

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

In The Appeals of)
Aramark Correctional Services,)
LLC) Docket Nos. MSBCA 2660, 2695 &
) 2696
Under)
DPSCS RFP Q0009015)

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OPINION BY BOARD MEMBER DEMBROW

By this bid protest appellant objects to the award of a contract for the delivery of prison commissary services to a competing vendor that proposes to remit to the State a specified *per capita per diem* commission less than the amount offered to be paid to the State by appellant for the same services. Because the Maryland State Board of Contract Appeals (Board) must defer to the reasonable discretion and judgment of the Department of Public Safety and Correctional Services (DPSCS) in the absence of proof that its determination was arbitrary, capricious or otherwise improper, the instant protest must be dismissed.

Findings of Fact

1. Among its other important duties, DPSCS is charged with the responsibility of operating all of the correctional and pre-trial detention facilities of the State of Maryland, which currently serve approximately 25,000 inmates at twenty-six (26) separate locations. (See Joint Exhibit 2, Page 103.)
2. The method of delivery of commissary services in the State's correctional institutions varies from facility to facility and such services in Maryland have traditionally been provided directly by the State rather than through a private vendor under contract with the State.
3. Beginning in 2003 DPSCS sought to privatize the delivery of commissary services in State correctional facilities as well as to simplify and make more uniform the process by which inmates are permitted to order, pay for, and receive certain merchandise from institutional commissaries.
4. DPSCS appointed a committee of its employees to investigate and study the delivery of commissary services to incarcerated persons in Maryland and elsewhere, which committee ultimately evolved into the procurement Evaluation Committee for the particular Request for Proposals (RFP) here at issue.
5. After several years of analysis and preparation intended to ease the transition of the provision of commissary services from the public to the private sector, DPSCS on January 21, 2009 issued an RFP identified as No. Q0009015, for which a pre-proposal conference was conducted on January 29, 2009 and proposals were due on or before March 9, 2009.
6. Specifications set forth in the RFP established with some considerable degree of precision those products required to be made available for inmate commissary purchase, approved methods of secure packaging and delivery, and the cost of each item. (See Attachment G to the RFP, Ex. 2, pg. 177).

7. Section 4 of the RFP entitled, "Evaluation Criteria and Selection Procedure" states: "The Contract resulting from this RFP shall be awarded to the Offeror that is most advantageous to the State, considering price and the evaluation factors set forth herein. In making this determination, *technical factors shall receive greater weight than price factors.*" (Ex. 2, pg. 54.) (Emphasis added.)
8. As a vital component of the commissary services solicited by DPSCS, bidders were required by the terms of the RFP to provide requisite automated computer capability to tabulate and track commissary orders and interface that record with the existing accounting system for tracking receipt and expenditure of inmates' private funds being held by DPSCS (known as MOBS, an acronym for the management of the DPSCS offender banking system), such capability anticipated for implementation in two (2) phases: first, for immediate utility, and thereafter as a long term uniformly effectuated institutional improvement. (Ex. 2, pgs. 22 *et seq.* and 30 *et seq.*)
9. Instead of more typical procurements by which the State ordinarily pays a vendor for certain specified services, in this procurement the vendors were solicited to offer to remit to the State a certain commission in order to receive from the State the exclusive right to sell certain merchandise at certain rates to inmates in Maryland correctional facilities, such commission to be paid by the vendor to the State based upon a fixed *per diem* rate multiplied by the number of inmates established as the average daily population (ADP) of all of the State's correctional facilities for the year. (See Attachment F to the RFP, Ex. 2, pg. 91 *et seq.*)

10. On March 9, 2009, two (2) vendors submitted proposals in response to the subject RFP, namely, appellant Aramark Correctional Services, LLC (Aramark) and interested party, Keefe Commissary Network, LLC (Keefe).
11. After review of the aforementioned technical proposals, both of the said vendors were deemed by the DPSCS Evaluation Committee to be reasonably susceptible of being awarded the contract.
12. After oral discussions with each of the vendors which were conducted on March 25, 2009, the Evaluation Committee ranked the technical proposal of interested party Keefe as superior to the technical proposal submitted by appellant Aramark.
13. After evaluation of the technical proposals, the financial proposals submitted by the two (2) vendors bidding for this contract were opened on March 30, 2010, at which time it was determined by the Evaluation Committee to solicit best and final offers (BAFO's) from each of the vendors, which was requested by correspondence that date. (Ex. 20 & 21.)
14. Both Aramark and Keefe submitted BAFO's to DPSCS on April 1, 2009, both of which increased from their initial proposals the commissions offered by the vendors to be paid to the State in consideration of the award of exclusive rights to provide commissary services to Maryland's correctional institutions during the course of the five (5) year period of the contract.
15. The BAFO's were reviewed by the Evaluation Committee on April 2, 2009, as a result of which DPSCS determined to request a second BAFO from each bidder, and a second BAFO request was transmitted to both of the vendors on that date. (Ex. 28 & 29.)
16. On April 6, 2009, both vendors submitted responses to the Department's second BAFO request, in which, based upon the projected inmate ADP assumption provided by the State, Aramark offered to remit an estimated \$15,092,415, or about

