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MARYLAND STATE
BOARD OF CONTRACT APPEALS

MARYLAND STATE BOARD OF CONTRACT APPEALS

APPEAL OF LEGAL AID BUREAU, INC.)
500 E. Lexington St.)
Baltimore, MD 21202)
)
Under Department of Human Resources (DHR))
Invitation for Bids No. OS/MLSP-11-001-S)
Legal Representation for Children Involved In)
Children In Need Of Assistance (CINA),)
Termination of Parental Rights (TPR) and Related)
Proceedings In The State Of Maryland)

MSBCA No. 2741

HEARING REQUESTED

NOTICE OF APPEAL

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NOTICE OF APPEAL

Legal Aid Bureau, Inc. (“Legal Aid”), through its undersigned counsel, and pursuant to Md. Code Ann., *State Fin. & Proc.*, § 15-211(a)(1) and COMAR 21.10.07, appeals the decision of the Department of Human Resources denying Legal Aid’s bid protest regarding Invitation for Bids No. OS/MLSP-11-001-S, “LEGAL REPRESENTATION OF CHILDREN INVOLVED IN CHILDREN IN NEED OF ASSISTANCE (CINA), TERMINATION OF PARENTAL RIGHTS (TPR) AND RELATED PROCEEDINGS IN THE STATE OF MARYLAND” (“IFB”).

I. Background

The Department of Human Resources (“DHR”) issued the IFB to satisfy the requirements of *Cts. & Jud. Proc.* § 3-813(d) and COMAR 07.01.13.04. Since the early 1980s, these provisions require DHR to enter into contracts with “legal service delivery organizations” in order to “[p]rovide statewide legal representation for children in CINA and TPR proceedings.” COMAR 07.01.13.04B(1). The contracts must be structured in such a way as to “[h]elp achieve the goals of [DHR] by assisting vulnerable clients in receiving the highest level of quality and cost effective legal services.” COMAR 07.01.13.04B(2).

Past solicitations for these services – including the most recent in 2006 – were conducted by way of the competitive sealed proposals method set forth in *State Fin. & Proc.* § 13-104 and COMAR 21.05.03. *See* DHR Request for Proposals No. CSA/MLSP-07-001-S, issued Feb. 28, 2006 (relevant pages attached as **Exh. __**). DHR has changed this prior policy to solicit these services under the competitive sealed bidding method set forth in *State Fin. & Proc.* § 13-103 and COMAR 21.05.02.

As set forth in the IFB, pursuant to Amendment No. 6, bid opening is to occur on October 29, 2010.

By way of a letter dated October 12, 2010, Legal Aid protested certain improprieties in the solicitation; namely,

- a. It is improper for the State to use the competitive sealed bidding method for source selection for the human services required by COMAR 07.01.13.04;
- b. The terms of the IFB are flawed with regard to Ancillary Contact Proceedings; and
- c. The solicitation should contain a "Variation In Estimated Quantities" clause.

(Exh. __).

By way of letter dated October 18, 2010, DHR denied Legal Aid's protest in full. (Exh. __).

II. Grounds for Appeal

- a. **It is improper for the State to use the competitive sealed bidding method for source selection for the human services required by COMAR 07.01.13.04**

DHR's denial of Legal Aid's protest that DHR should have conducted the procurement under the competitive sealed proposals method was arbitrary, capricious, clearly unreasonable and affected by error of law. DHR should have remained consistent with the plain language of relevant statutory and regulatory provisions and its prior, longstanding interpretation thereof; namely, that these provisions require DHR to procure legal services for CINA and TPR proceedings by way of the competitive sealed proposals method *rather than* the competitive sealed bidding method.

State Fin. & Proc. § 13-104(a)(1), COMAR 21.05.01.02B, and COMAR 21.14.01.03A provide that competitive sealed proposals under *State Fin. & Proc.* § 13-104 and COMAR 21.05.03 is the "preferred method" for procuring "human, social, cultural, and educational services." In the case of contracts for legal services for CINA and TPR proceedings under COMAR 07.01.13.04, this is particularly the case. COMAR 07.01.13.04B(2) requires these

contracts to “assist[] vulnerable clients in receiving the **highest level of quality** and cost effective legal services” (emphasis added).

