

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of)
Legal Aid Bureau, Inc.)
)
) Docket No. MSBCA 2826
Under)
DHR Agency Control No. OS/MLSP)
13-001-S)

APPEARANCE FOR APPELLANT: Scott A. Livingston
Bethesda, Maryland

APPEARANCE FOR RESPONDENT: Aretha J. Ector
Assistant Attorney General
Baltimore, Maryland

APPEARANCE FOR INTERESTED PARTY Darlene A. Wakefield
Baltimore, Maryland

OPINION BY BOARD MEMBER DOORY

This appeal must be dismissed because appellant failed to establish evidence of any ambiguities or improprieties in the Request for Proposals. The procurement officer's final decision denying the first protest is appropriate.

Findings of Fact

1. The Department of Human Resources (Department) issued a Request for Proposals (RFP) on August 7, 2012 for legal services for Children in Need of Assistance (CINA), Termination of Parental Rights (TPR), and other related proceedings. Legal services for children and adults were previously procured separately. In an effort to streamline

procurement of services with many similarities, the Department combined provisions into one RFP. Offerors were permitted to submit bids for one or both services and in multiple jurisdictions as long as the proposed caseload did not exceed a 1:150 attorney-client ratio.

2. On August 16, 2012 a Pre-Proposal Conference was held. Between August 9, 2012 and October 3, 2012 nine (9) Amendments were posted on eMaryland Marketplace (EMM) and the Department's website. Between August 13, 2012 and September 17, 2012, responses to questions were also posted.
3. Initially, on Monday, September 10, 2012 at 2:00 pm. proposals were due but when the first protest was filed, the due date was extended to September 24, 2012 at 2:00 pm by Amendment 4. Later, the Department issued Amendment 6 on September 20, 2012 which extended the due date again to October 15, 2012 at 2:00 pm.
4. Appellant alleges in its first protest that the RFP contained improprieties, eighteen (18) in all: 1) Improper Weights of Technical and Financial Proposals - Financial Proposals will Carry More Weight Than Technical Proposals; 2) Improper Contravention of the Statutory Requirements for Representation by Counsel; 3) Improperly Drawn Payment Provisions; 4) Discrepancies in the Term Governing the Obligation and Timing of Payments to the Contractor; 5) Improper Drafting of Section 2.24; 6) Improper Failure to Incorporate Answers in the RFP; 7) Violation of Client Confidentiality under Section 5.11 of the RFP; 8) Improper Staffing/Caseload Requirements; 9) Vague Scope of Work Requirements; 10) Ranking of Technically Superior Services; 11) Improper Specification on Out-of-State Travel; 12) Improper RFP Provisions that Contradict the Maryland Lawyer

Rules; 13) Improper Evaluation of the Financial Proposal; 14) Improper Failure to Respond to Questions; 15) Improper Withholding of the Best Information Available; 16) Arbitrary Specifications Governing the Distribution of Cases; 17) Improper Reporting Requirements; and 18) Misrepresentation of the Amount of Time Required for a Voluntary Placement Case.

5. A final decision was rendered to the first protest by the Procurement Officer on September 27, 2012. Eleven (11) allegations, specifically, protest item numbers 1, 2, 3, 5, 6, 8, 10, 12, 13, 17, and 18 were denied. Protest allegations in protest items 4 and 7 were accepted by the Department which revised the RFP by issuing Amendments 4 and 5 on September 6 and 17, 2012, respectively. Allegations 15 and 18 were accepted in part and denied in part. The Procurement Officer agreed to accept the allegations in protest item numbers 9, 11, 14, 15, and 16 and issued Amendment 7 on September 28, 2012 and Amendment 8 on October 2, 2012.
6. On October 5, 2012 appellant filed a second bid protest on seven (7) issues that were the subject of the first protest. Then appellant filed a timely appeal to the first protest on October 9, 2012, four (4) days after filing a second bid protest.
7. On October 11, 2012, the Procurement Officer issued the Department's final decision on the second protest denying each of the seven (7) grounds. On October 22, 2012, appellant filed a second appeal on the same grounds.
8. Currently, no recommendation for award has been made, and the Department is reviewing and evaluating all proposals. None of the parties have requested a hearing.

