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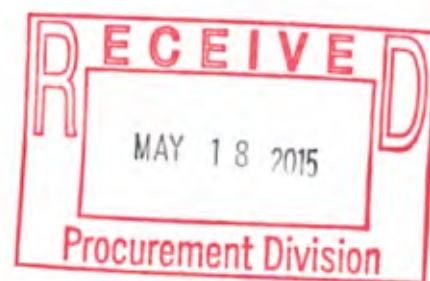
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May 18, 2015

**VIA HAND DELIVERY AND EMAIL (kristin.leonard@maryland.gov)**

Kristin Leonard,  
Procurement Officer  
Maryland State Department of Human Resources  
Procurement Division  
311 West Saratoga Street, Room 946  
Baltimore, Maryland 21201-3521



Re: **PROTEST**  
DHR RFP No. OS/MLSP-15-001-S, "Legal Representation Services for  
Children Involved in Child in Need of Assistance (CINA), Termination of  
Parental Rights (TPR) and Related Proceedings"

Dear Ms. Leonard:

This law firm and the law firm of Rifkin, Weiner, Livingston, Levitan and Silver, LLC represent the Legal Aid Bureau, Inc. ("Legal Aid"), a prospective offeror for DHR RFP No. OS/MLSP-15-001-S ("the RFP"). The purpose of this letter is to protest the RFP, pursuant to COMAR 21.10.02.03A, on the grounds that there are improprieties in the solicitation.

**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 services Baltimore City and Maryland's 23 counties from 13 offices statewide. Legal Aid provides legal counsel for abused and neglected children, the disabled, veterans, residents of nursing homes and assisted living facilities, migrant farmworkers, and those whose basic necessities including housing, custodial relationships, financial security, and health are at risk.

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Since the early 1980's, the Department of Human Resources ("DHR") has been required, pursuant to *Cts. & Jud. Proc.* § 3-813 and COMAR 07.01.13.04B, to enter into contracts with "legal service delivery organizations" to represent clients 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 150,000 children in CINA and TPR proceedings throughout Maryland. DHR paid for the legal services performed by Legal Aid in accordance with contracts awarded, from time to time, since 1982. Before 1982, some children were served by attorneys working in Legal Aid's domestic law unit. In the early 1990's, DHR procured these human and social services pursuant to the competitive sealed proposal method of source selection.

On or about April 20, 2015, DHR issued the RFP that is the subject of this Protest. The method of source selection is competitive sealed proposals pursuant to § 13-204, *St. Fin. & Proc. Art.* The RFP solicits proposals for legal representation for children in CINA, TPR, and related proceedings throughout Maryland. A Pre-Proposal Conference occurred on May 1, 2015. Potential Offerors submitted 140 written questions to which DHR provided written responses. As of this writing, there have been three amendments to the RFP. The RFP contemplates multiple awardees rather than a single awardee providing legal services in the political subdivisions.

The deadline for submission of bids is 3:00 p.m. on May 20, 2015. In accordance with longstanding decisions of the Maryland State Board of Contract Appeals starting with *Helmut Guenschel, Inc.*, MSBCA 1434, 3 MSBCA ¶211 (1989), Legal Aid is entitled to, and requests, a decision on the merits of this Protest before the date for submission of Proposals, even if it means postponement of the date of May 20, 2015 for submission of the initial proposals.

## II. BASIS FOR PROTEST

The improprieties set forth below demonstrate that the RFP is materially flawed. An objective review of those flaws compels the conclusion that the RFP should be withdrawn and revised before DHR undertakes to solicit and evaluate Proposals to perform the extraordinarily important work of protecting the rights of Maryland's most vulnerable population – abused and neglected children and young adults.

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#### **A. COMPLYING WITH THE RFP RESULTS IN VIOLATIONS OF THE MARYLAND LAWYERS' RULES OF PROFESSIONAL CONDUCT**

The RFP is requiring offerors to violate The Maryland Lawyers' Rules of Professional Conduct ("the Rules" or "Rule \_\_\_") this surely does not provide the legal service that Maryland's young and most vulnerable population deserves. The RFP does so in numerous ways. Moreover, the RFP plainly states that any exception taken to the RFP's requirements can result in a Proposal being deemed unacceptable and can cause the Proposal to be rejected. *See* RFP §§ 1.24 and 4.4.2.4.

