



Commonwealth of Massachusetts  
Office of the State Auditor  
Suzanne M. Bump

*Making government work better*

Official Audit Report – Issued March 30, 2016

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## Independent State Auditor’s Determination on the Department of Mental Health’s Proposal to Privatize Its Southeast Emergency Services Program





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Office of the State Auditor  
Suzanne M. Bump

*Making government work better*

March 30, 2016

Ms. Joan Mikula, Commissioner  
Department of Mental Health  
25 Staniford Street  
Boston, MA 02114

Dear Commissioner Mikula:

I am pleased to provide this review of the Department of Mental Health's proposal to privatize its Southeast Emergency Services Program. This report details our objectives, scope, and methodology and our determination based on our review. My audit staff discussed the contents of this report with the management of the Department of Mental Health.

It is the determination of this office that the Department of Mental Health has complied with all provisions of Massachusetts General Laws c. 7, § 54, and all other applicable laws, and thus this office has no objection to your request for the privatization of the Southeast Emergency Services Program.

I would also like to express my appreciation to the Department of Mental Health for the cooperation and assistance provided to my staff during our review.

Sincerely,

A handwritten signature in blue ink, appearing to read 'SMBump'.

Suzanne M. Bump  
Auditor of the Commonwealth

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## LIST OF ABBREVIATIONS

BMC	Boston Medical Center
CCBC	Community Counseling of Bristol County
CMR	Code of Massachusetts Regulations
DMH	Department of Mental Health
EOHHS	Executive Office of Health and Human Services
ESP	Emergency Services Program
MBHP	Massachusetts Behavioral Health Partnership
MCI	mobile crisis intervention
MGL	Massachusetts General Laws
OSA	Office of the State Auditor
RCC	Roxbury Community College
RFR	Request for Response

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## EXECUTIVE SUMMARY

Chapter 296 of the Acts of 1993, as amended, the Commonwealth's Privatization Law, outlines the process that must be followed by agencies and applicable authorities seeking to contract for services that are presently performed by state or authority employees. The law, which became effective December 15, 1993, applies to contracts that have an aggregate value of \$552,572 or more.<sup>1</sup>

Pursuant to this law, a specific process must be followed to demonstrate and certify to the State Auditor that (1) the agency complied with all provisions of Massachusetts General Laws (MGL) c. 7, § 54 and all other applicable laws; (2) the quality of the services to be provided by the designated bidders is likely to satisfy the quality requirements of the written statement of services and to equal or exceed the quality of services that could be provided by regular employees; (3) the total cost to perform the services by contract will be less than the estimated in-house cost; (4) the designated bidders have no adjudicated record of substantial or repeated noncompliance with relevant federal and state statutes; and (5) the proposed privatization contract is in the public interest in that it meets applicable quality and fiscal standards. The State Auditor has 30 business days (with the authority to extend the review an additional 30 days) to approve or reject the agency's certification.

The process that the agency must follow includes preparing a detailed written statement of service, estimating the most cost-efficient method of providing those services with agency employees, selecting a contractor through a competitive bidding process, and comparing the in-house cost and the cost of contract performance. The agency must also ensure that the private bids and private contracts, if ultimately awarded, contain certain provisions regarding wages, health insurance, the hiring of qualified agency employees, nondiscrimination, and affirmative action.

The Department of Mental Health (DMH) was established by MGL c. 19, § 1, and operates under MGL c. 123. DMH is a department under the purview of the Executive Office of Health and Human Services. According to its website,

*The Department of Mental Health, as the State Mental Health Authority, assures and provides access to services and supports to the mental health needs of individuals of all ages, enabling them to live, work and participate in their communities. . . .*

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1. Pursuant to Section 53 of Chapter 7 of the Massachusetts General Laws, the Privatization Law threshold, set at \$500,000 in 2009, is adjusted as of January 1 each year according to the Consumer Price Index as calculated by the US Bureau of Labor Statistics.

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*The Department's network provides services to approximately 21,000 individuals with severe and persistent mental illness across the Commonwealth, including children and adolescents with serious emotional disturbance and their families through a continuum of care. DMH is also statutorily responsible for admitting 8,000 to 9,000 forensically involved individuals to hospitals who are referred from the courts for evaluation and aid the courts for evaluation. . . .*

*The DMH structure is Area-based and . . . organized into five geographic areas, each of which is managed by an area director. The Areas are: Metro Boston, Western Massachusetts, Central Massachusetts, Southeast and Northeast-Suburban.*

The Southeast Area is broken down into four regions: Brockton, Cape Cod and the Islands, Fall River, and Taunton/Attleboro. DMH is proposing the privatization of its Emergency Services Program (ESP) for the Southeast Area, with the Massachusetts Behavioral Health Partnership (MBHP), because the Southeast Area remains the only state-operated area with DMH as the emergency-service provider.

MBHP is a private for-profit entity and has a network of more than 1,200 providers that offer integrated medical and behavioral healthcare to more than 360,000 members across the Commonwealth. Currently, DMH and MBHP have a service contract, entered into on July 1, 2012, and effective until June 30, 2017, that authorizes MBHP to manage the entire network of ESPs except the Southeast Area. MBHP, through its procurement process, contracts with ESPs to provide direct care for behavioral-health crises and emergency services to subscribers to the state's Medicaid program (MassHealth), subscribers to private health insurers, or the uninsured. The aforementioned service contract was amended on October 30, 2015, and was designated by DMH as its official privatization contract. Under the amendment, MBHP was to secure a contract on behalf of MassHealth for the delivery and management of the ESP in the Southeast Area, which are currently provided by DMH. This privatization contract essentially allows MBHP to expand its network into the Southeast Area by contracting with the selected emergency-service providers.