Decision

Appellant cites seven (7) grounds for this first appeal.

(1) Improper Weights of Technical Proposals and Financial Proposals - Financial Proposals will Carry More Weight Than Technical Proposals Equal Weights of Technical and Financial Proposals.

Appellant complains that Section 7.5 of the RFP (Criteria for Technical Evaluation) states that "Financial proposals will carry more weight than technical proposals." However, that provision was changed by Amendment 7 on September 28, 2012, and states, "Financial and technical proposals will carry equal weight." It is certainly within the prerogative of the Department to establish the weight of the evaluation criteria and there is nothing improper about its doing so. Evaluating financial and technical proposals equally is a very commonly employed methodology in procurements. The financial and technical proposals will be evaluated separately in accordance to Section 7.5 of the RFP. The Department will then evaluate the best overall qualified offerors to retain the best legal services for CINA/TPR and APS/APGRB children and adults throughout Maryland. There is nothing improper, erroneous or ambiguous about the criteria. This appeal ground is denied.

(2) Improper Failure to Incorporate Answers in the RFP and Make Sure that the RFP Clearly Establishes the Contract Requirements.

Appellant's appeal on this ground alleges that the Department did not comport to COMAR 21.04.01.01 which states,

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. It may include a statement of any of the procurement agency's requirements and may provide for submission of samples, inspection, or testing of the item before procurement.

The Department answered and posted on its website and on eMarylandMarketplace all 103 responses to questions submitted by prospective Offerors. The purpose of posting answers is to provide further explanation and understanding of the RFP requirements.

The appellant alleges that the Department answered the questions but did not amend the RFP to incorporate answers to the specifications. The Department issued nine (9) Amendments to this RFP which made significant and material changes to the RFP in accordance with COMAR 21.05.03.02. In an effort to facilitate understanding of these major changes, Section 6.2 of the RFP required Offerors to acknowledge receipt of all addenda to the RFP received by them.

Appellant alleges that Questions #36 and #54 were not answered and incorporated and as a result the RFP is unclear and vague. The Department posted on its website on September 4, 2012:

Question 36: In a two-provider jurisdiction, if the highest-overall-ranking provider bids for half of the potential cases in the jurisdiction will they be on shelter care coverage until they reach their maximum number or will there be some alternating schedule or formula?

Answer: No. MLSP will prepare alternating schedules.

The Department posted on September 5, 2012:

Question 54: Will there be a calendar generated by MLSP indicating assignment of shelter days based on ranking and number of

cases awarded? If a provider is the number one ranked vendor, will that provider be on shelters every day until the provider's case assignment is met? Or, will the provider share shelter days on the calendar with other successful providers based on ranking and cases awarded?

Answer: Yes. Please refer to the response to the questions 34 and 36 (third set of questions). Contractors will be placed on rotating/alternating shelter days with other successful Contractors.

Responding to an additional question, the Department changed Section 1.1 of the RFP regarding case assignments by issuing Amendment 7 incorporating the following clarifying language:

The Department expects that in most jurisdictions, Contractors will be placed on a shelter case calendar, which will be provided to the court and the LDSS. Contractors are placed on the calendar on a rotating basis. Cases are assigned to the Contractor who appears on the shelter calendar the day the case is scheduled to be heard. Contractors are not permitted to refuse assignment of cases other than for actual or perceived conflicts or if the maximum caseload, attorney/client ratio or contract dollar amount is met.

Note: Notwithstanding the above, the assignment of cases will be consistent with local jurisdiction practices and the State's best practices, including the existing Closed Case Policy and Sibling Policy for the Baltimore City jurisdiction.

The above language clarifies that there may be some differences in local jurisdictions and the Offerors are placed on notice to that effect. That notice is certainly not improper because all Offerors are treated alike.

