

BEFORE THE MARYLAND STATE BOARD OF CONTRACT APPEALS

**In the Appeal of The Law Office of
Deborah Ullmann, LLC**

Docket No. MSBCA 3089

**Under
Department of Human Resources
Solicitation No. OS/MLSP-18-200-S**

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OPINION AND ORDER BY MEMBER DOORY

The procurement agency’s decision to issue an emergency solicitation in response to the termination of a contract for legal services that excluded several jurisdictions that were included in the terminated contract was not arbitrary, capricious, unreasonable or contrary to law.

FINDINGS OF FACT

Maryland law requires that children who have suffered from abuse or neglect be represented by counsel in Child in Need of Assistance (CINA) and Termination of Parental Rights (“TPR”) hearings.¹ The Respondent, Maryland Department of Human Resources² (“DHS”) through its Maryland Legal Services Program (“MLSP”) issues requests for proposals and awards contracts for legal representation in CINA/TPR cases in the various jurisdictions in Maryland. The law requires courts to appoint an attorney with whom Respondent has a contract to represent children in CINA/TPR cases unless the court finds it is in the best interest of the child not to do so.³ MLSP has also established the Court Appointed Attorney Program (CAAP) to allow private

¹ See, § 3-813(a) of the Courts Article.

² The Maryland Department of Human Resources changed it name to the Maryland Department of Human Services on July 1, 2017.

³ See, § 3-813(d) of the Courts Article.

attorneys statewide to provide legal representation in cases where a conflict of interest in representation arises with an MLSP provider.

On July 6, 2016, Respondent entered into a contract with Appellant, the Law Office of Deborah Ullmann, LLC (“Ullmann”) to represent children in new CINA/TPR cases in Somerset and Worcester Counties for three years from the effective date of June 1, 2016, until May 31, 2019, with Respondent having the unilateral right to extend Appellant’s contract for two additional one-year terms. Respondent also entered into a contract with an effective date of June 1, 2016, with the Child Advocacy Project of the Eastern Shore, Inc. (“CAPES”) led by David C. Wright, Esquire (“Mr. Wright”) to represent children in CINA/TPR cases in Caroline, Dorchester, Kent, Queen Anne’s, Talbot and Wicomico Counties. CAPES did not win the award for new cases in Baltimore City, Baltimore, Cecil, Somerset and Worcester Counties, but was permitted to keep its existing cases in those jurisdictions pursuant to its previous contract.

Respondent terminated CAPES’ contract in part for representation in *existing* CINA/TPR cases in Cecil County effective October 13, 2017, and MLSP transferred all of CAPES’ existing cases (all assigned to Mr. Wright) to the firm under contract with Respondent for Cecil County. On April 5, 2018, Respondent terminated CAPES’ contract in full ending its representation in all new and existing cases in the remaining jurisdictions. On April 5, 2018, Respondent awarded emergency sole source contracts to individual attorneys who represented children in existing CINA/TPR cases as current or former employees of CAPES in the jurisdictions other than Cecil County. One of those emergency sole source contracts OS/MLSP-18-007, was for the representation of children in CINA/TPR cases in Wicomico, Worcester and Somerset Counties and was awarded to the Feehan Law Group. Respondent stated that the nature of the emergency in all four contracts was that it had to act immediately to ensure that all children represented by

CAPES continued to be represented by counsel as required by statute. The basis for selection was focused on continuity of representation, so Respondent selected attorneys who worked for CAPES to continue to represent their current clients. The rationale was that those attorneys were not responsible for CAPES' failure to perform its current contract, and that changing attorneys in existing cases would result in a detrimental impact on the stability of the children, and that stability and continuity of representation was Respondent's overwhelming goal. The terms of the four emergency sole source contracts were from April 5, 2018, to May 31, 2019, with two one-year renewal options. The award of the emergency sole source contracts was reported to and accepted by the Board of Public Works at its June 20, 2018 meeting. MLSP's transition plan for new CINA/TPR cases filed in the jurisdictions previously serviced by CAPES was to recommend to the judges in the various jurisdictions lists of recommended attorneys who could be appointed under CAAP until Respondent completed a competitive emergency procurement.