MBHP organized a procurement team that, on behalf of DMH, performed the following activities:

- developing and distributing the Request for Response
- developing the proposal scoring guide
- soliciting bids
- conducting bidder information sessions
- prescreening and evaluating bids
- selecting winning bidders

## **SUMMARY OF PROCUREMENT ISSUES IN THE AWARDING OF THIS CONTRACT**

On January 6, 2016, the Department of Mental Health (DMH) notified the Office of the State Auditor of the Massachusetts Behavioral Health Partnership's (MBHP's) intent to award its contracts to Boston Medical Center and Community Counseling of Bristol County to perform the services of the Emergency Services Program (ESP) in the Southeast Area. The notification was accompanied by a certification signed by the DMH Commissioner and the Secretary of the Executive Office for Administration and Finance.

Based on our review, this office has concluded that DMH's proposal to privatize its Southeast ESP meets the specific requirements set forth in the Privatization Law, Massachusetts General Laws (MGL) c. 7, §§ 52–55. The Law, however, requires that a proposed privatization comply not only with the requirements of the Privatization Law itself, but also with “all provisions . . . of all other applicable laws.” See MGL c. 7, § 54(7)(i). Service Employees International Union Local 509 (Local 509), a labor organization representing a large number of affected employees, has raised several objections to the procurement process in this proposed privatization. Although those objections do not support an objection by this office to DMH's privatization proposal, they are sufficiently serious to warrant a response from this office, in order to clarify how we view the procurement requirements of the Law, not only in regard to this privatization, but also so that other agencies will not misconstrue this office's decision in this case.

As an initial matter, it is clear that the procurement process in this privatization proposal is far more complicated and complex than the privatization proposals that this office has considered in the past. Previous privatization proposals have typically involved a private entity directly providing the same services formerly provided by public employees. In this case, ESP services that have been historically provided by DMH would, under this proposed privatization, be provided not by a vendor replacing DMH but, instead, by vendors chosen by MBHP, through an amendment to the existing contract between MBHP and the Executive Office of Health and Human Services (EOHHS), pursuant to which the Commonwealth provides most behavioral-health services to MassHealth members.

In making our determination in this case, and indeed in all privatization matters, this office takes a broad view of our responsibilities in the privatization process. Both statutory law and case law support this

broad view. See MGL c. 7, §§ 54(7)(i) and 55(a) (Auditor must find that a privatization proposal complies with “all other applicable laws”); Massachusetts Bay Transportation Authority v. Auditor of the Commonwealth, 430 Mass. 783, 791, 724 N.E.2d 288, 294 (2000) (“the Auditor, under the privatization act, operates under a broad grant of power”). Moreover, because the statute identifies this office as the agency that may adopt regulations and prescribe forms for the implementation of the Privatization Law, this office has assumed the traditional administrative-agency function of filling in the details in the legislative scheme. See MGL c. 7, § 55(c) (Auditor may adopt regulations and prescribe forms to carry out the provisions of MGL c. 7, §§ 54–55); Amherst-Pelham Regional School Committee v. Department of Education, 376 Mass. 480, 491-492, 381 N.E.2d 922, 930 (1978) (weight should be given to interpretation of statute by agency charged with its enforcement, particularly where statute vests authority in agency to fill in the details); 965 Code of Massachusetts Regulations (CMR) 4.00 (Department of the State Auditor’s regulations regarding the calculation of the privatization threshold). To the extent that this determination goes beyond a review of the express statutory criteria for determining whether an objection to a privatization is appropriate, this determination is firmly rooted in both statutory law and case law.

With these principles in mind, the following points represent this office’s perspective on the procurement issues as argued by both Local 509 and DMH.

### **State Procurement Requirements**

Local 509 contends that the proposed privatization violates state procurement regulations, promulgated by the Executive Office for Administration and Finance, set forth in 801 CMR 21.00, because MBHP is not a department within the Executive Branch and because the amendment to the existing MBHP contract is inconsistent with the restrictions set forth in 801 CMR 21.07.

Regarding the requirement in 801 CMR 21.06 that “a Procuring Department shall be responsible for conducting a Procurement” and the argument that MBHP is not a department within the Executive Branch as that term is defined in 801 CMR 21.02, it would be unreasonable for this office to conclude that DMH, or any other agency that did not actually conduct the procurement itself, is not responsible for the conduct of the procurement.<sup>2</sup> Indeed, there is no question that an agency such as DMH, by

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2. The regulations define a department as “[a]ny Executive Office, Department, Agency, Office, Division, Board, Commission or Institution within the Executive Branch excluding the Legislative Branch, Judicial Branch, Constitutional Offices, Elected Offices, Public Institutions of Higher Education, the Military Division and Independent Public Authorities.” 801 CMR 21.02.

establishing the parameters for the procurement, has ultimate responsibility for that procurement. Moreover, as the Supreme Judicial Court has opined, “a delegation to a private party is permissible if there are proper safeguards to prevent the arbitrary exercise of authority.” See Construction Industries of Massachusetts v. Commissioner of Labor and Industries, 406 Mass. 162, 173, 546 N.E.2d 367, 374 (1989). The contract between MBHP and EOHHS, as well as the amendment thereto for this privatization, provides those necessary and proper safeguards.

The question as to whether the amendment to the existing contract between MBHP and EOHHS for the privatization was permissible has a less clear answer, because there is nothing within state statutes or regulations that establishes a bright line for when an agency may amend a contract without undertaking a separate procurement.<sup>3</sup> It is clear, though, that agencies may make material changes to contracts through amendments. See, for example, Office of the Comptroller & Operational Services Division, Joint Policy: Procurement Contracts—Amendments, Suspensions or Terminations, at 14 (July 1, 2004, revised Nov. 19, 2014) (“amendment must be executed whenever there is a significant or ‘material’ change to the terms of a contract”). To the extent, therefore, that the proposed privatization is a material change to the MBHP contract, an amendment to that contract is not inappropriate.