For example, an Offeror is required (§ 4.4.2.4) to submit with its Proposal Appointment Orders with the Current Client List (RFP Attachment U-2). Contractors (*i.e.*, awardees of the contracts) are also required to furnish DHR with copies of Appointment Orders during the course of contract performance. Appointment Orders, however, are not only part of the confidential file of the child client, they are also protected confidential court documents. Accordingly, the Rules require that they cannot, and the applicable court rules state that they should not, be released without a procedure that results in permission from the court and that could potentially include redaction of the Order. *See* Cts. & Jud. Proc. §3-827 and Juvenile Rule 11-121(a).

Rule 1.8(f) permits the Maryland Legal Services Program ("MLSP"), which oversees the CINA/TPR contract on behalf of DHR to contract to pay for the child's legal services as long as there is: (a) no interference with the lawyer's independent professional judgment or with the attorney-client relationship; and (b) protection of confidential information relating to the representation of the client, as required by Rule 1.6. The RFP's mandating the release of confidential and protected information such as client Appointment Orders "and/or a copy of the Client's last Court Order" violates the attorney-client privilege and conflicts with the rules of a confidential court. Those provisions of the RFP fail to protect Maryland's most vulnerable children from being identified and potentially harmed.

Rule 1.8(b) provides, in pertinent part, that "a lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules." For example, a client's last court order may include information about sexual abuse, medication, psychotherapy, and other sensitive information. Disclosing such information to DHR

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Contract Monitors would disadvantage the client and are barred under Rule 1.8 unless the client gives informed consent. *See* RFP, 3.2.4.13, Contract Monitoring, A. Compliance Audits. However, child's counsel must adhere to the Rules under the Contract. How can a Contractor comply with the RFP if the RFP contradicts itself in a provision that is material to the Contractor's representation of the client?

Legal Aid submitted a written question (no. 115) to DHR, pointing out the material conflict between the Contractor's ethical obligations under the Rules and the RFP's requirements. DHR's response was entirely unhelpful: "Offerors shall demonstrate how they intend to meet the requirements of the RFP. See also, response to questions 15 and 39." DHR's responses to questions 15 and 39 are similarly unilluminating. The response to Question 39, in particular, states that the Appointment Orders are needed for monitoring and auditing purposes. Even if so, and even if allowable under the Rules, at the proposal stage of the procurement process there is no auditing or monitoring occurring for which Appointment Orders would be needed.

There are other examples of the RFP's inconsistent and incompatible provisions regarding the disclosure and handling of confidential client information. The requirements of RFP §4.4.2 cannot be reconciled with:

RFP § 3.2.4.1 B: "Client court identification numbers .....may be substituted, *if case information is shared with any State Agency other than DHR.*" (emphasis added)

RFP § 3.2.4.1 B: "The use/disclosure by a Contractor of any protected CINA/TPR client information under this contract .....is prohibited."

RFP § 3.2.1 D: "The Contractor shall adhere to the Maryland standard of practice for lawyers who represent children in child abuse and neglect cases...."

RFP §§ 3.2.3.3 A and B, role of child's counsel - follow Guidelines and Rules of Professional Ethics.

The RFP permits DHR to interfere with the lawyer's independence of professional judgment by directing where and how (in-person only) to visit the child and who can meet with the child if the attorney is not available. *See* RFP §§3.2.3.5 and 3.2.4.1.A xiv. § 3.2.3.5 interferes with the Offeror's ability to provide high quality cost efficient

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services to Maryland's most vulnerable children by reducing the ability to utilize paralegal staff in a meaningful role, particularly with respect to client visits. As noted in Question 93, it has been the practice that paralegals, case workers, investigators or licensed social workers have been allowed to visit the child client if the attorney is unavailable. DHR has offered no justification for eliminating this cost-effective way of serving clients.

In addition, the RFP requires the attorney to meet with the client prior to every scheduled hearing and at least twice a year. That level of visitation by the attorney is not only inefficient, it may not be feasible or practical, particularly with respect to child clients in out-of-state-placements or in jurisdictions where there are frequent postponements. Child clients may not wish to have face-to-face meetings with their attorneys and would prefer a meeting by phone, Skype, FaceTime, or some other method.

Further, while DHR may prefer that a visit be conducted in a child's placement, such a visit may not serve the best interest of the client. The in-placement environment may not provide a neutral or private setting that will facilitate "effective communication" as required by RFP 3.2.3.5A. A teenage client may, for example, prefer telephone contact or court communications. It should be up to the attorney, in consultation with his/her client, to determine the location of the visit and that location should be kept confidential between the attorney and the child client. To require the attorney to divulge the exact location of the visit runs afoul of Rule 1.6. Communications must be consistent with the Rules, including client-directed representation, the guidelines of advocacy, and the client's best interest.

