

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

In The Appeals of)
Trinity Services Group, Inc.)
)
) Docket Nos. MSBCA 2917,
Under DPSCS Contract Nos.) 2931 & 2935
Q0014004 & Q00B5400155)

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OPINION BY BOARD MEMBER DEMBROW

By this bid protest appellant seeks an order invalidating a contract award on the grounds that it was entered into unlawfully because it was approved without authorization under Maryland procurement law absent the benefit of competitive bidding as ordinarily required. The relief requested is denied. While the procurement process followed here was highly irregular, emergency circumstances compelled the action taken by the State.

Findings of Fact

1. On May 9, 2014, the Maryland Department of Public Safety and Correctional Services (DPSCS) issued a certain Request for Proposals (RFP) for the purpose of identifying a private vendor to provide food services at certain correctional

facilities located in Baltimore, Maryland. (App. Ex. 3A; Tr. 78.)

2. The opening Sec. 1.1.1 of the RFP claimed the total number of facilities to be twelve (12), but Attachment Y to the RFP itemized only nine (9) specific DPSCS facilities to be served. (App. Ex. 3A.) Attachment Y to the RFP also set forth the average daily population (ADP) at each of the facilities, which ranged from six (6) at the Patuxent Halfway House to 2,139 at the Baltimore City Detention Center, for a total of 5,700. Because those 5,700 individuals were to be served three (3) meals per day, the daily meal count identified in Attachment Y was 17,100 as of April 2014. (Tr. 359.) On the pricing sheet for the RFP, however, the estimated daily meal count was indicated to be 22,300. (Agency Report, Attachment F.) This latter figure was inadvertently and incorrectly listed because that was the count that had been used several years prior when the former RFP for DPSCS food services was developed. (Tr. 135.)
3. The RFP made clear that the anticipated daily numbers of meals required were merely estimates and that there was no guarantee of the actual number of meals needed. (Tr. 237, 525.) One of the more significant changes in the 2014 RFP as compared to the predecessor solicitation in 2009 was the upgrading of the minimum content of inmate meals which, by the terms of the 2014 RFP, were required in the future to comply with higher quality meal specifications used for U.S. Armed Forces. (Tr. 135, 228.) One example of this upgrade is that under Armed Forces standards, mechanically separated meats are not permitted to be served. (Tr. 230.)
4. Under the terms of the contract in force prior to 2015, Trinity was charging DPSCS \$2.03 per meal. (Tr. 97, 227.)
5. Two prospective competing vendors attended the pre-proposal conference and site visit, namely, appellant Trinity

Services Group, Inc. (Trinity) and Aramark, another entity well-known in the specialized industry of inmate food service. (Tr. 81.) Interested party Crystal Enterprises, Inc. (Crystal) did not attend the pre-proposal conference but a nonemployee representative attended the site visit. (Tr. 212, 487.)

6. At the oral presentation that was conducted by DPSCS in October 2014, Trinity, as the incumbent provider of food services, informed the procurement officer that the inmate count set forth in the RFP was incorrect. (App. Ex. 3A.)
7. There were as many as eight (8) Addenda issued to change or correct the specifications set forth in the initial RFP, the last of which cancelled the originally stated estimate of the daily need for 5,965 juvenile meals, changing that figure instead to a mere 240. (Tr. 209, 211.) It is unclear from the record how such a gross error occurred in the original drafting specifications.
8. Two (2) proposals were submitted in response to this solicitation, one by appellant Trinity and the other by interested party Crystal. (Tr. 80.)
9. After thorough evaluation by a DPSCS Evaluation Committee, Crystal was ranked first in the technical evaluation of the proposals and Trinity was ranked second. (Tr. 87.)
10. Crystal's proposal was also ranked first in the financial component of proposal evaluation, with a price considerably lower than Trinity's. Specifically, Crystal initially offered a price of \$1.19 per adult meal and \$.93 for juvenile meals, as compared to Trinity's initial pricing of \$2.80 per adult meal and \$3.10 per juvenile meal. (App. 3B; Tr. 88, 95.)
11. Trinity is one of a very small number of very large corporations that dominate the food service industry in the correctional setting. It is the incumbent provider of food services at the correctional facilities identified in the

subject RFP, Maryland being one of 44 states in which Trinity has government contracts. By contrast, Crystal is a smaller local minority business enterprise (MBE) founded in 1989 and based in Glendale, Maryland. Prior to award of this contract, Crystal had no experience providing food service to inmates, but did have a considerable successful history of providing food services to military institutions and others, including DPSCS, with gross annual revenue in the range of \$25 million. (App. Ex. 5A; Tr. 92, 467-469.)