The most relevant regulation, 801 CMR, 21.07(1), in pointing out that the relevant question is whether the amendment is within the scope of the original Request for Response (RFR) and directing our attention to the language in that RFR to determine whether the amendment is within that scope, also provides support for the amendment process in this procurement.<sup>4</sup> There are numerous provisions in the original RFR that demonstrate that an amendment of this sort is within the scope of that RFR.<sup>5</sup> Similarly, there are a number of provisions within the contract between EOHHS and MBHP that

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3. In contrast, the Uniform Procurement Act, which applies to public entities other than the Executive Branch of state government, limits amendments increasing the quantity of supplies or services or both specified in a contract to those in which “the increase in the total contract price does not exceed 25 per cent.” See MGL c. 30B, § 13(4).

4. *Contract and Contract Amendment Negotiation. The Department may negotiate with Selected Bidder(s) prior to execution of a Contract, and with Contractors after a Contract has been executed, as follows:*

(a) *The language of the RFR shall determine what elements of Contract performance or cost, within the scope of the original RFR and a Bidder’s or Contractor’s Response, may be negotiated. If the RFR is silent as to what can be negotiated, the Procuring Department and a Selected Bidder or Contractor may negotiate only the details of performance identified within the scope of the original RFR and the Bidder’s or Contractor’s Response, and may not increase or change the scope of performance or costs.*

801 CMR 21.07(1).

5. Section 6.3 of the RFR, for example, gave EOHHS “the right, at its sole discretion and at any time prior to or during the Contract term, to change any scope of work or portion thereof.”

demonstrate that this amendment is within the scope of that contract.<sup>6</sup> It is clear, therefore, that the amendment to the contract between MBHP and EOHHS does not violate the relevant procurement regulations.

## **Privatization Law Procurement Requirements**

Local 509, however, is quite correct in its contention that the Privatization Law itself establishes procurement requirements that may exceed what is otherwise required or not required under state law. In 2015, for example, this office objected to a privatization proposal from Roxbury Community College (RCC) that was not the result of a competitive procurement process, even though RCC was not subject to the procurement requirements of 801 CMR 21.00, because the Privatization Law requires such a process. See MGL c. 7, § 54(1); see also Roxbury Community College—Privatization Review (No. 2016-0204-130, Nov. 17, 2015) (<http://www.mass.gov/auditor/docs/privatization/11-17-15-signed-objection-letter-for-roxbury-community-college.pdf>). In this case, however, as set forth below, DMH’s privatization proposal meets the requirements of the Privatization Law.

As an initial matter, the Law itself defines privatization not as one contract or agreement but, instead, as “an agreement or combination or series of agreements.” See MGL c. 7, § 53. During the course of this office’s review of the privatization proposal, both Local 509 and DMH have, at times, misconstrued the nature of this privatization proposal by considering the privatization to consist solely of the amendment to the contract between MBHP and EOHHS. If that were true, this office would have no choice but to object, as it did with the RCC proposal, because there was no competitive procurement with sealed bids, only an amendment to an existing contract. This office, instead, views this privatization as a series or combination of agreements. Together, those agreements have to conform to the requirements of the Law and meet the principles set forth in the Law’s preamble:

*The general court hereby finds and declares that using private contractors to provide public services formerly provided by state employees does not always promote the public interest. To ensure that citizens of the commonwealth receive high quality public services at low cost, with due regard for the taxpayers of the commonwealth and the needs of public and private workers, the general court finds it necessary to regulate such privatization contracts.*

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6. Section 13.3 of the contract between EOHHS and MBHP allows EOHHS to modify any activity related to the contract “whenever, in the judgment of EOHHS, the goals of the project have been modified or altered in any way that necessitates such changes.”

MGL c. 7, § 52. The true test of a privatization proposal is not the structure of the contractual relationships, but whether those relationships, as a whole, comply with the Legislature's principles and requirements.

While this office finds that this privatization proposal does comply with the Legislature's principles and requirements, and rejects Local 509's arguments to the contrary, as set forth below, our conclusion is not entirely consistent with DMH's perspective and position on some of the relevant issues.

With regard to Local 509's arguments and viewing the proposed privatization as a series or combination of agreements, those arguments are not persuasive. Regarding Local 509's contention that the Privatization Law required that the amendment to the MBHP contract be subject to a public procurement, it is important to note that the initial MBHP contract was the result of a public procurement. In a more complicated privatization proposal such as this, it is essential that all the agreements are subject to a public procurement process, which is the case here, even though the agreements were not all procured at the same time or as part of the privatization. The essential contracts in a series of contracts, as in this case, that must meet the procurement requirements of the Privatization Law at the time of the privatization are the contracts that govern the provision of public services formerly provided by state employees, and those contracts, in this case, are the contracts between MBHP and the chosen vendors.

Local 509's contention that the Privatization Law only permits an agency, as defined in the Law, to prepare the written statement of services, solicit sealed bids, and designate the successful bidder, while consistent with the statutory language, would undermine the principles set forth in the Law's preamble. It would be unreasonable to assume that the Legislature would only permit an agency to undertake those tasks directly, even when indirectly undertaking those tasks, as in this case, ensures that the Commonwealth receives high-quality public services at low cost with due regard for the taxpayers of the Commonwealth and the needs of public and private workers. It would also be unreasonable to conclude that the Privatization Law would restrict the flexibility of agencies in privatization procurements to a greater degree than in non-privatization procurements, when the privatization is otherwise consistent with the requirements of the Law.

At the same time, this office's view diverges in some significant ways from DMH's view, which may have ramifications for this proposed privatization and the private vendors going forward, as well as for other

future potential privatization proposals. Even after recognizing that this privatization consists of a series of agreements, not just the amendment to the contract between MBHP and EOHHS, DMH has taken the position that the contracts between MBHP and its vendors are not subject to a number of statutory requirements, such as the Public Records Law, state procurement regulations, and the wage and benefit provisions of the Privatization Law. When viewed as a series of agreements, all of those agreements are a part of the privatization, and all of those agreements must comply with the Law. The contracts between MBHP and its vendors, for example, are an essential component of the privatization, and all of the records regarding those procurements should be considered public records.<sup>7</sup> Those procurements, too, are subject to the same regulations that govern state-agency procurements. Finally, in discussions with this office, DMH has taken the position that the Attorney General's ability to seek equitable remedies for any violation of the wage and benefit requirements of the Privatization Law may be limited to a breach-of-contract claim against MBHP.<sup>8</sup> That position is just plain wrong. If this privatization consists of a series of agreements, then all of the agreements that constitute the privatization, including MBHP's contract with its vendors, are subject to the Law, and the Attorney General has the authority to bring an action for equitable relief against any vendor with responsibility under the Law.