\$3 million more to the State than Keefe's evaluated offer of \$12,013,595 over the five (5) year term of the contract, or \$615,764 more per year. (Ex. 26, 30 & 31.) (The Board is sensitive to unnecessarily disclosing confidential information relating to bidding on this procurement, but these sums are expected to be publicly disclosed in the action item portion of the agenda of the Board of Public Works (BPW) in its review of this matter for approval, notwithstanding the presence of the confidentiality Orders and Agreements in this proceeding.)

17. The Evaluation Committee met again on April 6, 2009 to reconsider both the technical and the final financial proposal of each bidder and, notwithstanding the \$3 million lesser anticipated profit to be received by the State from Keefe as compared to Aramark over the five (5) year period of the contract, unanimously determined to recommend award of the contract to Keefe, which recommendation was set forth in writing to the appropriate DPSCS Deputy Secretary on April 8, 2009 and approved. (Ex. 36.)
18. A debriefing was provided to Aramark on April 20, 2009 and Aramark filed a bid protest with DPSCS the following day.
19. DPSCS denied Aramark's first bid protest on May 11, 2009.
20. Aramark filed the instant protest before this Board in timely fashion on May 21, 2009 and subsequently filed two (2) additional bid protests followed by timely appeals to this Board on February 19, 2010.
21. Appellant's protests over the award of the underlying contract to interested party Keefe were consolidated for hearing on the record which occurred on May 17, 18 and 19, 2010 and the record in this proceeding formally closed on May 28, 2010 except for the simultaneous filing of Briefs by all parties on June 18, 2010 and the filing of Reply Briefs ten (10) days thereafter.

Decision

Despite seven (7) years of continuing DPSCS effort to effect privatization of commissary services at Maryland's correctional facilities, this procurement is imperfect. In addition to the general allegation of inadequate analysis of best value to the State and DPSCS confusion over components of Aramark's proposal, appellant makes two (2) specific allegations of flaws in the State's evaluation of the dueling proposals here at issue, namely, (1) that reference checks were not uniform, and (2) that DPSCS violated the Code of Maryland Regulations (COMAR) when it determined without written authorization to request a second round of BAFO's before finalizing the procurement decision in this matter. The Board will address each of these aspects of appellant's complaint seriatim.

First, with respect to the non-uniformity of DPSCS inquiries of other states regarding satisfaction with commissary vendor services for each of these two (2) bidders, the Board observes that DPSCS did indeed violate its own evaluation guidelines. Item No. 6 of the document distributed to the Evaluation Committee members reviewing this procurement and titled, "Evaluation Committee Duties and Responsibilities" expressly required that "uniform questions will be asked" of references. (Ex. 15, pg. 952.) Walt Williamson, the Evaluation Committee representative who checked bidders' references, however, actively inquired of references only for Aramark and not for Keefe. Williamson explains this approach in his December 18, 2009 Memo to the Procurement Officer (presumably prepared in support of the Department's defense of the instant litigation), as occurring because during the course of his discussions with officials of other governmental entities, including Virginia, Pennsylvania, and Harford County, Maryland, he had already "determined that

Keefe was their contractor of choice and was looked upon favorably by the parties who were responsible for its contract execution." (Ex. 94A.) By contrast, his pro-active reference contacts during the week of March 26, 2009 regarding Aramark's service concluded that Aramark's work in Indiana did not include commissary service, in Ontario that the "client appeared to be pleased with service," and in Kentucky that Aramark's commissary experience was "small in scope." (Ex. 91.) Williamson's report to the full Evaluation Committee on vendor references included these comments. It was delivered orally and not in writing, but its substantive content is well preserved by his notes to the procurement officer. DPSCS inquiry in this regard should indeed have been more uniform, as DPSCS itself recognizes, but this Board surely cannot conclude that the reference-check defect committed here rises to a level of such egregious violation of accepted practice to invalidate the entirety of the Evaluation Committee's deliberations.

