

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

KEEFE COMMISSARY NETWORK,
L.L.C.,

Petitioner,

vs.

Case No. 14-0985BID

DEPARTMENT OF CORRECTIONS,

Respondent,

and

TRINITY SERVICES GROUP, INC.,
AND ARAMARK CORRECTIONAL
SERVICES, L.L.C.,

Intervenors.

_____ /

RECOMMENDED ORDER

On April 15 and 16, 2014, the Division of Administrative Hearings (DOAH) conducted a final hearing in Tallahassee, Florida, before Thomas P. Crapps, an Administrative Law Judge assigned by DOAH.

APPEARANCES

For Petitioner Keefe Commissary Network, LLC:
David C. Ashburn, Esquire
Hayden R. Dempsey, Esquire
Greenberg Traurig, P.A.
101 East College Avenue
Tallahassee, Florida 32301

For Respondent Department of Corrections:
Jonathan P. Sanford, Esquire
James Fortunas, Esquire
Florida Department of Corrections
501 South Calhoun Street
Tallahassee, Florida 32399-2500

For Intervenor Trinity Services Group, Inc.:
Donna E. Blanton, Esquire
Brittany Adams Long, Esquire
Radey Law Firm
301 South Bronough Street, Suite 200
Tallahassee, Florida 32301

For Intervenor Aramark Correctional Service, LLC:
Karen D. Walker, Esquire
Mia L. McKown, Esquire
Holland and Knight LLP
315 South Calhoun Street, Suite 600
Tallahassee, Florida 32301

STATEMENT OF THE ISSUE

Whether the Florida Department of Corrections' (Department) intended decision to award Trinity Services Group, Inc. (Trinity) with a contract for Statewide Canteen Operations under Invitation to Bid, DOC ITB-13-015 (ITB), is contrary to the agency's governing statutes, rules or policies, or the bid specifications.

PRELIMINARY STATEMENT

On December 9, 2013, the Department issued an ITB seeking to solicit bids for the provision of Statewide Canteen services for inmates and their visitors at the Department's facilities.

Trinity; Aramark Correctional Service, LLC (Aramark); and Keefe Commissary Network, LLC (Keefe) submitted bids for consideration. On February 4, 2014, the Department posted its intent to award Trinity with the contract.

On February 7, 2014, Keefe timely filed a bid protest with the Department. On February 20, 2014, Trinity intervened in the protest. Aramark did not file a bid protest, but filed a Notice of Appearance as a Named Party based on Keefe's allegations that Aramark was not a responsive or responsible bidder.

On March 4, 2014, the Department transferred Keefe's bid challenge to DOAH for a final hearing. The undersigned held a Case Management hearing on March 11, 2014. During the Case Management hearing, the parties requested that the final hearing be set outside of the 30-day time limit contained in section 120.57(3)(e), Florida Statutes (2013),^{1/} in order to conduct discovery. Because the parties waived the time requirement, the undersigned set the final hearing for April 15 through 18, 2014.

At the final hearing, the parties introduced Joint Exhibits numbered 1 through 38.^{2/}

Keefe presented the testimony of Rosalyn Ingram, the Department's bureau chief for Procurement, Land and Leasing, and General Services (Ms. Ingram); Jon Creamer, the Department's bureau chief for Contract Management and Monitoring (Mr. Creamer); and William Bosco (Mr. Bosco), Keefe's vice-president for Southeast Region. The Department presented the testimony of Ms. Ingram and Mr. Creamer.^{3/} In addition to Ms. Ingram and Mr. Creamer, the Department presented the

testimony of Shane Phillips (Mr. Phillips), the Department's operations manager for the canteen-contract. Keefe introduced Exhibits K-1, K-2, and K-4 into evidence.

Trinity presented the testimony of Patrick Tolliver (Mr. Tolliver), Trinity's vice-president for Information Technology, and James Long (Mr. Long), Trinity's chief executive officer. Trinity introduced Exhibits T-1 through T-5, T-7, T-8 and T-13.

Aramark participated in the final hearing, but did not present any witnesses or offer any exhibits into evidence.