### **The Term of the Privatization Contracts and the Law's Labor Standards**

Local 509 also complains that the anticipated length of the contracts, which would expire at the same time as the MBHP contract (at the end of June 2017), would allow the vendors to ignore the wage and benefit provisions of the Privatization Law after only slightly more than a year. Local 509 raises the inference that a short-term agreement like this is itself a violation of the Law and, alternatively, that the Law creates a kind of permanent wage and benefit standard, akin to the Prevailing Wage Law. Regarding that view of the Law as a permanent wage and benefit requirement, and the view that a private employer providing services previously provided by a public employer may never reduce the level of wages and benefits, this office will not opine on that argument because the Law places responsibility for

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7. During the course of our review of the privatization proposal, our auditors asked to review the bids of vendors that were rejected by MBHP, but our auditors were only permitted to do so after entering into a confidentiality agreement, to protect the identity of the unsuccessful bidders. While it is our view that those records are public records, we did not raise any objection because our auditors were able to complete their work despite this disagreement as to the public-record status of those records. When this privatization is viewed as a series of agreements, all of those agreements are part of the privatization, and all of those records should be considered public records.

8. Under the Privatization Law, the Attorney General may bring a civil action for equitable relief in the Superior Court to enforce MGL c. 7, § 54(2), or to prevent or remedy the dismissal, demotion, or other action prejudicing any employee as a result of a report of a violation of that section of the Law.

the enforcement of such wage and benefit issues solely on the Attorney General's Office. See MGL c. 7, § 54(2).

The definition of a privatization contract under the Law does clearly exclude subsequent privatization agreements, including agreements resulting from a rebidding, renewal, or extension of a privatization contract. See MGL c. 7, § 53 (“[a]ny subsequent agreement, including any agreement resulting from a rebidding of previously privatized service, or any agreement renewing or extending a privatization contract, shall not be considered a privatization contract”). At the same time, the Law declares that any amendment to a contract that has the purpose or effect of avoiding the requirements of the Law would be invalid. See MGL c. 7, § 54(1) (“[n]o amendment to a privatization contract shall be valid if it has the purpose or effect of avoiding any requirement of this section”).

Regarding the length of the contract, while the Law states that no privatization contract may exceed a five-year term, the Law sets forth no minimum standard for the term of a privatization contract. The test that this office will use in assessing the legitimacy of the term of a privatization contract is whether the contract's term has some rational basis or is designed to avoid the requirements of the Law. In this case, the limited timeframe for the contract results from EOHHS's preference to provide all ESP services under one umbrella contract with MBHP, or whoever the successful bidder is at the expiration of the present contract between EOHHS and MBHP, which, at the present, is at the end of June 2017. Given that rational basis for the term of the contract, this office has no ground on which to object. This office would take a different position if it were clear that the rationale for the limited timeframe of the proposed privatization were to avoid the employment protections set forth in the Law.

Going forward, if the procurement of a successor agreement to the agreement between EOHHS and MBHP is not completed by the end of June 2017 and instead the present agreement is extended until a new contract is negotiated, the wage and benefit requirements of the Law should continue to apply as well until that new contract is finalized. Any amendment at that time that would, in extending the length of the contract, also affect the wage and benefit protections of the Law would be inconsistent with this view. In a communication with this office on February 16, 2016, DMH took the same position, and this office's decision not to object to the privatization proposal is based, in part, on this assurance.

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## OBJECTIVES, SCOPE, AND METHODOLOGY

The objectives of our review were to determine whether the Department of Mental Health (DMH) complied with the Privatization Law, including the law's quality and compliance requirements, and whether the cost of providing emergency services in the Southeast Area would be less than the estimated cost for performing these services in house with DMH employees.

To meet these objectives, the Office of the State Auditor (OSA) examined the Request for Response (RFR) and the corresponding responses; reviewed proposed operating agreements between the Massachusetts Behavioral Health Partnership (MBHP) and Boston Medical Center (BMC) / Community Counseling of Bristol County (CCBC); and evaluated documentation and held on-site discussions with DMH, BMC, and CCBC management related to the quality of service to be provided.

In addition, OSA received a series of notifications from Local 509 and its legal representative, on behalf of DMH employees, highlighting concerns about the procurement process, quality of services, and operational cost of the privatization. OSA reviewed each concern within the requirement set forth in Massachusetts General Laws (MGL) c. 7, § 55, and, wherever applicable, obtained documentation and assessed Local 509 and its legal representative's concerns.

OSA examined cost forms<sup>9</sup> and other documentation<sup>10</sup> prepared on behalf of DMH that supported the privatization proposal and compared the estimated costs for contract management to the estimated costs for performing the services in house with DMH employees. OSA cross-referenced expenses to supporting documentation, including independently verifying certain operating costs to the Massachusetts Management Accounting and Reporting System, performing unemployment-benefit calculations based on the Department of Unemployment Assistance's benefit rates, and verifying fringe-benefit rates from the Office of the State Comptroller.

Regarding the quality of the proposed services, Local 509, members of the Legislature, and other stakeholders have voiced concerns over the perceived changes to staffing levels, hours of operation, levels of education, experience, licensure, and the populations eligible to receive Emergency Services

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9. Public Consulting Group, an actuarial firm hired by DMH, provided the following documentation: Consolidated Cost Forms, Brockton Multi-Service Center Cost Forms, Corrigan Cost Forms, Cape Cod and the Islands Cost Forms, Time Studies, and Contract Performance Cost Forms and Notes.