More problematic to the Board is COMAR § 21.05.03.03(D), the State procurement regulation governing BAFO's, which states as follows:

"The procurement officer may require more than one series of submission of best and final offers and discussions if the agency head or designee makes a *written* determination that it is in the State's best interest to conduct additional discussions..." [Emphasis added.]

Here it is admitted that DPSCS made no written determination to issue a second request for BAFO's; only an authorization orally transmitted by a DPSCS Deputy Secretary to the procurement officer. This is troubling to the Board on a couple of levels.

One may fairly assume that the above COMAR provision was thoughtfully and deliberately crafted to avoid unnecessary proliferation of BAFO's. There are times when a second BAFO may be useful, but the redundant issuance of the State's request for a BAFO may be counterproductive to broad procurement goals if

repeated BAFO's become so misused as to eliminate the meaning and significance of a final offer. Only one offer can be the final offer. Over the long haul the State's potential practice of regularly requesting a final offer and then re-requesting another "final" offer may leave some vendors with the impression that the State's first BAFO request may be a ruse rather than a conclusion to negotiations, as BAFO requests properly and rightfully should be recognized by the recipient.

In the context of the procurement here in dispute, the reason for the first BAFO was that the DPSCS Evaluation Committee was surprised that neither of the vendors sought to reduce their liability to the State during the first year of contract implementation to compensate for the cost of achieving the necessary interface of computerized commissary account activity with the existing MOBS system of tracking inmate funds, which DPSCS information technology (IT) experts projected could cost about \$2 million. But despite the bold lettering in the first BAFO alerting the two (2) vendors to this contract obligation, neither bidder sought to reduce their payment to the State. Instead, one bidder offered a comparatively slight increase in the commission it agreed to pay to the State, and the competing vendor agreed to a much higher increase in commission.

In response to the continuing surprise of the Evaluation Committee to the bidding approach taken by both bidders, DPSCS simply issued a second BAFO, this time deleting the information pertaining to the requisite MOBS interface earlier stated in bold. This, the second BAFO, failed again to secure the specific response DPSCS expected, as one bidder increased their offer further and the other conditionally did so based upon higher product costs to be passed on to inmates. In addition, the second BAFO was extremely confusing to at least one of the bidders and was technically without authorization under COMAR because its issuance was never approved in writing.

The quandary for this Board now faced with the evident flaw in the instant procurement as disclosed with 20/20 hindsight is to determine what should be done about it. Was the flaw fatal? Should a procurement which has already been underway for seven (7) years be delayed further simply because the agency head's designee authorized a second BAFO orally but not in writing? The Board cannot fairly impose such a harsh consequence in response to so innocent a violation of COMAR, which the Board notes in this application does not mandate any certain course of punitive or enforcement sanction. This is not to imply that a second BAFO is not required to be authorized in writing, nor that a writing was not required here. It is and it was. Nor is this ruling to imply that in the event this issue is confronted again, the Board will ignore this or any other COMAR obligation. It is merely to conclude that under the particular circumstances here presented, the Board cannot be compelled to grant appellant the absolute relief for which it prays merely because the procurement did not technically comply with COMAR § 21.05.03.03(D) and therefore should not have been issued even though its issuance did give rise to additional revenue to the State.

There are four (4) bases of reasoning behind the Board's conclusion on this point. First, appellant made no allegation in its bid protest that the State's second BAFO was defective. Thus, this question was never addressed in the first instance by the procurement officer. The principal function of the Board is to enable independent review for legal sufficiency of decisions made by the State's procurement officers, but here no issue was raised prior to appeal to the Board. Second, this flaw in the procurement is strictly procedural and not substantive. Third, DPSCS substantially complied with COMAR in that a Deputy Secretary did in fact authorize the second BAFO request, though that authorization should have been but was not set forth in writing. Fourth, both vendors were treated the same with respect to all BAFO's and therefore neither party was unilaterally

prejudiced by the second BAFO request. Moreover the Board cannot condemn the outcome of this procurement determination under all of the circumstances here presented.