12. On November 25, 2014, DPSCS requested of both offerors a best and final offer (BAFO). Crystal was specifically advised at that time that DPSCS had concerns with its bid because Crystal had offered to charge for juvenile meals an amount less than the amount it bid for adult meals, even though juvenile meals were the same as adult meals, except that juvenile meals also include an extra milk and snacks; so DPSCS reasonably expected that bids for juvenile meals should be higher than the bids for adult meals. (App. Ex. 3D; Tr. 92, 224.)
13. In response to the first BAFO request, Crystal offered a price of \$1.17 for adult meals and \$1.19 for juvenile meals. Trinity's response to the first BAFO increased its price for adult meals from \$2.80 to \$3.10 and increased its price for juvenile meals from \$3.29 to \$3.59. (Tr. 93, 95.)
14. After reviewing the responses to the first BAFO request, on December 5, 2014, DPSCS issued a second BAFO request and in a letter to Crystal that date stated, "it appears that Crystal's pricing may be too low. The Department is concerned that Crystal may not have not [sic] the ability to provide the services required at the prices proposed." (App. Ex. 3F; Tr. 226.) In response to that letter Crystal increased its pricing and for its second and final BAFO offered a price per meal of \$1.43 for adult meals and \$1.45 for juvenile meals, for a total proposal price of

- \$37,807,314. (App. Ex. 3G, 3I; Tr. 96, 233, 234.)
15. One of the reasons for Crystal's decision to raise its price from \$1.17 to \$1.43 is that Crystal neglected to include in its initial pricing the cost of an equipment maintenance fund in the amount of one million dollars (\$1,000,000) to be made available by the contractor according to the terms of the RFP. (Tr. 478-479, 517-522, 544, 550.)
 16. In response to the second BAFO request, Trinity declined to modify its prior offer to charge \$3.29 per adult meal and \$3.59 for juvenile meals, for a total proposal price of \$89,032,650.
 17. Based on the aforesaid final pricing proposals, Crystal's offer was more than \$50 million lower than Trinity's. (Resp. Ex. 16; Tr. 503.)
 18. The RFP established an overall Minority Business Enterprise (MBE) participation goal of 18% for this contract, without specifying any sub-goals.
 19. To achieve the stated MBE goal, DPSCS rejected Crystal's original MBE itemizations but allowed Crystal to amend its MBE schedules on multiple occasions. Between October 2, 2014 and January 6, 2015, in response to DPSCS demands, Crystal was allowed to correct its MBE forms, identify new MBEs to perform components of the contract, and also modify Crystal's initial descriptions of the work to be performed by certified MBEs under the correct work categories established by NAIC (North American Industrial Classifications) work classification codes. Ultimately, Crystal promised to subcontract with five (5) different MBE subcontractors to receive 18.6% of the state funds to be paid by DPSCS under the contract. (App. Ex. 7; Resp. Ex. 17-25; Agency Report, May 11, 2015 letter from procurement officer to counsel for appellant.)
 20. By contrast, Trinity indicated in its proposal that it intended to use a single MBE to achieve the 18% goal.

(Resp. Ex. 16.)

21. On December 16, 2015, DPSCS recommended award of the contract to Crystal, following which Trinity filed its first bid protest, which was denied by DPSCS on January 2, 2015. (Resp. Ex. 1.) The denial of that bid protest was appealed to the Maryland State Board of Contract Appeals (MSBCA) on January 6, 2015 and docketed as MSBCA No. 2917. The grounds of that bid protest and appeal included the allegation that DPSCS failed to assure that Crystal correctly understood the scope of work required by the RFP, that Crystal was not a responsible offeror "[i]nsofar as the price proposed by Crystal is inadequate to reasonably cover the costs of fully performing the Contract scope of work," and generally that DPSCS was arbitrary in its determination to recommend contract award to Crystal instead of Trinity.
22. Section 1.44 of the RFP required a \$2 million performance bond, stating, "Within 5 days of notification that it is recommended for the award of the contract, the successful Offeror must submit a Performance Bond (see Attachment S), or other suitable security in the amount of \$2,000,000 and shall keep the bond in effect for the entire term of the contract." (App. 6A; Tr. 101.) Thus, Crystal was obliged by the terms of the RFP to have a performance bond in force within five (5) days of December 16, 2014, a date which fell on a Sunday, extending the deadline to December 22, 2014. (Tr. 260.)
23. On several occasions the procurement officer reminded Crystal of its responsibility to post a \$2 million performance bond as required by Sec. 1.44 of the RFP. (Tr. 119, 121, 378, 501.) The first such communication occurred concomitant with the State's December 16, 2014 notification to Crystal that it had been recommended for award. Those reminders continued after contract approval. (Resp. Ex. 1.)
24. Crystal's initially identified surety company, Centennial

