



STATE OF VERMONT
OFFICE OF THE STATE AUDITOR

To: Justin Johnson, Secretary of Administration
Date: June 2, 2015
Re: Next Generation 911 System Contract
Cc: Michael Clasen, Deputy Secretary of Administration; Barbara Neal, Interim Executive Director of the E911 Board; Roger Marcoux, Jr., Chair of the E911 Board.

Introduction

On October 20, 2014, the Vermont Enhanced 911 (E911) Board entered into an \$11.2 million contract with FairPoint Communications to provide and maintain a new 911 system in Vermont. The 69-month contract is for a “Next Generation 9-1-1 system,”¹ defined by the National 911 Office as “an Internet Protocol (IP)-based system that allows digital information (e.g., voice, photos, videos, text messages) to flow seamlessly from the public, through the 911 network, and on to emergency responders.”²

The E911 Board is responsible for the development, implementation, and supervision of Vermont’s 911 system. The board consists of nine members who receive per diem compensation, and it also includes numerous support staff.³

The Board’s decision to contract with FairPoint came after a competitive bid process that began with a Request for Proposal (RFP) in spring 2014. In addition to FairPoint, two other vendors submitted proposals to the State – Intrado, Inc., which is the vendor for the State’s 911 system until July 2015, and TeleCommunication Systems, Inc. (TCS). The E911 Board compared the four-year proposals by Intrado and TCS with the five-year offer from FairPoint.⁴

Although FairPoint was not the lowest-cost bidder, the Board scored FairPoint’s proposal better than the

	FairPoint	Intrado	TCS
Total Cost of Bid	\$11,220,000	\$11,800,000	\$7,135,497
Contract Period in Years	5	4	4
Annual Cost of Bid	\$2,244,000	\$2,950,000	\$1,783,874
Weighted Bid Score	361.15	308.95	230.95

¹ Standard Contract for Services with FairPoint Communications and Enhanced Communications of Northern New England, Inc. #27944, 2014.
² See: [the National 911 Office website](#).
³ See: [30 V.S.A. §7052](#).
⁴ FairPoint proposed a four-year offer (two years with two one-year options to extend) and a set five-year offer. The five-year option was cheaper than the four-year option.

others (see Table 1). Cost was a small fraction of the scoring calculation, as is evidenced by the lowest cost bidder receiving the lowest score.

The Vermont State Auditor's Office initiated a brief inquiry of the new FairPoint contract and the E911 Board's contracting practices as they related to complaints our office received. Those complaints were three-fold:

1. The first complaint alleges that FairPoint does not have the capacity to enable users to contact 911 via text messages from mobile devices. FairPoint allegedly subcontracted for this functionality. Since FairPoint's proposal did not indicate that the firm would subcontract for this functionality, this alleged misrepresentation of the vendor's abilities could have affected bid scoring.
2. The second complaint alleges that FairPoint's proposal does not agree with the RFP's intellectual property requirement, and this new arrangement may jeopardize the State's ownership of the E911 database. The complaint also alleged that FairPoint did not include in its cover letter this exception to the intellectual property requirements, as is required by the RFP.
3. The third complaint alleges that FairPoint's roughly six-hour network outage on November 18, 2014, may be symptomatic of systemic problems that could undermine the vendor's ability to develop and maintain Vermont's E911 system.

The following sections of this report address these three complaints.

Complaint 1: Text-to-911 Functionality

After reviewing documents and communications surrounding the first complaint, and after corresponding with the interim director of the E911 Board, it appears that the chair of the E911 Board misinformed the complainant. The chair indicated that FairPoint was subcontracting to TCS for text-to-911 functionality and that the Board had consented. Based on subcontractor documentation and testimony by the interim director of the E911 Board, FairPoint is not subcontracting for text-to-911 services. It is unclear why the chair provided this misinformation, but it occurred as the Board experienced a transition in directors.

The subcontracting matter concerned the Text Control Center (TCC) part of the system, which is critical to delivering text messages to 911. According to E911 documentation, both Intrado and TCS have the capacity to provide this functionality. The interim director explained that neither the State nor FairPoint has contracted with TCS or Intrado to provide the TCC functionality. Instead, the wireless service providers in Vermont have contracted with these firms to provide this functionality. According to the Board's interim director, the wireless providers have instructed their TCC vendors to work with FairPoint to enable the delivery of text messages to 911.