Turning to another point of appellant's grievance, the Board must concur with Aramark's contention that DPSCS representatives were confused about some of the aspects of the Aramark proposal. However, the Board does not conclude that the confusion was solely the fault of DPSCS. Simply stated, Aramark should have done a better job explaining its technical proposal, in writing as well as during its oral presentation.

For example, despite the table set forth by Aramark in its bid and appearing as Joint Exhibit No. 9 at page 5.3, DPSCS may not have appreciated that Aramark sought to create fifty (50) new employment positions, rather than using some of its existing Maryland employees for the additional work prospectively required for Aramark to perform this contract. But Aramark should have been clearer and more precise in setting forth its staffing plan in such a fashion that DPSCS recognized that Aramark did indeed contemplate fifty (50) new hires instead of recycled current employees. In any event, Keefe's plan includes the creation of a total of eighty-eight (88) positions, thirty-eight (38) more than Aramark under the best scenario. Given the significance of job creation in the economic and political climate at the time of bid evaluation, it would not be surprising to learn that this aspect of Keefe's bid in the view of the Evaluation Committee carried greater weight than usual and regardless of whether or not Aramark's impact on the Maryland economy was correctly perceived by DPSCS as intending fifty (50) new positions, it was inferior to Keefe's.

In addition, not all members of the DPSCS Evaluation Committee may have appreciated the similarity between Aramark's existing "pick and pack" facility in Jessup, Maryland and the comparable business model contemplated by Aramark for prison commissary service. However, the coincidental proximity of

Aramark's currently used warehouse to a large state correctional facility was identified by DPSCS as a strength of Aramark's proposal, not a weakness. And despite argument to the contrary by counsel for Aramark, there is no fair indication in the record that DPSCS concluded that Aramark intended to use non-compliant packaging in its commissary services. Both the products required to be offered for sale as well as approved methods of packaging them are set forth with some particularity in the RFP and the Board must conclude that DPSCS had every expectation that Aramark would comply with all such contractual conditions, as Aramark promised it would, in part by segregating commissary services by separate conveyor and packaging processes within Aramark's existing "pick and pack" warehouse facility operation in Jessup.

The evidence adduced reflects also that DPSCS did not recognize that the reason for Aramark's loss of its largest previous commissary contract, namely for 11,000 inmates in Chicago, Cook County, Illinois, was not unknown or "vague" as alleged by the procurement officer, but instead, "based on financial terms." (Ex. 37, pg. 834-6, cf. Ex. 9, pg. 754.) It is quite correct that Aramark suffered from such points of confusion during the process of DPSCS evaluation of its proposal. But the obligation of DPSCS fully to appreciate Aramark's offer fell in large measure to Aramark to explain, emphasize and illustrate its strengths to the reasonable satisfaction of the Evaluation Committee. That the Committee members were not persuaded, or at least were of the unanimous impression that Keefe's proposal was more favorable to the State, was in part because Aramark's presentation of its proposal was inferior to its competitor. Instead of focusing on matters such as Aramark's philosophy of increasing its profit margin by carrying name-brand instead of generic products, which is totally irrelevant to the State's bottom line in this procurement, Aramark should have concentrated on sales points of greater persuasive relevance and poignancy to DPSCS concerns and considerations.

Another complaint raised by Aramark is that it should not have been disqualified because it lacked experience serving a prison population in excess of 15,000 inmates. On this point, the RFP at issue did not expressly require that bidders have prior experience with a prison population in excess of 15,000 but did require that bidders provide to DPSCS:

"An overview of the Offeror's experience providing equipment and commissary services similar to those included in this RFP. This description shall include:...[e]xperience with serving multiple institutions with a minimum population of fifteen thousand (15,000) inmates." (Joint Exhibit 2, pg. 50.)

Because Aramark does not have the prescribed experience, it was unable to provide an overview of such experience. But DPSCS did not disqualify Aramark on this basis. Instead, to Aramark's advantage, DPSCS did not regard this component of the RFP as mandatory and Aramark was deemed to be reasonably susceptible of being awarded the contract. Aramark's comparatively lesser past experience with prison populations of 5,000 in Sacramento, California, 2,000 in Mecklenburg, North Carolina, and 8,000 in Ontario (see Joint Exhibit 9, pg. 354 *et seq.*) was not viewed by the Evaluation Committee as rendering Aramark ineligible for contract award, but instead as merely a weakness when compared to Keefe's superior prison commissary experience with inmate populations of 85,000 in Florida, 31,000 in Virginia, and 28,000 in Arizona (see Joint Exhibit 11, pg. 607 *et seq.*). There was nothing arbitrary or capricious about this carefully considered and weighted determination, which was on the contrary, reasonable and even generous to Aramark.