On April 26, 2018, Respondent issued Emergency Request for Proposals Contract OS/MLSP-18-200-S ("Emergency RFP") pursuant to COMAR 21.05.06 for representation of children in new CINA/TPR cases filed in Caroline, Dorchester, Kent, Queen Anne's, Talbot, and Wicomico Counties, and for existing representation in CINA/TPR cases only in Washington County. The duration of the contracts awarded was from June 1, 2018, until May 31, 2019, to align the termination dates with Respondent's current contracts for representation in new CINA/TPR cases that had effective start dates of June 1, 2016. Proposals were due on May 11, 2018. Twelve questions were asked by prospective offerors concerning the Emergency RFP, and Respondent provided written answers. None of the questions asked why certain jurisdictions were not included in the Emergency RFP. On April 30, 2018, Appellant filed a protest of the Emergency RFP with the PO. The Appellant's three bases for its protest were that:

1. the Emergency RFP was defective and not complete because it did not seek proposals for all jurisdictions where CAPES had contracts to represent children in CINA/TPR cases, including Worcester, Wicomico⁴ and Somerset Counties;
2. cases not covered by the Emergency RFP were distributed without the benefit of the procurement process;⁵ and
3. Respondent treated Appellant unfairly by not awarding Appellant, the number-one ranked provider of legal services in Somerset and Worcester Counties, the existing cases formerly handled by CAPES in those jurisdictions pursuant to Appellant's interpretation of her July 7, 2016 contract with Respondent. Appellant cited the fact that Respondent awarded existing CINA/TPR cases in Cecil County that were formerly handled by CAPES to the number-one ranked legal services provider in that jurisdiction with whom Respondent had a contract for new cases.

The PO issued the final agency decision denying Appellant's protest on May 9, 2018. As to the first basis of Appellant's protest, the PO stated that, with the exception of Washington County, the CAPES law firm held the contract to provide legal services in each of the jurisdictions included in the Emergency RFP, and that since there is more than one firm qualified to provide representation in CINA/TPR cases in those jurisdictions, Respondent included those jurisdictions in the emergency competitive solicitation. As to the second basis for Appellant's protest, the PO stated that Respondent followed COMAR 21.05.06 in issuing the emergency sole source contracts to maintain continuity of representation for the children and to avoid disruption. The PO noted that Respondent consulted with the judges in the various jurisdictions when awarding those

⁴ The Emergency RFP does solicit legal service providers for new CINA/TPR cases in Wicomico County, and Appellant bid for and was awarded new CINA/TPR cases in Wicomico when contracts were awarded in response to the Emergency RFP.

⁵ Appellant alleges that she did not know about the emergency sole source award of existing CINA/TPR to the Feehan Law Group until after it received the PO's final decision dated May 9, 2018.

contracts, further noting that Judge Powell of Somerset County appointed the Feehan Law Group to handle existing cases there, and that Respondent incorporated that appointment into the emergency sole source contract covering Somerset County. As to the third basis of Appellant's protest, the PO denied Appellant was treated unfairly in regard to how existing cases formerly handled by CAPES were transferred in Cecil County. The PO explained that, unlike Somerset and Worcester Counties, Mr. Wright was the attorney of record in existing cases in Cecil County, and Respondent therefore did not have an attorney to provide continuity of representation in that jurisdiction. Respondent therefore transferred existing cases to a provider it had under contract in that jurisdiction and also appointed other providers through CAAP. The PO further noted that Appellant would continue to receive new CINA/TPR cases in Somerset and Worcester Counties per her existing contract with Respondent. Appellant filed an appeal of the PO's Final Agency Decision with the Board on June 14, 2018. Hearing on the merits was held on October 4, 2018.

DECISION

To prevail on an appeal of the denial of a bid protest, an appellant must show that the agency's action was biased or that the action was "arbitrary, capricious, unreasonable, or in violation of law." *Hunt Reporting Co.*, MSBCA No. 2783 at 6 (2012)(citing *Delmarva Cmty. Servs., Inc.*, MSBCA 2302 at 8, 5 MSBCA ¶ 523 at 5 (2002)).

Furthermore, it is well established that the jurisdiction of the Board is limited to those issues raised first before the state agency promulgating a given solicitation. *See, Mercy Family Care Center, Inc.*, MSBCA No. 2855 (2013); *Free State Reporting, Inc.*, 5 MSBCA ¶ 476, MSBCA No. 1180 (1999). This Board has authority and responsibility only to review final actions by the State's procurement officers. Appeals are taken to the Board from a procurement officer's final decision. *See, Mercier's, Inc.*, MSBCA No. 2629 (2008).