In addition, Rule 1.7 (Conflict of Interest) also applies because the same agency that is paying for the representation is also the agency that, throughout the pendency of the CINA/TPR litigation, may advocate for a position that is directly adverse to the child client's position. For example, DSS (DHR) may recommend a placement in a residential treatment facility, but the child opposes such a placement because the placement is not the least restrictive placement and not in the child's best interest.

For DHR to require violation of laws as part of contract performance offends due process and defies logic and common sense. Accordingly, the RFP provisions discussed above cannot stand.

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## **B. THE RFP'S EVALUATION CRITERIA ARE VAGUE AND AMBIGUOUS**

The vagueness of the RFP's Technical Proposal Evaluation criteria will result in such broad variations in proposals that evaluators will not be able to make fair and equal assessments of each Offeror's Proposal. In such circumstances, there is little likelihood that Offerors share a common understanding, so that DHR (and taxpayers) are unlikely to obtain the benefits of competition. COMAR 21.04.01.01 requires that specifications must be drawn to provide "a clear and accurate description of the functional characteristics of an item to be procured." The RFP falls far short in that regard.

Although RFP §5.2. lists the criteria to be used to evaluate the Technical Proposals in order of importance, there is no weight given to any of the criteria. RFP §5.2.1 states that the criteria to be used to evaluate an Offeror's Technical Responses to RFP Requirements and Work Plan are that "the State prefers an Offeror's response to work requirements in the RFP that illustrates a comprehensive understanding of work requirements and mastery of the subject matter, including an explanation of how the work will be done." It is unclear, however, what is meant by "a comprehensive understanding of work requirements or a mastery of the subject matter."

In addition, there is no weight given in evaluating the components of the Technical Proposal. In fact, DHR's Responses to Questions 74 and 118 specifically state that "There are no points, there is no scoring, there is no specific weight assigned in the RFP" and "There are no scores or percentages associated with each component of the Technical Proposal." The Response to Question 77 offers only that "if there are five offerers, the best technical proposal would be ranked number one, the second best proposal wild [sic] be ranked number two, three, four and five and so on...."

If there are no points, scores, or specific weights, how will the Technical proposals be evaluated against the RFP requirements and then against the other proposals? If DHR does not know what weight will be given, how can a proposer know which factors to commit to providing greater resources? If DHR does not know the weighting, it sends the signal that DHR can select any Proposals, irrespective of technical ranking. This undermines the policy of "providing for increased confidence in State procurement," pursuant to § 11-201(a)1, St. Fin. & Proc. Article.

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Legal Aid acknowledges and appreciates DHR's efforts to give technical factors greater weight than financial factors in the evaluation process. *See* § 5.5.3 Award Determination. DHR's failure, however, to disclose the relative weights given to the technical factors will allow the lowest price offered (most advantageous) to prevail and encourage bidders to engage in a "race to the bottom," which would not be in anyone's best interest, least of all the vulnerable child clients served through this Contract. *See* §5.3. To eliminate the possibility of this situation, it would be preferable for the State to establish a fixed price for the services to be rendered, with reasonable inflation increases over the course of the contract, and invite bidders to compete on technical factors within certain guidelines rather than financial.

"Offerors are entitled to know the relative importance of each of the evaluation factors, and it is incumbent upon the procuring agency to adhere to stated criteria." *A & R/Bowie*, MSBCA 1690, 4 MSBCA ¶1316, p. 11 (1992) (sustaining appeal where agency violated RFP by using a scoring method that was not communicated to the offerors). "Offerors are entitled to rely on the stated evaluation criteria, and the relative weight of those criteria, so as to configure their proposals in the manner they consider most advantageous." *United Technologies Corp. and Bell Helicopter Textron, Inc.*, MSBCA 1407 and 1409, 3 MSBCA ¶201, p. 35 (1989), citing *B. Paul Blaine Assoc., Inc.*, MSBCA 1123, 1 MSBCA ¶58, p. 9 (1983). "Procuring agencies do not have the discretion to announce in the solicitation that one plan will be used and then follow another in the actual evaluation." *Id.* at p. 35, citing *Genasys Corp.*, 56 Comp. Gen. 835, 838 (1977).

