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June 10, 2011

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Re: Appeal of Award by the Department of Health and Human Services for the Family Reunification Program, RFP # 201009774 - District #7

Dear Attorneys McCloskey, Stevens 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 for the Family Reunification Program – District #7. 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,

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

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 Spurwink. Written questions from the bidder's conference were due November 12, 2010 and responses to questions submitted by that date were provided by DHHS. Five (5) 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 a DHHS Office of Child and Family Services Permanency Supervisor who had previous experience working with Families. 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.

As a result of the review and scoring process, the team determined that Spurwink 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. Spurwink requested intervener status, which was granted on March 23, 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 Spurwink.

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 one of the three team member's prior experience with Families. However, other than a general allegation that it is improper for a bid to be evaluated by someone with prior knowledge of one or more of the bidders, there is 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 affirming that they had no bias, negative or positive, that would influence their evaluations. Moreover, the one team member identified by Families as having prior experience with the agency, Nick Pappas, specifically testified that he did not have any bias or prejudice concerning Families and that the team was "very clinical" in its review of the bids. He described the relationship between Families and DHHS as being "above average."

Further, the Panel finds no error relating to the consideration of prior contract history between Families and DHHS in District 7. 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: 1) that Spurwink should have been disqualified for failing to attach a required document – that is, Rider G; and 2) Spurwink's bid included budget forms that were either inaccurate or incomplete.

First, 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.

Second, with regard to Spurwink’s budget forms, the evidence in the record shows that those forms were, in fact, accurate and complete. Although Budget Form 2a (In Kind Resource Donation) was left blank, Spurwink’s Chief Financial Officer testified that there was no easy way to determine specific values for in-kind services for inclusion in the form and, therefore, Spurwink instead included a description of those services in its budget narrative. He also explained the values contained in forms 4 and 4a. Mr. Pappas testified that the Review Team reviewed Spurwink’s budget forms and did not have any concerns regarding their accuracy or completeness; and the Panel does not substitute its judgment for that of the Review Team in this regard.

Further, even if Spurwink’s budget forms were somehow inadequate, 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.

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 7.

Further, neither Spurwink nor Families received the highest number of points in the cost category – it was KidsPeace. Nevertheless, Families argues that travel and supervision costs bid by KidsPeace were unrealistically low and that this fact influenced the cost scoring for the other bidders. However, 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 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. The Panel does not find any error in this regard.

5) Litigation Disclosure: Families claims that the RFP instructions about providing litigation information were ignored by Spurwink and the Review Team. Families also claims its score was unfairly lowered because it disclosed on-going litigation. The Panel does not agree.

The RFP required bidders to “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).¹ Spurwink attached a list of litigation in

¹ 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.

which it was involved over the last five years. DHHS Exhibit, Tab 4, pages 139-141, thus satisfying the requirements of the RFP.

Further, even if Spurwink's disclosure of its litigation history was inadequate, litigation disclosure was not one of the pass/fail requirements of the RFP; and, in any event, 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.

With regard to Families claim that its score was lowered because of its on-going litigation, Mr. Pappas' testimony shows that the pending litigation was noted on the evaluation forms because it was an item discussed during the team review. However, the team did not take away or add points, per se. Rather, it assigned scores based on where they believed the bids fell on a continuum, taking into consideration the bidder's responsiveness to the RFP. In addition, Mr. Pappas stated that the team did not mark Families' score down because of the pending litigation. Finally, even if the Families score was reduced on this basis, the Panel does not substitute its judgment for that of the Review Team.

6) Improper reduction in score based on failure to provide information not required by the RFP: Families alleges its score was reduced because it had "no direct substance abuse experience," but that this was not a requirement of the RFP. First, as found above, the record establishes that the Review Team noted issues it discussed on the evaluation forms but did not deduct points for those items per se. Instead, the team assigned scores based on where the bids fell on a continuum. And, even if Families score was reduced on this basis, the Panel does not substitute its judgment for that of the Review Team.

In addition, Mr. Pappas testified that issues concerning substance abuse were relevant to the team's review because substance abuse can affect the potential success of a family

reunification. According to Mr. Pappas, Washington and Hancock Counties have among the highest levels of substance abuse problems in the State. Even Families' witness, Mary Wegrzyn, acknowledged that substance abuse is an issue in family reunification. Thus, it was reasonable for the Review Team to consider experience with substance abuse issues in evaluating bids responding to this RFP.

7) Failure to sign evaluation forms: Although not raised in its closing argument, Families alleged during the hearing 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 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. Mr. Pappas' testimony confirmed that all the scores and comments on the evaluation forms correspond with the scores and comments assigned by the Review Team. Further, the bidder and the District service area are both identified on the top of each page of the evaluation forms. See, DHHS Exhibit Tabs 8 and 9


8) Michigan Model: Finally, although not argued in its written closing, Families alleged during the hearing that Spurwink 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 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 Spurwink.

APPEAL PANEL ON CONTRACT AWARD

Dated: 6/9/2014



Michael Wenzel, Acting Director
Division of Purchases

Dated: _____

Tracy Poulin,
Department of Public Safety

Dated: _____

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.

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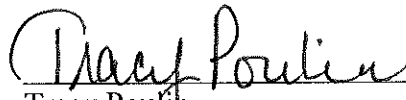
Accordingly, the Panel validates the contract award to Spurwink.

APPEAL PANEL ON CONTRACT AWARD

Dated: _____

Michael Wenzel, Acting Director
Division of Purchases

Dated: June 9, 2011



Tracy Poulin,
Department of Public Safety

Dated: _____

Christopher Batson
Maine Revenue Services

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Dated: _____

Michael Wenzel, Acting Director
Division of Purchases

Dated: _____

Tracy Poulin,
Department of Public Safety

Dated: June 9, 2011



Christopher Batson
Maine Revenue Services

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