Similarly, Aramark's contention that DPSCS conducted improper unilateral discussions with Keefe is also without merit. The limited communications between DPSCS and Keefe after the recommendation to award the contract to Keefe were appropriate to prepare for contract implementation by the selected vendor.

Perhaps of greatest consequence to the procurement outcome was DPSCS concern over the new vendor's capability to transfer its computer software and hardware to DPSCS in the short and long term phases contemplated. DPSCS placed a value of millions of dollars as the worth of this improvement. DPSCS endeavored to make it clearly known to Aramark that a more detailed explanation was desired in order for DPSCS IT contract supervisors to feel confident that Aramark's software system, known as ACTFAS, could be successfully interfaced with MOBS. But instead of forthrightly providing the desired analysis, Aramark's responses during the oral presentation to the Evaluation Committee on this point were perceived by the members of that Committee as evasive or worse, an insignificant annoyance to Aramark, which preferred that DPSCS evaluators accept a more careless and casual approach that one might fairly characterize with the words, "just trust us." Aramark's election of this approach toward the concerns of the Evaluation Committee surely did not endear Aramark to DPSCS favor on this important aspect of the contract. While the Board may give Aramark the benefit of any doubt and regard both vendors as equally capable of delivering the promised computer goods and services, Keefe's presentation to DPSCS on those points was objectively more detailed and therefore superior. At the very least it certainly cannot be said that the DPSCS Evaluation Committee was arbitrary or capricious in deeming Keefe the preferred offeror with respect to this key aspect of its procurement deliberations.

In closing, the Board should emphasize that it is sympathetic to Aramark's frustration that it offered a favorable rate but was denied the significant contract opportunity here at issue. Highly skilled and thorough counsel for Aramark makes forceful argument on a series of fronts. But the Board is cognizant that this contract is unique and very important to DPSCS as it seeks to privatize commissary services for the first time in Maryland. The Board is also appropriately restrained

from reversing the judgment of DPSCS correctional experts in their selection of the vendor they reasonably deem to be in the best interest of the State even though the anticipated profit expected to be gained by contracting with that vendor may be somewhat lower than a competing vendor. This is largely because DPSCS and not the Board will bear the responsibility of supervising the selected vendor for the next five (5) years.

Special expertise is needed to assure a smooth transition from a longstanding history in Maryland of State-provided commissary services to those to be provided by a private corporation, as well as for the ongoing operation of correctional institutional commissary services after initial implementation. Special security concerns are at the forefront of any endeavor that is afforded access to highly secure facilities housing potentially dangerous persons court-ordered to be committed and held in a custodial setting for the protection of public safety. Indeed, the entire purpose of this procurement is to identify an entity which will be exclusively entitled to introduce foreign material into correctional settings at inmates' request. In addition to shielding the institution against the introduction of contraband of various sorts, failure of timely delivery of commissary products or correct record keeping of purchases is said to be vital to the maintenance of institutional order and the safety and well-being of correctional officers. DPSCS is entitled to significant discretion in judging which vendor it deems best able to handle the various tasks that it seeks to be performed within its unique facilities.

To sum, the cost of Aramark's service may well be expected to net DPSCS \$3,078,820 more in revenue than Keefe's proposal over the course of the next five (5) years. That alone is tempting to sway favor toward award of the contract to appellant, especially in light of the State's dedicated efforts at fiscal restraint during current budget shortfalls. But the Board cannot conclude as a matter of law that DPSCS was arbitrary or

capricious in its trade-off analysis when DPSCS determined that the evident superiority set forth in Keefe's technical proposal, including superior prior experience and superior presentation of capability in its performance plan for Maryland, is worth the three million dollar (\$3,000,000) five (5) year cost differential between the two (2) vendors.

For all of these reasons, this appeal must be and hereby is DISMISSED.

Wherefore it is Ordered this day of July, 2010 that the above-captioned appeal is dismissed.

Dated:

Dana Lee Dembrow
Board Member

I Concur:

Michael W. Burns
Chairman

Michael J. Collins
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 2660, 2695 & 2696, appeals of ARAMARK Correctional Services, LLC under DPSCS RFP Q0009015.

Dated:

Michael L. Carnahan
Deputy Clerk