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Maryland Procurement Law Alert

Bid Protests Cannot be Filed by E-Mail Unless Permitted by the Solicitation

In *A.J. Billig & Co., LLC*, No. 3096 (Md. B.C.A. Oct. 11, 2018), the MSBCA held that bid protests must be filed with the procurement officer *in writing*, and that protests cannot be filed *by e-mail* unless expressly allowed by the solicitation.

A.J. Billig & Co. (“A.J. Billig”) provided auctioneering services under a contract with the Department of Housing and Community Development (“DHCD”) that expired on October 31, 2018. In June 2018, DHCD issued the RFP for the next contract. Although the RFP required each offeror to be registered on eMaryland Marketplace (“eMM”), A.J. Billig was not registered and therefore did not receive notice via eMM that the RFP had been issued. Further complicating the matter, the procurement officer sent an e-mail to a list of vendors regarding the RFP, but mistakenly sent the e-mail to [“andy@ajbillig.com”](mailto:andy@ajbillig.com) instead of [“andy@ajbillig.com.”](mailto:andy@ajbillig.com)

Proposals were due on July 10, 2018. Having not received a proposal from A.J. Billig (the incumbent contractor), DHCD reached out to A.J. Billig on July 19. During the call it was discovered that A.J. Billig did not receive notice via

eMM or e-mail that the RFP had been issued. Seven days later, A.J. Billig filed a bid protest *by e-mail* requesting that DHCD reopen the bidding process and allow A.J. Billig to submit a proposal. However, the RFP expressly stated that protests could not be filed by e-mail.

DHCD denied the protest on the grounds that A.J. Billig was required to file a *written* protest on or before July 26, 2018, and that A.J. Billig's e-mail on July 26 did not comply with the terms of the solicitation. On appeal, the MSBCA reluctantly agreed and explained that COMAR 21.10.02.03 requires protests to be filed with the procurement officer *in writing* "unless permitted by the terms of the solicitation." As the RFP required protests to be filed *in writing*, A.J. Billig therefore failed to file a timely protest and summary decision was entered in favor of DHCD.

State Agency May Conduct Emergency Procurements By "Most Appropriate Method."

In *Law Office of Deborah Ullmann, LLC*, MSBCA No. 3089 (Md. B.C.A. Oct. 16, 2018), the MSBCA held that agencies may properly exercise their discretion to conduct emergency procurements by awarding sole-source contracts to existing service providers in certain circumstances.

Pursuant to statute, the Maryland Department of Human Services ("DHS", formerly known as the Department of Human Resources) contracts with legal services providers for representation of children in Child in Need of Assistance and Termination of Parental Rights ("CINA/TPR") cases. (See, e.g., *Legal Aid Bureau, Inc.*, MSBCA Nos. 2826 & 2829 (Feb. 25, 2013).

In this matter, an entity known as "CAPES" provided such services under a previous contract in many jurisdictions, including Cecil County. In July 2016, DHR awarded CAPES a contract for new CINA/TPR cases in six Maryland counties, but no longer Cecil, Somerset, and Worcester Counties. Also in July 2016, DHR awarded The Law Office of Deborah Ullmann ("Ullmann") a contract for new CINA/TPR cases in Somerset and Worcester Counties. DHR allowed

CAPES to perform work on existing cases in Cecil, Somerset, and Worcester Counties pursuant to the prior contract.

In October 2017, DHS canceled its CINA/TPR contract with CAPES concerning *only* existing cases in Cecil County, and transferred those cases to the new contractor in Cecil County. In April 2018, DHS canceled CAPES' contract in full, and – instead of transferring existing cases in Somerset and Worcester Counties to Ullmann – awarded emergency sole source contracts to the individual attorneys (now-former CAPES employees) representing existing cases in each county. According to DHR, these awards were made to preserve continuity of representation.

Later that month, DHR issued an Emergency Request for Proposals (“RFP”) for new CINA/TPR cases in all counties serviced by CAPES pursuant to the July 2016 contract. The term of service set forth in the Emergency RFP was aligned with the July 2016 contracts, including Ullman's. Within days of issuance of the Emergency RFP, Ullmann protested alleged improprieties therein. All three protest grounds were denied by the Procurement Officer, and subsequently denied on appeal by the MSBCA.

First, the MSBCA said that the Emergency RFP was not defective for not seeking proposals concerning Worcester and Somerset Counties. This was because the MSBCA held that an agency may “delegate enormous discretion to a procurement officer to facilitate 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.”

Second, the MSBCA held that Ullmann's protest ground concerning the cases in counties subject to sole-source awards in April 2018 was untimely. Ullmann did not know of the sole-source awards until the Procurement Officer's final decision in May 2018. According to the MSBCA, Ullmann should have filed a *second* protest based on the disclosure of these awards in the final decision.

Third, the MSBCA held that the Emergency RFP was not defective for handling Somerset and Worcester Counties differently than other jurisdictions like Cecil

County. This was because there is “no provision of statute or regulation requiring [DHR] to include those jurisdictions in the solicitation.”

*Don't let your competitors outsmart you when it comes to Maryland bid protests. **Scott Livingston, Esq.***

Give us a call at [301.951.0150](tel:301.951.0150) or send an [email](#) to find out how we can help.

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