



JANET T. MILLS  
GOVERNOR

STATE OF MAINE  
BUREAU OF GENERAL SERVICES  
77 STATE HOUSE STATION  
AUGUSTA, MAINE 04333-0077

DEPARTMENT OF  
ADMINISTRATIVE &  
FINANCIAL SERVICES

KIRSTEN LC FIGUEROA  
COMMISSIONER

BUREAU OF GENERAL SERVICES

WILLIAM LONGFELLOW  
DIRECTOR

June 28, 2024

Via Electronic Mail: [jeb@tuckerlawmaine.com](mailto:jeb@tuckerlawmaine.com)

**SUBJECT:**

**Notification of  
Decision of Appeal  
Committee – RFP # 202401004**

Dear Mr. Birocco,

Enclosed please find the final decision of the appeal committee for the above-referenced appeal, per 5 M.R.S. § 1825-E(3). The appeal committee validates the contract award for RFP #202401004 for the reasons set forth in the attached decision.

This decision constitutes final agency action for purposes of judicial review. Any person aggrieved by this decision may appeal to Maine's Superior Court in the manner provided in 5 M.R.S. §§ 11001, *et seq.*, and M.R. Civ. P. 80C. A party must file a petition for review within thirty (30) days after receipt of notice of the decision.

Regards,

DocuSigned by:

*William Longfellow*

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William Longfellow, Director  
Bureau of General Services

Enclosure

cc: Brandon Martin, Acting Deputy Chief Procurement Officer  
David Morris, Acting Chief Procurement Officer  
Appeal Hearing Committee

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

In Re: Freedom Xpress, Inc. }  
Appeal of Contract Award under RFP # 202401004 } Decision on Appeal  
For Statewide or Regional Delivery Services of Library Materials }

**INTRODUCTION AND BACKGROUND**

On May 14, 2024, the Bureau of General Services (BGS) received a timely request for an appeal hearing filed by Freedom Xpress, Inc. on a contract award decision by the Department of Administrative and Financial Services (DAFS), on behalf of the Maine State Library.<sup>1</sup>

A request for proposal (RFP) numbered 202401004 was issued by the Maine State Library per 5 M.R.S. § 1825-B, for Statewide or Regional Delivery Services of Library Materials.<sup>2</sup> The RFP and contract selection process was managed by the Maine State Library, with assistance and oversight from DAFS. Four bidders responded to the RFP, but one bidder was eliminated as it failed to meet the eligibility requirements in Section I of the RFP. Three bids were scored by a five-member Evaluation Team assembled by the Maine State Library.

With the competitive bidding process, bidders’ proposals must be evaluated and ranked based on the scoring weights and the process enumerated within the RFP, as well as applicable laws, through the team consensus evaluation method. For this RFP, proposals were evaluated under the following sections as follows:

- Section II. Organization Qualifications and Experience (30 points)
- Section III. Proposed Services (45 points)
- Section IV. Cost Structure Acknowledgement (25 points)<sup>3</sup>

The Maine State Library awarded Stat Courier a total score of 84 out of 100 points, and awarded Freedom Xpress a total score of 79 points out of 100 points.<sup>4</sup>

Based on the aforementioned results of the scoring by the RFP evaluation team, on April

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<sup>1</sup> Exhibit 9.

<sup>2</sup> Exhibit 1.

<sup>3</sup> Exhibit 1.

<sup>4</sup> Exhibit 6.

30, 2024, the Maine State Library notified the bidders of the conditional contract award for all 4 regions to STAT Courier Service.<sup>5</sup> Freedom Xpress timely filed a request for a hearing on May 14, 2024 which was granted by the Director of the Bureau of General Services.<sup>6</sup>

Freedom Xpress also requested a stay of the award on May 10, 2024, which BGS also granted.<sup>7</sup> The Maine State Library requested reconsideration of the Stay<sup>8</sup> and on May 23, 2024, BGS granted the Library the limited ability to engage in contract negotiations with Stat Courier, but barred any execution of a contract with STATCourier until a formal Decision on Appeal has been released.<sup>9</sup>

DAFS issued a scheduling notice on May 30, 2024. Freedom Xpress was represented by counsel, Joshua Birocco, Esq. The Maine State Library was represented by AAG Sarah Forster. Nancy Macirowski, AAG, served as Presiding Officer. The deadline for the parties' submission of proposed exhibits and witness lists was set for June 7, 2024.