The concern about staffing and caseload requirements are stated clearly in Section 5.5 of the RFP, and the question of

case assignments, when a conflict arises, is clearly addressed in Sections 3.4(G) and 5.1 of the RFP.

The Procurement Officer properly denied this ground of the appeal for lack of ambiguity or impropriety. This ground of the appeal is denied.

(3) Ranking of Technically Superior Services

In this ground of the appeal, appellant alleges that the evaluation criteria are too vague and that the Department should include rankings in the evaluation of proposals. Evaluation factors must be included in the request for proposal. The Department is properly following the requirements of COMAR in this matter. COMAR 21.05.03.02A(2) states, "The evaluation factors and an indication of the relative importance of each evaluation factor, including price." In the RFP there are five (5) evaluation criteria which are listed in descending order of importance.

COMAR 21.05.03.02(4) and (5) state, "Numerical rating systems may be used but are not required," and "factors not specified in the request for proposals may not be considered." Appellant may want a ranking system but clearly one is not necessary. The evaluation criteria are certainly not vague and Offerors read the criteria to be considered and know they are listed in descending order of importance. The Procurement Officer properly denied this ground of the appeal. This ground of the appeal is denied.

(4) Improper Specification on Out-of-State Travel

This ground for appeal is based on the appellant's concern about how to factor the possibility of out-of-state travel.

Appellant argues over how these costs will be determined by Offerors even to the extent that they suggest that the Department set up a fund for out-of-state travel that the Department could administer. Offerors could then just request funds for any such travel as needed.

The purpose of this RFP is to provide legal services to vulnerable children and adults and by its very nature is not easily measurable. This RFP is an "indefinite quantity contract" defined in COMAR as "a contract for an indefinite amount of goods or labor to be furnished at specified times, or as ordered, that establishes unit prices of a fixed-price type." Out-of-state travel will be a variable that Offerors will have to factor when formulating their proposals. The Department did provide caseload charts, which include volume of anticipated cases per jurisdiction and identify any children currently placed out-of-state and the jurisdiction from where they originate. The information provided by the Department is Attachment A and Attachment A-1 of the RFP. Historical data was also provided. The RFP clearly states that the case numbers are projections only and may increase or decrease depending on certain variables. The best information available at the time of the RFP's issuance was provided.

The Procurement Officer determined that based on the nature of the RFP there were no improprieties or ambiguities in the RFP. This ground of the appeal is denied.

**(5) Improper RFP Provisions that Contradict the Maryland
Lawyers Rules**

RFP Section 3.4(D)(1) (Contact with Client) states,

The Contractor shall, as the child's attorney, have meaningful contact with the

client prior to every scheduled hearing in an environment that will facilitate effective communications. Meaningful contact should result in a better understanding of the client's background, legal position and/or emotional state of mind and provide the client, as age and developmentally appropriate, with an understanding of the proceedings.

The Maryland Judiciary Foster Care Court Improvement Project Guidelines of Advocacy for Attorneys Representing Children in CINA and Related TPR and Adoption Proceedings have been included in the RFP as Attachment J to be used as guidance and a best practice for Offerors who are awarded a contract. A provision in Guideline C titled Client Contact, specifically, C1, states in part,

The attorney should meet in the community with the child at each key stage of the representation to conduct a meaningful interview. The attorney should meet the child in preparation for a hearing, regardless of the child's age or disability, in an environment that will facilitate reasonable attorney-client communications. The attorney is encouraged to meet with the child in multiple environments, including the child's school, placement, each subsequent placement, or home.

Both provisions require the attorney to have meaningful contact with the client at key stages of representation so that the attorney can understand the client's background, current living environment and legal position so as to facilitate effective representation.

Further, Section 3.4(D)(2) states that

Contractors shall have, at a minimum, an Attorney in-Person Contact with the client in the client's placement at least once every six months. This contact shall be a

personal, face-to-face physical meeting between the client and an investigator, case worker, licensed social worker and/or an attorney employed by the Contractor. These contacts should provide an opportunity to observe the client's home environment. If the client resides in an out-of-State placement, Contractors shall have an In-Person contact with the client in the client's placement.

