

- therapy services for one year and two additional one year terms at the election of WMC.
4. The IFB contained two bidding options, identified as "Bid Solicitation I" and "Bid Solicitation II." The first option required 90 to 100 hours of physical therapy and all associated services to be provided by a single bidder. The second option call for a "number of individual or small contracts" to be awarded to a "sufficient number of partial service contractors" for 90 to 100 hours per week of physical therapy services. The bidding format set forth in the IFB allowed bidders to bid under either or both options and the same bid options were set forth for each of the two additional one year terms.
 5. As a result of perceived deficiencies in the procurement process stemming from the failure to issue an addendum following the pre-bid conference, the Respondent determined to reject all bids (that were submitted at bid opening on September 23, 1997) and resolicit.¹
 6. On November 25, 1997, a revised IFB under the same caption was issued by the Department of Health and Mental Hygiene (Department) on behalf of WMC. The bid specifications for the first year, and two additional one year terms if the State elected to extend the contract, provided:

BID PAGE (FIRST YEAR)

WESTERN MARYLAND CENTER PHYSICAL THERAPY CONTRACT

Only fill in Prices for the Award Option Being Offered, Unless Both Award Options are Being Offered.

AWARD OPTION I/BID SOLICITATION I

Firm fixed price to provide 100 hours per week of physical therapy services based upon the required presence of at least one physical therapist at all times a physical therapist assistant is on duty.

_____ *
x 52 wks =

Total one year cost to provide _____
physical therapy services
Divide by 12 = monthly bid cost _____

* This cost is based upon _____ hours per week of physical therapists services at \$ _____ per hour and _____ hours of physical therapist assistant services at \$ _____ per hour.

In the event the Center doesn't require 100 hours per week of physical therapy services, or if the contractor does not provide the full number of hours needed, the Center will deduct the appropriate hourly bid rate times the number of hours not needed or not provided from the

¹ Several bid protests of such action were denied. No appeals were ever filed with this Board from such denials.

payments due the Contractor.

AWARD OPTION II/BID SOLICITATION II

Firm hourly rate for Physical Therapist _____
Number of hours per week offered _____; number of weeks services
offered and inclusive dates of service _____

Firm hourly rate of Physical Therapist Assistant _____
Number of hours per week offered _____; number of weeks services
offered and inclusive dates of service _____

7. Bids were opened publicly on December 19, 1997.
8. Appellant did not submit a bid under Bid Solicitation (Option) I. Appellant's bid for Bid Solicitation (Option) II was as follows:
- 9.

AWARD OPTION II/BID SOLICITATION II

Firm hourly rate for Physical Therapist 40.00
Number of hours per week offered 40 - 80; number of weeks services
offered and inclusive dates of service 52 weeks

Firm hourly rate of Physical Therapist Assistant 23.00
Number of hours per week offered 20 - 30; number of weeks services
offered and inclusive dates of service 52 weeks

9. All Option I bids were more expensive than a combination of Option II bids. The Department decided to make awards based on bid amounts set forth by two different bidders from portions of their Option II bids, specifically: 20 hours Physical Therapist Assistant services to Appellant at its \$23.00/ hour bid amount under Option II for Physical Therapist Assistant services and 80 hours of Physical Therapist services to Tri-state Physical Therapy at its \$39.50/ hour bid amount for Physical Therapist services under Option II.
10. Subsequently, after the bid opening, the Department was advised that Appellant considered its Option II bid as a package or a single unified bid and would not provide Physical Therapist Assistant services without also being allowed to provide Physical Therapist services. Appellant's bid as set forth above did not state that a partial or progressive award was not acceptable.
11. On February 13, 1998, a letter was sent to Appellant advising Appellant that the Department had found Appellant to be a responsive and responsible bidder, and, since Appellant had submitted the lowest bid for Physical Therapist Assistant services at \$23.00/hour under Option II, the Department intended to award Appellant a contract for Physical Therapist Assistant services. Further, the letter acknowledged Appellant's intended refusal to provide this service without a corresponding award for Physical Therapist services under Appellant's \$40.00/hour bid for Physical Therapist services under Option II. The IFB specifications were cited which allegedly demonstrated the Department's intent to award by service type

and number of hours. Finally, the letter stated that because the Appellant had misinterpreted the Department's intent, it was not in the Department's best interest to require that Appellant honor its bid for Physical Therapist Assistant services; and that unless Appellant communicated a reversal of Appellant's position, the award would be made to the bidder who had submitted the next lowest bid for such services under Option II.

12. On February 24, 1998, Appellant filed a protest with the Department asserting that the Procurement Officer's recommendation to award Physical Therapy Assistant services without also awarding Physical Therapy services under Option II was unacceptable since it was the lowest bidder.
13. By letter dated March 20, 1998, the Department denied the protest.
14. On April 3, 1998, Appellant appealed to this Board.

