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October 12, 2010

VIA HAND DELIVERY

Mr. Joseph Sorrels
Procurement Officer
Department of Human Resources
Procurement Division
311 W. Saratoga Street, Room 946
Baltimore, MD 21202-3521

RE: **BID PROTEST**
IFB Agency Control No. OS/MLSP-11-001-S; ADPCIS No. N00R0401486;
Legal Representation for CINA, TPR and Related Proceedings in State of
Maryland

Dear Mr. Sorrels:

This law firm represents Legal Aid Bureau, Inc. ("Legal Aid"), a prospective bidder on the above-referenced solicitation. The purpose of this letter is to protest the improprieties in the solicitation. As outlined below, there are several improprieties in the solicitation which, in our view, require revision of the IFB in order to conform with the general procurement law.

I. Background

By way of background, Legal Aid is a private, non-profit 501(c)(3) organization established in 1911 to provide free civil legal assistance to low-income people in need throughout Maryland. Legal Aid serves Baltimore City and Maryland's 23 counties from 13

offices statewide. Legal Aid provides legal counsel for abused and neglected children, the disabled, residents of nursing homes and assisted living facilities, migrant farmworkers, and those whose basic necessities including housing, custodial relationships, and health are at risk.

Since the early 1980s, the Department of Human Resources (“DHR”) has been obliged, pursuant to *Cts. & Jud. Proc.* § 3-813 and COMAR 07.01.13.04B, to enter into contracts with “legal service delivery organizations” to represent children in Children in Need of Assistance (CINA) and Termination of Parental Rights (TPR) proceedings. In accordance with that obligation, since 1982 Legal Aid has represented more than 100,000 children in Children in Need of Assistance (CINA) and Termination of Parental Rights (TPR) proceedings throughout Maryland. This work was paid for through a contract with the Department of Human Resources (DHR). Prior to 1982, some children were served by attorneys working in Legal Aid’s domestic law unit. In the early 1990s, DHR procured these human and social services pursuant to the competitive sealed proposal method of source selection.

On or about September 2, 2010, DHR issued the instant Invitation for Bids (“IFB”) soliciting bids for legal representation for children in need of assistance, termination of parental rights and related proceedings in State of Maryland. There was a pre-bid meeting which included numerous questions and answers. There have been five amendments to the Invitation for Bids.

Pursuant to Amendment No. 4, the IFB’s deadline for submission of bids is 10:00 a.m., October 15, 2010.

II. Basis of Bid Protest

a. It is improper for the State to use the competitive sealed bidding method for source selection for the human services required in this solicitation.

COMAR 07.01.13.04B, “Contracts for Legal Services,” sets forth that DHR shall enter into CINA and TPR representation contracts which “[h]elp achieve the goals of the Department of Human Resources by assisting vulnerable clients in receiving the *highest level of quality* and cost effective legal services.” By procuring these services under the competitive sealed bidding process set forth in COMAR 21.05.02, rather than the competitive sealed proposal process under COMAR 21.05.03, DHR is rendering meaningless COMAR 07.01.13.04B’s requirement to consider the “quality” of services rendered.

As noted in IFB Section 2.19, “Procurement Method,” this procurement is being conducted pursuant to COMAR 21.05.02, Competitive Sealed Bidding. IFB Section 2.23, “Contract Award,” sets forth:

Contracts shall be awarded to the responsible Bidders whose Bid meets the specifications set forth in the Invitation for Bids and provides the lowest price. The State reserves the right to make the awards by item, or groups of items, or total Bid if it is in the best interest of the State to do so, unless the Bidder specified in his Bid that a partial or progressive award is not acceptable. DHR has the right to request

that a vendor(s) accept additional cases in the event an entire jurisdiction's caseload is not represented after all successful Bids/Bidders have been determined.

(Emphasis added).

This is an unwarranted change from the traditional approach. *State Fin. & Proc.* § 13-104(a)(1), COMAR 21.05.01.02B, and COMAR 21.14.01.03A provide that the competitive sealed proposals method is the "preferred method" for procuring "human" or "social" services, such as the services contemplated by this solicitation. In the absence of any very strong justification to the contrary, DHR must use the legislatively mandated "preferred" method, set forth under *State Fin. & Proc.* § 13-104(a)(1). There can be no more "human" or "social" service than the protection of children in need of assistance, and DHR has recognized this for the past 29 years.

