



STATE OF MAINE  
DEPARTMENT OF ADMINISTRATIVE & FINANCIAL SERVICES  
BUREAU OF GENERAL SERVICES  
BURTON M. CROSS BUILDING  
4<sup>TH</sup> FLOOR, 77 STATE HOUSE STATION  
AUGUSTA, MAINE  
04333-0077

PAUL R. LEPAGE  
GOVERNOR

H. SAWIN MILLETT, JR  
COMMISSIONER

BETTY M. LAMOREAU  
ACTING DIRECTOR

June 10, 2011

Jay P. McCloskey, Esq.  
McCloskey, Mina & Cunniff, LLC  
27 Bellevue Avenue  
Bangor, ME 04401

Bryan M. Dench  
Skelton, Taintor & Abbott  
95 Main Street  
Auburn, ME 04210

Paul Gauvreau, DAG  
Attorney General  
#6 State House Station  
Augusta, ME 04333-0006

Re: Appeal of Award by the Department of Health and Human Services for the Family Reunification Program, RFP # 201009774 - District #6

Dear Attorneys McCloskey, Dench and Gauvreau:

I am forwarding the Final Decision of the Appeal of the Department of Health and Human Services' award of the Request for Proposal Family Reunification Program – District #6. The Panel validates 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.A. 1101, 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,

A handwritten signature in cursive script that reads "Betty M. Lamoreau".

Betty M. Lamoreau, Acting Director  
Bureau of General Services

cc: Mark Randlett, DAG  
Appeal Panelists  
Claire Austin, Department of Health and Human Services

Attachment: Decision of the Appeal Panel

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

In Re: Families United  
Appeal of Award by the Department of  
Health and Human Services for  
RFP #201009774, Family Reunification  
Program in District 6

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**Decision of Appeal Panel**

**INTRODUCTION AND BACKGROUND**

This is an appeal by Families United (“Families”) from a decision of the Department of Health and Human Services (“DHHS”) to award a contract for the implementation of a family reunification program in District 6 (Penobscot and Piscataquis Counties) to KidsPeace National Centers of New England, Inc. (“KidsPeace”). 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”). KidsPeace timely requested and was granted intervener status. The Bureau granted Families’ request for a hearing.

An Appeal Panel (“Panel”) was comprised of three members chosen from State service. An evidentiary hearing was held on May 2 and May 13, 2011, 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.

**FACTUAL BACKGROUND**

On September 28, 2010, DHHS issued a competitive Request for Proposals (“RFP”), the purpose of which was to obtain bids from qualified community-based providers to implement

DHHS' Family Reunification Program. A bidder's conference was held on November, 4, 2010 and was attended by representatives of prospective bidders, including Families and KidsPeace. Written questions from the bidder's conference were due November 12, 2010 and responses to questions submitted by that date were provided by DHHS. Seven (7) bids were received by the Division of Purchases on or before the 2:00 p.m. January 13, 2011 deadline.

An evaluation team consisting of three State workers was formed to review the bids and included the DHHS District 6 liaison, a DHHS social services program specialist, and a DHHS social worker. The team members were instructed on the review of bids and the consensus scoring model; and each member of the team signed an "Agreement and Disclosure Statement" confirming that they had no bias in favor of, or in opposition to, any of the bidders. The team reviewed and scored the proposals using a weighted evaluation criteria detailed in the RFP. The bidder who received the highest rating, that is, whose proposal represented the best value to the State, would be awarded the contract.

The RFP established the following weighted criteria for evaluating the bids: Organization Qualifications and Experience (25 points); Specifications of Work to be Performed (40 points); and Cost Proposal (35 points). In the RFP, the scoring for the Cost Proposal criterion was further broken down into two components: Price: Comparison with Lowest Bid (25 points); and Budget Forms and Budget Narrative (10 points). In scoring the proposals, the team assigned sub-scores to the other criteria.

A consensus based scoring process was used, meaning the team reviewed, but did not score, the proposals in advance. The team met to discuss the proposals and reviewed them against the RFP requirements to arrive at the consensus scores. Scores for the cost criterion were not assigned by the group, but were calculated using a standard formula that assigns the most

points to the lowest cost proposal and proportionally fewer points to higher cost proposals. Before assigning the numerical scores, the team applied a pass/fail analysis against certain RFP requirements – specifically, whether the bid complied with a 20 page limit on the budget narrative; whether 12 point Times Roman font was used; and whether the required attachments were included.

As a result of the review and scoring process, the team determined that KidsPeace was the best value bidder. Notice of the award decision was mailed on February 23, 2011. Families filed a timely appeal of the contract award and was granted its request for hearing. KidsPeace requested intervener status, which was granted on April 6, 2011.