In 2000, the Maryland Administrative Office of the Courts Foster Care Court Improvement Project commissioned a report titled “A Study of the Quality of Purchased Legal Assistance for Children in Maryland.” (“Report,” attached as **Exh. __**). This report proposed certain recommendations regarding the solicitation of CINA/TPR services, including:

Recommendation 2: Recalibrate the proposal evaluation formula to give **more weight to factors bearing on attorney quality** and promised performance;
Recommendation 3: Make actual **past contracting experience a more important factor** in vendor selection;

(Emphasis added).

Recommendation 2 of the Report notes that “[i]n theory, and probably in practice as well, prospective vendors who promise little and bid low under the current system are likely to triumph easily over those who promise a great deal and price their services accordingly.” Report at 18. Recommendation 2 also suggests that DHR separately weigh the relative “competence of the offeror and the quantity of time/attention offered per case.” Report at 19. Finally, Recommendation 2 suggests that DHR consider “steps to discourage—or at least avoid excessively rewarding—unrealistically low bids.” Report at 20.

Recommendation 3 of the Report suggests that offerors “get points for having run [prior] contract[s] very well.” Report at 20. Recommendation 3 also suggests that DHR perform reference checks including judges and masters from the relevant jurisdictions as “the final regular phase of any evaluation.”

In 2001, DHR acknowledged Recommendations 2 and 3 by issuing Request for Proposals No. CSAALS-01\001-S, “Legal Representation for Children Involved in Children In Need Of Assistance (CINA) and Termination of Parental Rights (TPR) Proceedings In State Of

Maryland.” (“2001 RFP,” relevant portions of which are attached as **Exh. ___**). DHR implemented Recommendations 2 and 3 of the Report by considering both technical and financial factors in the determination of award, giving more weight to the technical proposal than the financial proposal. *See* 2001 RFP §§ 5.4, 5.5. DHR separately weighed various technical factors, including the “offeror’s ability to meet desired caseload,” “related experience,” “professional competency,” “projected attorney to client ratio,” “projected average number of hours per case,” and “projected average number of contacts per case.” (**Exh. ___** at §5.4, page 35). 2001 RFP §5.4 stated that “[t]he technical proposal is weighted heavier due to importance for quality service delivery for the children involved in these proceedings.”

In 2006, DHR issued Request for Proposals No. CSA/MLSP-07-001-S (“2006 RFP”, relevant portions of which are attached as **Exh. ___**), which similarly solicited CINA/TPR legal services under the competitive sealed proposals method. Notably, 2006 RFP §5.3 lists the exact same technical evaluation factors as 2001 RFP §5.4, and similarly affords higher weight to the technical evaluation, “due to importance for quality service delivery for the children involved in these proceedings.”

DHR’s 2001 RFP and 2006 RFP considered relevant statutory and regulatory provisions to require use of the “preferred” method of solicitation; namely, the competitive sealed proposals method. This interpretation of the various relevant statutory and regulatory provisions is reasonable. DHR interpreted COMAR 07.01.13.04B(2)’s requirement for the “highest level of quality and cost effective legal services” – in 2001 and 2006 – by setting forth in both prior RFPs that “[t]he technical proposal will be given more weight than the financial proposal in the final evaluation,” and that this weighting was “due to importance for quality service delivery for the children involved in these proceedings.” *See* 2001 RFP §§5.4, 5.5; 2006 RFP §§5.3, 5.4.

Administrative interpretations that contradict prior interpretations of the agency or are inconsistent on their face are not due deference—in fact, they are viewed with skepticism. *See General Elec. Co. v. Gilbert*, 429 U.S. 125, 142-43 (1976) (invalidating agency interpretation of Title VII because it "flatly contradicts" prior interpretations of the agency and by other agencies). As noted in *Department of Health & Mental Hygiene v. Reeders Memorial Home, Inc.*, 86 Md. App. 447, 453 (1991), "An agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored, and if any agency glosses over or swerves from prior precedents without discussion it may cross the line from tolerably terse to intolerably mute." *See also Montgomery County v. Anastasi*, 77 Md.App. 126, 137 (1988); *Action Alliance of Senior Citizens v. Leavitt*, 456 F. Supp. 2d 11, 22-23 (D.D.C. 2006).

