



STATE OF MAINE
DEPARTMENT OF ADMINISTRATIVE & FINANCIAL SERVICES
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August 30, 2010

Jeffrey Stone, President & CEO
Tiburon, Inc.
6200 Stoneridge Mall Road, Suite 400
Pleasanton, CA 94588

William Laubenstein, AAG
Attorney General
6 State House Station
Augusta, ME 04333

Re: Appeal of Award, Department of Public Safety, RFP #200912570
Computer Aided Dispatch System

Dear Mr. Stone and Attorney Laubenstein:

I am forwarding the final decision of the appeal panel with regard to Public Safety's award decision on the above-mentioned RFP. The Panel invalidates 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. §11001, et seq, and M.R. Civ.P.80C. A party must file a petition for review within 30 days after receipt of notice of the decision.

Regards,


Chip Gavin, Director
Bureau of General Services

cc: Elizabeth Wyman, AAG, Presiding Officer
Appeal Panelists
Betty M. Lamoreau, Director, Division of Purchases
Clifford Wells, Department of Public Safety

Attachment: Decision of the Appeal Panel

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

RE: APPEAL OF AWARD OF CONTRACT) DECISION OF
FOR COMPUTER AIDED DISPATCH) APPEAL PANEL
SYSTEM CONTRACT)
RFP number 200912570)

This is an appeal by Tiburon, Inc. from a decision of the Maine Department of Public Safety (“Department”) to award a contract for a computer aided dispatch system to xwave. 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 (“Rules”). The Director of the Bureau of General Services agreed to Tiburon’s request for a hearing.

The Appeal Panel (“Panel”) was comprised of three members employed in 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 August 17, 2010, at which the testimony of witnesses and documentary evidence were presented. After a review of the arguments and evidence presented by the parties, the Panel makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

In March, 2010, the Department issued a request for proposal (“RFP”) 200912570 seeking bids from vendors to provide a computer generated dispatch system, which represented a significant upgrade of the Department’s current dispatch system. Prior to issuing the RFP, the Department recognized that the project would require technical input and expertise beyond its in-house capabilities. Therefore, the Department engaged in a

competitive bidding process to hire both a project manager and a functional lead. The Department awarded both of these contracts to Abilis New England, Inc. Abilis had acquired all of the outstanding shares of xwave in 2009. Thus, individuals who worked on the development of the RFP were former employees of xwave.

The Department received only two bids on the RFP – Tiburon and xwave. Both of these companies submitted extensive documents in response to the RFP. In addition, both bidders presented a demonstration to the Department's selection committee, which was comprised of five individuals from inside and outside the Department but all were employees of the State with experience in public safety or technology systems.

The selection committee met immediately following the demonstrations to score the proposals, using a consensus-based scoring process. There is no evidence in the file that individual members of the selection committee filled out scoresheets or made notes while reviewing the bids. The only notes in the record are from Clifford Wells, the Department employee who was the project director responsible for supervising the RFP process. Mr. Wells was a member of the selection committee. His notes reflect his viewing of the demonstrations rather than recording comments made during the scoring meetings. There are also two hand-written pages identified as another selection committee member's notes. These notes, however, also appear to correspond to the demonstration and are not contemporaneous with the scoring of the bids. The scoring sheets themselves contain only numbers – there are no notations or comments contained on the score sheets.

There were 200 points available. The scoresheets showed that xwave received 188 points; Tiburon received 146 points. The Department notified xwave that it had been

awarded the contract and also notified Tiburon that it had not been selected. Tiburon filed the instant appeal.

REASONS FOR 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 of the Rules for Appeals of Contract and Grant Awards. The clear and convincing standard requires the Appeal 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 Servs.*, 655 A.2d 1260, 1264 (Me. 1995). The Panel 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 Contract Award Must Be Invalidated.

Tiburon raises two issues on appeal. It alleges that the hiring of former xwave employees to work on the RFP and facilitate the project created bias in favor of xwave in the selection process. Tiburon also argues that the failure of the selection committee to keep notes was a violation of law.

A. Tiburon Has Failed To Prove that the RFP Was Affected by Bias.

The first issue that the appeal panel will address is whether the Department's hiring of Abilis, which now owns xwave, created bias in favor of xwave, which was

ultimately selected for the contract award. Tiburon argues that the Abilis staff members who worked on the development of the RFP had an undisputed connection to xwave and thus the way the RFP was created favored xwave.

Aside from making this blanket statement and pointing to contracts and other documents that established the existence of the relationship, Tiburon presented no evidence that there was bias or a conflict of interest. There is no evidence that Abilis staff members were involved in the selection process itself. Nor did Tiburon point to any particular aspect of the RFP or the selection process that allegedly favored xwave.