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

The issue in this case is whether Families has met its burden of proving by clear and convincing evidence that the Department’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 team’s

actions were not arbitrary or capricious. *Central Maine Power Co. v. Waterville Urban Renewal Authority*, 281 A.2d 233, 242 (Me. 1971).

### DECISION

The Panel determines that Families has not met its burden of proving that any of the statutory criteria have been met so as to invalidate the contract award to KidsPeace.

There is no evidence of a violation of law in connection with DHHS' award in this RFP; and the panel finds that no such violation of law occurred. Further, under the circumstances of this case, the panel does not find the existence of any irregularity creating a fundamental unfairness or that the contract award by DHHS was arbitrary or capricious.

The issues raised by Families on appeal are discussed below.

**1) Assignment of Sub-scores:** Families alleged that the sub-scores used by the Review Team in scoring the proposals were improper because they were not disclosed in the RFP. Chapter 110, Section 2(A)(i) of the Rules for the Purchase of Services and Awards provides that “the request for proposal must contain at a minimum ... the evaluation criteria and relative scoring weights to be applied...” Here, the RFP contained the evaluation criteria and scoring weights, to wit: Organization Qualifications and Experience (25 points); Specifications of Work to be Performed (40 points); and Cost Proposal (35 points). In scoring the proposals the Review Team established subcategories and weights relative to the Organization Qualifications and Experience and Specifications of Work to be Performed criteria. There was nothing wrong with the Review Team acting in this manner. The evidence shows that the establishment of these subcategories and the assignment of sub-scores were done through a consensus process; and the subcategories matched the subsections for each of the criteria contained in Part IV, Sections I and II. Further, none of the sub-scores altered the overall criteria and weights contained in the

RFP. The sub-scores were applied equally to all the bidders and allowed the Review Team to score the proposals on these criteria in a more focused and consistent manner.

**2) Conflict of Interest/Bias:** Families alleged that the Review Team had a built-in conflict of interest or bias based on the previous experience of two of the three team members' prior experience with Families. Other than a vague reference to some tension between the Families and Jennifer Mosca, the District 6 liaison, there was no evidence of any specific bias or prejudice on the part of any member of the Review Team. Each team member signed an Agreement and Disclosure Statement, which identified Families as well as the other prospective bidders for this RFP, and affirmed that they had no bias, negative or positive, that would influence their evaluations. Ms. Mosca specifically testified she had a good relationship with Families and that her prior experience with the agency did not bias her review.

Further, the Panel finds no error relating to the consideration of prior contract history between Families and DHHS in District 6. The RFP specifically provided that State contract history on record would be considered in rating the proposal. RFP Part IV Section 1.3 (a).

**3) Pass/Fail Criteria:** Families alleged that the Review Team failed either to correctly or consistently apply the pass/fail criteria. Specifically, it argues that KidsPeace should have been disqualified for failing to attach a required document – that is, Rider G.

Ms. Mosca testified that the Review Team applied the pass/fail criteria by determining whether the bids met specific RFP requirements relating to page limits, font size and required attachments. Rider G was not a required attachment to this RFP. Part IV, Section IV of the RFP lists the attachments that needed to be submitted with the bids. Subsection 5 required "Signed Assurances for compliance with various State and Federal requirements" and noted in parenthesis that "A form is provided with other Proposal documents, Appendix A, titled Proposal

Cover Page and Required Forms.” Rider G is not an assurance, but rather an attachment to the standard state contract that identifies the country in which the work will be performed. There is no signature line on Rider G. By comparison, “Attachment 2: ASSURANCES” contains a signature line, is clearly an assurance relating to compliance with State and Federal requirements, and is obviously the “required attachment” referred to in Part IV, Section IV, subsection 5 of the RFP.

Even if it were a required attachment, which it is not, the Panel would consider the failure to disqualify a bidder for failure to include it insignificant. In Part III, Section 1.7 of the RFP the State reserved the right, in its sole discretion, to recognize and waive minor informalities and irregularities.

**4) Cost Scoring Formula:** Families alleged that the formula used to score costs was inherently flawed and fundamentally unfair because it rewarded any proposal that contained unrealistic and/or intentionally low estimates of costs. The formula used in this RFP, which is the standard formula used to score RFP proposal costs, assures that the lowest cost bid will receive the highest number of possible points and that higher cost bids will receive proportionally fewer points. It was applied consistently to all of the bidders in District 6 and KidsPeace, being the lowest cost bid, received the full 25 points in this subcategory.<sup>1</sup>

Further, even though Families opined that KidsPeace’s travel and supervisory costs were unrealistically low; there is no evidence in the record that KidsPeace did not, in fact, intend to limit its reimbursement for costs to the levels stated in its bid. Indeed, bidders were admonished in the RFP that their proposals should be submitted on the most favorable terms available from a price and technical standpoint; and that all bidders were expected to provide their best value

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<sup>1</sup> A maximum of 35 points was available in the cost category; 25 points for the contract price and 10 points for budget forms and narrative. KidsPeace received 7 points in the budget forms and narrative subcategory, for a total of 32 points.

pricing with the submission of the proposal. RFP, Part III, Section 6.1(c) and Part IV, Section III, subsection 1.8. Successful bidders will be held to their cost proposals in the contract.