In the instant case, DHR has substantially changed course without supplying a reasoned analysis. As set forth in IFB §2.19, "Procurement Method," this procurement is being conducted under the competitive sealed bidding method pursuant to COMAR 21.05.02. IFB Section 2.19 states that "[c]ontracts shall be awarded to the responsible Bidders whose Bid meets the specifications set forth in the Invitation for Bids and provides the lowest price." This method excludes technical considerations from the determination of award, awarding contracts *solely* upon price—no longer considering the "importance for quality service delivery for the children involved in these proceedings" in weighing relative technical proposals.

In the past, DHR interpreted COMAR 07.01.13.04B(2)'s mandate for the "highest level of quality and cost effective legal services" to require consideration of the relative quality of legal services provided as the most important factor in determining contract award. Notably, DHR's letter denying Legal Aid's protest mischaracterizes this regulation as merely requiring

“quality and effective representation.” See **Exh. ___** at 2. Rather, DHR now considers this regulation only to require “minimum requirements and ... satisfactory performance representing children.” *Id.* This interpretation is illogical at best. DHR cannot procure the “highest level of legal services” by determining that any offeror who meets “minimum requirements” is equal to another, more qualified offeror. DHR’s treating of unequal cases equally is arbitrary and capricious.

The impact of DHR’s arbitrary, capricious, unreasonable and erroneous determination to conduct this procurement under the competitive sealed bidding method can be shown in a simple example: Suppose Legal Aid – who during prior procurements has consistently scored far higher than all other offerors on technical factors – bids a price of \$1,500 per CINA/TPR case in Baltimore City. Seven other responsible bidders submit bids of \$1,499 per CINA/TPR case in Baltimore City. Pursuant to IFB §1.1’s chart, there will be a maximum of seven contractors in Baltimore City; awarded based on lowest price alone. In this scenario, DHR procures significantly lower quality legal services in exchange for a savings of \$1 per case. This outcome flies in the face of COMAR 07.01.13.04B(2)’s mandate for “highest level of quality and cost effective legal services.”

DHR decided to use the competitive bidding method for the instant IFB despite (i) *State Fin. & Proc.* § 13-104(a)(1), COMAR 21.05.01.02B, and COMAR 21.14.01.03A’s instruction that competitive sealed proposals is the “preferred method” for procuring “human, social, cultural, and educational services;” (ii) COMAR 07.01.13.04B(2)’s requirement that these contracts provide the “highest level of quality and cost effective legal services;” (iii) the 2000 Report’s Recommendations to “give more weight to factors bearing on attorney quality and promised performance” and “make actual past contracting experience a more important factor in

vendor selection;” and (iv) DHR’s longstanding policy of interpreting these provisions as requiring procurement under the competitive sealed proposals method. DHR’s unexplained “about face” is arbitrary, capricious, clearly unreasonable and in error of law.

b. The terms of the IFB are flawed with regard to Ancillary Contact Proceedings

DHR’s denial of Legal Aid’s protest on the ground that the specifications are unreasonably vague and ambiguous is arbitrary, capricious, clearly unreasonable and in error of law. It is not clear from the terms of the IFB which Ancillary Contact Proceedings require attorney representation under the contract.

IFB §3.4.A, “Representation at Hearings and Other Proceedings,” sets forth in relevant part:

The Contractor shall:

Provide representation of children in the following hearings/proceedings and submit **Monthly Case Statistics (Attachment Q)** on each to the State Project Manager:

...

3. Ancillary Contact Proceedings - Ancillary Contact Proceedings include but may not be limited to:
 - a) Treatment meetings
 - b) Placement meetings
 - c) Administrative hearings
 - d) School conferences and IEP meetings
 - e) Staffing conferences
 - f) Any other non-routine court proceeding requiring the Contractor’s attendance.

(Emphasis in original). Similarly, IFB §3.4.E, “Ancillary Contacts,” sets forth in relevant part:

The Contractor shall:

1. Attend and participate in required Ancillary Contact proceedings stemming from a CINA/TPR case. Ancillary Contacts may include, but are not limited to, treatment, placement, and administrative hearings, school conferences, staffing conferences

concerning the child, and any other non-routine court proceeding requiring the Contractor's attendance, except adoptions.

