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HAND DELIVERY

June 26, 2015

Administrative Determination Review Committee (HHN)
Ms. Shanin Brown, Coordinator
Committee on Health and Human Needs
Courthouse, Rm. 105
901 North Ninth Street
Milwaukee, WI 53233

**Re: Community Relations-Social Development Commission v.
Milwaukee County Department of Health and Human Services
Ordinance Chapter 110 Appeal No. 15-444**

Dear Ms. Brown:

The Milwaukee County Office of Corporation Counsel, on behalf of the Milwaukee County Department of Health and Human Services (DHHS), submits this position statement in support of the Request for Proposals (RFP) process and determination resulting in a *Notice of Intent to Award* the Federal Fiscal Year (FFY) 2015-2016 Wisconsin Home Energy Assistance Program contract to Community Advocates and UMOS.

INTRODUCTION

Presently before this Committee is an appeal by the Community Relations-Social Development Commission (SDC) of DHHS's April 29, 2015 *Notice of Intent to Award Contract* determination based upon scoring by four (4) independent, experienced proposal scoring panelists. (Record 29 at p. 242.) SDC seeks administrative review of that determination in its May 15, 2015 appeal notice. (Record 34 at p. 263.) SDC's appeal letter does not provide any clear or specific legal or factual arguments as to why it believes DHHS's decision is erroneous and should be set aside. Milwaukee County DHHS respectfully requests that this committee affirm the department's determination and quash SDC's appeal as DHHS kept within its jurisdiction, and made findings that were not contrary to law, arbitrary, oppressive, or unreasonable, and were supported by substantial evidence.

BACKGROUND

RFP Introductory Materials

On February 13, 2015, DHHS issued a Request for Proposals (RFP) for the FFY 2015-2016 Wisconsin Home Energy Assistance Program (WHEAP) for Milwaukee County. The RFP introductory paperwork welcomed prospective new bidders to participate in the RFP process, advised of website availability for proposal materials, provided notice of a February 25, 2015 deadline for submissions of questions for a March 2, 2015 pre-proposal question and answer

(Q&A) session on proposal guidelines, and highlighted the date and time for final proposal submissions. (Record 1 at p. 2.)

RFP Section 3: Proposal Selection and Award Process

Program requirements are set forth in Section 5 of the RFP, which includes a description of WHEAP as the program that “administers the federally funded Low Income Home Energy Assistance Program (LIHEAP) and Public Benefits (PB) Energy Assistance Program.” (Record 1 at p. 90.) Section 5 also explains that the Division of Energy Services (DES) contracts with Milwaukee County DHHS for WHEAP’s local administration and delivery of services impacting over 64,000 low-income Milwaukee County households with benefits and crisis services. (Record 1 at p. 91.)

Section 3 is titled, “Proposal Selection and Award Process.” Section 3.1 describes the scoring and selection process as involving review by the RFP manager and/or his representative to determine that: (1) technical requirements are met; (2) the proposal contains completed, required forms; and (3) submittal requirements are met (Record 1 at p. 16). The Section also describes that accepted Proposals are reviewed by a Review and Scoring Panel (consisting of community experts, consumers, and county staff) and scored against the stated criteria in Section 3.2 of the RFP. (Record 1 at p. 16.) The RFP makes clear that the review and scoring panel is the sole determiner of the points to be assigned. (Record 1 at p. 17.)

This RFP review panel involved a diverse, experienced group in all respects -- gender (1 man, 3 women), ethnicity (1 African-American, 3 Caucasians); age (3 reviewers over age 40); and background (both county and non-county/community). (Record 13 at p. 165.) All panel members are knowledgeable of the community. All panel members are knowledgeable of direct service and administrative requirements. All are experienced in the RFP process and participate in the Milwaukee County Energy Assistance Steering Committee. (Record 13 at p. 165.) Notably, the RFP review panel did not include any member of the DHHS Management Services Division team, the DHHS contract coordinator for the Energy Assistance Program, or any employee or board member of the 4 bidding agencies.

RFP Section 4: Overview of Proposal Review Process, Review Scoring Criteria

What is important to understand up front is how the scoring process occurs. The proposal award is based upon submitted data (scored by data/objective formulas) and technical components (scored by the review panel based on subjective reviewer judgment).