Surety Associates, Inc., did provide correspondence to Crystal which Crystal provided to DPSCS on January 6, 2015 stating, "We, as their agents feel very strongly that that [sic] Crystal Enterprises, Inc. will meet all of the required conditions [for obtaining a performance bond] promptly." (Resp. Ex. 2.)

25. Approval of the recommended award of the contract to Crystal was scheduled for consideration by BPW on January 7, 2015.
26. On January 6, 2015, the DPSCS procurement officer informed representatives of BPW that Crystal had not yet obtained a performance bond. (Tr. 379.)
27. The original Action Agenda page for BPW approval of the contract on January 7, 2015 did not include any reference to a performance bond, but that omission was corrected at the request of DPSCS by evening e-mail of January 6, 2015, and the final Action Agenda, 2d Revision, added a line which noted as follows: "**PERFORMANCE BOND: \$2,000,000.**" (App. Ex. 1A, 2A, 6C; Resp. Ex. 3; Tr. 283, 288, 290.)
28. After hearing argument from counsel for appellant, including the payment ramifications of Trinity's accurate assertion that the inmate count set forth on the pricing sheet was incorrect, on January 7, 2015, the Board of Public Works (BPW) awarded a three-year contract to Crystal in the face of the appeal. (App. Ex. 1A & 1B @ pg. 43.)
29. Just before contract approval, the transcript of the BPW meeting of January 7, 2015 reflects the following prophetic colloquy with respect to Crystal's ability to provide the required food services at the price quoted, and the presence or absence of the required performance bond:

COMPTROLLER FRANCHOT: Are you confident that the winning bidder can actually produce the services that were in your RFP? And what protection for the taxpayers is there if there is, to your disappointment, an inability to stay within budget?

[DPSCS ACTING SECRETARY] PARRISH: Yes, sir. We, we believe that they can adequately supply and meet our, our needs. We do have contract monitors that operate our State correctional facilities, our State contract monitors. So we, we are confident that we can, that they can meet our need and we can sustain.

COMPTROLLER FRANCHOT: And there, there is a bond on this that they agree, if they for some reason fall short in performance, are they, is the State going to be able to I guess rebid this if this doesn't work?

MR. PARRISH: I'm pretty sure there should be. Yes. Yes, sir. Yes.

TREASURER KOPP: Is it \$2 million?

COMPTROLLER FRANCHOT: So there's a performance bond?

MR. PARRISH: Yes, sir.

SECRETARY MCDONALD: The item, the item was revised a few minutes before the meeting to indicate that there is a \$2 million performance bond on this. So that will be in the record, a \$2 million performance bond.

30. The foregoing assurances made to BPW were inexcusably incorrect. DPSCS now proffers that there was confusion regarding whether the questions posed by the Comptroller and State Treasurer pertained to the presence of a provision in the RFP requiring a \$2 million performance bond, rather than the presence of the actual \$2 million performance bond itself as required by the RFP. (Tr. 114, 292.) MSBCA rejects that explanation. The question was clear and so was the answer provided. At the same time, MSBCA does not find that DPSCS intended to deceive BPW; only that a mistake was made in an intimidating setting caused in part by last minute changes made to the BPW Agenda to expedite contract award.

