

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

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	)	
In Re: Victory Supply LLC	)	
Appeal of Award by Division of Procurement	)	
Services for	)	<b>Decision of Appeal Panel</b>
Clothing, Textiles –Inmate & Patient	)	
RFQ #22021*207	)	

**INTRODUCTION AND BACKGROUND**

This is an appeal by Victor Supply LLC (“Victory”) from a decision by Department of Administrative and Financial Services, Division of Procurement Services (the “Division”) to award a contract for apparel and textiles to be used at State correctional facilities and psychiatric hospitals to Bob Barker Company, Inc (“Barker”). 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”). The Bureau granted Victory’s request for a hearing.

An Appeal Panel (“Panel”) was comprised of three members chosen from State service. An evidentiary hearing was held on August 17th, 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.

**FINDINGS OF FACT**

On or about February 17, 2022, the Division issued a Request for Quotes (“RFQ”) for apparel and textiles to be used at State correctional facilities and psychiatric hospitals. The RFQ

contained written specifications for the apparel and textiles and provided that bids would be accepted until March 10, 2022. Four responses to the RFQ were received: Barker, Victory, Charm-Tex, and Medline Industries, LP.

The RFQ provided that the bids would be evaluated on a Best Value basis, which “may take into consideration the qualities of the goods or services to be supplied, their conformity with the specifications listed in the RFQ, the purposes for which they are required, the date of delivery, and the best interest of the State”. *State Exhibit 1, bates page 013*. The RFQ further noted that, once it was determined that a bid conformed to specifications, the award would be based on the lowest price among the bidders but reserved the right to not make the award to the lowest priced bidder if there is documented poor performance by the vendor. *State Exhibit 1, bates page 014*

It was at the discretion of the Division to determine whether the bid conformed to the specification of the RFQ. *Id.* The RFQ required that the bidder include an affirmative statement that its bid complied with the specifications unless it “specifically addresses how its bid differs from the specifications, and why the differences should be deemed acceptable by the State.” *State Exhibit 1, bates page 013*. The RFQ further allowed for the Division to “recognize and waive minor informalities and irregularities” *State Exhibit 1, bates page 015*. Sue Garcia conducted the review and evaluation of the bids for the Division.

As part of its bid, Barker included numerous deviations from the specifications listed in the RFQ, including different blends of materials, bulk purchases, color deviations and longer delivery times. Ms. Garcia determined that all the deviations were minor and acceptable. Victory’s bid had two deviations, which were also determined to be minor and acceptable.

After concluding which bids conformed, Ms. Garcia evaluated the costs.<sup>1</sup> Costs were determined by the totaling the cost of each line item. In situations in which there was a difference in the number of items the price covered, Ms. Garcia would determine the per unit cost and use that number to determine cost. Using this cost evaluation method, Barker was determined to have the lowest bid and was awarded the conditional award.

### **GOVERNING LAW AND STANDARD OF REVIEW**

The issue in this case is whether Victory has met its burden of proving by clear and convincing evidence that the Division'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).

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<sup>1</sup> The bids submitted by Charm-Tex and Medline Industries, LLP, were non-conforming and, therefore, disqualified from consideration.

## DECISION

The Panel determines that Victory has met its burden of proof that the award contained irregularities that created a fundamental unfairness.

Victory alleged that, even though the RFQ allowed for deviations, it “understood that it needed to comply with all of the specifications or risk rejection.” Victory contended that “it would have bid differently if the RFQ advised that it could bid in bulk instead of the units of measure contained in the RFQ.” *Appellant Closing Argument, p. 4*. For example, Victory argues that its compliance with the bid specifications – such as the provision of 100% cotton briefs and items in certain colors – resulted in its bid costs being higher. *Id.*<sup>2</sup>

Notwithstanding Ms. Garcia’s determination that the deviation from specifications in Barker’s proposal were minor and acceptable, the Appeal Panel finds that the deviations had a substantive effect on the cost of its bid – a lower cost due to the use of less expensive materials, economy of scale, and avoidance of the cost of custom making items. Allowing so many deviations that lower the cost of the bid is an irregularity that was fundamentally unfair to those bidders who sought to meet the specifications of the RFQ and placed them on unequal footing.

Accordingly, the Panel invalidates the contract award to Barker.

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<sup>2</sup> Barker, on the other hand, bid a 60/40 cotton polyester blend and would provide shorts in only five of ten colors specified in the RFQ. State Exhibit 6, p. 44, 153.

**APPEAL PANEL ON CONTRACT AWARD**

Dated: 9/20/2022

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Dated: 9/19/2022

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Dated: 9/19/2022

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Department of Education

**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.