Data Scoring

When DHHS first issued RFPs for this contract in approximately 2007, it undertook a review of the RFP process used by its divisions and revised departmental policies to enhance uniformity and ensure objectivity. (See Affidavit of DHHS Director of Contract Administration Dennis Buesing, attached.) Proposers’ scores in certain areas are objectively calculated using data from the proposer’s budget, staff roster, and staff requirement submissions. Scores are therefore based on how well the proposers’ submitted data satisfies predetermined thresholds for the

particular category (Record 17 at p. 179; Record 19 at p. 186; Record 21 at p. 193; Record 23 at p. 206; Record 25 at p. 216; Record 27 at p. 229). Again, these categories are not scored by the review panel. Here are the categories scored based on data scoring:

- Staffing levels
- Staffing diversity
- Training opportunities
- Administration
- Budget Comparison

Review Panel Scoring

The review panel must score proposals against published criteria per Section 4, Part 4, Paragraph II, A and D of the RFP. (Record 1 at p. 82-83.) Scoring guidelines are contained in Section 4, Part 4, Paragraph III (Record 1 at p. 83). A major objective of the review process is reliability, so that the rating system consistently reaches the same conclusion each time in repeated observations of the same proposal. (Record 14 at p. 166.) In other words, the same standard is used regardless of the weighted criteria. This methodology is not unique to this RFP. Indeed, all DHHS purchase of service contract proposals use this same objective criteria for evaluation of these 7 categories. And it is the same methodology used in the last 2 RFPs that awarded the contracts to SDC.

Section III criteria already contains a weight or percentage when the panel members begin their review. The total weight of all criteria equals 100%. (Record 1 at p. 86.) The reviewer must assign a score from 0 to 5 (Record 14 at p. 166) for each weighted category to ensure quality, value, and experience are measured in the same manner as the score derived from data, as described above. Here are the pre-weighted categories that the review panel must score from 1 to 5 (Record at 1 at pp. 83-86):

- Administrative Ability (12%)
- Budget Justification (13%)
- Cultural Diversity and Cultural Competence (9%)
- Previous Experience (13%)
- Outcomes and Quality Assurance (13%)
- Service Plan and Delivery (28%)
- Staffing Plan (12%)

Total Scores

As required by Section 4, Part 4, Paragraph III of the RFP, proposals were ranked according to their total percentage allotment. (Record 1 at p. 86.) Based on that calculation, SDC did not score either first or second in any zone for which there were 3 or more proposers, or first in any zone for which there were only 2 proposers. (Record 15 at p. 174.) Perhaps most telling is that SDC bid for selection in every zone despite its inability to service constituents in each zone. Its plan for citizens in zones 3 and 4 is for them to apply in zones 1, 2, or 6. Its plan for citizens in

zone 5 is to apply in zone 6. Its zone 2 facility lease expires in December 2015. (Record 36 at p. 267.)

ARGUMENT

Chapter 110 Committee Limited to Record Review

This Committee's review is restricted to the County record, which forms the only evidence before it. MCO § 110.09. In undertaking its review, the Committee is to apply the following 4-part test: (1) did the department keep within its jurisdiction; (2) did the department act according to law; (3) was the action of the department arbitrary, oppressive, or unreasonable, representing its will and not its judgment; and (4) is the evidence such that the department might reasonably make the determination in question. There is a "presumption that the [department] acted according to law and the official decision is correct." *State ex re. Ruthenberg v. Annuity and Pension Bd. of City of Milwaukee*, 89 Wis.2d 463, 473, 278 N.W.2d 835, 840 (1979) (citations omitted).

SDC's Appeal: Scoring

In its May 15, 2015 letter, SDC stated its grounds for appeal in only a generic manner, listing a litany of grievances, but no specifics about how the RFP is deficient. (Record 34.) It claims generally that the Proposal Selection and Award Process (RFP Section 3) and the Overview of Proposal Review Process, Review and Scoring Criteria (RFP Section 4, Part 4) were not adhered to in that SDC's proposal was not properly evaluated against the review and scoring criteria as required by RFP Section 3.2 for the review panel scoring categories. It asserts with no elaboration that the determination of points was not properly assigned for various sections of SDC's proposal as provided in RFP Section 3.1. (Record 34.) It asserts, with no specifics, that SDC's proposal was not properly rated by the review panel per RFP Section 4, Part 4, Paragraph IIA-G. (Record 34.)