A protester is materially prejudiced by the agency's incorrect weighting of the RFP factors. *Dismas Charities*, B292091, 2003 CPD ¶125, 2003 WL 21665202, p. 3 (2003) (sustaining protest even though agency, post-protest, claimed the result would have been the same under proper weighting of the factors). The RFP's vague evaluation parameters, and the confusing comments made by DHR personnel during the Pre-Proposal Conference to explain how weighting and evaluation will be conducted, portend a problematic and flawed evaluation. This excerpt from the Pre-Proposal Conference transcript at pp. 48 - 51 is revealing:

MR. JOSEPH [Legal Aid]: You list the proposition that technical will carry more weight than the financial; is that correct?

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MS. LEONARD [Procurement Officer]: Correct.

MS. DAVIS [Director, Legal Services Program]: That's correct.

MR. JOSEPH: How much more weight?

MS. ECTOR [DHR AAG]: There are no points or measurements assigned to the RFP, so we cannot tell you that it will be 70-3-, 60-40. There are no points assigned to each of the criteria. However, the technical portion of the proposal will be considered more heavily than your financial.

MR. JOSEPH: Okay, you're saying no points will be assessed what?

MS. ECTOR: The criteria. There's no points, there are no scoring, there are no specific weight assigned in this RFP.

MR. JOSEPH: Either to the technical nor the fiscal?

MS. ECTOR: Correct.

MR. JOSEPH: But you just also stated in the fiscal part it will be ranked according to price.

MS. ECTOR: Correct.

MR. JOSEPH: But that's not consistent with what you just said.

MS. ECTOR: A ranking is from lowest to highest. If there are five offers with financial proposals, they would be ranked from the lowest offerer's proposal to the highest, one, two, three, four, five. That's all.

MR. JOSEPH: The ranking is based on the unit of dollars in the technical side?



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MS. ECTOR: Correct.

MR. JOSEPH: As to the technical side now, how do you rank from best to worst under what system?

MS. ECTOR: If there are five offerers [sic], the best technical proposal would be ranked number one, the second-best proposal would be ranked number two, three, four, five and so on. Then there would be an overall ranking considering the technical and the financial, and then we will get an overall ranking one through five. And that's because in my example there were five offerers [sic].

MR. JOSEPH: How are you going to figure out what technical overrides what price, if you have top rank at a higher price, how are you going to figure that out?

MS. ECTOR: We will consider all of the factors in the RFP, all of the criteria, and determine which proposal is in the best interest of the State and provides the most advantageous price for the services offered.

MR. JOSEPH: I just alert you to the fact that you're going down a road that you've been before with a roadblock. And I'll say nothing more.

Another material flaw in the RFP is the use of the word "preference" in a manner that is, at best, vague. For example, RFP § 5.5.3 (Award Determination) suggests that there are two paths down the award determination road: one for Offerors without any continuing cases, and the other for Offerors with cases to be continued and who also wish to receive new cases.<sup>1</sup> The word "preference" is used here without any weighting or scope parameters ("preference will be given to Offerors that are current providers that wish to keep their current caseload, but do not wish to take on new cases.") To provide a fair and equal opportunity for all Offerors to decide how best to prepare their Proposals, the term

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<sup>1</sup> The value or amount of the "preference" is unclear because the costs for keeping current caseload cannot be accurately evaluated due to flaws in the financial evaluation form.  
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"preference" must be clarified. In that regard, the conflicting comments of the Procurement Officer and the Director of the Maryland Legal Services Program reflect a lack of clarity on the application of that preference:

Ms. Leonard: Also, in order to maintain continuity of representation, preference will be given to offerers [sic] that are current providers who wish to keep their current caseload and wish to take on new cases, provided that award recommendations to such offerers [sic] are determined to be in the best interests of and most advantageous to the State.

...

Ms. Davis: An offerer[sic] who is an incumbent provider who wishes to keep their cases will receive preference with regard to those cases only. There will be competition for all new cases in every jurisdiction whether you're new or whether you're an incumbent. The incumbents who have cases that wish to keep them will receive preference for the purpose of continuity of representation, that's it. The new cases are out on the free market.

Pre-Proposal Transcript at pp. 37; 39-40.

In addition, § 3.2.4.14 (Transition) allows for a current Contractor to retain its current cases "if the State Project Manager or the court determines it is in the best interest to do so...." Yet the RFP is unclear as to the factors the State Project Manager must consider in determining whether the current Contractor will retain its current caseloads. Suppose DHR has determined that it is best for a teenager to be placed in a residential care facility, but the attorney strongly advocates – per the teenage client instructions— that there should not be a placement in a residential care facility. The State Project Manager is in a position to deny the teenager effective counsel by deciding not to allow the case to remain with the current Contractor.