A copy of FairPoint's Subcontractor Reporting Form – a required form the Board did not have but was completed by the vendor after our request⁵ – shows that the only subcontractors FairPoint was working

⁵ See: [Sec. 32 of Act 54 of 2009](#).

with on that date were Solacom and Geocomm.⁶ If FairPoint were subcontracting to TCS or Intrado for TCC functionality and FairPoint did not inform the State, it would be a breach of contract.⁷

Our office also reviewed the scoring of the bids and the effect of text-to-911 functionality on that scoring. Using the Board's scoring sheet and methodology, we ran a simulation that adjusted FairPoint's scores for the four main criteria that related to text-to-911 functionality. If FairPoint were to have scored a zero (the lowest score) for those four criteria, FairPoint's overall score would have still been the highest of the three bidders.

In summary, it appears FairPoint is not subcontracting for text-to-911 functionality and that a change to FairPoint's text-to-911 functionality would not have greatly affected the outcome of the bid scoring. It is unclear at this time whether FairPoint is capable of effectively implementing this system because the go-live date is roughly two months away. According to the Board's interim director, the vendor has thus far met all of its contractual milestones, though one deadline was pushed back a week.

The effectiveness of the E911 Board's scoring methodology is also unclear, but it's beyond the scope of this limited inquiry.

Complaint 2: Intellectual Property Rights of the Database

The second complaint alleges that FairPoint's proposal does not agree with the RFP's intellectual property requirement, and this new arrangement may jeopardize the State's ownership of the E911 database. FairPoint also did not include in its cover letter this exception to the intellectual property requirements, as is required by the RFP.

FairPoint did indeed take exception to the section labeled "Intellectual Property/Work Product Ownership" of the RFP. In brief, the RFP section stated: "The State shall retain all right, title and interest in and to all data content provided by the State, and to all information that is created under a Contract, including, but not limited to, all data that is generated under a Contract as a result of the use by a Contractor, the State or any third party of any technology systems or knowledge bases that are developed for the State and used by a Contractor ("**State Information**"), and all other rights, tangible or intangible (collectively, "**State Intellectual Property**") ... All Work Product shall belong exclusively to the State, with the State having the sole and exclusive right to apply for, obtain, register, hold and renew, in its own name and/or for its own benefit, all patents and copyrights, and all applications and registrations, renewals and continuations thereof and/or any and all other appropriate protection."⁸

FairPoint did not agree to this section and argued that much of the language did not apply to this particular service offering. In brief, FairPoint stated that it "will retain any and all right, title and interest in any intellectual property now owned or hereinafter created. To the extent use of intellectual property owned by FairPoint or its contractors is needed as part of the services, FairPoint will ensure that the

⁶ FairPoint's proposal included three contractors (Solacom, Geocomm, and 911 DataMaster), while the company's subcontractor reporting form showed two (Solacom and Geocomm).

⁷ FairPoint Contract, 50 (Third-Party Support Contracts) and 63 (Sub-Agreements), 2014.

⁸ Sealed Bid Information Technology Request for Proposal for Next Generation 911 System, 45, 2014.

state has an appropriate license to use such property for the duration of the contract term or procure a comparable license in order to deliver the same or substantially the same services. Any transfer of ownership of any right, title or interest in any work performed and/or service delivered (including without limitation software, processes, etc.) must be expressly agreed to in a duly signed writing transferring such ownership.”⁹

While both Intrado and TCS proposed that they would comply with this section, both firms asserted that their software is their property and that an agreement would need to include language protecting their proprietary information.^{10, 11}

Notwithstanding FairPoint’s unwillingness to agree to the requirement in the State’s RFP, the two sides agreed to terms that appear to protect the State’s ownership of the database and access to software. Attachment D of the FairPoint contract spells out ownership rights of the system. Under the section labeled “State Intellectual Property,” the contract states: “The State shall retain all right, title and interest in and to all State Data ..., State-owned intellectual property, and State Proprietary Materials.”¹²

Under the section labeled, “Work Product Ownership; Licensing,” the contract establishes: “All tangible reports surveys, plans, charts, literature, recordings (video or audio), pictures, drawings, analyses, graphic representations, notes and memoranda, written procedures and documents, which are prepared by Contractor or the State solely in the performance or receipt of the Services in Attachment A for the State’s internal purposes shall be owned by the State and be considered ‘work for hire’ and remain the property of the State of Vermont regardless of the state of completion, unless otherwise specified in this Contract.”¹³

The contract does establish the contractor’s right and title to its proprietary designs, algorithms, software, and other information, while also ensuring “all license rights granted herein shall continue with the State in perpetuity.”¹⁴ The State’s contract with Intrado for 911 services, which expires this summer, includes similar contractor protections but does not clearly and thoroughly define the State’s property rights, like the new contract does.¹⁵

The FairPoint contract also establishes the confidentiality of sensitive State information,¹⁶ ensures state access to data after the termination or expiration of the contract,¹⁷ and prohibits the selling and transfer of any portion of the contract without the State’s written approval.¹⁸

⁹ FairPoint Proposal to Provide Next Generation 911 System, 161, 2014.