31. On January 8, 2015, DPSCS notified Crystal that "the contract cannot be executed without it [the performance bond]," in response to which Crystal stated "We should have it by COB [close of business] Monday [Jan. 12, 2015]." (Resp. Ex. 4.)
32. On January 12, 2015, Crystal apologized to DPSCS for not yet having the bond stating, "we fully anticipate having the bond finalized by the end of that meeting [on Wed., Jan. 14, 2015]." (Resp. Ex. 5.)
33. The contract was executed by DPSCS on January 12, 2015, but thereafter withheld by DPSCS from Crystal until January 30, 2015, the day before Crystal formally began providing food service at the designated DPSCS facilities on February 1, 2015. (Tr. 309.)
34. By correspondence e-mailed to Crystal on January 20, 2015, DPSCS stated, "Crystal was to have submitted a Performance Bond or other suitable security in the amount of \$2,000,000 within 5 days of notification of recommended award of the contract. . .The Department hereby notifies Crystal that its Contract shall be terminated for Default, effective 5:00 PM, January 30, 2015, unless Crystal cures its default by providing the required Performance Bond on or before that date and time. . .In the event the Department terminates The [sic] Contract, the Department may procure substitute performance upon terms and in whatever manner the procurement officer may deem appropriate, and Crystal shall be liable for any excess costs for substitute performance." (Resp. Ex. 6; Tr. 125, 294, 296.)
35. E-mails were exchanged between the procurement officer and the Governor's Office of Minority Affairs (GOMA) on the morning of January 26, 2015 in which DPSCS stated, "The decision was made to extend the due date [for Crystal to obtain a performance bond] but it was also decided not to inform Crystal of this decision until at the least the 29th

or so. That way, they will continue their aggressive efforts to get the bond." Later the same day, Meridian Management Group, Inc. on behalf of the Maryland Small Business Development Financing Authority (MSBDFA) directed correspondence to the procurement officer stating in part that Crystal's "request can be recommended for approval to our MSBDFA Board of Directors." (App. Ex. 6E, Resp. Ex. 7; Tr. 126, 297, 300-301.) The procurement officer shared this information with others at DPSCS, explaining that MSBDFA "sees no reason why the request would be denied." (Resp. Ex. 9.)

36. The first meeting of the MSBDFA Board of Directors after January 26, 2015 was February 12, 2015. So in light of the January 26, 2015 letter, DPSCS directed correspondence to Crystal extending the time to obtain a performance bond to February 27, 2015 and allowing Crystal "to provide a Performance Bond or other suitable security, or combination of Performance Bond and suitable security as described in Section 1.44 of the RFP in the amount of \$2 million." (App. Ex. 6E; Resp. Ex. 8.)
37. On February 12, 2015 MSBDFA approved Crystal for a \$1 million performance bond and a \$1 million line of credit. (Resp. Ex. 10; Tr. 130.)
38. Crystal never did obtain a performance bond. (Tr. 488-489.)
39. On February 13, 2015 DPSCS directed correspondence to BPW correcting the mistaken information provided to BPW by DPSCS concerning its earlier representation when the contract was approved on January 7, 2015 that Crystal had a performance bond in place. (App. Ex. 6H; Resp. Ex. 11; Tr 132.)
40. Problems arose from the commencement of services by Crystal, if not before. It was reported that Trinity failed and refused to cooperate with Crystal during the transition of services from Trinity to Crystal. (App. Ex. 6G; Tr. 511.) Crystal further alleges that a substantial portion of the

equipment required to operate the subject dining services was inoperable from the outset. (Tr. 512.) Early in the course of contract performance Crystal also discovered that the inmate count provided by DPSCS in the pricing sheet of the RFP was incorrect. The estimated number of meals identified in the RFP was 22,300, but the number of daily meals actually needed was 15,600, a disparity of 30%. (Resp. Ex. 14.) Very shortly after the contract start date of February 1, 2015, Crystal was operating with a negative cash flow, its costs incurred to provide food services to DPSCS exceeding the amount it priced in its proposal and agreed to receive for the services specified.

41. Based on a per meal price of \$1.43, 15,600 daily meals computes to payment of \$22,308 per day, compared to \$24,453 for 17,100 meals as predicted in Attachment Y, or \$31,889 for the 22,300 meals estimated in the pricing sheet attached to the RFP and used by offerors to state their prices.
42. On February 6, 2015, Trinity filed its second bid protest, complaining that Crystal had failed to secure the \$2 million performance bond required by the RFP and that the BPW was falsely notified about that status when the food services contract was approved the previous month.
43. On February 19, 2015, Crystal reported to DPSCS that it had a cash flow problem and requested the ability to invoice on a weekly basis instead of a monthly basis, as provided in the contract. (App. Ex. 3H.) In response, the State agreed to allow Crystal to submit its invoices on a biweekly basis. (Tr. 240, 545.)
44. Asserting that it was losing \$10,000 per day because the meal count stated in the RFP differed from the actual meal count by about 30%, on February 24, 2015 Crystal directed correspondence requesting an increase in its per meal price from \$1.43 to \$2.20. (Resp. Ex. 12; Tr. 116, 133, 331.) That correspondence also threatened DPSCS with a four-day

