

Via Facsimile and Certified Mail, Return Receipt Requested

October 18, 2010

Scott A. Livingston, Esquire
Rifkin, Livingston, Levitan & Silver, LLC
7979 Old Georgetown Road
Suite 400
Bethesda, Maryland 20814

**Re: Legal Aid Bid Protest
Invitation For Bids for Legal Representation for Children Involved in
Children in Need of Assistance(CINA), Termination of Parental Rights
(TPR) and Related Proceedings in State of Maryland (IFB)
Agency Control No.: OS/MLSP 11-001-S**

Dear Mr. Livingston:

This letter is in response to the Bid Protest (Protest) filed on behalf of Legal Aid Bureau, Inc. (Legal Aid) pursuant to COMAR 21.10.02.03. The Department of Human Resources (Department) received the Protest on October 12, 2010. The Protest alleges that there are three improprieties in the solicitation: 1) It is improper for the State to use the competitive sealed bidding method for human services; 2) The terms of the IFB are flawed; and 3) The IFB should contain a "Variation In Estimated Quantities" clause. The remaining Protest ground alleges that the Department failed to honor option year contracts. Legal Aid requests to meet with the Department to discuss the Protest, and in the interim, postpone the bid opening pending the resolution of the Protest.

Upon review of the Protest, supporting documents and the record, for the reasons that follow, it is the decision of the Department to deny the Protest in whole.

I. Factual Background

The Department issued the referenced IFB on September 2, 2010. The Pre-Bid Conference occurred on September 14, 2010. Six Amendments were posted on eMaryland Marketplace and the Department's website between September 22, 2010 and October 14, 2010.

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Responses to Questions 1 – 122 were posted between September 30, 2010 and October 14, 2010. Bids in response to the IFB were due Friday, October 15, 2010 at 10:00 a.m. and scheduled to be opened on October 15, 2010 at 11:30 a.m. The Protest was received on October 12, 2010. As a result of the Protest, on October 14, 2010 Amendment #6 was issued and postponed the due date for receipt of Bids until Friday, October 29, 2010.

II. The Competitive Sealed Bidding Method of Procurement is Appropriate.

Legal Aid's Protest alleges that the Department should have used the competitive sealed proposal method to procure the legal services. Legal Aid contends that the Department must use the legislatively mandated "preferred" method, set forth under *State Fin. & Proc. Article § 13-104(a)(1)*, Annotated Code of Maryland, to procure these human services. *See Protest, p. 3*. The Department's failure to use this method "ignores the relative experiences and capabilities of the various bidders." *Protest, p. 3*. There is no requirement that the Department use the competitive sealed proposal method and Legal Aid's allegations are not supported by the law or the facts of the IFB.

Section 3-813 of the *Cts. & Jud. Proc.* states that every child who is the subject of a CINA petition must be represented by counsel that is under contract with the Department. In accordance with this statute and COMAR 07.01.13.04, the purpose of the IFB is to award contracts to attorneys to provide quality and effective representation in CINA and TPR cases statewide. Neither the statute nor regulations dictate the manner in which the legal services are to be provided. Nor do the regulations specify the manner in which the contracts are to be awarded. Contrary to Legal Aid's argument, there is no legislative mandate to use the competitive sealed proposal method for all human services. The competitive sealed proposal method is preferred, but, COMAR does not mandate its use. Because there is no mandate, the Department may exercise discretion to determine which procurement method is best. Simply because the competitive sealed proposal method was used in the past, does not dictate its use in future procurements.

In this IFB, the Department determined the minimum level of experience needed to represent the children effectively and set minimum qualifications for all bidders. The specifications also included a requirement that all contractors comply with the CINA Guidelines and industry standards and practices when representing children. In order to respond to this IFB, bidders must demonstrate that they meet the minimum requirements



and have satisfactory performance representing children. Legal Aid argues that in addition to experience, the Department must consider other factors such as appellate
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experience, contacts with the community, training and education. All of these concerns are addressed in the IFB as well. Specifically, the IFB requires that each attorney complete a minimum number of continuing education credits each year regardless of years of experience, and requires contact with the child in the child's community. In addition, all attorneys are under an ethical obligation to represent the best interest of the children. All of these measures are minimum requirements and are not subject to the discretion or whim of the bidders as would be the case if bidders were allowed to propose what training or services they would offer each child. The Department has mandated specific services to ensure quality and continuity of representation amongst the contractors who desire to represent children on behalf of the State. Therefore, the decision to award contracts to the lowest bidders is appropriate under these circumstances and allows the Department to limit the number of contractors based upon the needs and best interest of the State.

III. The terms of the IFB are not flawed.

Legal Aid asserts that the specifications in the IFB are vague and ambiguous. This allegation is very broad and the only reference to any vagueness or ambiguity is the reference to Ancillary Contacts. Legal Aid argues that it does not know which "Ancillary Contacts are 'above and beyond the required contracted legal services.'" *See Bid Protest*, p. 4. Legal Aid contends that there should be criteria for attorneys to use to decide whether or not to attend an ancillary proceeding and what criteria will be used by the State to pay contractors.

