

June 22, 2021

Lucia Nixon, Ph.D., Director
Office of Program Evaluation & Government Accountability
82 State House Station
Augusta, ME 04333-0082

Re: Invitation to attend GOC meeting on 6/25

Dear Director Nixon,

DAFS representatives will be available for the meeting of the Government Oversight Committee (GOC) on Friday, June 25, 2021. Thank you for the invitation. In anticipation, we have compiled the following for your review. Please also feel free to transmit this document to GOC members in preparation for the meeting.

Overview

Over the past 12 years, DAFS' Bureau of General Services' Division of Procurement Services has matured from an organization focused solely on processing purchase transactions to one that mitigates unnecessary risk to the State, ensuring best value for every dollar spent, and facilitating open and transparent purchasing.

	2015	2016	2017	2018	2019	2020	TOTALS
Procurements	935	2268	2311	2351	2360	1350	11575
Appeal requests	9	10	4	12	7	7	49
Appeals granted	2	2	0	8	7	6	25
Stay requests	5	5	1	3	2	1	17
Stays granted	0	3	0	1	0	0	4
Awards invalidated	1	1	0	1	0	1	4

Over the last five years, DAFS has published 11,575 procurement requests. Of these, less than half a percentage point (0.4233 percent) have led to an appeal request and, all told, less than four-hundredths of one percentage point (0.0346 percent) of solicitations have been invalidated – as in this instance with Mr. Woods' company, TideSmart Global.

In fact, this appeal was one of only seven requested in 2020, six of which were granted. Of those six, this is the only appeal that was invalidated. Despite the rarity of this occurrence, DAFS followed all appropriate statutory and other governing obligations, as well as procurement best practices.

Governance

Per State statute, DAFS' Director of the Bureau of General Services shall purchase all goods and services for the State in a manner that best secures the greatest possible economy and unless otherwise provided by law, purchases shall be made through competitive bidding per 5 M.R.S.A. § 1825-B. The Request for Proposal (RFP) process is governed by 5 M.R.S.A. § 1825-D and Chapter 110 "Rules for the Purchase of Services and Awards." The RFP appeal process is governed by 5 M.R.S.A. § 1825-E and Ch. 120 "Rules for Appeals of Contract and Grants Awards."

RFP Process

The role of Procurement Services is to lend purchasing expertise to State agencies, and Procurement Services acts as a facilitator to that end for all State agencies – while State agencies act as subject matter experts (SMEs) and are the true arbiter of the goods and services they need. To use a highway safety analogy: Procurement Services maintains the roads – and the individual State agencies are the drivers. In fact, many State agencies employ highly qualified contracting specialists to collaborate with Procurement Services to this very end.

The RFP process is conducted in five phases, which are well outlined to State agencies in a number of formats. Perhaps most helpful is [this guide for conducting an RFP process](#).

[In addition to the guide linked above](#), Procurement Services has created a number of trainings for State agencies on the procurement process, which are linked below.

Overall process:

- [Step-by-step instructions on the RFP process](#)
- [Key Procurement Dates GUIDE](#)
- [Procurements greater than \\$10,000 GUIDE](#)
- [Procurements less than \\$10,000 GUIDE](#)
- [Summary form of pertinent information for the RFP process](#)
- [Overview of purchasing a commodity GUIDE](#)

Guidance by phase:

- [RFP Phase 1 VIDEO \(transcript\)](#)
- [RFP Phase 2 VIDEO \(transcript\)](#)
- [RFP template with directions and guidance](#)
- [Guidelines for completing the evaluation and scoring process](#)

Guidance by role:

- [Role of the RFP Coordinator \(at agencies\) VIDEO \(transcript\)](#)
- [RFP Coordinator acknowledgment form to assume responsibilities of the position](#)
- [RFP Evaluator acknowledgment form to assume responsibilities of the position](#)

Please also see Appendix A for a narrative of the RFP process.

