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RE: Decision of Appeal Panel, Department of Health and Human Services  
RFP # 201506114, Crisis Mobile Resolution and Stabilization Unit Services

Dear Mr. Cohen, Ms. Wertheimer, Ms. Mueller, Mr. Dingman, Ms. Moynihan & Mr. Gauvreau:

I am forwarding the Final Decision of the Appeal Panel for the above-referenced appeal. 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. 11001, et seq, and M.R. Civ. P. 80C. A party must file a petition for review within thirty days after receipt of notice of the decision.

Regards,

Edward A. Dahl, Director  
Bureau of General Services

cc: Sarah Forster, Assistant Attorney General, Presiding Officer  
Mark Lutte, Director, Division of Purchases  
Jim Lopatosky, Acting Director, Division of Contract Management, DHHS  
Michael Mahar, Division of Contract Management, DHHS  
Michelle Fournier, Office of Information Technology, Hearing Panelist  
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Enclosure: DAFS Rule Chapter 120

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

RE: APPEAL OF AWARD OF CONTRACT )  
FOR CRISIS MOBILE RESOLUTION ) DECISION OF  
AND STABILIZATION UNIT SERVICES ) APPEAL COMMITTEE  
(RFP #201506114) )

This is an appeal by Maine Behavioral Healthcare, Inc. (“MBH”) from the decisions of the Department of Health and Human Services and two of its divisions, the Office of Substance Abuse and Mental Health Services and the Office of Child and Family Services (“DHHS”), to award contracts pursuant to RFP #201506114 for crisis mobile resolution and stabilization unit services to Sweetser (Districts 1 and 4) and The Opportunity Alliance (“TOA”) (District 2). The appeal is brought pursuant to 5 M.R.S. § 1825-E and Chapter 120 of the Rules of the Division of Purchases of the Department of Administrative and Financial Services. The Director of the Bureau of General Services agreed to MBH’s request for a hearing. The winning bidders in the respective districts, Sweetser and TOA (the “Intervenors”), sought and were granted intervenor status.

The Appeal Committee (“Committee”) was comprised of three members of 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 March 4 and 7, 2016, at which the testimony of witnesses and documentary evidence were presented. At the close of the testimony, the parties were permitted to present written closing arguments and the administrative record was held open until 5:00 p.m. on March 14, 2016. After a review of the arguments and evidence presented by the parties, the Committee makes the following findings of fact and conclusions of law.

## FINDINGS OF FACT

In July of 2015, DHHS issued RFP #201506114 for crisis mobile resolution and stabilization services in each of eight geographic districts. Joint Exhibit (“J.E.”) 1.<sup>1</sup> DHHS held a bidders’ conference on August 28, 2015, and allowed bidders to submit written questions until September 4, 2015. Tr. 1 at 40. DHHS published its responses on November 5, 2015. J.E. 2; Tr. 1 at 40. The deadline for submitting proposals was November 12, 2015. Tr. 1 at 41. Two providers submitted proposals in Division 1, MBH and Sweetser (*see* J.E. 5(A)); three providers submitted proposals in Division 2, MBH, Sweetser and TOA (*see* J.E. 5(B)); and two providers submitted proposals in Division 4, MBH and Sweetser (*see* J.E. 5(C)).

As described in the RFP, the proposals were evaluated in four areas: Organization Qualifications and Experience (30 points), Specifications of Work to be Performed (35 points), Cost Proposal (25 points), and Economic Impact within the State of Maine (10 points). J.E. 1 at 26-29. The first two areas were evaluated using a consensus scoring model. J.E. 1 at 30. In the third area – cost – any bidder who agreed to accept the rates contained in the RFP was awarded the full 25 points. *Id.* The fourth area – economic impact – was the sum of two sub-parts, recent economic impact and projected economic impact, and based solely on the numbers supplied by the bidders using a formula that awarded the highest dollar amount the full number of points (5 in each area) with the other bids receiving a percentage of the 5 points reflecting the difference between their dollar amount and the highest dollar amount. *Id.* at 30-31.

