

Docket No. 2137	Date of Decision: 9/13/99
Appeal Type: <input checked="" type="checkbox"/> Bid Protest	<input type="checkbox"/> Contract Claim
Procurement Identification: Under DHR Community Services Adm., Legal Services Program, Contract No. CSA/LS-00/001-S	
Appellant/Respondent: Ullmann & Wakefield, P.A. Dept. of Human Resources	

Decision Summary:

Contracts - Sole Source - Resort to a de facto sole source procurement must be authorized by the provisions of COMAR 21.05.05.02.

BEFORE THE MARYLAND STATE BOARD OF CONTRACT APPEALS

In the Appeal of :
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ULLMANN & WAKEFIELD, P.A. :
 : MSBCA Docket No. 2137
Under DHR Community Services :
Administration, Legal Services :
Program, Contract :
No. CSA/LS-00/001-S :
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 APPEARANCE FOR APPELLANT Ralph S. Tyler, Esq.
 Hogan & Hartson, LLP
 Baltimore, MD

 APPEARANCE FOR RESPONDENT Turhan E. Robinson
 Assistant Attorney General
 Baltimore, MD

 APPEARANCE FOR INTERESTED
PARTY Legal Aid Bureau, Inc. Rhonda Lipkin, Esq.
 Baltimore, MD

OPINION BY CHAIRMAN HARRISON

Appellant timely appeals the denial of its protest that the Respondent's Request for Proposal in the above solicitation breaches Appellant's existing contract for similar services.

Findings of Fact

1. On April 22, 1997, the Maryland Legal Services Program (MLSP) issued a Request for Proposal (RFP) which solicited competitive sealed proposals to acquire legal services for Children in Need of Assistance ("CINA") throughout the State of Maryland, except for Montgomery County, and Termination of Parental Rights ("TPR") cases, including Montgomery County. As a result of this RFP a Contract was awarded to Appellant, hereinafter referred to as the 1997 Contract.
2. The 1997 RFP did not seek legal services for CINA cases in Montgomery County because in 1997, by law, the responsibility

for the Montgomery County CINA caseload was posited with the Office of the Public Defender.

3. The period of performance set forth in the 1997 RFP was November 1, 1997 to June 30, 2001, broken down into four contract periods.
4. The projections in the RFP for Montgomery County's TPR cases in each of the contract periods were based on statistics the MLSP received from the Montgomery County Circuit Court docket. The RFP projections were as follows: Contract period¹ one: 25 cases; Contract period two: 28 cases; Contract period three: 30 cases; and Contract period four: 33 cases.
5. The 1997 solicitation process for Montgomery County TPR proceedings resulted in the award of contracts to the Law Offices of Kathleen Brault and Appellant. Ms. Brault was the highest ranked offeror, but chose in her offer to limit the number of TPR cases she would accept in each of the four years to fifteen(15). Appellant submitted an offer to handle all TPR cases in Montgomery County. However, Appellant's contract limited the total number of cases Appellant could be awarded as follows:

Cases Assigned

The Contractor shall provide legal representation to children in Child in Need of Assistance and derivative Termination of Parental Rights cases in Montgomery County.

¹Contract period one was only eight months long (November 1997 through June 1998). The remaining three periods were FY1999, FY2000, and FY 2001.

The Department will make good faith efforts to assign 10 cases in year 1, 13 cases in year 2, 15 cases in year 3 and 18 cases in year 4 for a maximum contract case award of 56. The definition of a case will be defined in pages 10-11 of Exhibit A. The Department will only pay for cases in which the Contractor provides representation. The case numbers set forth in Exhibit A are an estimate of the needed services. Because the case numbers awarded by this Contract are derived from the Court dockets of this jurisdiction, the Department cannot give any assurance that the maximum number of cases projected or the number of cases awarded by this Contract will be achieved during each contract year.

The Department, in its sole discretion, reserves the right in years 2, 3 and 4 of the Contract to increase the maximum number of cases assigned per year by up [to] 10% without the need for Modification of the contract, provided the Department has sufficient appropriations. The contract will be based upon the price set forth in Exhibit B.

6. Ms. Brault's contract was terminated for convenience at the end of Contract period one. MLSP held discussions with Appellant resulting in Appellant's offer to assume responsibilities in Contract periods two, three and four for the caseload demands that resulted from the termination of Ms. Brault's contract. MLSP, however, has agreed only to compensate Appellant for additional cases received for Contract periods one and two. Appellant has been compensated for additional cases at its original contracted cost-per-case for Contract period two and Contract period three to the date of the hearing herein.
7. During the 1999 legislative session, the Department of Human Resources ("DHR" or "Department"), of which MLSP is a part, was provided funding from funds transferred from the Public Defenders' budget for the assumption of legal representation

for both CINA and TPR proceedings in Montgomery County. Additionally, the Montgomery County District Court was granted exclusive original jurisdiction over TPR proceedings.

8. The Department's responsibility for CINA and TPR cases increased as a result of actions taken during the 1999 legislative session. The increased cases exceeded the scope of the 1997 RFP. The record in this appeal reflects that approximately 10% of CINA cases will require subsequent representation of a child in a TPR proceeding. The record further reflects that it is often in the best interest of the child that the child's attorney in the CINA proceeding represent the child in the TPR proceeding.
9. To meet the increased annual demands of the estimated 850 CINA cases and 85 TPR cases in Montgomery County resulting from the transfer of funds to the Department and the District Court assumption of exclusive original jurisdiction over TPR proceedings, the Department issued the above-captioned procurement on May 11, 1999.
10. The above-captioned procurement was in the form of a request for competitive sealed proposals (RFP) to acquire legal representation for all CINA and TPR cases in Montgomery County for a two year period beginning July 1, 1999 and ending June 30, 2001 (i.e. FY2000 and FY2001).
11. The 1999 RFP required submission of both a technical and financial proposal for review by an evaluation committee. A pre-proposal conference was held on May 18, 1999 at which questions were taken from potential offerors. During the conference, a question was raised as to "Who has the current contract for Montgomery County?" MLSP notified all potential offerors present that DHR did not have an existing CINA

contract in Montgomery County and that Appellant has an existing contract for TPR cases in Montgomery County which would be recognized as the first ranking TPR contract under the procurement.