2. Provide written justification, any related court documentation and/or any additional supporting documentation requested by the State's Project Manager to substantiate all Ancillary Contact case proceedings

Note: It is within the State Project Manager's discretion to compensate the Contractor for Ancillary Contacts a flat fee of \$500 per child client, per contract year, regardless of the number of ancillary contacts per year (**Attachment P**) (see Section 2.18, Payment Terms/Billing). The State's Project Manager will review the justification and documentation provided by the Contractor on a case-by case basis to determine whether the proceeding was an Ancillary Contact and was above and beyond the required contracted legal services warranting payment by the State.

(Emphasis in original). In contrast, IFB §2.17, "Payment Terms/Billing," sets forth in relevant part:

C. Ancillary Contact Proceedings

Similar to as described under the CINA/TPR Case Proceedings described in A, above, Contractors shall bill the Department for only one (1) Ancillary Contact proceeding identified below per child client, per Contract year, using the **CINA/TPR Ancillary Contact Request for Payment Summary Form (Attachment P)**. Contractors shall only receive a flat fee of \$500 per child client per contract year regardless of the number of Ancillary Contact Proceedings. Ancillary Contact proceedings may include, but are not limited to, the following proceedings:

1. Treatment meetings
2. Placement meetings
3. Administrative hearings
4. School conferences and IEP meetings
5. Staffing conferences
6. Any other non-routine court proceeding requiring the Contractor's attendance.

The State's Project Manager will review the justification and documentation provided by the Contractor on a case-by case basis to determine whether the contact was an Ancillary

Contact, which was above and beyond the required contracted legal services warranting payment by the State.

(Emphasis in original).

These provisions are contradictory. If IFB §§3.4.A and 3.4.E require attendance at all Ancillary Contact proceedings, it does not follow that IFB §2.17.C and the “note” to § 3.4.E state that the Project Manager will review the justification for an "Ancillary Contact, which was above and beyond the required contracted legal services warranting payment by the State." If all Ancillary Contacts are required by the IFB, they *cannot* be "above and beyond" the IFB requirements at the same time. As a result, it is ambiguous as to whether all Ancillary Contacts are either (i) “required contracted legal services” under the IFB, or (ii) “above and beyond the required contracted legal services warranting payment.”

Specifications must be sufficiently definite and free from ambiguity to permit competition on a common basis and an ambiguity exists if the specification is subject to more than one reasonable interpretation. *Toxicology Testing Service, Inc.*, B-219131.2, 85-2 CPD ¶469 (Oct. 28, 1985). An award under a solicitation is improper if a solicitation contains an ambiguity which causes bidders to compete on an unequal basis and it is uncertain which bidder, absent the ambiguity, would have been low. *See Wheeler Bros., Inc.; Defense Logistics Agency--Request for Reconsideration*, B-214081.3, 85-1 C.P.D. ¶388 (Apr. 4, 1985); *see also Rockville Partition, Inc.*, MSBCA No. 1835, 4 MSBCA ¶367 at 5 (1994) (holding that bidders should compete on equal footing and that one bidder not be accorded a competitive advantage by obtaining a contract without meeting the specifications expected to be met by other bidders).

DHR has not disclosed what criteria it will use in determining which Ancillary Contacts are “above and beyond the required contracted legal services warranting payment.” Because bidders have no guidance as to which Ancillary Contacts will be compensated under the terms of

the contract, bidders are placed on unequal footing. Any award under the IFB's terms for Ancillary Contact Proceedings will be improper by placing certain bidders at a disadvantage to others.

Apparently, DHR believes that the "Uniform Guidelines of Representation for Attorneys Representing Children in CINA and related TPR and Adoption Proceedings" are sufficient performance specifications setting forth the contract's required legal services. (See IFB Attachment R, **Exh. ___**). In contrast, the 2000 Report includes Recommendation 16, which suggests that DHR "[w]rite detailed performance standards based on the proposed 'Uniform Guidelines' into RFPs/contracts with vendors, and expect to pay more for this higher level of service." The 2000 Report indicates that the "Uniform Guidelines" are simply that – "guidelines" – and are not "detailed performance standards" which contractors must meet during performance of the contract. Without such "detailed performance standards," it is impossible for contractors to know which Ancillary Contact Proceedings require their attendance.