The IFB defines an Ancillary Contact in Section 1.10 as any "other court proceedings or a contact that falls outside of a routine court proceeding that involves emergency or significant events in the child's life. These contacts include, but are not limited to treatment, placement and administrative hearings, school case conferences and staffing conferences concerning the child." These types of hearings may be required by the court or the local department, but are not part of the standard CINA/TPR proceedings. Section 2.17, Payment Terms/Billing, permits contractors to bill for Ancillary Contact proceedings one time per child per year. This billing is in addition to the regular CINA/TPR billing. There is nothing misleading about this statement. The once per year



billing for Ancillary Contacts is the same type of billing that is permitted for CINA/TPR cases. This method is not arbitrary and applies to all contractors equally. Further, if Legal Aid had questions about the billing, it had an opportunity to present questions to the procurement officer.

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Legal Aid argues that bidders cannot provide a fixed price that takes ancillary services into consideration because of the alleged ambiguities. Here, bidders are not being asked to provide a price for these proceedings. Payment for Ancillary Contact proceedings is set by the Department at \$500.00 and is not included in the bidder's price proposal. In other words, the payments made for these proceedings have no impact on the bidder's price proposal. On October 8, 2010, in response to Question # 107, bidders were specifically advised that payment for Ancillary Contact proceedings should not be included in the bid price and would not be considered for evaluation purposes.

While it is not possible to predict whether an Ancillary Contact proceeding will ever arise in a particular case, the Department recognizes that there may be proceedings that impact the child during the contractor's representation of that child. For these reasons, the Department has decided to compensate contractors for their services and to compensate contractors equally. The most common types of proceedings are identified in the IFB, however, it is not possible to give an exhaustive list. If the contractor has a question about whether a proceeding may be considered Ancillary, the contractor should confer with the MLSP Project Manager.

Legal Aid argues that it does not know whether attendance at Ancillary Contact proceedings is mandatory. Section 3.4E, as part of the contractor requirements, the contractor is required to attend and participate in Ancillary Contact proceedings. Therefore, as stated in the IFB, if there is a hearing of the type described in the IFB involving the child, contractors shall attend the proceeding. This is not ambiguous. If a contractor attends a proceeding and desires to be paid, the contractor shall submit an invoice that contains a description of the proceedings and any supporting documentation (see Attachment P to the IFB). Additionally, in response to Questions, the Department explained that all requests for payment for Ancillary Contact proceedings required submission of an invoice.

IV. A "Variation In Estimated Quantities" clause is not required.



Legal Aid argues that the IFB should permit “an equitable adjustment in the contract price, reflecting the cost increases per case due solely to decrease in volume. *Protest, p. 6.* The Department understands Legal Aid’s concerns, but has determined that it is in the best interest of the State to continue to proceed with the firm fixed-price contract, pursuant to COMAR 21.06.03.01.

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The Department has considered the nature and type of services required, the complexity of the procurement and the difficulty in determining the costs associated with providing the legal services requested. This is not a revenue generating contract and the Department has no control over the number of children that may require representation during the term of the contract. Considering that there is an abundance of competition for the contracts, the Department has concluded that a firm fixed-price contract will result in the best value for the State. The IFB explains that the caseload projections are provided as guidance only and cannot be guaranteed. The projections are based on historical data, case trends, and existing cases, which was the best information available at the time of the solicitation. In light of the uncertainties, it is in the best interest of the State to prohibit contract price adjustments because of the various and unknown fluctuations that may occur in the individual contractor’s costs.

V. The Department has not failed to honor option year contracts.

In this Protest ground, Legal Aid appears to suggest that the Department must exercise the two one-year options contained in the IFB. In the Summary Statement, Section 1.1 of the IFB, bidders are advised that the term of the contract is three years with two one-year options to be renewed at the sole discretion of the State. Bidders are reminded in Section 2.9 Options, that the exercise of an option, if any, rest solely with the State. Any person that submits a Bid in response to the IFB, is presumed to accept all of the terms and conditions of the solicitation, unless otherwise stated. Should Legal Aid refuse to accept the terms of the Option language, then it may note the objection as an attachment to the Transmittal Letter as proscribed in Section 4.3B.

Lastly, Legal Aid suggests that the Department has failed to exercise the options in the current contract and as a result Legal Aid has lost money. This Protest ground is rejected as untimely and totally unrelated to this IFB. Protest must be filed within seven days of when the basis of the protest is known or should have been known. COMAR



21.10.02.04. The time for Legal Aid to protest the extension of the current contract, if it had a right to do so, would have been at the time of the extension.

VI. Conclusion

For the reasons stated herein, the Department denies Legal Aid's Protest in whole. As a result, the Department does intend to proceed with bid acceptance and opening on October 29, 2010 as indicated in Amendment #6.

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This decision is the final action of this agency. This decision may be appealed to the Maryland State Board of Contract Appeals in accordance with COMAR 21.10.07.02. If you decide to take such an appeal, you must file written notice of appeal to the Appeals Board within ten (10) days from the date you receive this decision. Notice shall be sent to:

The Maryland State Board of Contract Appeals
6 St. Paul Street
Suite 601
Baltimore, Maryland 21202

Sincerely,



Joseph Sorrells
Procurement Officer