Tiburon has failed to show any actual evidence in the form of documents or testimony that would support its claim of bias and thus it has failed to meet its burden of proof on this point. *See Carl L. Cutler Co., Inc. v. State Purchasing Agent*, 472 A.2d 913, 918 (Me. 1984) (bare assertion of bias is insufficient to show prejudice). *See also In re Williams*, 2000 ME 34, ¶ 14, 745 A.2d 991, 996 (failure to provide offer of proof is fatal to claim of bias).

Moreover, the Department acknowledged in its presentation that the hiring of Abilis and, as a result, the involvement of former xwave employees, created an appearance of a conflict of interest. The evidence suggests, however, that the nature of this project was unique and highly technical. It appears that very few individuals were equipped to assist the Department in the development of the computer assisted dispatch system. The Department hired the third parties using a competitive bidding process that presumably gave Tiburon the same opportunity to be chosen for these contracts.

In short, while the close relationships of the parties who worked on the RFP and the winning bidder is concerning, in the absence of clear and convincing evidence of bias,

the appeal panel rejects Tiburon's argument that the RFP or the selection process were improperly weighted in favor of xwave.

B. The Failure To Take Notes Was a Violation of Law as Well as an Irregularity Resulting in a Fundamental Unfairness.

Notwithstanding its failure to prove bias, Tiburon has succeeded on its alternative ground for appeal of the award to xwave. The Appeal Panel concludes that Tiburon has shown by clear and convincing evidence that the selection committee's failure to keep individual notes was both a violation of law and an irregularity that resulted in fundamental unfairness.

A violation of law exists when there is a deviation from the law governing the competitive bid process, the rules governing the competitive bid process or the RFP.

Pine Tree Legal Assistance, 655 A.2d at 1263. The section of the competitive bid statute governing "public notice and review of bids" provides, in pertinent part, that

The State Purchasing Agent shall make the public aware of contracts for which bids are being requested and the procedure to be used in reviewing bids. Rules adopted under this subchapter must include a clear procedure:

...

2. **Review Process.** To be used when reviewing competitive bids, *including the requirement that written records be kept by each person directly reviewing or ranking bids.*

5 M.R.S.A. § 1825-D (emphasis added). In accordance with this statute, the rules governing the purchase of services and awards provide that "[w]ritten records must be kept by each person reviewing or ranking proposals. These records must be made available upon request." Me. Dept. of Admin. and Fin. Servs., 18-554 CMR 110 § 3.A.iii.

Thus, the statute and the rule make clear that each member of the selection committee is required to keep a written record of his or her review of the proposals. The record in this case is devoid of such notes. While there are a few pages of hand-written notes in the record, those notes do not relate to the scoring criteria and instead seem to correspond with the demonstrations that were conducted by the bidders. In addition, the scoresheets themselves do not contain any comments or notes from the selection committee – either as individuals or in a consensus format. The appeal panel concludes that the failure to keep notes is a violation of law.

Moreover, the instant case demonstrates how the lack of notes, indeed the complete lack of any explanatory comments on the part of the selection committee, has made the scoring process difficult to understand. While the committee members met to score the proposals, there is nothing in the scoresheets that explains the scores themselves. The numbers alone have no meaning to anyone examining the process. Individual notes or some recorded comments to indicate how and why points were awarded or withheld would have helped to explain how the scoring worked. The scoresheets provide no guidance as to how the selection committee was measuring the bids against the criteria set forth in the RFP.

The rule quoted above requires that the notes be made available upon request, which would indicate that the notes are supposed to provide some elucidation as to how the bids were scored.¹ In the instant case, the failure to take notes and to record

¹ In its appeal presentation, Tiburon made much of the fact that the Department had failed to produce the notes in response to a Freedom of Access Act request. The appeal panel has no jurisdiction over disputes involving FOAA. At the beginning of the hearing the Department submitted notes described in this decision, which were admitted over Tiburon's objection.


comments from the selection committee was an irregularity that created a fundamental unfairness.

DECISION

In light of the foregoing findings of fact and conclusions of law, the Appeal Panel concludes that Tiburon, Inc. has met its burden of proving by clear and convincing evidence the statutory criteria requiring an invalidation of the award. *See Pine Tree Legal Assistance, Inc. v. Department of Human Servs.*, 655 A.2d at 1264.

WHEREFORE, the Department's decision to award the contract for computer aided dispatch system to xwave is invalidated.

Appeal Panel:



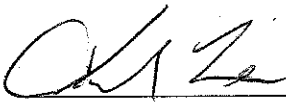
Michael Wenzel
Division of Purchases

8/25/2010
Date



Gilbert Bilodeau
Natural Resources Service Center

8/25/10
Date



Chad Lewis
Department of Health & Human Services

8/27/10
Date

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 any 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 the activity that is the subject of the proceeding is located. Any such appeal must be filed within 30 days of receipt of this decision.