DHHS notified all bidders of its decisions on December 22, 2015. J.E. 6. In District 1, Sweetser received the conditional award; Sweetser’s proposal scored 83 points to MBH’s 62.42.

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<sup>1</sup> The record in this matter contains many pieces: citations to the joint exhibits are to those contained in the binder marked “Hearing Exhibits” by exhibit and page number; citations to the bidders’ proposals, contained in separate binders, are to “Name of Bidder at page(s)” (*e.g.* MBH at 57); and citations to the two days of hearing transcripts are to “Tr. day at page(s)” (*e.g.* Tr. 1 at 10, 12).

*Id.* In District 2, TOA was given the conditional award; TOA's proposal received 88.44 points to Sweetser's 79 and MBH's 62.42. *Id.* In District 4, Sweetser received the conditional award; Sweetser's proposal scored 81 points to MBH's 62.42. *Id.* MBH challenged the awards in Districts 1, 2 and 4 by petition on January 6, 2016. J.E. 7(C). BGS granted MBH's petition over DHHS's objection, as well as a request from Sweetser and TOA to intervene. J.E. 7(F) and 7(G).

## 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. §§ 1825-D and 1825-E and in regulations of the Division of Purchases at Chapter 120. The clear and convincing standard requires that the Committee 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 Committee 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.

In determining whether an award is arbitrary or capricious, the Panel must not substitute its judgment for that of the Committee. *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).

## **II. The awards to Sweetser and TOA must be invalidated.**

While the Appeal Committee recognizes that this appeal involves three separate decisions and three contract awards, it is clear from both the testimony and the documentary evidence that the arguments made by MBH and the responses by DHHS and the Intervenors pertain to all three of the awards, and that there are no differences in how DHHS either evaluated the proposals or applied the scoring criteria that would cause different outcomes among the districts in dispute.

In its appeal, MBH presents three reasons that the awards to Sweetser and TOA should be invalidated. First, MBH complains that the RFP violated the law as its design failed to result in an award to the best-value bidder. This argument is broken down into two subparts: that the automatic award of 25 points to all bidders under the cost section of the RFP failed to recognize and account for the potential for material differences in cost among the proposals; and that the economic impact section of the RFP failed to recognize the best value for the state as it effectively awarded the most points to the bidder who was the largest (recent economic impact) or who would spend the most state dollars (prospective economic impact). Second, MBH complains that the proposals were not scored fairly or consistently against the RFP or as compared to one another. Finally, MBH complains that the RFP was not clear or specific with respect to the information that was to be provided and the format in which the information was to be provided, rendering DHHS's evaluation of the proposals fundamentally unfair.

For the reasons explained below, the Committee finds that the awards to Sweetser and TOA must be invalidated.

### **A. Taken as a whole, the RFP was designed to result in an award to the best value bidder.**

Maine law requires that contracts subject to competitive bidding, such as the awards at issue in this matter, "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). Chapter 110 of the Division of Purchases regulations further requires that the “cost of the contract must be included in the evaluation criteria” and that the cost “must receive a minimum of 25% of the total weight of all criteria. Chap. 110, § 2(A)(i)(aa). Finally, Executive Order 2012-004 requires consideration of “the responding bidder’s economic impact on the Maine economy and State revenues.” J.E. 8(D).

Turning first to the cost component of the RFP, the RFP put all bidders on notice that by submitting a proposal (1) they were agreeing to accept the rates stated in the RFP, and (2) each bidder would receive the full 25 points allocated to cost. J.E. 1 at 28-30. However, contrary to MBH’s argument, the term “best-value bidder” cannot be reduced solely to competition on the basis of cost. As the appeal committee explained in *In re: Appeal of Award of Contract for Alternative Response Program in Districts 1 and 2* (2008), a state agency seeking to procure services is within its discretion to determine that cost is not a helpful factor in determining the “best-value bidder” where the rates are set in advance. This seems particularly appropriate in a case where the rate-setting process was itself public, and involved input from the bidders who ultimately submitted proposals in response to the RFP. Tr. 1 at 30-38; Tr. 2 at 25-26. In addition, witnesses acknowledged during their hearing testimony that a significant variable in determining the ultimate cost of the services to be provided pursuant to these agreements is something that is outside of the control of the bidders: the needs of the patients. Tr. 1 at 196-97; Tr. 2 at 143-46. By awarding all of the bidders the 25 points, DHHS was able to focus on the criteria that related directly to the provision of services. To the extent that MBH or other bidders