By not adhering to the mandated method of source selection, DHR ignores the relative experiences and capabilities of the various bidders. DHR is setting itself up to award contracts to vendors who have minimal experience in CINA and TPR proceedings, and may not be able to properly handle the caseloads assigned.

The competitive sealed bidding method of source selection is appropriate where the IFB specifies, in detail, quantity, quality and time of delivery of goods and services. Price is the only material term that differentiates one bidder from the next, and an award is made to the responsible bidder who offers the lowest price. This method works well for purchase of commodities and construction services because the specifications clearly identify the nature of the items or services to be procured; all bidders are competing on equal footing to provide the exact same goods or services, and the State merely requires bidders to satisfy the minimum requirements.

When it comes to the legal services necessary to represent a child in need of assistance, however, price is not the only differentiator between proposals for these human services. The quantity *and quality* of the services vary widely from one contractor to the next. While years of experience certainly factor into the level of quality of a contractor, other measures include, but are not limited to, appellate experience and performance; relationships with key providers in the State, local jurisdictions, and the courts; emphasis on training and education; and the ability, willingness, and track record regarding travel to visit clients and involvement in non-judicial activities on behalf of clients. These measures are not taken into account by a competitive sealed bidding procurement, and as such, the State may not select its most advantageous offer.

DHR should revise the terms of the solicitation to conduct the procurement under the competitive sealed proposal method pursuant to *State Fin. & Proc.* § 13-104 and COMAR 21.05.03. In soliciting these services under a Request for Proposals, DHR should structure its evaluation criteria in light of COMAR 07.01.13.04B's direction to procure the "highest level of quality."

b. The terms of the IFB are flawed.

The specifications are vague and ambiguous. This makes it impossible for a bidder to compete on equal footing because, among other reasons, various bidders will place different interpretations on the vague language used in specifying the scope of work. DHR should clarify which Ancillary Contacts are “above and beyond the required contracted legal services.”

COMAR 21.04.01.01 provides: “A specification as used in this title means a clear and accurate description of the functional characteristics or the nature of an item to be procured.” Turning now to the specifications set forth in the above-referenced IFB, there are too many vague provisions which make it impossible, as a practical matter, for bidders to compete on equal footing.

For example, IFB Section 2.17.C, “Ancillary Contact Proceedings,” sets forth various “ancillary proceedings” where the contractors may, or may not, elect to provide any work. Evidently, it is up to the contractor, in the first instance, to make a determination about whether the contractor (*i.e.*, attorney for the child in need of assistance) must actually attend various proceedings including:

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.

It is apparently not a requirement that the attorney/contractor attend; however, there are no criteria provided for whether or not the contractor should, should not, must, or must not attend those proceedings.

The basis for compensation for participation in ancillary contacts is set forth in excessively subjective terms. The IFB provides: “**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 added).

This is unfair. A prospective bidder cannot tell, in advance, whether or not those future proceedings will or will not be required in any particular case. Worse yet, the State has not disclosed what criteria will be used in determining on a “case-by-case basis” whether the contact was “above and beyond the required contracted legal services warranting payment by the State.” It should be noted that several questions regarding the criteria for determining whether an ancillary contact warranted a separate invoice were posed to the State as part of the written Questions and Answers process (Questions 20, 33, 73, and 107). The State’s responses to those questions were vague and circuitous.

If the State knows what criteria it will use in determining whether the contact was “above and beyond” what is required, the State must disclose those criteria in order for the specifications to serve as a “clear and accurate description of the functional characteristics or the nature of an item to be procured.” See COMAR 21.04.01.01. If the State does *not* know what criteria will be used, the State should not call upon the bidders to somehow predict the future as to what will determine whether such an Ancillary Contact is “above and beyond” what is required. It is conspicuously unfair to put bidders on unequal footing, each guessing what will be the criteria for additional payment.

