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April 26, 2010

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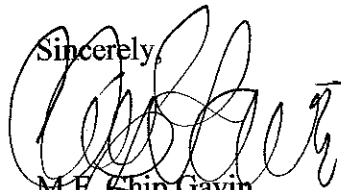
Re: Appeal of Award, Department of Health and Human Services, RFP #200904435
Adult Mental Health Warm Line Services

Dear Attorneys DeTroy, Witham and Gauvreau:

I am forwarding the Final Decision of the Appeal Panel in the above-referenced matter. 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.

Sincerely,



M.F. Chip Gavin
Director, Bureau of General Services

cc: William Laubenstein, AAG
Appeal Panelists

Attachment: Decision of the Appeal Panel

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

In the Matter of)	
Amistad, Inc.)	
Appeal of Award by)	
Department of Health and Human Services)	
Office of Adult Mental Health Services)	
)	Decision of Appeal Panel
)	
RFP No. 200904435)	

INTRODUCTION AND PROCEDURAL BACKGROUND

This is an appeal by Amistad, Inc. (“Amistad”) from a decision of the Department of Health and Human Services, Office of Adult Mental Health Services (“Department” or “OAMHS”) awarding a contract for Adult Mental Health Warm Line Services (“Warm Line” or “Program”) pursuant to a Request for Proposals issued in June 2009. The appeal is pursuant to 5 M. R. S. A. § 1825-E and Chapter 120 of the Rules of the Bureau of General Services, Department of Administrative and Financial Services (“Rules”). The Bureau of General Services granted the request of Amistad for a hearing. The Bureau granted intervenor status to the successful bidder, Sweetser (“Sweetser”).

The Appeal Panel (“Panel”) was comprised of three members chosen from state service. A presiding officer conducted the hearing but did not have a vote in the decision. A hearing was held on April 9, 2010, at which the testimony of witnesses and documentary evidence was presented.

After reviewing the arguments and the evidence presented by the parties, the Panel makes the following findings.

FINDINGS OF FACT

The Department issued a Request for Proposals (“RFP”) in June 2009 and provided responses to bidders’ questions posed in writing and at a bidders’ conference on July 17, 2009. The RFP required bidders to submit proposals by 2:00 pm, September 16, 2009. The RFP requested proposals for the “establishment/delivery of a recovery-based, peer operated system of Warm Lines (sic) that is available statewide and directed toward a target audience of adults who utilize mental health services.” The contract for the Warm Line would be for a six-month period with an option for annual renewal of up to two additional years.

The Department stated in the RFP that the Program must be peer run and managed and outlined the philosophy underlying the RFP. This philosophy stressed integrated care and the importance of an interactive conversation rather than a clinical assessment. The RFP noted the reciprocal nature of Intentional Peer Support (“IPS” relationships and devoted a substantial part of one page to a description of IPS. The RFP further noted the importance in the IPS model of understanding one’s “worldview and referenced a statement of a leading proponent of IPS that “using peer support as a tool, people are able to acquire new knowledge about themselves and others, and develop new possibilities for hope, healing and health that would otherwise not have been achievable.”

Part II of the RFP, Scope of Work—Specifications of Work, set forth in detail the Department’s expectations with regard to the Program. These expectations included: statewide accessibility; staff and program director trained and certified as Certified Intentional Peer Support Specialists; payment of a living wage; opportunity for education about recover, building connections, mutual responsibility and divergent worldviews;

and, “commitment to recovery and growth by demonstrating willingness to challenge self, others and the relationship.” Under Scope of Work, the Department advised bidders to pay particular attention to “the evaluation plan for implementation of philosophical and programmatic items that focus on community integration, integration of Intentional Peer Support values, and individual growth and recovery.” The Department included with the RFP a bibliography and advised bidders to become familiar with these materials “as they are integral to the services being provided.” Two of the items listed in the bibliography specifically addressed IPS.

The RFP stated that bids would be evaluated for the ability to meet the requirements identified in the RFP and would be scored: (1) Organization Qualifications and Experience--30 points; (2) Scope of Work—Specifications of Work to be Performed--45 points; (3) Cost, Lowest Bid--15 points; and (4) Cost, including narrative material and supporting documentation--10 points.

The Department received two proposals. The Evaluation Team prepared score sheets for each bidder. The record contains consensus notes and notes of individual evaluators. A summary of the scoring submitted by the Department shows that Sweetser received a total score of 93, with 30 points awarded for Organization Qualifications /Experience, 40 points for Scope of Work and 23 points for cost. Amistad received a total score of 83.3, with 25 points awarded for Organization Qualifications/Experience, 35 points awarded for Scope of Work and 23.3 points awarded for cost.

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.A. §§ 1825-D and 1825-E and Chapter 120 of the Rules for Appeals of Contract and Grant Awards. The clear and convincing standard requires the Committee be convinced that the truth of the assertions on appeal is highly probable, as opposed to more probable as not. *Pine Tree Legal Assistance, Inc. v. Department of Human Servs.*, 655 A.2d 1260, 1264 (Me. 1995). The Panel 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. Discussion. The Panel has determined that Amistad has not met its burden of proving by clear and convincing evidence that the award of the contract was in violation of law, contained irregularities creating fundamental unfairness or was arbitrary or capricious.