- ultimatum that without such a price increase, "CEI [Crystal] is not able to continue service beyond Feb. 28, 2015 as the contract currently stands." (Resp. Ex. 12.)
45. No documentation was provided to DPSCS by Crystal to substantiate its allegation that it was losing \$10,000 per day and the DPSCS procurement officer did not believe that number to be accurate. (Tr. 341.)
 46. On February 26, 2015, Crystal notified DPSCS that it affirmatively refused to provide a performance bond, informing DPSCS in the words of the procurement officer "that they are losing thousands of dollars a day on the contract and cannot afford to put another penny into it." (App. Ex. 6H; Tr. 335, 362, 364.)
 47. On February 26, 2015, DPSCS decided to terminate the extant contract, enter into a short-term emergency contract, and re-issue the solicitation. (Tr. 150, 451.) Among the reasons for that decision were the short time period available to DPSCS to take action to assure continued food service, and also the fact that even at the inflated rate, Crystal's pricing was substantially lower than Trinity's. (Tr. 167, 372, 453-455.)
 48. As requested by Crystal, the emergency contract agreed to by DPSCS set forth a per meal price of \$2.20 instead of \$1.43, which increased the cost of Crystal's initial bid by the sum of \$6,610,568. The cost of juvenile meals increased from \$1.45 to \$2.22. By contrast, Trinity's offered price was \$3.29 for adult meals and \$3.59 for juvenile meals, still significantly higher than Crystal's price. (Tr. 159.)
 49. The emergency contract did not include the requirement of a performance bond. (Tr. 366-367.)
 50. On February 27, 2015 DPSCS notified Crystal "the Department has determined that it is in the best interest of the State to terminate the contract for convenience." (Resp. Ex. 13.) The reason that DPSCS terminated the contract for

- convenience instead of for default is that DPSCS provided an incorrect estimated number of meals in the RFP. (Tr. 152.)
51. On March 9, 2015, Trinity filed its third bid protest complaining that the emergency contract was unlawful. That protest was denied by DPSCS on April 14, 2015.
 52. On April 7, 2015, Trinity filed its fourth bid protest, complaining primarily that Crystal's proposal in response to the RFP should have been disqualified because it failed to comply with the RFP requirements concerning MBE subcontractor participation. Specifically, Trinity complained that after bid submission Crystal was wrongfully permitted by DPSCS on multiple occasions to modify its MBE forms designating its qualified MBE subcontractors. DPSCS contends that the allowed modifications were all permitted under Maryland law. (App. Ex. 7; Resp. Ex. 16-19, 22-25; Tr. 176-202, 346-353.)
 53. Because Crystal is itself an MBE, under the Crystal proposal, 100% of the revenue paid for performance of the subject contract is to be paid to MBEs. (Tr. 192.)
 54. On April 15, 2015, Trinity filed its second Notice of Appeal which was docketed by MSBCA as No. 2931. The basis of Trinity's second MSBCA appeal centered on its challenge of the State's designation of the circumstances of late February 2015 as sufficient to constitute an emergency, and also objecting to the six-month term of the emergency contract as unduly excessive in duration.
 55. The DPSCS procurement officer initially proposed a contract duration of one (1) year from March 1, 2015 as the term of the emergency contract with Crystal, but that time frame was shortened to six (6) months. (App. Ex. 9; Tr. 375.)
 56. A six-month emergency contract for continued provision of food services at the subject correctional facilities was scheduled as an agenda item at the BPW meeting on April 15, 2015, and unanimously approved by BPW after extensive

discussion highly critical of the irregular nature of the emergency contract recommended for approval. (App. Ex. 2A & 2B; Resp. Ex. 15; Tr. 368, 457.) The request presented by DPSCS to BPW at that time was for additional funding of \$6,610,568 to Crystal in order to continue food service retroactively from the first of March through the end of August 2015 at a rate of \$2.20 per adult meal. Characterizing the emergency additional funding demand as deplorable in that Crystal "put a gun to its [the State's] head," the Comptroller requested a fuller investigation into the procurement, stating further at that meeting, "this is the most troubling procurement action that has ever been brought across my desk, our desk, in my eight years at the Board [BPW]." (App. Ex. 2B @ pgs. 37, 61.)