10. Other documentation includes but is not limited to all submitted bids, contracts (e.g., vendors, Service Employees International Union Local 509), the Management Study, Certificates of Compliance, MBHP's ESP Management Activities Comparison Form, and the Area Encounter Breakdown.

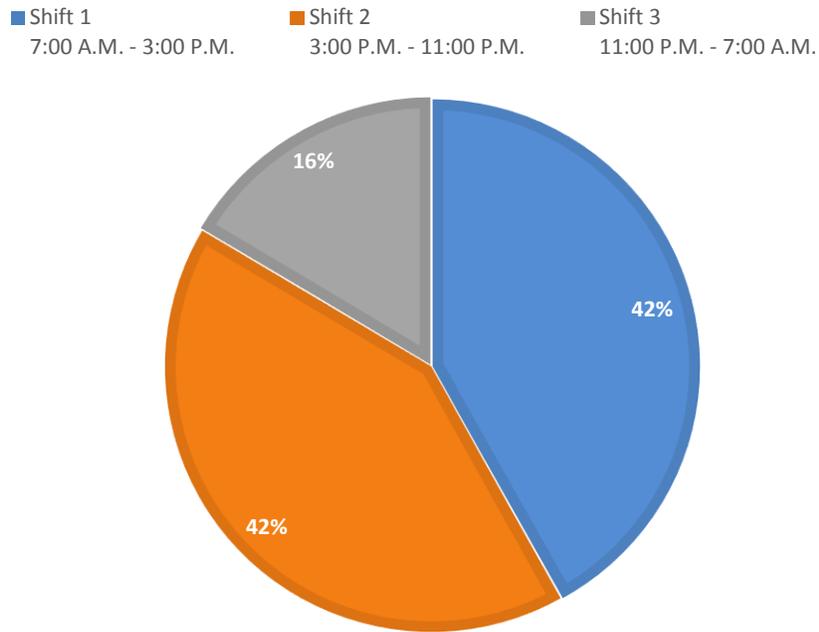
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Program (ESP) services. OSA obtained additional data from DMH, interviewed DMH and MBHP staff, performed site visits at various programs that currently provide ESP services, and considered the specific concerns raised. For these reasons, and because of the substantial amount of documentation required for this privatization review, OSA extended its review of this proposal beyond the initial 30 days in accordance with MGL c. 7, § 55. The most significant concerns around the quality of care are discussed below.

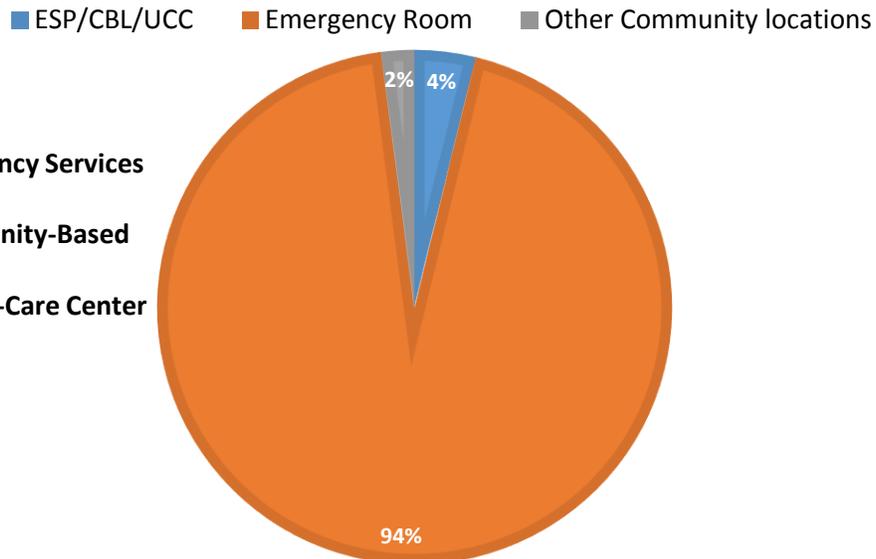
### **24/7 Staffed Community Locations Providing ESP Services**

The objective data demonstrate that there will be no reduction in the quality of services provided under the new MBHP ESP contracts. The RFR published by MBHP mandates that all ESP services be provided around the clock. According to the RFR, regardless of the hours when the community-based location is staffed, ESPs must provide services 24/7/365 and meet the same ESP standards as the services currently provided by DMH. The ESP service model under MBHP is designed to be flexible to meet the needs of individuals wherever they present in crisis. In the most recent 12-month period, as illustrated in the two graphs below, only 16% of all DMH encounters occurred on the third shift (11:00 p.m. to 7:00 a.m.). Of those encounters, fewer than 4% occurred at a community-based location, the only location where there is a reduction in hours. Third-shift encounters at a DMH community-based location thus represented 0.63% of all encounters. Therefore, the objective analysis shows that any impact would be de minimis.

