of the Federal project period.”

In the “Evaluation Requirements” section DHHS-0008, there are 6 requirements listed. Requirements #1, 3, 4, and 6 mention HRSA requirements specific to interacting with HRSA staff and HRSA electronic report submittals and #2 references the HRSA final evaluation report which is defined in the RFP on DHHS – 0010 as “submitted sixty days after the end of the

Federal project period”. The remaining requirement, #5, references attending the ME MHCAP Advisory Board meetings to provide updates on the evaluation. There was no mention of what would be expected in the second renewal period for evaluation services or deliverables after the HRSA requirements have been met and grant funding ended.

MCDC countered that HART was clear in that it believed the “contract term” of the RFP was inconsistent with the “grant term” in the HRSA Grant and suggested this may have been a result of an oversight by the MCDC. However, MCDC’s witness testified that the terms of the RFP take precedence over the terms of the HRSA Grant and that they could proceed with evaluation of the program after the grant period expired.

Hart Consulting could have questioned the MCDC for clarification of this perceived inconsistency but did not ask the MCDC questions regarding this point. HART did avail itself of the opportunity to ask those questions.

Hart Consulting’s cost proposal and full submission responded to each of the requirements in the RFP. We submitted a proposal that met the needs of the DHHS and its federal grantor.

HART’s proposed cost approach included the costs for annual evaluation activities within the timeframe of the grant program period. The HART proposal stated that if the state had deliverables in addition to those in the grant and listed in the RFP, they would provide a cost estimate. This is a routine way of tying costs to deliverables.

It is not clear how any cost proposals were reviewed and evaluated for the second renewal period.

HART found no clear information on the evaluation deliverables in the second renewal period and no program workplan, questioning how the review team could fairly compare any of the proposals. It is this discrepancy that caused their proposal to be different, not wrong nor incomplete, just different.

MCDC stated that with the exception of the “Evaluation Report,” the Scope of Services generally describes ongoing evaluation services not pegged to specific dates. Hart Consulting could have provided a cost estimate for these ongoing evaluation services in Renewal Period #2;

presumably, this is how the other bidders were able to provide a cost proposal for the second renewal term.

Review of the record shows that 5 other bidders submitted cost scores satisfactory and scored by the MCDC.

DECISION

The Panel reviewed the documentary evidence, considered the testimony of the witnesses, and read the closing briefs of all parties.

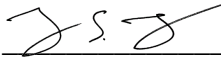
The Panel was not clearly convinced that the disqualification of the HART proposal was irregular or arbitrary in this instance. It is clear that the MCDC and the evaluators could have disqualified a party and they did so with consideration. While they were not required to disqualify, that was their choice. HART demonstrated its experience in bidding and used its knowledge to use a bidding strategy to propose cost in the way they did. They also had some concern and added a specific paragraph to offer additional services should they be wanted. Other bidders were able to respond fully, including renewal period 2. HART did participate in the question and answer process offered by the MCDC. They could have clarified any concern over the perceived lack of specificity but did not. The MCDC forewarned bidders that they ran the risk of disqualification and they chose that action in this case.

For the reasons above, the Panel is not clearly convinced of an irregularity that created a fundamental unfairness or an arbitrary and capricious action by the MCDC in the disqualification of the HART proposal.

Accordingly, the Panel validates the MCDC award decision.

APPEAL PANEL

Dated: 8/12/2020

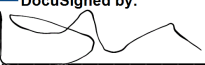
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STATEMENT OF APPEAL RIGHTS

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.