12. MLSP issued Amendment 1 to the 1999 RFP on May 25, 1999 providing that Appellant's 1997 Contract would remain first ranking for Montgomery County TPR cases and that other TPR contracts awarded in accordance with the 1999 RFP would be awarded based on the remaining caseload available after Appellant received fifteen cases in Contract period three (FY2000) and eighteen cases in Contract period four (FY2001).
13. On May 28, 1999, Appellant filed a bid protest with MLSP alleging that the new RFP interferes with Appellant's existing 1997 Contract and that the RFP breaches the Department's pre-existing obligations to Appellant under the 1997 Contract. Appellant asserted that the Department should withdraw the 1999 RFP.
14. The Procurement Officer issued a final decision denying the protest on June 15, 1999 and this appeal followed.
15. As noted above, the Appellant's 1997 Contract provides that the Department will make good faith efforts to assign and pay Appellant for 56 cases during the life of the Contract with the Department reserving the right to increase the maximum number of cases in years 2, 3 and 4 by 10% without the need for modification of the Contract.
16. At the hearing of the appeal evidence was presented that Appellant has unsuccessfully sought to have its 1997 Contract modified in writing to cover the cases that it received as a result of the termination of Ms. Brault's contract (and those cases that it received resulting from an increased caseload).

While such matter is not properly before us, we are concerned about the legality of unwritten contractual arrangements. See ARA Health v. Department of Public Safety, 344 Md. 85 (1996). We recognize that any dispute over payment arising out of the cases that Appellant has received as a result of the termination of Ms. Brault's contract and those cases received resulting from an increased caseload in Montgomery County may result in a contract claim. We emphasize again that such matter is not properly before us in this bid protest appeal.

Decision

Appellant has protested that the 1999 RFP for children's legal services representation in Montgomery County interferes with its preexisting 1997 Contract for TPR representation in Montgomery County. The current 1997 Montgomery County Contract between the Department and Appellant covers TPR cases only. By its terms, what remains of Appellant's 1997 Contract is for possible assignment by the Court² of 15 TPR cases for Contract period three and 18 TPR cases for Contract period four. The Department now estimates that as a result of legislative and budgetary activity in 1999, 85 TPR cases will be annually available for assignment by the Montgomery County District Court. Thus, the protested RFP's annual estimated number of TPR cases is much greater than the 10 to 18 (plus an additional 10%) maximum number of cases that Appellant may be awarded annually under its 1997 Contract.

Rather than terminate Appellant's 1997 Contract because of the expanded projections of TPR cases resulting from the 1999 legislative and budgetary actions, the procurement officer has informed all

²While it is anticipated that the Court will normally appoint the contract provider of services, such appointment is at the discretion of the Court.

offerors that the current 1997 Contract with Appellant will dictate the first priority for TPR case assignment in Montgomery County. The offerors were also informed that contracts awarded under the 1999 RFP will be awarded based on the remaining TPR caseload available after Appellant has received the awarded case numbers (15 for FY2000 and 18 for FY 2001) based upon the 1997 TPR contract. Accordingly, we find that an award of contracts under the 1999 RFP would not conflict with Appellant's pre-existing 1997 Contract.

It also follows that we are of the opinion that Appellant's 1997 Contract would have to be modified in order to add the projected additional TPR cases identified in the 1999 RFP. The additional new TPR cases are outside the scope of the original 1997 competition and should not be procured by issuance of a change order or modification thereto, but by a new competition. See Master Security, Inc., B-274990, B-274990.2, 97-1 CPD ¶21 (January 14, 1997).

Were the Appellant's protest to be sustained and Appellant's position adopted what would result would be a "cardinal change" to Appellant's 1997 Contract which would evade the requirement for obtaining competition and therefore, undermine the integrity of the competitive procurement process as a *de facto* sole source procurement. In the Matter of American Air Filter Company - DLA Request for Reconsideration, Comp. Gen. B-188408, 78-1 CPD ¶443 (June 19, 1978); See Tilden-Coil Constructors, Inc., Comp. Gen. B-211189.3, 83-2 CPD ¶236 (August 23, 1983); Cray Research v. Navy, 556 F. Supp. 201 (D.D.C. 1982).

Maryland Procurement Law has specific requirements for justification of award of sole source contracts. §13-107, State Finance and Procurement Article, Annotated Code of Maryland; COMAR 21.05.05.02. The Maryland General Assembly has mandated competition in State Contracts. §§13-102 to 104, State Finance and Procurement

Article, Annotated Code of Maryland and COMAR 21.05.01.02. An award of a *de facto* sole source contract to Appellant would conflict with the statutory mandate for competition and adversely impact upon the integrity of the competitive procurement process. Accordingly, the appeal is denied.

Wherefore it is Ordered this day of September, 1999 that the appeal is denied.

Dated:

Robert B. Harrison III
Chairman

I concur:

Candida S. Steel
Board Member

Randolph B. Rosenkrantz
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 2137, appeal of ULLMANN & WAKEFIELD, P.A. Under DHR Community Services Administration, Legal Services Program, Contract No. CSA/LS-00/001-S.

Dated:

Mary F. Priscilla
Recorder