FINDINGS OF FACT

1. The Department is the state agency that is charged with the purpose of "protect[ing] the public through the incarceration and supervision of offenders and to rehabilitate offenders through the application of work, programs, and services." § 20.315(1), Fla. Stat. The Department considers its provision of canteen commissary services to inmates and their visitors an integral part of its responsibilities regarding inmate supervision.^{4/}

2. Keefe is the largest private provider for canteen services in correctional facilities nationwide. Since 2003, Keefe has provided the Department with canteen services for inmates.^{5/} Keefe's existing contract with the Department provides canteen services for approximately 89,000 inmates and their

families, and the contract is the largest private canteen services contract in the nation. Keefe's gross revenue generated under the existing contract with the Department is approximately \$79 million dollars. Furthermore, under the existing contract, Keefe pays the Department a per diem rate of \$0.96 per inmate, per day, which generates over \$30 million dollars annually.

3. Trinity is a Florida corporation that provides food, canteen, and laundry services to correctional facilities in 45 states, and services 650 canteen accounts. Trinity consists of subsidiaries, A & S and Swanson, which Trinity acquired with its focus of providing services in correctional facilities.

4. Aramark is also in the business of providing canteen services in correctional facilities.

5. On December 9, 2013, the Department released the ITB seeking bids for providing statewide canteen operations through the Department's on-site inmate canteens and visitor park canteens. According to the ITB, the Department was seeking a vendor to serve a current population of 89,000 inmates, at 267 canteens and 106 visiting park canteens.^{6/}

6. Under the ITB, the Department does not pay the winning bidder for providing canteen services. Rather, as the ITB explains, the selected bidder pays the Department on a per diem basis of fixed fee, per day, per inmate based on the Department's official midnight count. The responsive, responsible bidder that

provided the Department with the highest per diem rate, per inmate would be considered the successful bidder.

7. The ITB set out a time frame for implementation of the statewide canteen operations. Bids were to be submitted and opened on January 21, 2014. The contract was to begin March 6, 2014, with full implementation of the canteen operations by April 1, 2014.

8. The ITB's initial language concerning the implementation and start of the canteen contract required full service delivery of canteen operations at all institutions by April 1, 2014, but also recognized a 90-day 'start-up' period for the initial delivery of equipment, supplies, hiring and training of Contractor staff, and transition of services from the current contractor."^{7/}

9. The ITB also attached a Master Canteen Product List as Exhibit A, listing the products and prices for each product that was to be sold in the canteen.

10. The Department compiled the Master Canteen Product List based on the list of products currently offered by the incumbent provider, Keefe. The prices found in the Master Canteen Product List for each product had been previously determined by the Department and Keefe based on section 945.215, Florida Statutes, which requires that the price not exceed fair market price.

11. Before releasing the ITB with the Master Canteen Product List, the Department reviewed the products sold in the canteens, and attempted to remove any items it identified by name as being proprietary to Keefe. For example, the Department removed Keefe's own brand of potato chips, Moon Lodge, from the Master Canteen Product List.

12. The ITB provided prospective bidders the opportunity to submit written inquires to the Department concerning the ITB by January 3, 2014.

13. The Department received written questions and posted its responses in the ITB in Addendum 1 on January 10, 2014. Addendum 1 provided answers to questions about the ITB's specifications; revised certain ITB specifications and Exhibits A, B and H; and added new ITB Exhibits I, J, K and L.

14. Addendum 1 amended the beginning date of the contract's implementation to February 3, 2014, and the date for full-service delivery at all Department institutions by April 1, 2014. (Addendum 1, 2.4, revised page 10). Importantly, for this case, the Department revised section 2.4, deleting its allowance of a 90-day "start-up" period for the transition of the canteen contract.^{8/}

15. Further, Addendum 1 removed certain proprietary items from the Master Canteen Products List found in the ITB. Questions submitted to the Department in Addendum 1 show, in

pertinent part, that potential bidders expressed concerns about the ability to provide certain products that the incumbent provider, Keefe, had proprietary interest or exclusive right to sell from the manufacturer.^{9/} The Department answered, in essence, that the successful bidder was required to provide all products listed for re-sale identified on the Master Canteen Product List and that section 3.10 of the ITB set out the process for the successful bidder to seek substitutions on the Master Canteen Product List.

16. After the Department's issuance of Addendum 1, Mr. Stephen Hould, Trinity's general counsel, emailed a letter on January 13, 2014, to the Department expressing Trinity's concerns. Specifically, Mr. Hould raised issues that Trinity believe would negatively impact the capacity to respond to the ITB with a competitive bid.

17. Mr. Hould's letter questioned the ability to implement the canteen services timely and requested information about the cash sales in Visitor Parks, and about determining the amount of revenue generated from the sale of the proprietary items removed from the Master Canteen List.