The Response to Question 82 states only that the Offerors must demonstrate that they are capable in all respects of carrying out the services required in the RFP and that the criteria listed in § 5.2 will be used to evaluate the Technical Proposal. As discussed above, however, there is no quantifiable system for evaluating the Technical Proposal.

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It is also entirely unclear how an Offeror's Financial Capability will be used in the evaluation process. The RFP requests information related to Financial Capability at § 4.4.2.11, yet does not provide any information as to how the submitted "fiscal integrity" information will be part of the evaluation process. For example, will DHR utilize that information solely to determine responsibility, on a "pass-fail" scoring or will it also have an evaluative function? It violates procurement law for a single factor to be counted twice (once in the "pass-fail" and a second time in evaluating the technical superiority of the proposal).

Maryland procurement law is clear: the evaluation of a proposal must be based on the evaluation factors set forth in the RFP. COMAR 21.05.03.03(A)(1). "Factors not specified in the request for proposal may not be considered." COMAR 21.05.03.03(A)(5). Accordingly, modifying the evaluation criteria without amending the RFP or giving other notice to Offerors contravenes the General Assembly's stated purposes for Maryland's statutory procurement scheme, which include providing for increased confidence in State procurement, ensuring fair and equitable treatment of all persons who deal with the State procurement system, and providing safeguards for maintaining a State procurement system of quality and integrity. *See* Md. Code Ann., State Fin. & Proc. § 11-201.

Moreover, Maryland procurement law requires that Offerors compete on equal footing, and that one Offeror not be accorded an unfair 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). This is why, pursuant to COMAR 21.04.01.01, specifications must be drawn to provide "a clear and accurate description of the functional characteristics of an item to be procured." Likewise, the specifications governing required financial information must be "clear and accurate." The RFP fails to meet those standards.

### **C. THERE IS AN INHERENT CONFLICT OF INTEREST IN DHR CONDUCTING THE EVALUATION PROCESS**

The multiple responsibilities that DHR discharges and the context within which these duties are to be discharged create a procurement situation that is fraught with conflict, confusion, and unintended, unfortunate consequences.

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DHR's primary role within the executive branch of government is to develop and manage policies and programs that meet the needs of various segments of vulnerable populations, including abused and neglected children. As an agency of the executive branch, DHR, particularly in challenging fiscal times, is constantly under pressure to contain and, when necessary, to reduce expenses.

Within DHR's budget responsibility and control are both the statutorily mandated programmatic activities on behalf of CINA clients and the similarly mandated legal representation of these clients. As a result, legal representation, as a budget item, has proven to be in tension with other programs within the agency and a pressure point within the agency's overall budget. DHR has consistently operated with a particularly disproportionate focus on minimizing and reducing the costs of doing business. In such circumstances, DHR's success could be disproportionately measured in terms of how well it contains, minimizes, and/or reduces costs. This establishes a conflict for DHR as the procuring agency for the contract work solicited in the RFP.

Moreover, conflicts arise between DHR and Legal Aid out of sometimes conflicting roles in extra-judicial proceedings, including those organizations' respective participation in the legislative process. Sometimes their positions are the same; just as often, they are not.

It must be noted that the usual petitioner in a CINA proceeding is the local DSS, which is governed by DHR. A question arises as to the appropriateness of having DHR, in effect, procure and administer contracts for legal services rendered to one party in proceedings in which it also has an interest as a potentially adverse party in the proceedings at the trial and appellate levels. (*See A Study of the Quality of Purchased Legal Assistance for Children in Maryland*, p. 30, July 14, 2000)

This conflict is particularly relevant with respect to "reasonable efforts." *See* §3-816.1, Cts. & Jud. Proc. From the moment a child comes to the attention of the local DSS, that office has a statutory duty to make "reasonable efforts" to provide services to: (1) prevent the child's removal from the home; or (2) if the child has already been removed, reunify the child with the parent as soon as possible; or (3) if the child is to remain outside of the home, stabilize the child in placement and plan for permanency. Granted, it is the court's responsibility to determine the local DSS's level of compliance. Legal Aid often utilizes this requirement to leverage services for clients and insist upon

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fully litigating these issues. DHR's oversight of the procurement process for legal services in CINA proceedings in essence allows DHR to select its own adversaries on the issue of whether clients should receive certain services.