A. Disproportionate weight given to IPS. In its request for an appeal hearing, and in subsequent submissions and oral argument, Amistad claimed that the Evaluation Team placed disproportionate and inappropriate weight on the IPS model and did not unambiguously state in the RFP that proposals would be evaluated on the basis of a bidder's ability to provide IPS. Amistad argued that this was fundamentally unfair. In addition, Amistad claimed that it was arbitrary and capricious for the Evaluation Team not to give due credit for a proposal that incorporated peer support and recovery but was not specifically labeled IPS.

The Department responded that a careful reading of the RFP reveals that IPS was at the core of the program for which it was seeking proposals. In support of its position, the Department pointed to the statement of philosophy, the specific references to IPS, the bulleted Warm Line program scope of work and the bibliography. The Department noted that at no time did any bidder ask questions with regard to the model the Department was seeking to be implemented.

After careful consideration, the Panel determined that, read as a whole, the RFP made it reasonably clear that the Department was seeking proposals for a program that would implement IPS. The Panel notes, and the Department acknowledged, that a better approach would have been to state specifically that the Department was seeking proposals for an IPS model program.

B. Goals and Indicators. Amistad alleged the Evaluation Team ignored the requirement in State law and in the RFP that the ensuing contract must be performance based and that it was arbitrary or capricious for the Panel not to give sufficient attention to this requirement in scoring the proposals. In particular, Amistad pointed out the highly

successful peer based program developed by Amistad and the sophisticated evaluation process it has developed.

The Department responded that the RFP set forth three Goals and Indicators and that the proposals were evaluated on the basis of whether or not the bidder had demonstrated that its program was designed to meet these goals. No extra credit was to be given to a bidder that set forth additional Goals.

The record shows that the Evaluation Team did give consideration to Goals and Indicators, noted that Sweetser was deficient in this regard and that Amistad presented a good proposal on Goals and Indicators. Nevertheless, it is the province of the Evaluation Team and not the Appeal Panel to evaluate the proposals and the Appeal Panel will not undertake to second guess the Evaluation Team on how it scored Goals and Indicators in the context of Scope of Work.

Accordingly, the Panel has determined that the evaluation of Goals and Indicators was not in violation of law and was not arbitrary or capricious.

C. Qualifications and Experience. Amistad claimed that the scoring of Organizational Qualifications and Experience was arbitrary or capricious. It pointed out that Amistad created and has operated for four years a state-wide Warm Line program and that its staff is certified in IPS. Notwithstanding, the Evaluation Team awarded Amistad only 25 of 30 available points and awarded Sweetser the full 30, a discrepancy, Amistad argues, that can only be attributed to the undue emphasis placed on IPS, a factor noted positively in the scoring summary for Sweetser and negatively in the scoring summary for Amistad.

The record shows that Sweetser has operated a local Warm Line program and that the staff at Sweetser had developed the Amistad Warm Line program while employed by or under contract to Amistad. Again, it is not for the Panel to re-evaluate the proposals and the record includes the justification for the apparent scoring disparity. Further, given the Panel's determination that the RFP reasonably put bidders on notice that the Department was seeking an IPS model program, it was not arbitrary or capricious for the Evaluation Team to score differently Qualifications and Experience.

D. Total Cost and Budget. Amistad claimed that a review of the budget proposal submitted by Sweetser shows that it is inadequate to support requirements for IPS certification, staff debriefing and supervision. The failure of the Evaluation Team to take this into account was a violation of law, fundamentally unfair and arbitrary or capricious.

The Department responded that the Sweetser proposal set forth the basis for its budgetary submission and that in any contract entered into with Sweetser would obligate Sweetser to provide the required services at the price contained in its proposal.

The Panel is not persuaded that the record shows that there was a violation of law or that the evaluation of the cost proposals was fundamentally unfair or arbitrary or capricious.

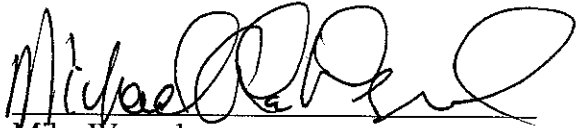
CONCLUSION

Amistad has not established by clear and convincing evidence that the awarding of the contract for Adult Mental Health Warm Line Services to Sweetser was in violation of law, contained irregularities that created a fundamental unfairness, or was

arbitrary or capricious. The Panel therefore validates the award made by the Office of Adult Mental Health Services.

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Dated: 4/23/2010


Mike Wenzel
Division of Purchases

Dated: _____

Paul Blood
Department of Environmental Protection

Dated: _____

Peter Beringer
Department of Conservation

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.

Dated: _____

Mike Wenzel
Division of Purchases

Dated: 4.23.10

Paul Blood
Department of Environmental Protection

Dated: _____

Peter Beringer
Department of Conservation

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Post-it® Fax Note 7671		Date <u>4.23.10</u>	# of pages <u>1</u>
To <u>Bill Lashbaugh</u>	From <u>Paul Blood</u>		
Co./Dept. <u>REC office</u>	Co. <u>ME DEP</u>		
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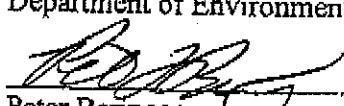
Dated: _____

Mike Wenzel
Division of Purchases

Dated: _____

Paul Blood
Department of Environmental Protection

Dated: 4/23/2010



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