57. Crystal claimed that it needed to charge \$2.20 per meal in order to break even without a profit, but according to appellant's unchallenged calculations, the increase in Crystal's per meal cost from \$1.43 to \$2.20 resulted in the authorization of payment to Crystal of the sum of \$620,083 more than the increase that would have been required for Crystal to derive an extra \$10,000 per day that Crystal claimed was its daily loss when performing the contract at the initially agreed upon price of \$1.43 per meal. (App. Ex. 10; Tr. 426, 430, 548.)
58. On May 11, 2015, DPSCS denied Trinity's second and fourth bid protests. Trinity's third MSBCA appeal was filed May 28, 2015 and docketed as MSBCA No. 2935.
59. A three-day hearing was conducted on these consolidated appeals, concluding June 10, 2015.

Decision

"Hindsight is 20/20" is an adage apt for many procurement contracts gone awry. Unlike those procurements, what makes this procurement particularly infuriating is that thoughtful concerns

about the award of the DPSCS correctional facility food service contract to Crystal were expressed not after the fact, but prior to contract award. Nonetheless, anticipated problems came to fruition as feared.

The first concern that Crystal's price was too low to cover its costs was expressed by DPSCS. Appellant as incumbent vendor also recognized that fault as soon as it became aware of its competitor's dramatically lower pricing offer. Thereafter BPW members, concerned that that defect could potentially lead to contract default, specifically demanded assurance from DPSCS that the State would be protected by the presence of a performance bond to assure contract performance at the rate promised.

It is abundantly clear from the record of BPW inquiry on January 7, 2015 that contract approval was conditioned upon the presence of a performance bond and forthcoming only after express assurances were given to BPW that a performance bond was indeed in effect so that taxpayers would thereby be held harmless in the event of Crystal's default. Yet, less than a month after commencement of a three-year contract, DPSCS found itself faced with the emergency arising from its sudden inability to feed inmates without the necessity of an additional expenditure of more than \$6 million over the agreed upon price.

The scope of MSBCA jurisdiction is limited to the adjudication of bid protests and contract disputes timely filed in accordance with applicable law and regulation. Here we are presented with four (4) protests arising from the approval of two (2) State contracts: first, the original contract approved by BPW on January 7, 2015; and the second, the emergency contract awarded April 15, 2015.

The various bases of the three appeals are as follows:

MSBCA No. 2917

- "DPSCS failed to assure full understanding of the scope of work as shown by the unreasonably low price

proposed by Crystal."

- "DPSCS erroneously determined that Crystal is a responsible offeror" because "the price proposed by Crystal is inadequate to reasonably cover the costs of fully performing the contract scope of work."

MSBCA No. 2931

- "The circumstances created by DPSCS failed to constitute a valid emergency."
- The duration of the emergency contract was in excess of "the time frame necessary to meet a critical state need, public exigency or emergency."

MSBCA No. 2935

- The original contract was the result of a misrepresentation by DPSCS to BPW and the recommendation for award was unlawful in the absence of the required performance bond.
- Material flaws in Crystal's MBE schedules rendered it "not reasonably susceptible for being selected for award."

By these consolidated appeals, Trinity challenges the lawfulness of the admittedly irregular procurement process that was followed here. Appellant seeks from MSBCA the issuance of a declaratory judgment rendering both the January 7 and April 15 contracts void as *ultra vires*, compelling the State to reissue a new RFP, but also staying such an order temporarily to assure that affected inmates continue to be fed.

MSBCA analyzes the substantive merits of each of the grounds of Trinity's three (3) appeals by addressing the last filed appeal first, namely, alleged MBE deficiencies. With respect to MSBCA No. 2935, MSBCA concludes that DPSCS was in compliance with Maryland law when it permitted Crystal to amend its MBE submissions. This was authorized by SF&P 14-302 and COMAR 21.11.03.12, also known as the "72-Hour Rule." (See Tech

Contracting Co., MSBCA Nos. 2912 & 2916 (April 27, 2015.)
Second, the recommendation for award to Crystal in the absence of a performance bond was not unlawful. It is undisputed that an unfortunate error was committed when BPW was wrongly informed that a performance bond was in effect as required by the RFP. But that mistake does not preclude BPW from making a final lawful determination to award a contract, nor does it void such action premised on a falsehood uttered by the State.