The Attachment J Guidelines in provision C3 (Ancillary Contacts with the Child) state in part, "The attorney should have meaningful contact with the child at least every six months, even if a court hearing is not scheduled." The provision in C3 continues to add, "As necessary or appropriate to the representation, the attorney should attend treatment, placement, and administrative hearings, and other proceedings, as well as school case conferences or staffing conferences concerning the child."

Both the RFP and the Guidelines seek to build an attorney/client relationship that will foster quality representation and an understanding of the child's living environment. There is no ambiguity between the RFP and the Guidelines. The Procurement Officer was correct to deny this protest ground. This ground for the appeal is denied.

(6) Improper Withholding of the Best Information Available

Appellant alleges that the Department has failed to provide the best information as to quantity of cases under the RFP. The Department provided to all Offerors as part of the RFP Attachment A, the same CINA/TPR projected Caseload Chart and also included Attachment A-1, APS/AGRB Projected Caseload Chart. That information is based on Fiscal year 2012 figures. Future cases

are projections based on some trends and in CINA/TPR cases, historical, statistical data, and agency policies established over past years which results in overall Statewide decreases in these type of cases.

Appellant contends the Department should use State Stat numbers to determine the quantity of cases but those numbers are just a snapshot in time, not a full year-long view. This is an indefinite quantity contract which means quantity of cases cannot precisely be determined in advance.

The RFP is structured so that the responsibility of Offerors is capped if caseloads increase. Offerors must submit a price per case on a maximum caseload that they determine themselves, and Contractors are not contractually obligated to exceed the maximum caseload amount and dollar amount they determine. By streamlining into one (1) RFP, as opposed to previous years where there were four (4) separate RFPs for legal services, the Department will be able to more efficiently monitoring caseloads, assignments and projected budgets, avoiding delays in payments.

However, if there are unexpected caseload increases, and there is no Contractor to accept additional cases as a contract modification, then the Department may appoint attorneys under the MLSP's Court Appointed Attorney Program.

The Procurement Officer properly denied this ground of the appeal. This ground of the appeal is denied.

(7) Improper Reporting Requirements

This ground of appeal asserts that reports required under the RFP are improper. RFP Section 3.5 requires all Contractors to submit reports to the State's Project Manager. These reports are necessary to conduct fiscal analysis and to analyze how State

dollars are being utilized and spent. The State certainly has a right and responsibility to request such accountability.

The Procurement Officer correctly rejected this ground. This ground is denied.

To sum, all seven (7) grounds of this first appeal are denied because the appellant failed to establish evidence of any ambiguities or improprieties in the RFP.

Wherefore it is Ordered this _____ day of February, 2013 that the above-captioned appeal is DISMISSED.

Dated:

Ann Marie Doory
Board Member

I Concur:

Michael J. Collins
Chairman

Dana Lee Dembrow
Board Member

Certification

COMAR 21.10.01.02 **Judicial Review.**

A decision of the Appeals Board is subject to judicial review in accordance with the provisions of the Administrative Procedure Act governing cases.

Annotated Code of MD Rule 7-203 **Time for Filing Action.**

(a) Generally. - Except as otherwise provided in this Rule or by statute, a petition for judicial review shall be filed within 30 days after the latest of:

- (1) the date of the order or action of which review is sought;
- (2) the date the administrative agency sent notice of the order or action to the petitioner, if notice was required by law to be sent to the petitioner; or
- (3) the date the petitioner received notice of the agency's order or action, if notice was required by law to be received by the petitioner.

(b) Petition by Other Party. - If one party files a timely petition, any other person may file a petition within 10 days after the date the agency mailed notice of the filing of the first petition, or within the period set forth in section (a), whichever is later.

* * *

I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA 2826, appeal of Legal Aid Bureau, Inc. Under DHR Agency Control No. OS/MLSP 13-001-S.

Dated:

Michael L. Carnahan
Deputy Clerk