The same agency that has authority over the child is the same agency that is "shopping" for the child's lawyer. It is problematic, therefore, that the agency is able to select the law firm based on the lowest prices (assuming the minimum requirements of the RFP are met) rather than based on the best interests of the child client who deserves, like any other individual or entity, the highest quality of legal representation. Zealous, quality legal representation is in the best interest of the child. For DHR to purchase legal services for children that are under DHR care, it must comply with the client confidentiality and independent professional judgment provisions set forth in Rule 1.8, as discussed in Section II.A above.

Legal Aid recognizes that there are significant budget constraints placed upon DHR and all other State agencies at this time. However, in prioritizing where to realize savings, Maryland Legal Aid believes DHR should not seek to save a modest amount of funds by paying less for the representation of a vulnerable child. The legal proceedings concerning a child's guardianship and care have a significant effect upon his or her future well-being. DHR should recognize that significant interest while drafting the RFP evaluation criteria to ensure that each CINA/TPR client is well represented by an attorney focused solely on providing the most zealous representation for that client.

Even with the best of intentions, it is highly possible that the historically adversarial relationship between DHR and Legal Aid influences DHR's procurement of legal services. For that reason, Legal Aid protests DHR's conducting the procurement under the current RFP. The Department of Budget and Management could serve in DHR's stead, to avoid the issues described in this section of this Protest.

#### **D. THE FINANCIAL PROPOSAL FORM IMPROPERLY PREVENTS OFFERORS FROM PROPOSING A PRICE FOR CARRYOVER CASES**

There is a flaw in the Financial Proposal Form that undermines the likelihood that offerors are competing on equal footing, each with a common interpretation of the RFP terms. RFP Section 1.3 (Contract Type) states that "The Contracts resulting from this

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solicitation shall be Indefinite Quantity Contracts with Fixed Unit Prices in accordance with COMAR 21.06.03.06(A) and 21.06.03.02." RFP Section 4.5 (Volume II – Financial Proposal) states:

Under separate sealed cover from the Technical Proposal and clearly identified in the format identified in Section 4.2 "Proposals," the Offeror shall submit an original and four (4) copies, and an electronic version in Microsoft Word or Microsoft Excel of the **Financial Proposal**. The **Financial Proposal Form (Attachment F1: CINA/TPR Proceedings Pricing Proposal)** shall contain all price information in the format specified in the **Attachment F1, which shall not exceed the \$1450 as the FLFUP capped price for the Base period and \$1500 as the FLFUP capped price for the Option years.** *The Offeror shall complete the Financial Proposal Form only as provided in the Financial Proposal Instructions and the Financial Proposal Form itself.* (Italicized emphasis added).

Offerors must complete the Financial Proposal Form "only as provided," per RFP § 4.5 Volume II – Financial Proposal. As to Attachment F (Pricing Proposal), column "C" is derived from Attachment F-2; significantly however, F-2 does not allow carry over cases to be included in the "requested caseload." Accordingly, the Financial Proposal Form does not provide any place for submission of the pricing of carryover cases. This is an impropriety in the solicitation that invalidates evaluation of the proposals. It is elementary that DHR may not solicit proposals calling for one basis of award and award the contract on a different basis. *Appeal of ParkNet*, 5 MSBCA ¶473 (Sept. 27, 1999).

Legal Aid and DHR share a common mission: help children in need of assistance and avoid termination of parental rights. Yet the parties differ over the reasonableness (or lawfulness) of the current RFP to accomplish their mutual goals. Pursuant to COMAR 21.10.02.08, 02.08:

The procurement officer may conduct discussions and, if appropriate, negotiations with the protester or any other interested party and may resolve the protest by agreement with any one or more interested parties. The agreement shall be in writing and shall be subject to the approval of the reviewing authority and the Office of the Attorney General.

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This Protest over improprieties in the solicitation may give rise to reasonable discussions, and, if appropriate, negotiations to resolve the Protest.

Under the circumstances, the impropriety in the solicitation – the absence of a place to submit the prices for carryover cases – means the RFP is fatally flawed.

**E. THE RFP IMPERMISSIBLY INTERFERES WITH THE CONTRACTORS' STAFF MANAGEMENT RESPONSIBILITIES**

The RFP interferes with the Offeror's ability to provide high quality cost-effective legal services to its clientele, among other things, by restricting the selection and management of staff. The result is that the RFP calls on contractors to act in a manner that is unacceptable in customary legal practice. This interference improperly restricts the Contractor's ability to direct and control the manner in which legal services are delivered to each child.