Section 3.6 describes the protest and appeals process. In particular, it states: "Subjective interpretations by the reviewers are not subject to protest or appeal." (Record 1 at p. 18.) It also states that: "The appeal must be specific as possible and should identify deviations from published criteria in the selection process or the procedures outlined in these RFP instructions that are alleged to have been violated." (Record 1 at p. 18.) Section 3.2 of the RFP explains that the review and scoring criteria for proposals will be evaluated per the process and criteria detailed in Section 4, part 4, titled, "technical requirements". (Record 1 at p. 17.) As explained previously, the criteria is weighted based upon a procedure developed nearly a decade ago by DHHS to ensure uniformity and quality in the scoring process. (*See* Buesing Affidavit, attached.)

At no time did SDC raise any issues of significant ambiguity, error, conflict, discrepancy, omission, or other deficiency prior to the question submission deadline as required by the RFP . (Record 1 at 9.) Indeed, SDC noted "not applicable" on its *Statement of Deviations and Exceptions Form* (Record 39 at p. 115), attached to its proposal. Here is the language from the RFP on that point:

DEVIATIONS AND EXCEPTIONS

Submission of a proposal shall be deemed as certification of compliance with all terms and conditions outlined in the RFP **unless clearly stated otherwise in the attached “Statement of Deviations and Exceptions”** (see Appendices). (emphasis supplied) The DHHS reserves the right to reject or waive disclosed deviations and exceptions.

Deviations and exceptions from original text, terms, conditions, or specifications shall be described fully, on the attached “Statement of Deviations and Exceptions” (see Appendices) and attached to the Cover Letter (item 2). In the absence of such statement, the Proposal shall be accepted as in strict compliance with all terms, conditions, and specifications and the Proposers shall be held liable.

(Record 1 at p. 21.) Additionally, if a bidder submits inaccurate budgetary information, that is on the bidder. Per the RFP's bolded terms: **“The Proposer is responsible for any Proposal inaccuracies, including errors in the budget and any best and final offer (if applicable).”** (Record 1 at p. 17.)

SDC's Appeal: Q&A

SDC claims that it sought “reasonable and appropriate clarification for an important aspect of the RFP” but did not receive a responsive answer, to its alleged disadvantage. SDC does not state the particular question at issue, but DHHS's compilation of the record indicates that it involves the question in Record 12 -- why DHHS assigned particular dollar amounts to certain zones. (Record 12 at p. 163.) However, that question inquires of a subject matter irrelevant to the budget submission – DHHS's reasoning for setting certain budget amounts.¹

As way of background, after the bids were scored, DHHS determined that no combination of proposal awards would fit within available funds. (See Affidavit of Diane Gallegos Zettelmeier.) DHHS therefore requested new budgets from each proposer, based on the amount of funding between crisis, outreach, and operations dollars. That did not re-open the question and answer period², but Milwaukee County did allow technical questions about that revised budget submission.³

Specifically, on April 22, 2015, SDC called and spoke to DHHS staff about why DHHS assigned particular dollar amounts to certain zones. That same day, DHHS responded by email requiring that the question be put in writing so *if* it involved an allowable question, *then* any answer

¹ An acceptable question relevant to the budget submission would have been for instance, “are you aware that there's a different unit price for each zone” to alert DHHS to a potential math error. (See Affidavit of Diane Gallegos Zettelmeier.)

² Before the pre-proposal conference, written questions were accepted until 1:00 p.m. on March 2, 2015. After the pre-proposal conference, questions were accepted until noon on March 4, 2015. (Record 1 at p. 4.)

³ Examples of technical questions would be, where to place an item on a form, clarifying a program or service description. (See Affidavit of Diane Gallegos Zettelmeier.)

could be provided to all proposers. The nature of the question deemed whether DHHS would provide an answer not the mere asking of the question itself. Here is the email exchange:

I am going to have to ask you to put your question in writing since it seems to fall out of the range of “technical assistance” in resubmitting the budgets. Since the RFP is still open, I will have to have the question reviewed before providing an answer to all parties.