Appeal Process

After an award, parties have 15 days to file a request for appeal. An appeal hearing must be held sixty days from the date of the aggrieved party's (petitioner's) request for appeal, whereby the petitioner shall present evidence to substantiate specific grievances stated in the appeal hearing request. Additionally, per Chapter 120, "other parties of interest may petition to intervene" in an appeal hearing and Procurement Services may allow or disallow such participation in writing within seven calendar days of receipt of the request to intervene; in this case, the winning bidder, Alliance Sports Marketing, petitioned to intervene in the appeal hearing, and that petition was granted by Procurement Services. The hearing is overseen by a presiding officer to control all aspects of the hearing, rule on point of order, rule on all objections, and may question witnesses.

An appeal committee consisting of three people from State government shall determine whether to *validate* or *invalidate* the contract award decision under appeal; the actions of the appeal committee are limited to those options only.

During an appeal, a petitioner bears the burden of proving that one or more of the following occurred:

- A. Violation of law;
- B. Irregularities creating fundamental unfairness; or
- C. Arbitrary or capricious award.

The petitioner (in this case, TideSmart Global) shall present evidence first using exhibits and witnesses who may be cross-examined by the State and any intervenors (if applicable). The State and/or any intervenor (in this case, Alliance Sports Marketing) shall have the opportunity to submit evidence relevant to the appeal through witnesses and exhibits. The appeal committee shall have the ability to issue subpoenas, subject to approval by the Attorney General, for witnesses not willing to testify.

The appeal committee shall consider all evidence entered into the record and shall look for clear and convincing evidence that one or more of the above were committed. A written decision shall be submitted to DAFS' Director of the Bureau of General Services within fifteen calendar days following the final day of the hearing of appeal. The Director shall notify the petitioner, the contracting agency, and all intervenors of this decision within ten calendar days.

Timeline of this RFP (#202006107) with statutory reference

DATE <i>(all in 2020)</i>	ACTION	RULE / STATUTE	REQUIRED DATE <i>(date by which we would have had to comply)</i>
July 14	RFP posted / Email bulletin distributed	5 MRSA §1825-D	Public must be made aware of contracts for which bids are required
July 14 through 16	Kennebec Journal ad'	Ch. 110	Three consecutive days
None	Amendment		
July 23	Questions due		
July 29	Answers posted	Ch. 110	A minimum of 7 days prior to proposal opening date (July 29)
August 5	Proposals due		
August 6 through August 31	Evaluation process		
September 2	Award package submitted to DAFS by contracting agency's selection panel		
September 2	Award package approved by DAFS		
September 2	Award notifications sent to bidders	Ch. 110	Contracting agency must notify all bidders
September 14	Stay request and appeal hearing request submitted to DAFS by TideSmart Global	Ch. 120	Stay request must be filed within 10 calendar days of award (September 11) + Appeal request must be filed 15 calendar days of award (September 16)
September 15	Stay request denied	Ch. 120	BGS Director must notify petitioner within 7 days (September 20)
September 15	Appeal hearing granted	Ch. 120	BGS Director must notify petitioner within 15 days (September 29)
September 19	Request from awarded bidder for intervenor status		
September 23	Intervenor status granted	Ch. 120	Director of Division of Procurement Services must notify within 7 calendar days (September 25)

October 13, 23, 27	Pre-hearing conference with parties		
October 21	Exhibits due		
October 23	Pre-hearing conference with panelists		
October 30 and November 2, 12, 13	Appeal hearing		
November 18	Appeal discussion with panelists		
December 2	Appeal decision sent to BGS Director	Ch. 120	15 days following final day of hearing (November 30)
December 7	Appeal decision sent to parties	Ch. 120	BGS Director shall notify parties within 10 days (December 11)

Overview of this RFP (#202006107)

Following the standard process as outlined above, the Department of Public Safety’s Bureau of Highway Safety (MeBHS) sought proposals to provide Sports Marketing Services. The selected vendor would be marketing in professional sports settings and special events promoting MeBHS behavioral safety programs. The marketing methods included public service announcements, signage, information displays, and personal interaction with the public using local law enforcement and MeBHS staff during events. The primary audience being young drivers between 20-24, drivers between 25-55, and teen and young adult traffic safety education at high school and college events.

The RFP anticipated making one award with a contract start date of October 1, 2020 and included subsequent renewals through September 30, 2025.