State Fin. & Proc. § 11-201(a)(2) sets forth as a policy of the General Procurement Law, "ensuring fair and equitable treatment of all persons who deal with the State procurement system." The IFB's provisions regarding Ancillary Contact Proceedings places bidders on unequal footing based upon their interpretations of this ambiguity, does not ensure fair treatment and compensation for contractors, and does not ensure the "highest quality of legal services" pursuant to COMAR 07.01.13.04B.

The Procurement Officer should either (i) clarify the ambiguity in the solicitation by explicitly stating that contractors must attend all Ancillary Contact Proceedings and that all Ancillary Contact Proceedings will be compensated, or alternatively, (ii) publish the criteria to be used by DHR in determining whether an Ancillary Contact Proceeding is required and will be

compensated. DHR's denial of Legal Aid's protest of the improprieties in the solicitations provisions regarding Ancillary Contact Proceedings is arbitrary, capricious, clearly unreasonable and in error of law.

c. The solicitation should contain a "Variation In Estimated Quantities" clause.

DHR's denial of Legal Aid's protest on the ground that the solicitation should contain a "Variation In Estimated Quantities" ("VEQ") clause is arbitrary, capricious, clearly unreasonable, and in error of law. COMAR 21.07.01.15 is explicit in requiring such a clause in "all contracts that contain estimated quantity items."

IFB Attachment No. A-1, as amended by Amendment No. 5, estimates "Projected Caseloads" for each fiscal year by jurisdiction. Pursuant to IFB §4.1, as amended by Amendment No. 5, a bidder must bid on the entire caseload in all single-vendor jurisdictions (e.g., Washington County). In its protest, Legal Aid noted that, if these estimates are inaccurate, bidders will be develop their bid prices, among other things, by spreading their anticipated fixed cost over the number of cases estimated (by the government). If the number of actual cases significantly underruns the estimated quantity, the bidder will not recover his fixed costs due solely to the underrun. Similar to construction contracts, if the actual quantity underruns the estimated quantity by more than 25%, these fixed costs could place a bidder at significant fiscal disadvantage. In response to DHR's failure to include a VEQ clause, bidders will likely increase their bid prices accordingly in order to protect themselves from the risk of inaccurate estimates.

Offerors for Government contracts generally rely, and the Government intends that offerors rely, on estimated quantities contained in a solicitation. *See River/Road Construction, Inc.*, ENG BCA No. 6256, 98-1 BCA (CCH) ¶29,334 (Oct. 6, 1997). DHR's denial claims that these "caseload projections are provided as guidance only and cannot be guaranteed" does not

render these “projections” as something *other than* an “estimated quantity” to be relied upon by a bidder in preparing a bid.

Because the solicitation (i) contained an estimated quantity item – namely, “projected caseloads” - and (ii) failed to include a VEQ clause in the solicitation as required under COMAR 21.07.01.15, DHR’s denial of Legal Aid’s protest on this ground is arbitrary, capricious, clearly unreasonable and in error of law. In the existing contract, awarded in 2006, there is a variation in estimated quantities and DHR has offered no rationale for abandoning this practice.

III. Conclusion

For the foregoing reasons, this Board should grant Legal Aid’s appeal on all three grounds.

IV. Request for Hearing

Pursuant to COMAR 21.10.07.06, Legal Aid requests a hearing of this Appeal.

V. Request for Ruling

Based on the foregoing, Legal Aid requests that this Board:

1. Order the Procurement Officer to rescind the IFB and republish the solicitation in accordance with the competitive sealed proposal method under *State Fin. & Proc.* § 13-104 and COMAR 21.05.03;
2. Order the Procurement Officer (i) clarify the specifications requiring Ancillary Contact Proceedings and that all Ancillary Contact Proceedings will be compensated, or alternatively, (ii) publish the criteria to be used by DHR in determining whether an Ancillary Contact Proceeding is required and will be compensated;

3. Order the Procurement Officer to include a "Variation In Estimated Quantities" clause in the solicitation pursuant to COMAR 21.07.01.15;
4. Prohibit DHR from proceeding with bid opening and award on the instant solicitation until the resolution of the instant Appeal; and
5. Award Legal Aid costs of filing in pursuing its bid protest and this Appeal, as well as other relief that this Board may deem appropriate;

Dated October 27, 2010



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Certificate of Service

I HEREBY CERTIFY that on this 27th day of October, 2010, a copy of the foregoing Notice of Appeal was sent via First Class U.S. Mail to:

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