With respect to Trinity's first filed appeal, MSBCA No. 2917, there is no indication alleged or proven that Crystal did not understand the full scope of its contract obligations except by virtue of the fact that its price was low. There is no good cause shown to disallow a State contract merely because a price is low, particularly when the State has gone to lengths to warn the offeror of the potential deficiency of its pricing. Trinity stated no protest grounds based on Crystal's financial capability, so that aspect of determination of an offer's responsibility is not before MSBCA. Second, the duration of the short-term emergency contract entered into by the State is not in violation of Maryland law or regulation. The current six-month contract under which Crystal is providing food services to DPSCS expires at the end of August 2015. The fear that MSBCA shares with the State is that such a short time period may be insufficient for DPSCS to complete the new procurement before the expiration of the current contract, particularly in light of the State's representation at the June hearing that the new RFP has yet to be issued. Ten (10) weeks during summer vacation is a very short time for offerors to respond to a new RFP and also allow DPSCS to evaluate proposals and select a winner. A contract duration of six months is the absolute minimum necessary to meet the emergency that existed at the end of February 2015.

Trinity's appeal on the basis that no emergency existed permitting the State to circumvent the obligation of competitive bidding is also denied on the merits. With the authority of the

head of a unit of State government such as the Secretary of DPSCS, a procurement officer may be delegated enormous discretion to facilitate an emergency procurement as authorized by the State Finance & Procurement Article of the Maryland Annotated Code (SF&P) Sec. 13-108(a)(1), which states, "the 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." In the event of an emergency procurement, the only restraining conditions set forth in statute are the requirement that the procurement "(i) obtain as much competition as possible under the circumstances; (ii) limit the emergency procurement to the procurement of only those items both in type and quantity, necessary to avoid or to mitigate serious damage to public health, safety, or welfare; and (iii) after awarding the procurement contract, submit to the Board [of Public Works] a written report that gives the justification for use of the emergency procurement procedure." SF&P 13-108(a)(2).

The broad authority of a procurement officer acting with the approval of the agency head is similarly set forth in the Code of Maryland Regulations (COMAR) Sec. 21.05.06.01, *et seq.* whenever "competitive sealed bidding or competitive sealed proposals cannot be used in awarding or modifying a contract because of an emergency." COMAR 21.05.06.02 further provides: "Any procurement agency may make an emergency procurement when an emergency arises and the agency's resulting need cannot be met through normal procurement methods."

"Emergency" is defined by COMAR 21.01.02.01B(36) 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." (Emphasis added.) The absence of foreseeability or presence of an unexpected occurrence is a regulatory requirement that is very troubling to MSBCA because here, prior to contract

award, public officials and others openly expressed worry over the possibility of Crystal's default for inability to perform the contract at the rate promised, which ultimately was the very cause of the State's termination of the original contract. According to strict interpretation of the foregoing definition, one might argue that in order to qualify as an emergency, a condition must exist that was not foreseeable. Crystal's default does not fall into that category.

MSBCA is without authority to re-write COMAR. It is also without an understanding of why the applicable definition of "emergency" as set forth in COMAR is somewhat contrary to the dictionary definition, expressly excluding situations that may be expected or foreseeable. Moreover, in the ordinary sense of the word, some emergencies are indeed not foreseeable, but other emergencies may be anticipated. They are not always the result of an unexpected surprise.

Consider the following hypothetical: A tropical storm is brewing in the Atlantic Ocean off the mid-Atlantic coast. It is identified more than a week before it is likely to make landfall. It continues to develop until it becomes a Category 4 hurricane, expected to slam directly into Ocean City, Maryland. Businesses are boarded up and people are evacuated a couple of days ahead of time. When the storm hits, there is extensive occurrence of flooding, road closures, power outages, damage to property, and personal injury, just as expected. Afterwards people are in need of immediate assistance by the provision of such basic necessities as food, water, and shelter. Should the State really be prohibited from undertaking any emergency procurement in excess of \$25,000 under such circumstances, simply because the storm was predicted? That would result in an absurd restriction on the ability of the State lawfully to take reasonable action; but interpreted with exactitude, the COMAR definition of "emergency" would do just that.

The dictionary definition of "emergency" as commonly

understood includes not only circumstances that are unforeseeable but also any "set of circumstances demanding immediate action." (Webster's New World Dictionary.) "Emergency" has also been defined as a "sudden occurrence of a serious and urgent nature that demands immediate action." (American Heritage Dictionary.) Black's Law Dictionary wisely provides alternative definitions of "emergency," some of which are based on nonforeseeability of an event, but another of which includes any "pressing necessity." For MSBCA, it is difficult to conceive of a better example of an emergency than the State being suddenly informed that in four (4) days food will no longer be provided to correctional facilities, potentially resulting in highly justified sharp criticism and costly litigation, not to mention inmate starvation, prison riots and the obvious danger posed to correctional officers and the public at large. Crystal's threat to walk off the job created an emergency, whether it was foreseen or not.