An appeal hearing was held via Zoom and recorded on June 12, 2024, where the parties presented sworn testimony through witnesses, and the parties presented admitted documentary evidence in accordance with 5 M.R.S. § 1825-E and 18-554 C.M.R. Chapter 120 ("Chapter 120"). Both parties submitted simultaneous closing briefs on June 14, 2024.

The Appeal Committee (Committee) was comprised of three state employees appointed by DAFS who were not involved in the RFP or contract award process. All Committee members attended the hearing, reviewed the Exhibits and Closing Statements and met on June 20, 2024 to deliberate their decision. The Presiding Officer attended the Committee's deliberations, but did not vote in the decision. After a review of the testimony and documentary evidence presented by the parties, the Committee makes the following findings of fact and decision on appeal.

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<sup>5</sup> Exhibit 7.

<sup>6</sup> Exhibit 12.

<sup>7</sup> Exhibits 8 and 10.

<sup>8</sup> Exhibit 11.

<sup>9</sup> Exhibit 12.

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

Pursuant to laws applicable to contract award appeals, a petitioner has the burden to show by clear and convincing evidence that the state agency's contract award decision (1) was in violation of law, (2) contained irregularities that created a fundamental unfairness, or (3) was arbitrary or capricious. 5 M.R.S. § 1825-E; Chapter 120, Sec. 3(2); Sec. 4(1). The clear and convincing standard requires that the Committee 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 Committee may only decide whether to validate or invalidate the contract award under appeal; it cannot make a new contract award, make adjustments, or assess monetary damages. *See* 5 M.R.S. § 1825-E (3); Chapter 120 (4) (1).

In determining whether an award is arbitrary or capricious, the Committee 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).

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## **OVERVIEW OF PETITIONER'S COMPLAINT AND PARTIES' POSITIONS**

Freedom Xpress argued that the appeal award should be invalidated because it included irregularities creating fundamental unfairness and it was arbitrary and capricious. In support of these arguments, Freedom Xpress asserted, *inter alia*, that the Maine State Library did not properly consider its experience and capabilities as the incumbent vendor, that the scoring was arbitrary and inconsistent, and that the contract was not awarded to the most cost-efficient proposal.

In response, the Maine State Library argued that the award decision should be validated, that Freedom Xpress was on notice to put its best foot forward in its bid, and that the evaluation team could not substitute knowledge of contract history for the response in their proposal. The Maine State Library further argued that the award went to the best-value bidder, consistent with 5 M.R.S. § 1825-B, and that the cost portion of the bids were properly scored. The Maine State Library argued that Freedom Xpress did not meet its burden of proof and that the scoring was not arbitrary and capricious and was not the result of procedural irregularities creating fundamental unfairness.

During the appeal hearing, the Maine State Library presented sworn testimony from Lori Fisher. Freedom Xpress had the opportunity for additional questioning and cross examination. Freedom Xpress presented sworn testimony from Beth Chris and Destiny Osgood. The Maine State Library had the opportunity for additional questioning and cross examination. In accordance with the parties' joint request, closing briefs were received on June 14, 2024.

## **FINDINGS OF FACT AND CONCLUSIONS**

The three eligible bids were sent to a five-member Evaluation Team for review and scoring. The five evaluators were Lori Fisher, Maine State Librarian and RFP Coordinator; Beth Crist, Director of Special Projects at the Maine State Library; James Jackson Sanborn, Executive

Director of Maine InfoNet and coordinator of Inter-Library Loan services; Daisy Singh, Dean of Libraries at the University of Maine-Orono; and Jon Knepp, Director of Dover-Foxcroft Library.

In reviewing and scoring the bids, the Evaluation Team started with a baseline of half the available points for each section of the RFP. The Evaluation Team then added points when a bid exceeded the minimum requirements and deducted points when a proposal failed to meet minimum requirements. Thirty total points were available for Section II. Organization Qualifications and Experience; forty-five points were available for Section III. Proposed Services and 25 points were available for Section IV. Cost Proposal.