¹⁰ Intrado Inc. Response to RFP for Next Generation 9-1-1 System for the State of Vermont, 242-243, 2014.

¹¹ TCS Technical Response to Next Generation 9-1-1 System Information Technology Request for Proposal, 101-102, 2014.

¹² FairPoint Contract, 63.

¹³ Ibid, 64.

¹⁴ Ibid.

¹⁵ Standard Contract for Services with Intrado, 96, 2010.

¹⁶ FairPoint Contract, 66.

¹⁷ Ibid, 73.

¹⁸ Ibid, 77.

In summary, the complaint we received about FairPoint taking exception to the State's RFP is valid, but it appears the contract addresses these concerns more comprehensively than the State's previous contract for E911 services.

The second part of this complaint concerned FairPoint's failure to include this intellectual property exception in a cover letter. The RFP requires that exceptions to the RFP's conditions must be outlined in the cover letter and failure to do so is "deemed to be acceptance of the State terms and conditions."¹⁹ It is true that FairPoint's cover letter does not make note of the exception in the cover letter, but it is included in the vendor's technical proposal.

Complaint 3: Network Outage Issues

The third complaint alleges that FairPoint's roughly six-hour network outage on November 18, 2014, may be symptomatic of systemic problems that could undermine the vendor's ability to develop and maintain Vermont's E911 system.

In December 2014, the Public Service Board (PSB), which is responsible for regulating public utilities, began investigating FairPoint at the request of the Vermont Department of Public Service, which represents the public before the PSB. The PSB's investigation spans a range of issues that include this network outage,²⁰ and the E911 Board is a party to this case.²¹

Since this matter and others relating to FairPoint are under investigation by the PSB, our office will not presently get involved. As a general rule, our office does not involve itself in active investigations or judicial proceedings.²²

It is also noteworthy that in August 2014, roughly two weeks before FairPoint was selected as the new vendor of Vermont's E911 system, the Intrado 911 system for Vermont experienced a 40-minute outage.²³

Summary

The first complaint alleged that FairPoint does not have text-to-911 capacity and therefore subcontracted for this functionality, which could have skewed the vendor's proposals. However, a review of documentation and testimony from the E911 Board interim director show that FairPoint is not subcontracting for this functionality and that the complainant was misinformed about FairPoint's subcontracting practices by the chair of the E911 Board. The functionality FairPoint was allegedly

¹⁹ RFP for Next Generation 911 system, Section 6.2.2, 57.

²⁰ See: [The webpage for PSB Docket 8390](#).

²¹ Public Service Board, *Order Re: Procedural Schedule, Motions to Intervene, and Motion to Appear Pro Hac Vice*, 6, 2015. [Read the order here](#).

²² The U.S. Government Accountability Office (GAO) calls on auditors to avoid interfering with investigations and legal proceedings. See Page 142 of the [GAO's Government Auditing Standards](#). While this inquiry was not a performance audit, we use the Government Auditing Standards to guide our work.

²³ Read: [The E911 Board Press Release on the Network Outage](#).

subcontracting for is supposed to be provided by contractors of the wireless service providers, according to the interim director.

The second complaint that alleges FairPoint's proposal does not agree with the RFP's intellectual property requirement and that this new arrangement may jeopardize the State's ownership of the E911 database, stems from a documented disagreement. But the contract, which sets the legal parameters of this arrangement, includes language to protect the State's property rights and data. The second part of this complaint is that FairPoint did not include in its cover letter its exception to the intellectual property requirements, as is required by the RFP, and this is true.

The third complaint alleges that FairPoint's roughly six-hour network outage on November 18, 2014, may be symptomatic of systemic problems that could undermine the vendor's ability to develop and maintain Vermont's E911 system. Since this matter and others relating to FairPoint are under investigation by the PSB, our office will not presently get involved.