In order to reach the foregoing conclusion, MSBCA adopts the rationale that an "emergency," in the limited sense allowed by a strict interpretation of the COMAR definition, arose because of the absence of a performance bond contrary to assurances made to BPW by DPSCS. This at least came as an unexpected surprise to BPW members, who had earlier been informed that there was a performance bond in force. Any rational examination of the circumstances present here must conclude that the State had full justification to take emergency action to prevent a catastrophe.

MSBCA suspects that on many other occasions, BPW took emergency action and was justified in doing so, even though agency management did indeed foresee an injurious occurrence that was expected in the absence of an expedited preventative emergency response. In many instances, emergencies have arisen simply because agency management did not initiate procurement activity in time for a new contractor to be in place before a prior contract expired. While Maryland statute does not prohibit such a circumstance to be cause to circumvent the requirement of

competitive bidding, the COMAR definition of "emergency" does create such a prohibition by stating that an emergency exists only under conditions that are "unexpected" or "which agency management reasonably could not foresee." Application implications of the current restrictive COMAR definition of "emergency" will be left to another day. Without re-writing COMAR, for purposes of the instant Opinion, MSBCA is satisfied that an emergency existed because the absence of a performance bond was not anticipated.

The reason to dwell on this point is because the emergency nature of the procurement in dispute is at the very heart of the State's justification for violating the requirement of competitive bidding which applies in most procurement settings outside of the status of an emergency. It is also the essence of appellant's contention that the short-term emergency contract entered into by the State on April 15, 2015 was in violation of Maryland law and therefore outside of the authority of BPW. MSBCA is a principal bulwark to assure fair competition in the award of State contracts, and with respect to the April 15, 2015 contract award, no competition was permitted at all. But in the rare circumstances that existed at that time, MSBCA does not for a moment believe that BPW did anything other than what was required to be done under the conditions then present. MSBCA rejects appellant's assertion that no emergency existed. The BPW action of April 15, 2015 was necessary and lawful.

From a purely cynical perspective, one might make a number of unflattering observations about both of the firms that responded to this solicitation. Trinity might be regarded as a large company determined to stifle and eliminate competition in an effort to secure the ability to gouge the State for an unreasonably high rate of compensation for providing food services at correctional facilities. After all, it seeks to be paid \$3.29 per meal when its recent former charge was only \$2.03, a price hike of more than 60%.

On the other hand, Crystal might be criticized for defaulting on the contract it agreed to perform and providing the State only four (4) days notice of its intention to repudiate its agreement. Crystal might also be accused of attempting to hike its prices after discovery of the enormous cost disparity between the mere two (2) proposals from which the State was forced to choose a vendor to deliver services that could not be delayed. Those factors, both the limited number of proposals received as well as their costs, were publicly disclosed upon contract award, just prior to Crystal's newfound realization that it actually could not provide the services it agreed to provide at the cost that it agreed to provide them, leaving the State with few options other than to accede to Crystal's "gun to the head." Crystal certainly should not be allowed to profit from its pricing error and subsequent threat to repudiate its contractual obligations. A terrible precedent is created when an offeror is allowed to secure a State contract by understating its price and thereafter permitted to force the State to adjust the cost upwardly when other options are limited and the situation dire.

Finally, lest the State be omitted from this list of prospective faults, MSBCA should also note that two (2) staggering errors by DPSCS contributed directly to the problems that ensued: one, that the agency did not know how many meals it needed when it issued its RFP for provision of food; and second, the very costly misrepresentation made to BPW concerning Crystal's performance bond.

MSBCA hindsight is 20/20. No pleasure is derived from reciting the foregoing litany of prospective derogatory issues accompanying this procurement. Hopefully the next procurement for these needed goods and services will go more smoothly, but that remains to be seen. In the meantime, with respect to these appeals, they must be and hereby are denied for the reasons stated above.

WHEREFORE, it is by MSBCA this _____ day of June, 2015,

ORDERED, that these appeals be and hereby are DENIED.

Dated:

Dana Lee Dembrow
Board Member

I Concur:

Michael J. Collins
Chairman

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 2917, 2931 & 2935, appeals of Trinity Services Group, Inc. Under DPSCS Contract Nos. Q0014004 & Q)B5400155.

Dated:

Michael L. Carnahan
Clerk