Freedom Xpress argues that the scoring procedures for the Proposed Services Section were irregular and arbitrary, creating a fundamentally unfair award. Freedom Xpress was awarded 26 of 45 points for this section while Stat Courier was awarded 38 points. The primary argument of Freedom Xpress is that their experience and capabilities as the incumbent bidder were not properly considered in the scoring of this section.

The Appeal Hearing Committee finds that the proper section in which to consider an incumbent vendor's experience and capabilities is within Section II. Organization Qualifications and Experience. Freedom Xpress was awarded 28 of 30 points for this section. Stat Courier was awarded 27 of 30 points. Based on the testimony and other evidence presented, including the RFP,<sup>10</sup> the respective bids,<sup>11</sup> and the Team Consensus Evaluation Notes,<sup>12</sup> the Appeal Hearing Committee finds no evidence of any irregularity in the scoring of this section or that that the scoring was arbitrary and capricious.

With respect to Section III. Proposed Services, Freedom Xpress was awarded 26 of 45 points, which is more than the halfway baseline for this section. Stat Courier was awarded 12 more points, that is, 38 of 45 points. The Appeal Hearing Committee finds that the bidders were required to set forth complete information in response to the questions in the RFP. It was not

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<sup>10</sup> Exhibit 1.

<sup>11</sup> Exhibits 3 and 4.

<sup>12</sup> Exhibits 5-1 and 5-2.

reasonable or appropriate to expect the agency to give greater weight to the experience of the incumbent rather than its submission with respect to Proposed Services, especially given that the scope of work for this RFP sought changes in the way the interlibrary loan service was currently operating. Further, the Appeal Hearing Committee credits the testimony of Ms. Fisher that the Evaluation Team did consider information as to experiences with Freedom Xpress and that it did not change their evaluation of the proposal.

The closing statement of Freedom Xpress sets forth a few comparisons of the submissions of Freedom Xpress and Stat Courier in an attempt to argue that Stat Courier's score should have been lower than that of Freedom Xpress. This cherry-picking of individual items falls far short of the burden of proof of showing that an award was the result of an irregularity or that it was arbitrary and capricious. Furthermore, the testimony and the documentary evidence indicate that the scoring was reasonable, and not arbitrary and capricious.

Finally, Freedom Xpress argues that the award was not the most cost-effective because the Stat Courier's proposal was \$245,000 more than that of Freedom Xpress. State law requires that competitively awarded contracts "must be awarded to the best-value bidder, taking into consideration the qualities of the goods or services to be supplied, their conformity with the specifications, the purposes for which they are required, the date of delivery and the best interest of the State." 5 M.R.S. § 1825-B(7). The Division of Procurement Rules, 18-544 C.M.R. Chapter 110, Section 2.A.i.aa. require that the cost of the contract must receive a minimum of 25% of the total weight of all criteria. The RFP properly allocated 25% of the points to Cost Proposal and Freedom Xpress received 25 of the 25 points for that section.<sup>13</sup> . The cost of each bid was properly scored in accordance with law, rule and the RFP.<sup>14</sup>

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<sup>13</sup> Exhibit 6.

<sup>14</sup> Ironically, the apparent argument of Freedom Xpress that the cost of the bid should have been part of the assessment of the Proposed Services would have been a procedural irregularity.

## **SUMMARY OF DECISION**

As reflected herein, the Committee reviewed the documentary evidence, considered the testimony of the witnesses, and carefully considered the closing arguments by the parties.

Freedom Xpress has not met the burden of proof necessary to invalidate the award. Accordingly, the Appeal Committee validates the Maine State Library award decision.



### APPEAL COMMITTEE

Dated: 6/28/2024

DocuSigned by:  
*Adam Dounane*  
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Adam Dounane, DEI Coordinator  
Division of Procurement Services, DAFS

Dated: 6/28/2024

DocuSigned by:  
*Debra Downer*  
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Debra Downer, Deputy Director  
Division of Contract Management, DHHS

Dated: 6/28/2024

DocuSigned by:  
*Michael McNeil*  
7008796FB36A449...  
Michael McNeil, Procurement Analyst I  
Division of Procurement Services, DAFS

**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