wished to highlight efficiencies in their proposals, they were free to do so in their response to Section II (Proposed Services). Tr. 1 at 155-56.

In contrast, the economic impact component of the RFP was not designed to lead to the “best-value bidder.” The recent economic impact portion simply measured the size of one bidder relative to the others. *See* Tr. 1 at 171-72, 242-44; Tr. 2 at 127-28. The projected economic impact portion awarded the most points to the bidder who planned to spend the most money, which in turn would cost the State the most money. *See* Tr. 1 at 167-69. The Appeal Committee believes that the Division of Purchases needs to work with the executive agencies to create a different tool to measure economic impact as required by the executive order; however, given the small number of points allocated to economic impact in this RFP (10) and the relative scores given to the bidders, the Committee does not believe that in this instance, the economic impact component alone rendered the RFP legally invalid.

**B. The evaluation of the proposals was arbitrary and capricious because the proposals were not scored or evaluated consistently.**

Sections I and II of the bidders’ proposals were scored using a consensus scoring model. Unlike the formulaic scoring for cost and economic impact, the scoring in these two sections was subjective. While the Appeal Committee is well aware that its role is not to substitute its judgment for that of the agency, it is responsible for determining whether the scoring process was fair, *i.e.* that it was not arbitrary and capricious. In this case, while there is certainly no evidence of intent on the part of DHHS to be anything but fair, a review of the scoring process as evidenced by the consensus scoring sheets indicates that the proposals were not scored or evaluated consistently.

The focus below on the comments contained on the consensus scoring sheets is deliberate; in a consensus scoring process, the consensus scoring sheets are the only evidence of

what the team of reviewers (the “Reviewers”) found significant enough to record as the basis for their scoring decisions. *In re: Appeal of Award by the Public Utilities Commission for RFP #201106108, Next Gen 9-1-1 Services* (2012) at 5 (referring to scoring sheets for evidence of inconsistent treatment). While testimony at the hearing suggested that some items were more important than others, it is fair to conclude that the Reviewers must have thought there was something significant about the items listed in order for them to make it onto the consensus scoring sheet at all. It was unclear from the testimony whether the Reviewers started with the maximum number of points available for each section and worked down, or whether each proposal started at zero and ‘earned’ points. Tr. 1 at 216; Tr. 2 at 86. In either case, it was clear that the Reviewers considered both the strengths and the weaknesses of the proposals, and that they did not link specific attributes to specific numbers of points. Tr. 1 at 218-221; Tr. 2 at 87-90.

MBH points to a number of areas where another bidder received a positive on the consensus scoring sheet for something that was also contained in MBH’s proposal, but was not recognized by the Reviewers. For example, MBH highlights the different treatment given to the proposals’ use of “behavioral health homes.” Use of behavioral health homes showed up as a positive for TOA’s proposal on the consensus scoring sheet, but not for MBH. J.E. 5(B) at 151, 157. The Committee located one reference to “Behavioral Health Home” in TOA’s response to Section I, and a brief, passing reference to “health homes” in Section II, even though it was considered by the Reviewers as a “positive” under Section II on the consensus scoring sheet. TOA at 9, 26; J.E. 5(B) at 157. MBH’s proposal referred to its relationship with behavioral health homes at several places in its proposal in response to Section I. MBH(#2) at 6, 11, 12, 13, 15. While there is certainly nothing wrong with highlighting an element in one proposal that



'stands out' even if it appears in other proposals in a less significant way, in this instance, the Reviewers chose to recognize TOA's response that was virtually indistinguishable from MBH's and used it as part of the basis for a score in a category (Scope of Work) that it did not even relate to – all while criticizing MBH for failing to follow the formatting/organization of the RFP. J.E. 5(B) at 151 (and discussion below).

