

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

Re: VTEC Training	}	
And	}	
KnowledgeWave, Inc.	}	
Appeal of Contract Award of RFP #	}	Decision on Appeal
202206099 for Microsoft Training	}	
Services	}	

INTRODUCTION AND BACKGROUND

The Bureau of General Services received and granted two requests for hearing of appeal on a contract award decision by the Department of Administrative and Financial Services (DAFS) for Microsoft Training Services. The award was made following a request for proposal (RFP) process governed by Division of Purchases promulgated rule, Chapter 110. The requests for appeal were timely filed by VTEC Training (VTEC) and KnowledgeWave, Inc. (KW) under the process defined in Division of Purchases rule Chapter 120.

Representatives of the appellants, VTEC and KW, and the Attorney General’s Office representing DAFS, met with the Administrative Hearing Officer (AHO) and Procurement Services staff to discuss the process to be used to complete the hearing.

The AHO determined that the hearing would be held remotely using a video conferencing service (ZOOM). The parties agreed in advance on joint exhibits related to the procurement process, communications, scoring, and documentation by the review team. Other documents and demonstrative aids were discussed, but there was no agreement on admissibility at the conference. The parties were directed to present proposed exhibits and aids during the testimony portion of the hearing where the AHO would rule on admissibility. A written summary of this conference was shared with all parties.

The hearing was held on Monday, December 19, 2022, where the parties presented witnesses over the live video conference system, witnesses were sworn, examination and cross examination occurred, and all parties presented allowable evidence in accordance with Chapter 120. The parties agreed to verbal closing statements. The hearing adjourned at the completion of the closing arguments. The Panel met twice to deliberate and reach this decision.

The Appeal Panel (“Panel”) was comprised of three members chosen from within state service. All Panel 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 Department issued a competitive Request for Proposal (RFP), for the purpose of contracting with a single vendor to provide Microsoft Training Services within State Government under the direction of the Office of Information Technology. The RFP provided details and instructions for participating in a written question and answer process to seek further clarification and for submitting proposals. In addition, the RFP generally noted the key process events and the application evaluation and selection procedures. Proposals were timely submitted by seven bidders and were distributed by the Division of Procurement Services to the RFP coordinator for review and scoring by the selected review team. Proposals were offered by the seven bidders in response to the specific requirements of DAFS, including details of their cost proposal as prescribed within the RFP. During the review process, the RFP coordinator, a non-scoring member of the review team requested a resubmission of pricing on a new pricing template to address changes to Microsoft’s product eligibility for authorized training. All bidders provided this new cost information and the original cost submissions were held and were not shared with other bidders prior to notification of award. The new cost submissions were scored and used in addition to scores assigned in the other scoring criteria to determine the highest rated bidder.

GOVERNING LAW AND STANDARD OF REVIEW

The issue, in this case, is whether VTEC or KW have met their burden of proof by clear and convincing evidence that the DAFS 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 appellant’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 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 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 VTEC on appeal are as follows:

DAFS was alleged to have violated the appeal criteria by making an award to a bidder who was not in compliance with Maine law related to registering as a foreign corporation with the Maine Secretary of State and being licensed as a proprietary school under Maine Department of Education law.

The RFP, within its general provisions, stated: “*All applicable laws, whether or not herein contained, are included by this reference. It is the bidder’s responsibility to determine the applicability and requirements of such laws and to abide by them.*” VTEC contends that it was the only bidder to have registered as a Maine corporation and that it was licensed as a proprietary school under MDOE regulations. The VTEC appeal request sought relief by having all other proposals rejected and it awarded the contract. The RFP did not require these actions.

VTEC claimed it was the second-place bidder as well as an in-state bidder and that failure to award to VTEC was a violation of the appeal criteria.

The Master Score sheet ranks VTEC second place in cost score only amongst all seven bidders. Its total score of 82.29 was ranked fourth out of the seven bidders. One of the seven bidders was disqualified for not meeting qualifications. Statute does allow the Director of the Bureau of General Services to award a contract to the first-place bidder if the bidder does not perform. The statute does state a “...contract may not be awarded to a bidder that the Director of the Bureau of General Services determined was not in compliance at the time the initial bid was submitted.”

VTEC cited state procurement law and the Maine Buy American and Build Maine Act, claiming as an in-state bidder the award to an out of state bidder violated the appeal criteria.

The relevant procurement statute does allow an in-state bidder to be favored when bids are considered a tie. The Director of the Bureau of General Services shall award contracts, grants, or purchases to in-state bidders or to bidders offering commodities produced or manufactured in the State if the price, quality, availability, and other factors are equivalent. The Master Score Sheet shows VTEC was fourth after the reviewers completed their consensus scoring. VTEC did demonstrate that they were the only in-state bidder to this RFP.

The Maine Buy American and Build Maine Act was considered by the Maine Legislature and a bill was passed. It was subsequently vetoed by the Governor and an override was unsuccessful. The Act did not become law and there is no violation.

VTEC claimed the process was generally flawed, that references were not checked and that other violations of the published procurement process were not followed.

The RFP required that bidders furnish a description of projects within the last five years and to provide contact information related to those projects. The reviewers could have contacted them but there is no evidence contact was made on any bidder's projects and none were noted in the consensus scoring notes.