Decision

Section II K. and Section IV D.2.(a-e) of the revised IFB, set forth the permissible award parameters under Option II.

These specifications state:

II K. The State reserves the right to make the award by item, or group of items, or total bid if it is in the best interest of the State to do [sic], unless the bidder specifies in its bid that a partial or progressive award is not acceptable.

IV D.

2.) BID SOLICITATION II

- a.) In the event no single qualified bid is received, or if any or all single bids received are more expensive than can be obtained with a number of individual or small contracts, WMC reserves the rights [sic] to make awards to a sufficient number of partial service contractors to meet the needs of the Center as described hereafter for 90-100 hours per week of physical therapy. The Center has the option to increase/decrease hours as deemed necessary for the continuity of patient care.
- b.) In order to allow for this multiple award possibility, hourly rate bids will be accepted from any qualified licensed physical therapist or physical therapist assistant, physical therapist group or association, private firm or public agency. As indicated in the Bid Solicitation II section of the bid pages for each respective contract year, each bidder should list any minimum or maximum

number of hours that it will provide physical therapy services for each respective physical therapist type (therapist or assistant) and the proposed days and times when such services will be provided.

- c.) If a single award is not made, the Center will request services to be provided in the reverse order of the Bid Solicitation II bid prices received. That is, the lowest price qualified bidder will be requested/allowed to schedule services for as many hours of services as it is willing to provide and is convenient to the Center. After scheduling the lowest bidder, the Center shall schedule the next lowest qualified bidder for the number of hours that it is willing/able to provide. The Center shall then continue scheduling bidders/contractors in this fashion until it has provided for all its needs.
- d.) If two or more bidders bid the same hourly rate, the Center will give scheduling preferences to the bidder: 1) with the greatest hours of availability; 2) with the most experience and corresponding qualifications.
- e.) In order to ensure the Center that it will have a sufficient number of contractors the Center may execute contracts with more vendors than it will typically use in order to call upon them in the event of unusual need, the short term availability of the lower cost contractor, or the termination of such a lower cost contractor. In all instances, however, the Center will use the lowest cost contractor available at any given time that services are needed.

Appellant argues that these provisions do not authorize the Department to split award of the services horizontally; i.e. choosing to accept only one of the two line items in Option II, either Physical Therapist services or Physical Therapist Assistant services, from a bidder who has submitted a bid for both.

The parties seem to agree and the Board finds that the bid specifications for Option II permit a "bidder" to submit a bid for only one of the two service categories or line items. The issue is how the bid specifications are to be interpreted when a bidder submits a bid for each of the two service categories or line items.

This is a procurement for the benefit of patients at a State hospital pursuant to Section 11-202(3)(ii) of the State Finance and Procurement Article. Thus, under Section 13-103(a)(2) of the

State Finance and Procurement Article, COMAR 21.05.02.13B² and Section II K. of the IFB, the State reserved, based on the best interest of the State, the right to make award by item, or group of items, or total bid, unless the bidder specified in its bid that a partial or progressive award is not acceptable.

Appellant did not specify in its bid that a partial or progressive award is not acceptable. Such position was only expressed after bids were opened.

Since Appellant did not specify in its bid that a partial award is not acceptable, the State could award Appellant a contract based on Appellant's bid for only one of the two items under Option II.

The State determined to award Appellant only the Physical Therapist Assistant portion of its bid under Option II. Appellant has not shown that this determination was not in the best interest of the State. Appellant's bid for Physical Therapist (\$40.00) was 50 cents more expensive per hour than its competitor's low bid of \$39.50 to whom the State determined to award 80 hours of Physical Therapist services. Appellant's bid of \$23.00 per hour for Physical Therapist Assistant services was the low bid for such services. Thus the Department achieved the desired 90-100 hours per week of physical therapy services at the lowest price.

Accordingly, we deny the appeal and remand the matter to the Department for appropriate action.

² COMAR 21.05.02.13B provides:

B. Determination of Most Favorable Bid. Bids shall be evaluated to determine which bidder offers the most favorable price to the State in accordance with the evaluation criteria set forth in the invitation for bids. Only objectively measurable criteria which are set forth in the invitation for bids shall be applied to determining the most favorable evaluated bid price. The State reserves the right to make the award by item, or groups of items, or total bid if it is in the best interest of the State to do so unless the bidder specifies in its bid that a partial or progressive award is not acceptable.

Wherefore, it is ORDERED this 13th day of July, 1998 that the appeal is denied and the matter is remanded to the Department for appropriate action.

Dated: July 13, 1998

Robert B. Harrison III
Chairman

I concur:

Candida S. Steel
Board Member

Randolph B. Rosencrantz
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 2059, appeal of Physical Therapy, Inc. under DHMH IFB# DCT 98-4483, Physical Therapy Services - Western Maryland Center.

Dated: July 13, 1998

Mary F. Priscilla
Recorder