(Record 12 at p. 163). Soon thereafter SDC submitted this emailed question:

Based on your funding amounts per zone, and the number of applications expected to be collected in each zone, there is a huge discrepancy in the funds received per application. Can you please explain the rationale behind the determination of the funding levels for each zone.

(Record 12 at p. 163.) Since DHHS determined that the question did not address a technical budget issue, it did not provide a response. (*See* Affidavit of Diane Gallegos Zettelmeier, attached.) But it makes no difference. The bottom line is that the question did not impact the outcome of the scores for SDC or any other provider since it did not pertain to the budget submission itself. It neither disadvantaged SDC nor advantaged Community Advocates, UMOS, or ESI.

SDC Appeal: Arbitrary, Oppressive, Unreasonable

SDC also claims that the determination of the department regarding the notice of intent to award was arbitrary, oppressive, and unreasonable representing the will of the department and not its judgment and unreasonable based on the evidence. (Record 34.) The County will analyze each factor to show that the proposal scoring panelists kept within their jurisdiction, and that their findings were not contrary to law, arbitrary or oppressive, and were supported by substantial evidence.

I. THE RFP REVIEW PANEL KEPT WITHIN THEIR JURISDICTION.

All care and services purchased by DHHS must meet the State Department of Health Services (DHS) standards and be written in accordance with DHS promulgated rules and established procedures. *See* Wis. Stat. section 46.036(2). Additionally, Milwaukee County Ordinance Section 46.09(1) authorizes DHHS⁴ to enter into the purchase of human services⁵ from nongovernmental vendors and provides that contract amounts proposed for award be submitted to the appropriate county board committee for review and recommendation. *Id.* “No contract or contract adjustment . . . shall take effect until approved by resolution of the county board.” *Id.*

⁴ MCGO 46.09(2)(a) defines “Department” as the department of human services. Under (b), “provider” means a “nongovernmental public or private agency or proprietary organization furnishing the human services being contractually purchased.”

⁵ MCGO 46.09(2)(c)(1) defines “Human Services” as “[t]he care or treatment services the department of human services is authorized by statute to provide or purchase. . . .”

Once that process is finalized, DHHS may award the contract. Thus, at all times, DHHS had jurisdiction over this RFP process.

The Milwaukee County Ordinances do not require an RFP for these contracts. DHHS instituted an RFP process in approximately 2007 after the County's Audit Division recommended it to enhance and expand contracting competition and diversity. (*See Buesing Affidavit, attached.*)

II. THE RFP REVIEW PANEL ACTED ACCORDING TO LAW.

MCGO 46.036(2) requires only that contracts for human services be approved by the appropriate Milwaukee County Board committee, and ultimately, the Board of Supervisors. In such a circumstance, the only option available is for the committee/Board to enjoin the department from awarding the contract. The department may then re-RFP. It is also possible that the County Executive could execute a vendor contract subject to the County Board's review and approval.

As set forth previously, in 2007, DHHS changed its procedure of simply issuing a contract for energy assistance to issuing an RFP. That change occurred at the recommendation of Audit to ensure a fair, competitive, and quality proposal process. (*See Buesing Affidavit, attached.*)

And DHHS acted according to law here in following that RFP process. It issued an RFP on February 13, 2015 to open the proposal process. (Record 1 at p. 1.) Issuance means posting to the Milwaukee County's web portal. (*See Buesing Affidavit attached.*) Interested parties are notified of the RFP by an emailed letter sent out on E-notify, so that any person can sign up to receive notification of RFP posting. (*See Buesing Affidavit, attached.*) The RFP process provides notice of all deadlines, including pre-and post-conference question submission deadlines, the date of the pre-proposal conference, the date and time that final proposals are due. (Record 1 at p. 4.) The RFP provides details on the scoring process (Record 1 at p. 83.)

DHHS acted according to law in following the requirements of the RFP and handling this RFP just as it does for any other RFP. Examples of not acting according to law would be deviating from the process by responding to a proposer's question after expiration of the Q&A period, or providing a response to one provider and not the pool of proposers. DHHS did not deviate from process here.

An arbitrary action or decision is one that is "either so unreasonable as to be without a rational basis, or one that is the result of unconsidered, willful or irrational choice of conduct—a decision that has abandoned the 'sifting and winnowing' process so essential to reasoned and reasonable decision making." *Glacier*, 221 Wis. 2d at 369-70 (quoting *Nelson Bros. Furniture Corp. v. Dep't of Revenue*, 152 Wis. 2d 746, 757, 449 N.W.2d 328, 332 (Ct. App. 1989)).