**5) Litigation Disclosure:** Families claims that the RFP instructions about providing litigation information were ignored by KidsPeace and the Review Team. The Panel does not agree.

The RFP required that bidders “attach a list of all current litigation in which the Bidder is named and a list of all closed cases in which the Bidder paid the claimant either as part of a settlement or by decree” RFP, Part IV, Section 1.1(g). KidsPeace responded that “There have been no civil litigation matters in the past 12 months in which KidsPeace National Centers of New England is named as a defendant.” DHHS Exhibit Tab 4, KidsPeace proposal at page 2. In addition, KidsPeace attached to its proposal various “Notes to Consolidated Financial Statements” that disclosed litigation involving other KidsPeace affiliates. KidsPeace proposal at pages 121, 155 and 186. It was not unreasonable for the Review Team to determine that KidsPeace’s response satisfied the RFP. Moreover, litigation disclosure was not one of the pass/fail requirements of the RFP.

Even if KidsPeace’s disclosure of its litigation history was inadequate, which the Panel does not find, Part III, Section 1.7 of the RFP reserved the right to the State, in its sole discretion, to recognize and waive minor informalities and irregularities.<sup>2</sup>

**6) Scoring errors:** Families alleges that the Review Team improperly reduced its scores. Specifically, it claims that reductions for a failure to follow budget narrative format, for a lack of

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<sup>2</sup> Families appears to have abandoned its argument that the RFP required the disclosure of litigation history for the past ten years. In any event, the RFP does not establish such a time frame. Families assumed a 10 year disclosure period applied based on a response in the Questions and Answers provided by DHHS relating to the length of time an agency employee could be subpoenaed. See Questions and Answers, Question #11.



a formal process for the handling of flex funds, and for “no good evaluation tools” were erroneous.

Ms. Mosca testified that approximately 12 hours was spent reviewing and scoring the bids as a Team, in addition to the time each member spent individually reading the bids and the RFP. The record contains notes kept by each team member from his/her individual review, as well as notes of discussions among the team members during the consensus scoring process. DHHS Exhibit Tabs 7 and 8. Ms. Mosca testimony indicates that the Team was consistent in the manner in which it scored the bids.

**a) Budget Forms and Budget Narrative** – With regard to the deduction of points under Budget Forms and Budget Narrative, Ms. Mosca testified that the Review Team’s decision on this criterion was informed by Part IV, Section III, subsection 1.6 and Part III, Section 5.3(d) of the RFP. Subsection 1.6 required bidders to submit a brief budget narrative explaining how costs were determined and provides that the budget narrative was to be included in the narrative described in Part III, Section 5.3(d). Section 5.3(d) required bidders to submit a narrative of no more than 20 pages which was responsive to each question and instruction listed in Part IV, Proposal Content. Part IV, Section III of the RFP covers the cost proposal and required the bidders, inter alia, to submit a proposal covering the entire contract period (July 1, 2011 to June 30, 2012) including all fees necessary to comply with the contract. Part IV, Section III, subsection 1.1.3 states that “Failure to provide the requested information, or to follow the required response format, may result in exclusion of the proposal from consideration at the discretion of the Department.”

Families’ budget narrative is located at page 20 of its bid. Department Exhibit, Tab 3. It contains the title heading “SECTION III: COST PROPOSAL,” but is not specifically identified

as its budget narrative. Families' budget narrative does not state the total contract cost, nor does it state that the proposal covers the entire contract period. Detailed information explaining how costs were determined is not provided until the fourth paragraph. These factors are enough to support the Review Team's decision to deduct points for failure to follow format; and the Panel does not second guess the team's scoring decision.