The RFP included the goals the MeBHS hoped to achieve, the duties of the awarded bidder, events required to attend, and interactive event displays. All bidders were required to be brief and concise in responding to what the bidder intended to offer, giving particular attention to describing the methods and resources used to accomplish the tasks involved.

The cost submitted by bidders was required to cover the entire period of the initial contract including the costs necessary for the bidders to fully comply with the contract terms, conditions, and RFP requirements. Per standard practices, it was clearly stated that costs related to the preparation of the proposal or negotiation of the contract were not to be included.

All proposals would be evaluated by qualified reviewers judging the merits of the proposals and scored on a 100-point scale measuring the degree to which each proposal met the following criteria: Organization Qualifications and Experience (35 points); Proposed Services (35 points); Cost Proposal (30 points).

In terms of the 30 points available for the cost proposal, each RFP submission was assigned a score according to a mathematical formula. The lowest bid was awarded 30 points. Proposals with higher bid values were awarded proportionately fewer points calculated in comparison with the lowest bid. The scoring formula used is: (Lowest submitted cost proposal / Cost of proposal being scored) * 30 = pro-rated score.

In response to this RFP, two proposals were submitted:

Date/Time	Bidder	Location (City, State)	Price
8/4/2020 11:39 AM	Alliance Sports Marketing LLC	Nashville, TN	\$735,000
8/5/2020 5:50 PM	TideSmart Global	Falmouth, ME	\$747,272

Three individuals evaluated the proposals:

- Nicholas Brown, Department of Public Safety, Highway Safety Program Coordinator
- Ann Wood, Department of Public Safety, Contract Grant Specialist
- Jamie Pelotte, Department of Public Safety, Senior Contract Grant Specialist

(Please note: The State Procurement Review Committee is invoked only when the resulting contract will total more than \$1 million, which was not the case with this RFP.)

The evaluators familiarized themselves with the RFP, the summary of questions and answers, and each of the proposals. Individual evaluation notes were taken by each evaluation team member noting any positives or strengths, negatives or weaknesses, questions or uncertain information, and anything the evaluator found interesting or innovative.

On August 26, 2020 the evaluation team met to conduct consensus scoring whereby the evaluation arrives at a consensus regarding assignment of points on each evaluation criterion. Points were assigned to each section of the proposal based on how many points “earned”.

Below is the master score sheet reflecting the resulting points of the two proposals:

PROPOSAL SUBMITTED BY:		TideSmart Global		Alliance Sports Marketing LLC	
COST:		Cost:	747,272.10	Cost:	735,000.00
EVALUATION ITEM	POINTS AVAIL.				
Section I: Organization Qualifications and Experience	35	30		35	
Section II: Proposed Services	35	30		35	
Section III: Cost Proposal	30	29.5		30	
TOTAL	100	89.5		100	

Appeal of this RFP (#202006107)

TideSmart Global submitted a request for stay and a request for appeal to Procurement Services on September 14, 2020. The following day, Procurement Services denied the request for stay and granted the request for appeal. The awarded party, Alliance Sports Marketing, applied for intervenor status on September 19, 2020 in order to participate in the hearing, and DAFS granted that status on September 23, 2020.

Procurement Services followed statute and rules to arrange the appeal hearing. Submissions were due by October 21, 2020, with multiple pre-trial hearings being held beginning in mid-October and through the remainder of the month. The appeal hearing began on October 20, 2020.

The appeal panel was comprised of:

- Dick Thompson, Department of Administrative & Financial Services, Deputy Commissioner
- Lindsey Kendall, Department of Administrative & Financial Services, Procurement Analyst II
- Gilbert Bilodeau, Department of Administrative & Financial Services, Service Center Director

The appeal panel considered five arguments made by the petitioner (TideSmart Global) – and, ultimately, that appeal panel invalidated the award made to Alliance Sports Marketing for “irregularities creating fundamental unfairness” as described below:

1. The petitioner alleged that the RFP’s scope of work and associated appendices were lacking sufficient detail to aid in the development of an accurate cost proposal. Chapter 110 states, “The request for proposal must contain at a minimum a clear definition (scope) of the project, the evaluation criteria and relative scoring weights to be applied, the proposal opening date and time, and agency contact person.” The panel found the scope of work did not meet the requirement in Chapter 110 referenced above. The only detail pertaining to the actual work to be done was found in Appendix H, which still failed to give relevant parameters for each event in order to associate accurate cost. This level of detail, if not conveyed through the RFP, would only be the knowledge of the incumbent, and is therefore fundamentally unfair.
2. The petitioner alleged that through evidence shown on the RFP Evaluation and Planning Form, MeBHS did not adequately research the market for qualified potential bidders other than the incumbent. The panel found that though there was shown to be little effort by MeBHS to research other potential bidders, the minimum requirements of the form were met, and there was no evidence that the Procurement Services found the form to be unsatisfactory.
3. The petitioner alleged that the ongoing COVID-19 pandemic should have been included in the RFP, as the services requested could very well be impacted by the pandemic. The panel found that the COVID-19 pandemic was not, appropriately, considered in the consensus scoring of either proposal.

4. The petitioner attempted to show evidence that deemed the members of the evaluation team unfit for their role in evaluating the proposals as a result of the RFP. The panel found that all three members of the evaluation team were chosen by MeBHS and followed the processes described within Chapter 110.
5. The appellant alleged that the eligibility requirements within the RFP were arbitrary in nature, creating a fundamental unfairness. The panel reviewed the evidence, testimony, and the eligibility requirements of the RFP and resolved that the requirement for bidders to have already obtained certification as a Road Safety Professional (RSP) prior to the proposal due date was indeed unusual. The panel discovered that the intervenor (Alliance Sports Marketing) had contacted Lauren Stewart of MeBHS on May 7, 2020 and noted that the RSP certification had been obtained by Brandon Vonderharr, President of Alliance Sports Marketing. It was not clear, however, what MeBHS did to research the RSP certification and its prevalence in the industry at the time of drafting the RFP, or how MeBHS would have otherwise considered the RSP certification necessary enough to include as an eligibility requirement without the email from the intervenor.

The appeal hearing concluded on November 14, 2020. A discussion with the appeal panel took place on November 18, 2020, and Procurement Services issued its appeal decision internally on December 2, 2020, which was then transmitted to the parties on December 7, 2020.

Overview

TideSmart Global sought the remedy of invalidation of the contract award and the three person appeal panel granted the relief sought, and this was the extent of their jurisdiction.

Except as provided in [paragraph B](#), an appeal panel may not modify the contract or grant award under appeal, or make a new award. Pursuant to language in the RFP, “[i]ssuance of [an] RFP does not commit the Department to issue an award or to pay expenses incurred by a Bidder in the preparation of a response to th[e] RFP.”

Should MeBHS still need the services originally outlined, a competitive bid would have to be initiated. At this time, MeBHS has not submitted a new RFP draft to Procurement Services for review.

Thank you,



Kirsten LC Figueroa
Commissioner
Department of Administrative & Financial Services

Appendix A – RFP Process

The RFP process is conducted in five phases – please review [this guide for conducting an RFP process](#).

Prior to commencing an RFP process, State agencies should understand the basic needs and requirements for the good / service they hope to procure, have a clear budget for the resulting agreement, and ensure their Commissioner is supportive of said.

Phase 1 – Drafting RFP and Identifying the Evaluation Team: State agencies draft the RFP utilizing the template provided by DAFS Procurement Services with a focus on creating an “introductory summary of the purchase sought” (Part I) and outlining the specific deliverables or requirements desired (Part II, Scope of Services), identifying along the way any questions for Procurement Services. State agencies also draft the RFP summary form, which identifies the expected contract start date, budgeted contract amount, the goods / services sought, experience purchasing the goods / services, research conducted to identify possible bidders, the team of evaluators who will be reviewing the proposals submitted – and obtain the signature of their Commissioner or designee; this mitigates the risk for any perceived or validated conflict throughout the process.