The ambiguities in the specifications make it impracticable to provide a fixed bid price that takes the performance of the ancillary services into consideration. IFB Attachment R is titled “Guidelines of Advocacy for Attorney Representing Children in CINA and Related TPR and Adoption Proceedings.” These guidelines are in the nature of *suggestions* which, if performed by the attorney, may or may not be “above and beyond” the contract requirements.

In addition, IFB Section 3.4.E.1 provides:

The Contractor shall: 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.

This sentence indicates that the contractor “shall” attend “required” proceedings. On the other hand, the IFB does not specify which Ancillary Contacts are “required.” Procedurally, it is unclear who is supposed to make such a determination about what is “required,” as between the procurement officer, the State Project Manager, or the contractor/attorney. Substantively, it is unclear what is meant under Attachment R’s “guidelines” about whether an attorney “should” attend. Again, if the work is “above and beyond,” then it is certainly not within the “required” scope of work. This is an impropriety in the solicitation that should be cured.

The contract requirements for “Ancillary Contact Proceedings” are further misleading or unclear because of Section 2.17.C, which sets forth:

Similar to as described under the CINA/TPR Case Proceedings described in A, above, Contractors shall bill the Department for only one (1) Ancillary Contract proceeding identified below per child client, per Contract year, using 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.

Thus, the contractor is in the anomalous position of (1) deciding whether it “should” or “should not” attend an ancillary proceeding, (2) guessing about what constitutes “above and beyond” what is required, and (3) earning a flat fee of \$500 per child client per contract year regardless of the number of Ancillary Contact Proceedings.

Suppose, for example, there are five such Ancillary Proceedings for one child and for another there is only one. Under the IFB, it appears to be arbitrary – treating unequal cases equally – to pay a single price for such wide variations in the amount of services rendered. In a case where there are several Ancillary Proceedings, the contractor gets paid \$500, and in the case where there is only one Ancillary Proceeding, the contractor earns the same \$500.

From a legal ethics standpoint, this single payment regime is more troubling. Contractors are monetarily incentivized to cut down on the amount of services rendered to children in need of assistance. In Legal Aid’s experience, CINA and TPR proceedings are best handled with multiple ancillary child contacts in order to assure the best representation for the children.

Maryland procurement law requires that bidders 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 the other bidders. *See, e.g., Rockville Partition, Inc.*, MSBCA No. 1835, 4 MSBCA ¶367 at 5 (1994). As a result of DHR’s ambiguous specifications concerning “required” Ancillary Contacts, Legal Aid is not competing on an equal footing with other bidders who have differing interpretations. DHR should clarify this specification so that bidders will be competing with the same understanding as to what will be considered “above and beyond the required contracted legal services,” and therefore eligible for additional compensation.

c. The IFB should contain a “Variation In Estimated Quantities” clause.

IFB Attachment A-1 provides a schedule identifying, by jurisdiction, projected case loads. There is a footnote, setting forth, “These caseloads are estimates for budget purposes only and cannot be guaranteed. A two percent (2%) caseload increase has been estimated for the passed [sic] period and option periods.”

Pursuant to IFB Section 4.1, as amended in IFB Amendment No. 5, Bidders are to base their bids in Baltimore City on a minimum caseload of 1,000 cases, but in jurisdictions where only one vendor will be selected, bidders are required to base their bids on the entire caseload. Where these estimated caseloads are inaccurate, a bidder may face an unfair fiscal disadvantage due solely to DHR’s erroneous estimates.

For example, suppose a bidder recognizes its fixed costs and spreads those fixed costs over the estimated total caseload in Washington County of 260 per year. Suppose the bidder’s price reflects not only the fixed costs spread over that estimated caseload of 260 per year, but also reflects in its bid price the marginal costs associated with the performance of the work per case. Now suppose further that the actual quantity turns out to be 130 cases (or 60% of the estimate). This means that the contractor’s per case cost will increase due solely to the decrease in volume comparing the estimated quantity with the actual quantity.