**b) Flex Funds** – The RFP directed bidders to “outline a process to ensure that flexible monies (i.e., flex funds) will be immediately available to members of the treatment team, an average of \$300 per family.” DHHS Exhibit Tab 1 at page 12. Flex funds are monies used in support of activities and purchases related to family reunification. *Id.*

Families' addressed flex funds on page 7 of its proposal. DHHS Exhibit, Tab 3. There, Families stated that it makes flexible funds available and gives examples of potential uses and exclusions. It mentions the existence of open accounts with area retailers and indicates that staff can access petty cash with “appropriate documentation” to pay for minor and immediately needed items. Requests for funds considered “exceptional” require “OCFS Liaison approval.”<sup>3</sup> The Review Team determined that Families' proposal demonstrated a “lack of criteria, process” and had “no formal process + accountability” with respect to flex funds and deducted 2 points from its score. DHHS Exhibit Tab 8 at page 4. It was within the Review Team's judgment to make such a determination on the basis of Families' proposal; and, again, the Panel does not second guess the team's scoring decision.

**c) Evaluation Tools/Measuring Outcomes** – The Review Team deducted 4 points from Families' score under Measuring Outcomes, noting that its proposal had “No good evaluation tools – no specific tool beyond tracking and records.” DHHS Exhibit Tab 8 at page 4. Families

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<sup>3</sup> Families also mentions flex funds on page 10 of its proposal where it states “We have used flexible funds to help pay for materials, memberships and field trips.”

argues that its proposal detailed the evaluation tool it would use – that is, the *North Carolina Family Assessment Scale for Reunification-R* (NCFAS-R).

Ms. Mosca testified that Families’ failure to follow the RFP format factored into the Review Team’s decision to deduct 4 points in this area. In the RFP, Measuring Outcomes falls under Part IV, Section II subsection 3.b. Subsection 3.b. is further broken down into: i.) Measuring and Verification; and ii.) Evaluating Program Effectiveness. However, Families discussed and described the NCFAS-R tool in its proposal in the section correlating to Part IV, Section II, subsection 3.a. of the RFP, Performance Indicators – Desired Consumer Outcomes.<sup>4</sup> It was within the Review Team’s judgment to reduce Families’ score for this reason; and, again, the Panel does not second guess the team’s scoring decision.

**7) Failure to sign evaluation forms:** Families alleges that the proposal evaluation forms were not signed by the person recording them and that the scoring pages failed to indentify either the bidder or the district. The Panel does not find error in either regard.

First, there is nothing in the purchasing laws or the Division of Purchases rules that require the proposal evaluation forms to have been signed. Chapter 110, Section 3.A.iii of the Division’s rules requires that written records be kept by each person reviewing or ranking proposals; and there are written notes of each of the Review Team members in the record for this RFP satisfying this requirement. See, DHHS Exhibit Tabs 8 and 9.

Second, the evidence shows that the proposal evaluation forms in the record correspond to the correct bidders. Ms. Mosca testified that she prepared all of the evaluation forms and she identified the handwriting on those forms as hers. She stated that the forms were bound together when she received them, that she kept them together for each bidder, that the ReviewTeam

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<sup>4</sup> In contrast, KidsPeace described its measuring tools in the section of its bid correlating to Part IV, Section II subsection 3.b of the RFP.

reviewed the proposals one at a time, and that the forms were bound when she returned them to DHHS. Additionally, the scores on the summary page match with the scores contained on the pages for each of the scoring criteria; and the dates on the summary page matches the dates on the pages for each of the scoring criteria.

**8) Michigan Model:** Finally, although not argued in its written closing, Families alleged during the hearing that KidsPeace failed to use the so-called “Michigan Model” as required by the RFP. However, the testimony of the DHHS witnesses shows that the RFP did not require that the Michigan Model, specifically, be used for the family reunification program. Rather, Maine’s family reunification program, although derived from the Michigan Model, has been modified to fit Maine families. Bidders were asked to describe how they would implement the program services as outlined in the RFP. Families wrongfully assumed that the Michigan Model was required.

Accordingly, the Panel validates the contract award to KidsPeace.

**APPEAL PANEL ON CONTRACT AWARD**

Dated: 6/9/2011

  
Michael Wenzel, Acting Director  
Division of Purchases

Dated: \_\_\_\_\_

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Tracy Poulin,  
Department of Public Safety

Dated: \_\_\_\_\_

\_\_\_\_\_  
Christopher Batson  
Maine Revenue Services

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**APPEAL PANEL ON CONTRACT AWARD**

Dated: \_\_\_\_\_

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Michael Wenzel, Acting Director  
Division of Purchases

Dated: June 9, 2011

Tracy Poulin  
Tracy Poulin,  
Department of Public Safety

Dated: \_\_\_\_\_

\_\_\_\_\_  
Christopher Batson  
Maine Revenue Services

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Dated: \_\_\_\_\_

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Michael Wenzel, Acting Director  
Division of Purchases

Dated: \_\_\_\_\_

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Tracy Poulin,  
Department of Public Safety

Dated: June 9, 2011

  
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Christopher Batson  
Maine Revenue Services

### **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.