**1. Section 1.23 of the RFP– Substitution of Personnel**

The provisions of Section 1.23 impermissibly intrude on the Contractor's ability to manage its own staff by granting to the State Project Manager the ability to approve or disapprove the substitution of staff on the contract. It may not be in the Contractor's best interest, for example, to fill a vacancy with a person with "qualifications at least equal to those of the key personnel for whom the replacement is requested." See §1.23 C. If a person with many years of experience leaves or retires, the Contractor should not be required to hire a replacement with the same level of experience as would be required under this provision. Further, providing the State Project manager with a "detailed explanation of the reason(s) for the substitution" of an employee would violate confidential personnel information to which the State Project Manager or anyone outside of the Contractor's human resources staff is not privy.

Finally, it is not the State Project Manager's role to determine if an employee of the Contractor should be hired on a contingent or temporary basis. The Contractor should be able to hire its employees based on its own hiring practices and policies.

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Section 1.23 puts DHR in a position to approve or disapprove a staff hiring, and, worse, there is no remedy if DHR lets the matter remain unresolved for some excessive and indeterminate time period.<sup>2</sup> Contractors working under this contract do not work on behalf of DHR; rather, they work on behalf of children in CINA/TPR proceedings and oftentimes are in opposition to DHR. The result is that DHR can hinder delivery of legal services, in violation of the implied obligation in all Maryland contracts; namely, that neither party may do anything to hinder the performance of the contract by the other party. *See Calvert General Contractors Corp.*, MDOT 1004, 1 MSBCA ¶5 at 25 (1981) ("[i]n this construction contract, as in every contract, there is an implied obligation that neither party will do anything to hinder the performance of the other party"); *Alpha Omega Amusements, Inc.*, MSBCA Nos. 1887 & 1951, 5 MSBCA ¶412 (1998) (where State took actions which would necessarily prevent a contract from being performed as bid and planned, the State breached the implied obligation not to prevent or hinder performance by the other party).

The Contractor accepts responsibility for keeping the State Project Manager informed about changes in personnel on the contract, including the submission of a resume and a Certificate of Good Standing provided by the Courts, and handling any specific complaints about the performance of a particular staff person. The authority for the hiring, firing, and management of personnel, however, should rest with the Contractor, who is responsible for the recruitment, training, supervision and compensation of its personnel.

DHR has not offered any regulatory/statutory authority for its suggestion that it has the right to dictate the selection and management of the Contractor's personnel. In responding to Question 3, DHR stated, "the State Project Manager is responsible for ensuring that the personnel assigned to the contract meet the minimum requirements and are able to carry out the duties and responsibilities under the Contract." To the contrary, it is the Contractor's responsibility to do so, just as it is the State Project Manager's responsibility to manage his/her own staff. Staff who work under the contract are employees of the Contractor, not the State, and as such, the terms and conditions of their employment should be under the control of the Contractor.

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<sup>2</sup> This possibility is more glaring because DHR has routinely missed the 30-day deadline for payments and regularly forces the Contractor to wait for 90 days before payments.  
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Moreover, Legal Aid paralegals and attorneys are unionized and it may violate the collective bargaining agreement if Legal Aid relinquishes its ability to act in accordance with the Collective Bargaining Agreement (CBA). Legal Aid personnel decisions require strict adherence to the terms and conditions of the CBA.

**2. Section 3.2.4.7**

- D. "Law clerking experience is insufficient to meet the two year minimum [experience] qualification. "
- E. Supervision of staff with less than two years of experience requiring "physical presence during all court ordered proceedings".

RFP §§ 3.2.4.7D and E are unnecessarily burdensome and restrictive. Excluding relevant law clerk experience, which is often the only legal experience a new hire has, unduly restricts the potential hiring pool for qualified attorneys.

Also, requiring in courtroom supervision is not always practical, and the requirement is onerous and not beneficial to the client. Courtrooms often lack the space to accommodate two attorneys, and having two attorneys creates confusion for clients and others involved in the matter as to who represents the client.

In response to Question 108, DHR stated that it has determined that two years' experience is the minimum for an attorney to represent a client. This Response, however, offers no rationale or justification for this excessive level of supervision.