Reviewing the bases of Appellant's protest and the PO's decision regarding each, the Board concludes as follows:

1. The PO's denial of Appellant's protest on the basis that Respondent's decision not to include all jurisdictions in the Emergency RFP that were formerly serviced by CAPES rendered the Emergency RFP defective and incomplete was correct. Respondent is required by statute to provide representation to children in CINA/TPR cases. The statute dictates that courts appoint counsel with whom DHS has a contract unless it is in the best interests of the child not to do so. COMAR 21.05.06.02B(1) allows a procurement agency to issue an emergency procurement "...when an emergency arises and the agency's resulting need cannot be met through normal procurement methods." COMAR 21.01.02.01B(36) defines "emergency" as "a sudden and unexpected occurrence or condition which agency management reasonably could not foresee that requires an action to avoid or to mitigate serious damage to public health, safety, or welfare." Given the statutory mandate to provide representation and the immediate need in the jurisdictions covered by the Emergency RFP, Respondent's decision to issue the Emergency RFP was not arbitrary, capricious, unreasonable or in violation of the law. Section 13-108(a)(1) of the State Finance & Procurement Article allows the head of a unit of State government to delegate enormous discretion to a procurement officer to facilitate an emergency procurement: "...with the approval of the head of a unit, its procurement officer may make an emergency procurement by any method that the procurement officer considers most appropriate to avoid or mitigate serious damage to public health, safety, or welfare." *See, also Trinity Services Group, Inc.*, MSBCA Nos. 2917, 2931 & 2935 (2015) at 17-18.

The decision not to include all jurisdictions previously covered by CAPES' terminated contract in the Emergency RFP was a proper exercise of discretion by the procuring agency and

does not render the solicitation defective or incomplete, particularly since the excluded jurisdictions were covered, either via award of emergency sole source contracts for existing CINA/TPR cases in those jurisdictions, including Somerset and Worcester Counties, or via transfer to a provider with whom Respondent had a contract or under CAAP, as in Cecil County.

2. Appellant's protest basis that cases not covered by the Emergency RFP were distributed without the benefit of the procurement process is without merit. The record clearly shows that Respondent awarded four emergency sole source contracts in the jurisdictions not included in the Emergency RFP, except for Cecil County, where circumstances were different, and where existing cases were transferred in accordance with § 3-813(d) of the Courts Article. Once again, Respondent is mandated by statute to provide children in these jurisdictions with legal representation in CINA/TPR cases, and Respondent used continuity of representation as the standard for award in the face of the immediate need the termination of CAPES' contract created. Appellant's Appeal included, for the first time, several bases for challenging the award of the emergency sole source contracts awarded on April 5, 2018, namely: that the sole source method was improper and failed to comply with COMAR 21.05.01, 21.05.04 and 21.05.06.02D; that the attorneys awarded the contracts had violated the Maryland Rules of Professional Conduct; and that Respondent would be paying higher contract prices under the emergency sole source contracts than if it adopted Appellant's interpretation of its existing contract for Somerset and Worcester Counties and transferred existing cases in those jurisdictions to Appellant. The Board cannot address these bases for challenging the award of an emergency sole source contract for Somerset and Worcester Counties because Appellant did not raise them in its protest before the PO, and the PO did not have an opportunity to render a final decision thereon for the reasons set forth *Mercy Family Care Center, Inc., Free State Reporting, Inc.*, and *Mercier's, Inc., supra*. The Board notes that given Appellant's

contention that it did not know about the award of the emergency sole source contract until it received the PO's final decision denying its protest, then Appellant would have had seven days from that date to file a timely bid protest concerning the award of the emergency sole source contract. *See*, COMAR 21.10.02.03B.

3. Appellant's final basis of its protest was that Respondent was unfair in how it transferred existing CAPES cases in Cecil County vis-à-vis its award of an emergency sole source contract for existing cases in Somerset and Worcester Counties. Appellant bases its allegation of unfairness on its interpretation of its existing contract with Respondent. Appellant's allegation, however, is not relevant to the protested issue of whether Respondent's decision not to include those jurisdictions in the Emergency RFP rendered the solicitation "defective and not complete." The record shows that Respondent did not include certain jurisdictions in the Emergency RFP because coverage for existing CINA/TPR cases in those jurisdictions had already been procured. Although the PO stated in the final agency decision that the circumstances regarding the disposition of existing CAPES cases were different in Cecil versus Somerset and Worcester Counties, Appellant cites no provision of statute or regulation requiring Respondent to include those jurisdictions in the solicitation.

Appellant, for the first time, in its Appeal asserts that Respondent breached its contract when it awarded an emergency sole source contract for representation of existing cases in Somerset and Worcester Counties.⁶ However, Appellant's April 30, 2018 letter to the PO was clearly submitted as a protest of the failure to include certain jurisdictions in the Emergency RFP,

⁶ "... that existing cases in Somerset and Worcester Counties should have been transferred to my firm upon termination of CAPES' contract, it was a breach of contract for DHR to issue an Emergency Sole Source contract for existing cases in Somerset and Worcester Counties to CAPES' former employee."

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 No. 3089, The Law Office of Deborah Ullmann, LLC, under Maryland Department of Human Services Solicitation No. OS/MLSP-18-200-S.

Dated: October 16, 2018

/s/
Ruth W. Foy
Deputy Clerk