### SOUTHEAST AREA ENCOUNTERS BY SHIFT

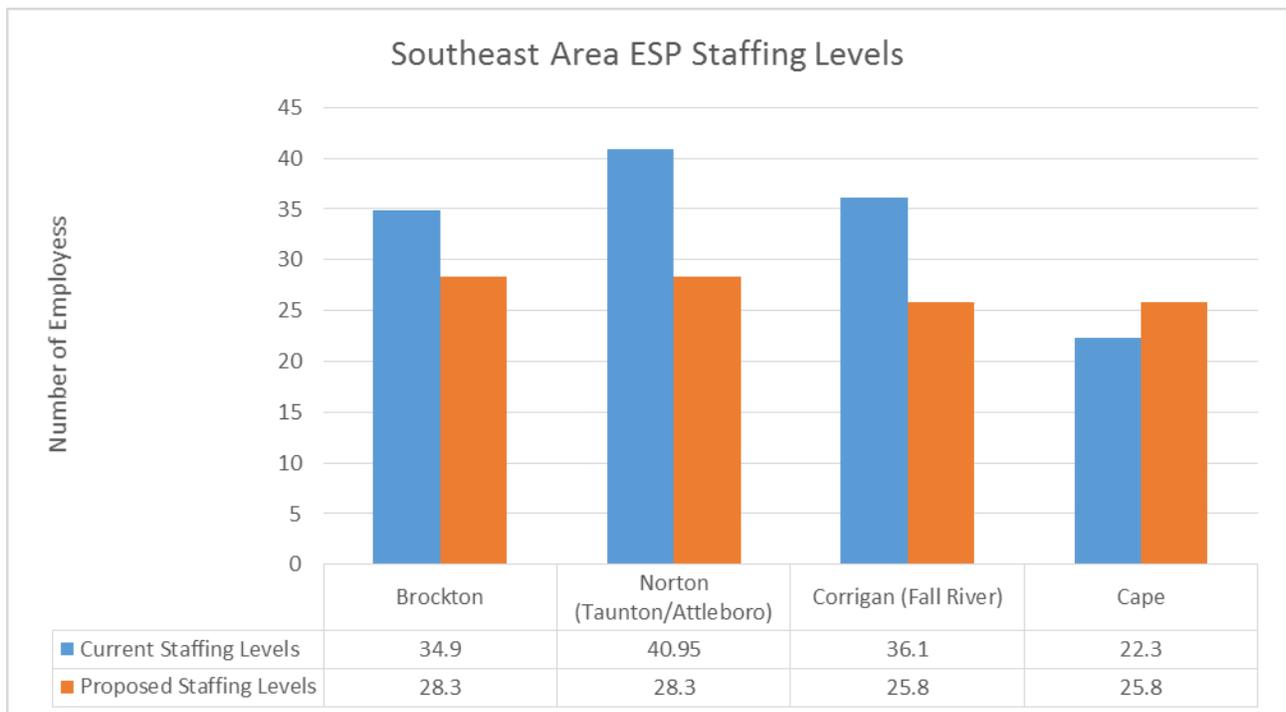


### Shift 3 Encounter Locations



## Perceived Changes to Staffing Levels

In a March 16, 2016 letter to OSA, DMH stated “that the staffing levels included in the written statement of services reflect *minimum*, recommended staffing levels. (See DMH Privatization Proposal at 78-83(ESP); id. at 97-98 (MCI); is. At 109-11 (CCS)).” ESPs are required to adjust their staffing levels to meet the needs of the community in which they serve and to comply with all program standards. Local 509 submitted data to OSA that suggest that the proposed MBHP privatization staffing requirements would not meet the Southeast ESP quality-of-service specifications. During this review, OSA investigated this issue by visiting and meeting with CCBC and BMC; MBHP-selected ESP providers; Bay Cove Human Services Inc., a BMC subcontractor; and DMH. Staff members for each organization assisted OSA by providing further clarification on their staffing levels. Bay Cove and DMH both reported that they used Boston as a baseline to measure staffing needs, applied the Boston-level staffing needs to the Fall River and Cape Cod and the Islands Areas based on the number of encounters, and added 10% more staff as a buffer. CCBC, BMC, and Bay Cove all indicated that they review their staffing levels on an ongoing basis and adjust accordingly to meet the needs of their members. CCBC, BMC, and Bay Cove officials also stated that their network allows them to add (and eliminate) staff when needed, especially in times of crisis when the circumstances call for such measures.



## **Licensing Requirements**

In the March 16, 2016 letter to OSA, DMH stated that it has “direct experience that demonstrates that changes in licensing requirements do not necessarily result in a diminution and quality.” DMH further states that it has replaced state-employee registered nurses with licensed practical nurses at one of its Community Crisis Stabilization locations and has noted no changes in its ability to meet quality standards.

## **Centralized Call Center**

OSA visited Boston’s Fuller Mental Health Center, met with staff members, and observed the operation of its centralized call center. During this visit, OSA verified that call-center employees were master-level clinicians who appeared qualified to assess the needs of callers. The call-center clinicians evaluate the needs of each client and determine whether the client will require mobile crisis intervention (MCI) services. If MCI services are required, an MCI clinician located in the client’s community is dispatched to the client’s location.

## **Impact on Follow-Up Care**

All services currently being provided by the DMH state-operated ESP will be provided under the MBHP model. The statement of services in the RFR is clear that an ESP’s services must be flexible in accommodating the regional needs in which it operates. In particular, it is expected that future services by BMC and CCBC will include non-crisis counseling, problem-solving, and community collaboration in order to provide a service consistent with the specifications outlined by MBHP in its RFR. During OSA’s visit to Boston’s Fuller Mental Health Center, the staff met with personnel from BMC, Bay Cove, and DMH, who helped provide further clarification on these services. These individuals stated that BMC and Bay Cove will be working very closely with the Department of Youth Services and the community (e.g., police departments, school departments, fire departments) and will establish a committee consisting of community leaders from those departments. This committee will serve to ensure that BMC and Bay Cove have an understanding of the ESP issues affecting the community and that the community is aware of the available services. Finally, BMC and Bay Cove staff reported that they will employ “certified peer specialists” who will inform members of the community of how the system works and provide guidance on obtaining the required services.

### **Commercially Insured Individuals Will Still Receive Services**

In the March 16, 2016 letter to OSA, DMH stated, “All ESPs are required to provide services to individuals, regardless of insurance status, who present in psychiatric crisis. Thus the private ESPs must provide services to the same population as DMH.” DMH further stated that the data show that private ESPs serve a broader population. DMH data show that in fiscal year 2015, individuals with commercial insurance represented approximately 13% of all MBHP ESP encounters, while commercially insured individuals represented barely half of 1% of all DMH-operated ESP encounters.