**F. ONE VENDOR JURISDICTION ISSUES**

RFP § 1.16.5 on page 13 (typo in RFP; should be numbered 1.15.5) addresses how cases will be assigned if the highest ranked Offeror cannot handle a case because either there exists a lack of manpower or there is a conflict of interest. Significantly, the solicitation is silent about the situation where there is single contractor in a particular jurisdiction. The RFP must be revised accordingly.

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### **G. KEEPING FUNDS SEPARATE**

The RFP's provision prohibiting the co-mingling of funds (§ 3.2.4.11) interferes with the Offeror's ability to provide high quality, cost efficient services. Legal Aid sought an explanation (Question 109) as to the State's interest in how the Contractor chooses to use that revenue, earned through satisfactory performance of the contract. It is important to recognize that the RFP is soliciting a fee-for-service contract. This is not a cost-plus type of contract. DHR's response was uninformative: "Per the RFP, Contractors shall have accounting procedures in place that will separate all revenues and expenses associated with the contract form [sic] other revenue sources"). For these reasons, the RFP's unnecessary and burdensome restriction regarding revenue earned by the Contractor cannot stand.

### **H. UNLAWFUL PENALTIES**

The monetary penalties of \$150 per day for late invoices/reports in the RFP (Section 3.2.4.2 NOTE) are an unreasonable remedy, given DHR's own challenges with the receipt of its own mail. Legal Aid has a messenger service hand deliver its monthly invoices/reports to DHR because delivery by mail has been ineffective, *i.e.*, invoices/reports were apparently lost in the mailroom on a consistent basis.

This \$150 per day amount is not reflective of the damages that might reasonably estimate the cost that DHR would incur for tardy invoices or reports. On a highway construction project, contractor tardiness means the SHA incurs extra costs for inspection, maintenance of a field office, and harm to the traveling public; accordingly, time is of the essence and SHA may assess reasonable liquidated damages for tardiness. By contrast, there is no discernible injury to DHR if, for instance, an invoice or report is a day late. There is no basis whatsoever for estimating that DHR will suffer any loss in the range of \$150 per day.

Further, this section conflicts with RFP § 3.6.2, which imposes penalties that are in line with those imposed under the current Contract. While § 3.6.2 deals only with invoices, the reports listed in 3.2.4.2 comprise the invoice.

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## I. OTHER DEFICIENCIES

1. There should be a required HIPAA Agreement to protect personal health information. The RFP has no such requirement.

2. There is no Cost of Living Adjustment in the maximum rates set forth in RFP Section 4.5 (\$1450 and \$1500).

3. Section 3.2.3 (Legal Representation at Hearings and Other Proceedings) lists Voluntary Placement Proceedings at which representation by the Contractor is expected. Under the current Contract, there is a separate payment schedule for Voluntary Placement Proceedings (up to \$500). The RFP is silent as to whether this payment practice will continue or whether the Voluntary Placement Proceedings will be paid at the Contractor's per-case rate for other proceedings.

4. Section 3.2.4.2. J requires the Contractors to provide "*ad hoc*" reports. When asked for the definition of *ad hoc* reports (Question 106), DHR responded that *ad hoc* reports are any reports not listed in the RFP. Requiring an Offeror to agree to an undertaking not adequately described in the RFP is inconsistent with Maryland Procurement Law.

5. The RFP introduces a new requirement of a financial audit in § 3.4.13.D; namely, it must be submitted 90 days after the end of the contract year. This violates the Federal Single Audit Act. Section 1.35.2 indicates that the total amount of Federal funds allocated for MLSP in FY15 is 29%. In accordance with the Single Audit Act, no audits may be required *other than* the A-133. For those Contractors that produce an A-133 as part of their annual audit, it would be in DHR's best interest to supplement the single audit by testing revenue and expenditures related to the CINA contact. It is impossible to see how such how DHR suddenly requires a separate audit to be conducted of the 71% of the State funds allocated for MLSP. This would add cost to the prospective offeror that routinely obtains federal grants, which means the specification is drawn – illegally—in such a manner as to disfavor one vendor over the others.

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If you have any questions regarding this Protest, I trust you will let me know.

Finally, to acknowledge receipt of this Protest, please sign and date-stamp the enclosed copy of this letter and return it to our waiting messenger.

Sincerely,



Philip M. Andrews  
Sheila R. Gibbs  
KRAMON & GRAHAM, P.A.

Scott Livingston  
RIFKIN, WEINER, LIVINGSTON  
LEVITAN & SILVER, LLC

#### Enclosures

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