Applying these principles to the present case, SDC's appeal fails to show that DHHS acted in an arbitrary or unreasonable manner by somehow not following the RFP process. The RFP process is a mathematical process incorporating both objective and subjective review used now for nearly a decade to ensure fairness and uniformity in scoring. The review panel followed appropriate instructions in the RFP in using their judgment and experience in scoring under the 7

relevant categories. SDC's failure to reference with any specificity any scoring element as deficient confirms the process is reasonable and based on sound measures.

III. THE RFP REVIEW PANEL'S DECISION WAS NOT ARBITRARY, OPPRESSIVE OR UNREASONABLE, AND THE EVIDENCE SUPPORTS THE NOTICE OF INTENT TO AWARD DECISION.

The third factor, whether the department's decision was arbitrary, oppressive, or unreasonable and represented its will and not its judgment, is controlled by the fourth factor: whether the evidence was such that it might reasonably make the order or determination in question. See *State ex rel. Harris v. Annuity and Pension Bd., Emp. Ret. Sys. of City of Milwaukee*, 87 Wis. 2d 646, 652, 275 N.W.2d 668 (1979). "The question is one of the sufficiency of the evidence." *Id.* The test is whether the evidence reasonably supports the decision. *Id.*

To reach this determination, the Chapter 110 Committee is to examine whether the RFP and evidence therein on which the scorers relied was sufficiently reasonable to support the decision made. *Id.* In this review, the committee is limited to the record on appeal, and the allegations in the appeal cannot add facts to the record. *State ex rel. Irby v. Israel*, 95 Wis. 2d 697, 703, 291 N.W.2d 643, 646 (Ct. App. 1980).

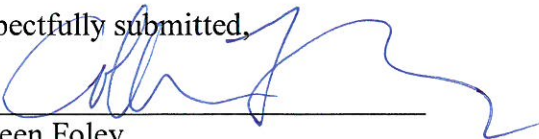
The evidence in the record clearly supports that DHHS issued a proper RFP and *Notice of Intent to Award*. SDC provides only generic criticisms of the RFP scoring system without referencing mathematical or even factual error concerning the weighted categories. Review panels are selected precisely for their judgment and expertise and this RFP involved a diverse, experienced panel. And subjective judgment of the review panel is not the sole scoring measure. The data score provides the objective scoring component. Allowing a disgruntled proposer to dismantle an RFP based on vague criticisms of scoring (that SDC's proposal was not properly evaluated against the review and scoring criteria) would render any RFP meaningless.

This committee does not address credibility, nor does it re-weigh the evidence. *State ex rel. Harris*, 87 Wis.2d 647, 652. The only question before this committee is whether the evidence reasonably supports the decision. *Id.* It is important to note that a "reasonable" interpretation of the evidence from this RFP by DHHS does not need to be the only interpretation. See *Hamilton v. DILHR*, 94 Wis. 2d 611, 617 (1980). Reasonable minds can differ, and the Committee is not to substitute its own assessment of the evidence for DHHS's interpretation and reliance on this RFP's results as reasonable. Because the substantial evidence test is highly deferential to DHHS's determination, the Committee may not substitute its view of the evidence for that of DHHS reviewing the sufficiency of the evidence on appeal. *Van Ermen v. State Dep't of Health and Social Servs*, 84 Wis.2d 57, 64, 267 N.W.2d 17 (1978); see also *Clark v. Waupaca Cnty. Bd. of Adjustment*, 186 Wis.2d 300, 304-05, 519 N.W.2d 782 (Ct. App. 1994) ("If any reasonable view of the evidence would sustain the board's findings, they are conclusive...[e]ven if we would not have made the same decision"). The evidence in the record clearly supports that DHHS issued a proper RFP and issued a proper *Notice of Intent* letter based on that RFP's scoring results. Therefore, DHHS properly exercised its discretion in making its determination. Its actions were neither arbitrary nor capricious.

CONCLUSION

Based on the forgoing, the DHHS respectfully requests that this Committee affirm DHHS's determination, and quash SDC's appeal.

Respectfully submitted,



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