### **Access to Emergency Beds**

DMH stated in the March 16, 2016 letter to OSA that all ESPs throughout the state have the same access to make referrals to emergency psychiatric beds and that all ESPs utilize the MBHP bed-finder tool. DMH further emphasized that there is no correlation between the operation of the ESP and the availability of a bed in an acute psychiatric facility at any given time. As noted, a critical measure of ESP quality is the rate at which the program is able to appropriately divert individuals to less restrictive appropriate levels of care. The data show that the DMH ESP is less successful in achieving such diversions compared to other providers.

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## DETERMINATION

Based on our review, we have concluded that the Department of Mental Health (DMH) has complied with the Privatization Law in reaching its decision to privatize the Emergency Services Program (ESP) in the Southeast Area, whose services have been performed in house with DMH employees.

DMH has certified and demonstrated to the Office of the State Auditor (OSA) that the quality of the services to be provided by Boston Medical Center (BMC) and Community Counseling of Bristol County (CCBC) will equal or exceed the quality of services that could be provided by DMH employees, that the total cost to perform the service by the contracts will be less than the estimated in-house cost, that BMC and CCBC have no adjudicated record of substantial or repeated noncompliance with relevant federal and state statutes, and that the proposed privatization contract is in the public interest in that it meets applicable quality and fiscal standards. We therefore approve DMH's certification in each of those required areas.

We reviewed DMH's compliance with the statutory provisions of the Privatization Law and have concluded that DMH has complied with all provisions of the Privatization Law as follows:

1. The Massachusetts Behavioral Health Partnership (MBHP), on behalf of DMH, issued a Request for Response (RFR) on July 6, 2015, with an initial response due date of September 1, 2015, for DMH's Southeast Area, including the Brockton, Cape Cod and the Islands, Fall River, and Taunton/Attleboro service areas. In response to the RFR, five potential providers submitted a total of 12 bids for review. CCBC was selected for the Brockton and Taunton/Attleboro areas, and BMC was selected for the Fall River and Cape Cod and the Islands areas. The terms of the proposed contracts will not exceed five years.
2. For each position in which CCBC and BMC will employ any person pursuant to the privatization contract and for which the duties are substantially similar to the duties performed by a regular DMH employee, MBHP's statement of services included a statement of the appropriate minimum wage rate to be paid for that position. The CCBC and BMC bids and proposed privatization contracts include provisions specifically establishing the wage rate for each such position, which is not less than the appropriate minimum wage rate. Additionally, the CCBC and BMC bids and proposed contracts include provisions for CCBC and BMC to pay not less than a percentage, comparable to the percentage paid by the Commonwealth for state employees, of the costs of health-insurance plans for every employee employed for at least 20 hours per week. Moreover, the proposed contracts include a provision requiring the CCBC and BMC health-insurance plans to provide coverage to the employee and his/her spouse and dependent children. The proposed contracts also require CCBC and BMC to submit quarterly payroll records to the Executive Office of Health and Human Services, listing the name, address, Social Security number, hours worked, and hourly wage paid for each employee in the previous quarter.

3. The CCBC and BMC proposed contracts contain a provision requiring CCBC and BMC to offer available positions to qualified regular employees of DMH whose state employment is terminated because of the privatization contract and who satisfy CCBC's and BMC's hiring criteria. The proposed contracts contain a provision requiring CCBC and BMC to comply with a policy of nondiscrimination and equal opportunity for all persons protected by Massachusetts General Laws (MGL) c. 151B and to take affirmative steps to provide such equal opportunity for all such persons.
4. Public Consulting Group, on behalf of DMH, prepared a comprehensive written estimate of the cost for regular DMH employees to provide services in the most cost-efficient manner to the ESPs in the Southeast Area. These estimates include all direct and indirect costs of regular DMH employees, including, but not limited to, personnel costs, travel and other employee reimbursements, unemployment benefits, and a one-time startup cost to ensure the effective and efficient transition of services while maintaining the quality standards set forth in the RFR.
5. DMH provided notice to Service Employees International Union Local 509 (Local 509) upon MBHP's publication of the RFR on July 6, 2015, and recorded this notification in letters sent on July 7, 2015. Local 509 subsequently sought and received resources from DMH to aid in its response to the RFR. On September 15, 2015,<sup>11</sup> MBHP received a bid from Local 509 on behalf of the DMH employees, which MBHP evaluated during the bid review period.

Additionally, during the time of the RFR posting, Local 509 proposed a contract amendment to Article 7 of the parties' collective-bargaining agreement. The amendment proposed that callback pay be compensated in the same structure as standby pay and that this structure be changed to a \$500 payment for a standby period of 7 days. According to the union, this amendment would save DMH between \$700,964 and \$742,564 per year. To the extent deemed feasible, these proposed efficiencies were included in DMH's Management Study.

6. After soliciting and receiving bids, MBHP, on behalf of DMH, publicly designated CCBC and BMC as the bidders to which the contracts would be awarded.
7. DMH Commissioner Joan Mikula and Executive Office for Administration and Finance Secretary Kristen Lepore provided certifications of compliance with the following requirements detailed in the Privatization Law, MGL c. 7, § 54 (7):
  - (i) *the agency complied with all the provisions of Section 54 and all other applicable laws;*
  - (ii) *the quality of the services to be provided by CCBC and BMC is likely to satisfy the quality requirements of the statement of services, and to equal or exceed the quality of services that could be provided by regular agency employees;*
  - (iii) *the contract cost will be less than the estimated cost of regular DMH employees providing the services, taking into account all comparable types of costs;*

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11. On February 16, 2016, 24 taxable inhabitants of the Commonwealth of Massachusetts filed a Complaint for Injunctive and Permanent Relief from receiving funds related to the privatization of mental-health services in the Southeast Area, stating that DMH had violated Chapter 46 of the Acts of 2015, line item 5047-0001, which states that "there shall not be a reduction in services in the Southeast Area related to the alignment of state-operated emergency services." The case is presently pending in Suffolk Superior Court, civil action no. 2016-0508D.