Under that circumstance, it would be fair to give an equitable adjustment in the contract price, reflecting the cost increases per case due solely to the decrease in volume. However, the solicitation does not contain any clause allowing for such variations in estimated quantities. This violates COMAR 21.07.01.15 “Variation in Estimated Quantities,” which sets forth that such a

clause is a “[m]andatory provision for all contracts that contain estimated quantity items.” DHR may contend that there are no “estimated quantities” because of the disclaimer in the footnote that these caseloads are “estimates for budget purposes only and cannot be guaranteed.” Bidders recognize that, as explicitly stated, these figures are “estimates” of actual caseloads.

If the estimates are inaccurate, the failure to provide realistic estimates where bidders are going to be paid per case for the actual work performed undermines one of the policies of the procurement regulations. Pursuant to COMAR 21.01.01.03E, Maryland’s procurement regulations provide “[i]ncreased economy in State procurement activities and ... maximize to the fullest extent the purchasing power of the State.” In Legal Aid’s view, the solicitation should be revised to include a clause allowing for equitable adjustments where there is a variation in the estimated versus the actual quantities. The State may look to a provision consistent with the mandatory provision for variations in estimated quantities applicable in construction contracts set forth in COMAR 21.07.02.03.

III. Failure to honor option year contracts

The solicitation provides, at Section 4.2, “The fully-loaded Firm Fixed Unit Price per Child Client per Year for years 1 through 3 shall be the same [sic] no increase is allowed and shall not exceed \$1,500.00. The fully-loaded Firm Fixed Unit Price per Child Client per Year for Option years 1 and 2 shall be the same no increase is allowed and shall not exceed \$1,600.00.” A reasonable reader would infer that if there are any requirements for legal representation for CINA/TPR, then the government may opt to procure those services from the awardee(s) of this upcoming bid. A reasonable bidder would likewise infer that the bidder – in its future capacity as a contractor in Option Years 1 and 2 – would be paid in accordance with the bid prices set forth in Attachment A-3.

On the other hand, there has been a troublesome practice on the part of DHR in the past. When the option years arrive, and the contractor is entitled – by contract – to compensation at the rate set forth in the proposal for those option years, DHR deviates from its contract obligations. Instead of paying the contractor the prices proposed in the financial proposal, DHR does not honor the contractor’s Option Year prices as set forth in its financial proposal. Instead, DHR issues a modification to extend the duration of the existing contracts at the existing prices. As a result, the contractor is denied the benefit of its bargain. The contractor’s costs have increased, as was anticipated when the bid was first made and accepted, but the fees for services have been essentially frozen at the price of the last base year, in degradation of the contractor’s rights.

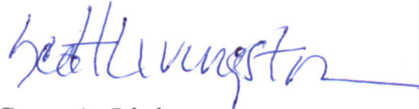
In light of the terms of the IFB, Legal Aid anticipates that DHR will abide by its contract requirements. Legal Aid interprets Attachment A-3 as obligating DHR to pay the rates set forth in Legal Aid’s financial proposal in the option years. Further, Legal Aid reasonably expects that DHR will not attempt to avoid those obligations by modifying the existing contract and extending the period of time.

IV. Conclusion

For the reasons set forth above, Legal Aid Bureau, Inc. protests the terms of the solicitation, IFB Agency Control No. OS/MLSP-11-001-S; ADPCIS No. N00R0401486; "Legal Representation for CINA, TPR and Related Proceedings in State of Maryland." Legal Aid Bureau, Inc. requests the opportunity to meet with the procurement officer, engage in discussions and possibly negotiations to resolve this bid protest in accordance with COMAR 21.10.02.08.

In the meantime, DHR must postpone the date of bid opening until the resolution of this protest. *See Helmut Guenschel, Inc.*, MSBCA No. 1434, 3 MSBCA ¶211 (1989); *William F. Wilke, Inc.*, MSBCA No. 1162, 1 MSBCA ¶61 (1983). If DHR intends not to postpone receipt of initial proposals, please contact me immediately so that Legal Aid may take appropriate action.

Very truly yours,



Scott A. Livingston

cc: Brian L. Wilbon, Acting Secretary, Department of Human Resources
Delores Edwards, Director, Maryland Legal Services Program
Aretha Ector, Esq., Assistant Attorney General
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