Phase 2 – Review / Approval of the RFP: State agencies submit RFPs and summary forms to Procurement Services for review, comments, and approval. Procurement Services reviews each for completion, clear terms, ability for the marketplace to understand the purchase requirements, fairness to all potential bidders, violations of law, and document quality. Once all feedback and comments have been resolved between Procurement Services and State agencies, State agencies are notified that the documentation can be finalized ahead of Phase 3.

Phase 3 – Publication / Release of RFP: The RFP is finalized by State agencies and the final RFP document released on the Procurement Services’ website, shared via DAFS’ Procurement Services email alert, and posted in the *Kennebec Journal*. Once the RFP is released publicly, State agencies ensures are responsible for notifying any potential bidders of the opportunity to bid.

Potential bidders have the opportunity to submit questions in writing (or sometimes at an in-person bidders’ conference). State agencies acknowledge all questions, and provide a single document that answers all submitted questions, which is reviewed, approved, and posted by Procurement Services. If there are any necessary amendments to make to the RFP, based upon the questions submitted, Procurement Services also reviews, approves, and posts those amendments. All amendments and answers must be posted a minimum of seven days prior to the proposal due date.

Proposals are received by Procurement Services via electronic submission. All proposals are logged and reviewed for timeliness. Thereafter, Procurement Services remits all proposals to agencies for evaluation and award.

Phase 4 – Proposal Evaluation and Award: The agencies’ RFP coordinator receives the proposals and reviews any potential conflict of interests (perceived or real). Once each evaluator has verified there are no conflicts, individual evaluators review the proposals to ensure a basic understanding of what is being offered and prepares notes to aid in conversation with fellow members of the

evaluation team. Thereafter, the evaluation team meets and conducts consensus scoring. The evaluation team reviews one proposal, one section at a time and discusses the intricacies of the proposal comparing to what was requested in the RFP. After each section, the evaluators come to consensus regarding the score allocated for that section. Each RFP is based on a 100-point scale with the cost section a minimum of 25 percent of the total points. Once all the proposals are reviewed and scored, the evaluation team prepares final documents and submits to Procurement Services for review and approval prior to notifying bidders of the award. After receiving approval from Procurement Services, State agencies send conditional award notifications to all bidders.

Phase 5 – Post-Award: Per State statute, any aggrieved party has ten days to request a stay of the awarded contract and fifteen days to request an appeal hearing. All appeals are submitted to DAFS' Director of the Bureau of General Services. During this time, State agencies may be negotiating with the awarded bidder.

Helpful Links FMI

DAFS – Division of Procurement Services	https://www.maine.gov/dafs/bbm/procurementservices/
DAFS – Policies and Procedures	https://www.maine.gov/dafs/bbm/procurementservices/Policies-Procedures
Purchasing Statutes: Title 5, Administrative Procedures and Services, Chapter 155, Purchases	http://www.mainelegislature.org/legis/statutes/5/title5ch155sec0.html
5 MRSA §1825-B Bids, awards, contracts and grants	http://www.mainelegislature.org/legis/statutes/5/title5sec1825-B.html
5 MRSA §1825-D. Public Notice and review of bids	http://www.mainelegislature.org/legis/statutes/5/title5sec1825-D.html
5 MRSA §1825-E. Appeal Procedures	http://www.mainelegislature.org/legis/statutes/5/title5sec1825-E.html
Ch. 110 – Rules for the Purchase of Services and Awards	https://www.maine.gov/dafs/procurementservices/policies-procedures/chapter-110
Ch. 120 – Rules for Appeals of Contract and Grant Awards	https://www.maine.gov/dafs/procurementservices/policies-procedures/chapter-120
Executive Order 2016-001 – An Order Re-establishing the State Procurement Review Committee	http://www.maine.gov/tools/whatsnew/index.php?topic=Gov_Executive_Orders&id=671521&v=article2011
LD 875 – An Act to Protect Taxpayers in the Privatization of Services and To Establish the State Procurement Review Committee	http://legislature.maine.gov/legis/bills/display_ps.asp?LD=875&snum=130
Vendor and Bid Opportunities	https://www.maine.gov/dafs/bbm/procurementservices/vendors
Request for Proposals	https://www.maine.gov/dafs/bbm/procurementservices/vendors/rfps