- (iv) CCBC, BMC and their supervisory employees, while in the employ of CCBC and BMC, have no adjudicated record of substantial or repeated willful noncompliance with any relevant federal or state regulatory statute, including, but not limited to, statutes concerning labor relations, occupational safety and health, nondiscrimination and affirmative action, environmental protection, and conflicts of interest; and*
- (v) the proposed privatization contract is in the public interest, in that it meets the applicable quality and fiscal standards set forth herein.*

Regarding the fiscal standards, OSA's financial analysis, set forth in the attachments to this determination, demonstrates that, over a one-year period, the cost for DMH's operation of the ESP in the Southeast Area, if operated in house with DMH employees, would be approximately \$14,931,848, whereas the proposed contracts with CCBC and BMC would be an estimated \$7,923,984. Thus the privatization of DMH's Southeast ESP would yield a cost saving of \$7,007,864.

For all of these reasons, it is the determination of this office that DMH has complied with all provisions of the Privatization Law and all other applicable laws, and thus this office has no objection to DMH's request for the privatization of its Southeast ESP.

## EXHIBIT A

### Department of Mental Health Privatization of Its Southeast Emergency Services Program Cost Comparison for One-Year Period Ending June 30, 2017

	Department of Mental Health Cost Comparison Form	Office of the State Auditor Adjusted Costs*	Total Costs, Including Adjustments
<b>In-House Cost Estimate (Exhibit B)</b>	\$13,024,296	\$1,907,552 <sup>†</sup>	\$14,931,848
<b>Less Contract Performance Costs (Exhibit C)</b>	6,631,329	1,292,654 <sup>‡</sup>	7,923,984
<b>Cost Savings</b>	<u>\$ 6,392,967</u>	<u>\$ 614,897</u>	<u>\$ 7,007,864</u>

\* Total may be off by \$1 because of rounding.

† Personnel costs were adjusted to include a 3% increase for fiscal years 2015, 2016, and 2017, as noted in the Collective Bargaining Agreement between the Commonwealth of Massachusetts and the Alliance, American Federation of State, County and Municipal Employees—Service Employees International Union Local 888 Unit 2. Additionally, this adjustment includes a 2.88% increase for non-personnel costs in fiscal year 2015 and a recalculation of the 2.91% and 3.07% increases for non-personnel costs in fiscal years 2016 and 2017, respectively, per the Centers for Medicare and Medicaid Services (CMS) Market Basket Index change for fiscal year 2015 (Public Consulting Group: Summary Table—CMS Market Basket Index Levels and Four-Quarter Moving Average Percent Changes).

‡ Unemployment costs were adjusted to properly reflect the 30-week / \$722-per-week maximum benefit for all full-time-equivalent employees.

## EXHIBIT B

### Department of Mental Health Privatization of Its Southeast Emergency Services Program In-House Cost Estimate for One-Year Period Ending June 30, 2017

	Department of Mental Health (DMH) In-House Cost Estimate*	Adjustments <sup>†</sup>	Adjusted DMH Cost Estimate
<b>Direct Costs<sup>‡</sup></b>			
<b>Personnel Cost</b>	\$11,817,338	\$1,518,496	\$13,335,834
<b>Material and Supply Costs</b>	6,662	402	7,063 <sup>§</sup>
<b>Rent<sup>  </sup></b>	–	186,573	186,573
<b>Depreciation</b>	61,552	9,207	70,759
<b>Maintenance</b>	211,517	33,174	244,691
<b>Utilities</b>	394,707	57,426	452,133
<b>Other Costs<sup>#</sup></b>	4,606,697	310,053	4,916,750
<b>Less Total Revenue</b>	4,074,176	207,779	4,281,955
<b>Total In-House Costs</b>	<u>\$13,024,296</u>	<u>\$1,907,552</u>	<u>\$14,931,848</u>

\* These estimates are based on actual fiscal year 2014 personnel and non-personnel costs.

† Personnel cost was adjusted to include a 3% increase for fiscal years 2015, 2016 and 2017, as noted in the Collective Bargaining Agreement between the Commonwealth of Massachusetts and the Alliance, American Federation of State, County and Municipal Employees—Service Employees International Union Local 888 Unit 2. Additionally, this adjustment includes a 2.88% increase for non-personnel costs in fiscal year 2015 and a recalculation of the 2.91% and 3.07% increases for non-personnel costs in fiscal years 2016 and 2017, respectively per the Centers for Medicare and Medicaid Services (CMS) Market Basket Index change for fiscal year 2015 (Public Consulting Group: Summary Table—CMS Market Basket Index Levels and Four-Quarter Moving Average Percent Changes).

‡ For the purposes of the privatization cost review, only direct costs were included. Indirect costs are incurred whether DMH privatizes its Emergency Services Program or performs the work in house, so they are excluded from the cost-savings calculation.

§ Total may be off by \$1 because of rounding.

|| Beginning in 2017, DMH would enter into a lease agreement with Hyannis Office Park Center LLC to occupy a building (270 Communications Way, Building #6) in Hyannis.

# These costs include travel and other reimbursements, payroll taxes, office equipment lease, administration, housekeeping, subcontracted direct care, medical records, contracted observation beds, medical staff, and leased equipment.

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## EXHIBIT C

### Department of Mental Health Privatization of Its Southeast Emergency Services Program Contract Costs for One-Year Period Ending June 30, 2017

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	Department of Mental Health (DMH) Cost Estimate	Adjustments	Adjusted DMH Cost Estimate
<b>Contract Price</b>	\$5,617,171	–	\$5,617,171
<b>Transition Costs*</b>	1,014,158	1,292,654 <sup>†</sup>	2,306,812
<b>Total Contract Costs</b>	<u>\$6,631,329</u>	<u>\$1,292,654</u>	<u>\$7,923,984<sup>‡</sup></u>

\* These costs include unemployment benefits and a one-time startup cost.

† Unemployment costs were adjusted to properly reflect the 30-week / \$722-per-week maximum benefit for all full-time-equivalent employees.

‡ Total may be off by \$1 because of rounding.