The issues raised by KW on appeal are as follows:

KW claimed it was the awardee in a prior Maine RFP process for these services in March of 2022 and that their pricing was published at that time. Competitors in the current RFP process received an unfair advantage by having this information.

The March 2022 RFP process had reached the conditional award stage and information was made public for disappointed competitors to understand the award decision. Cost and pricing for all competitors was available publicly at that time as allowed by Chapter 110 Rule.

KW claimed the majority of the weight of the scoring criteria hinges on the pricing and that the scoring sheet was flawed, an irregularity that created a fundamental unfairness, and that the scoring sheet was arbitrary.

The cost submissions were requested for a list of courses sought by DAFS without any fixed number of attendees. The pricing was presented against a variable number of attendees per

course in ascending number of participants. The review panel simply added each cost component across the three levels of attendees and summed the total of all courses to achieve a single cost for calculation into points. Thirty-five points were awarded to the lowest total cost as calculated and all other competitors' costs were compared against the lowest total cost to achieve a proportionately lower score in the usual practice at the Division of Procurement Services. Each bidder had the same cost submission form and completed the costs against the same list of courses provided by DAFS. There was no guarantee or firm commitment of how many courses would ultimately be purchased under the contract.

DECISION

The Panel reviewed the documentary evidence, considered the testimony of the witnesses, and listened carefully to the closing arguments by the parties.

The VTEC claim that the MDOE Proprietary School statute and rule should disqualify all other bidders who did not have that license. The services requested by DAFS were for a vendor to provide training services to the Office of Information Technology that would manage its employees' participation and coordinate other state employees' use of the training. Nowhere in the RFP did DAFS request a license as a Proprietary School. It is noted that the consensus scoring notes did recognize this licensure within the VTEC response. It is further noted that Chapter 147 of the Department of Education Rules on file with the Secretary of State provides exemptions including:

- G. Any course of instruction or training sponsored by a company for the education and training of its own employees, and the training or instruction is not the primary activity of the company;*

The Panel was not convinced that the actions or inactions of DAFS in this area violated any of the appeal criteria.

Similarly, the registration of Foreign businesses falls within the jurisdiction of the Secretary of State (SoS). No request for their status with the SoS was made to the bidders and no check was made for this status. There is an enforcement mechanism at the SoS associated with this process and opportunities to file and correct any necessary filing. The DAFS RFP put compliance with these requirements as the responsibility of the bidder.

VTEC's claim that it was the second place bidder was not substantiated by the total score developed for each bidder. It is true that VTEC's cost was the second lowest overall, but the total

score of all scoring criteria placed VTEC in fourth place among the eligible bidders. Maine procurement law was cited as being violated by allowing a bidder that was not in compliance at the time of bid submission. The Panel was not convinced that the awarded bidder was out of compliance with an RFP requirement or procurement law. VTEC was unaware that the preference law was vetoed and was not in effect. The Panel finds no violation related to this issue.

VTEC's claims that the general process was flawed, demonstrated by failure to check references. The RFP asked for information on projects, and it was received by all compliant bidders. A review of the consensus scoring summary shows no consideration of references for any bidders. All bidders were treated the same in this issue.

The Panel was not convinced by the evidence and testimony presented by VTEC that any of the appeal criteria were met.

KW expressed concerns over the availability of its course pricing from an earlier Maine RFP process was considered carefully by the Panel. Division of Purchases Rule, Chapter 110 Rules for the purchase of services and awards, Section 2, A, v. reads:

v. Proposals shall be opened publicly at The Division of Procurement Services or a nearby appropriate facility at the discretion of The Division of Procurement Services. The opening of proposals shall be open to public attendance. The name of the respondent will be read aloud. No other information will be made available prior to evaluation and award notification. All proposals shall be sequestered from this time until notification of award by the contracting agency after which time they become public record.

The availability of the cost information from the March 2022 proposal was in conformance with the rule. While a bidder might use this information to formulate their own prices in the new RFP process initiated in July 2022, it is not unfair. All bidders had the opportunity to take notice of competitors' pricing as public information.

KW expressed concern over the cost information requested from bidders and that it was not likely or would not ever be the actual amount of services used by DAFS over the life of the contract. This was irregular to the Panel, but absent knowing what the actual number of various courses would be, DAFS chose to create a spreadsheet and asked all bidders to complete the same form. The review team calculated total cost and cost score uniformly for all bidders based on the defined list of services. The Panel was not convinced this was fundamentally unfair.

KW raised an issue that the 35 points assigned to the cost score was too high and that a lower score would have allowed the other criteria to be more impactful, especially since the cost was not requested against a detailed actual list of participants per course. Section 2, A, ii. Of the procurement Rules require at least 25% of total scoring weight be assigned to cost at a minimum. There is no maximum score defined in the Rule and the Panel is not convinced DAFS is in violation of any of the appeal criteria by using a weighted score of 35% (35 points out of 100).

The Panel looked at the issues raised on appeal individually for VTEC and KW, and the issues collectively in their totality. The Panel was not clearly convinced a violation of law occurred, that there was an irregularity that created a fundamental unfairness, or an arbitrary or capricious award. The Appellants have not met the burden of proof necessary to invalidate the award. Accordingly, the Panel validates DAFS' award decision.

APPEAL PANEL

Dated: 12/22/2022

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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.