A similar problem occurred with respect to hours of operation. MBH was penalized for "no detailed hours of operation," despite it being specified in their proposal under "facilities" as 24/7/365. MBH(#2) at 32. Sweetser's response was substantively identical. Sweetser at 14. At the hearing, the individual who served as the RFP Facilitator for DHHS agreed that the Reviewers overlooked the information in the MBH proposal, but suggested that the Reviewers likely missed the information because it was buried in a busy paragraph, and because MBH's proposal did not follow the outline of the RFP. Tr. 1 at 284-85. However, both proposals had the information in similarly structured paragraphs in approximately the same location in sections captioned "Crisis Mobile Response." MBH(#2) at 32; Sweetser at 14. Even if the MBH response had not been in the same place as Sweetser's, the Reviewers role was to evaluate the substance of the proposals, and the RFP Facilitator's response suggests that the Reviewers valued form over substance.

MBH provided additional examples. Sweetser was given a "positive" for its use of Electronic Health Records ("EHR"), while MBH was not. J.E. 5(A) at 113, 107. Both proposals refer to the use of electronic health records. Sweetser at 16; MBH(#1) at 12, 31. Sweetser was given a "positive" for multiple walk-in sites. J.E. 5(A) at 113. MBH was not. J.E. 5(A) at 107. MBH's proposal contained multiple walk-in sites. MBH(#1) at 31. Sweetser's proposal offered the same number. Sweetser at 14.

It was clear from the testimony that the Reviewers zeroed in on what they believed to be a lack of detail in the MBH proposal. Tr. 1 at 275-76. That concern also appears on the consensus scoring sheets. J.E. 5(A) at 107. But it is also clear from the examples cited above that the Reviewers singled out elements of the other proposals that also appeared in the MBH proposal with no credible explanation for the difference in treatment. The Committee finds that the proposals were not evaluated and scored consistently.

**C. The RFP was sufficiently clear with respect to the information that was to be provided.**

MBH's final argument – that the RFP was not specifically clear with respect to the information that was to be provided and the format in which it was to be provided – is unpersuasive. Part IV of the RFP states that the bidders must “follow the outline used below, including the numbering and section and subsection headings as they appear here.” J.E. 1 at 26. Under Subsection IV(C) there is a “Section II” that contains one subsection:

1. **Services to be Provided.** Discuss the Scope of Services referenced above in Part II of this RFP and what the Bidder will offer. Give particular attention to describing the methods and resources you will use and how you will accomplish the tasks involved.

...

*Id.* at 28. Part II of the RFP contains a 10 page long outline of the desired services. *Id.* at 13-22. MBH argues that it is not sufficiently clear that the response to Section II should be in the outline form contained in Part II. That the Reviewers took the lack of the outlining as a significant factor in determining MBH's score is discussed above; however, the Appeal Committee believes that it is reasonable for a bidder to connect the outline in Part II to the requirements of Part IV, “Section II” and does not believe that the RFP is so unclear in that area as to render it fundamentally unfair. It would be helpful if future RFPs made the connection more explicit by

stating that the discussion of the scope of services is to be done in the outline form contained in Part II.

### CONCLUSION

MBH has demonstrated by clear and convincing evidence that the evaluation and scoring of the proposals was arbitrary and capricious. The Committee therefore invalidates the awards made by DHHS.

Dated: 3/29/16

Michelle D. Fournier  
Michelle Fournier  
Office of Information Technology

Dated: 3/29/16

Deborah C. Friedman  
Deborah C. Friedman  
Department of Education

Dated: 3/29/16

Kathy Paquette  
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Division of Purchases

### 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 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 with 30 days of receipt of this decision.