18. On the specific issue concerning the implementation date, Mr. Hould wrote the following:

The Recommended Award is scheduled to be posted on January 28, 2014, and the ITB requires that implementation commence February 3, 2014, and be complete at all

institutions by April 1, 2014. (Addendum 1, 2.4, Revised Page 10). That schedule does not allow sufficient time to establish the pilot program at Jefferson C.I., complete the field testing of the Point of Sale Equipment required by 4.5 of the ITB, enter into a contract, acquire, install and test the necessary equipment and software, hire and train staff and fully implement the commissary systems at all locations. As a result, the only vendor who can comply is the incumbent. The current schedule defeats the opportunity for anyone other than the incumbent to offer a competitive bid.

The ITB, section 2.4, indicated, prior to Addendum One, that the Department will allow a ninety (90) day start up period for the initial delivery of equipment, supplies and hiring and training of Contractor staff and transition services from the present contractor. A ninety (90) day start up period would be practical and allow for competition. However, the current schedule, if it can be met, allows only forty-one (41) working days from commencement to the deadline to have all canteens open which does not allow a competitive bid.

19. Because Mr. Hould's letter arrived during the time frame for a bid specifications challenge, the Department officials seriously considered the issues raised in the letter.

20. Upon receipt of Mr. Hould's letter, the Department contacted Mr. Bosco, Keefe's representative, requesting information about Keefe's revenues from proprietary items identified in the usage report from the Department by the end of the day, and the cash sales information.

21. Mr. Bosco replied to the Department by e-mail the same date, identifying additional proprietary products contained on

the Master Product Canteen List and providing the Department with the cash sales information.

22. Mr. Phillips, the Department's canteen contract manager for the ITB procurement, reviewed the information provided by Mr. Bosco, and revised the Master Canteen Product List.

23. On January 16, 2014, the Department published Addendum 2 which, in part, revised answers to certain questions addressed in Addendum 1, and issued a revised Exhibit K and a new Exhibit M. The revised Exhibit K provided a usage report containing the incumbent vendor's proprietary items.

24. Addendum 2 did not change the implementation date for the canteen contract, which was April 1, 2014, based on the ITB and Addendum 1.

25. In reference to issues concerning the Master Canteen Product List, Addendum 2 revised answers to questions 10, 37, and 50. In those questions, potential bidders had asked the Department if the ITB required the bidders to submit a product list. The potential bidders noted that the ITB's Master Canteen Product List referenced products that were proprietary to the incumbent vendor. The Department answered that bidders were not required to submit a product list, and that section 3.10 of the ITB outlined the process for a successful bidder to add, delete, or substitute products listed on the Master Canteen Product List.^{10/}

26. No bidder protested the ITB's specifications, including the Addendums.

27. Keefe, Trinity and Aramark submitted bids concerning the ITB.

28. The Department opened the bids on January 23, 2014.

29. The Department reviewed all three bids and determined that the bids met the required mandatory bid submissions outlined in section 5.1 of the ITB.

30. The Department conducted a review of the bidders' financial documentation and determined that all of the bidders met the ITB's financial requirements.

31. The Department posted its bid tabulation on February 4, 2014, and announced its recommended award to Trinity, the bidder that the Department determined to be the first-ranked bidder. The Department determined that Aramark was the second-ranked bidder and Keefe was the third-ranked bidder based on the Unit Prices shown on the tabulation.^{11/}

32. Keefe filed a timely notice of intent to protest the award to Trinity, and timely filed its formal written protest.

Implementation Date

33. The existing contract between Keefe and the Department provided that the contract would terminate on March 31, 2014.

34. The Department began to prepare the ITB in the summer of 2013, based on the March 31, 2014, contractual deadline with Keefe.

35. The Department delayed in releasing the ITB based on internal deliberations concerning whether the ITB would include only statewide canteen operations or include other programs, such as inmates' access to MP3 players. Consequently, the Department issued the ITB on December 9, 2013.

36. The existing contract contains a provision requiring the incumbent provider, Keefe, to provide a transition schedule for a potential new vendor, if selected in competitive procurement, 180 days before the expiration of the contract. Keefe did not submit a transition plan.

37. The Department did not seek to enforce Keefe's contractual obligation of providing a transition plan.

38. The Department contacted Keefe about a short-term extension of the canteen contract beyond the March 31, 2014, date. Keefe did not agree to a short-term extension of the current canteen contract. Thus, because Keefe did not agree to the contract extension, the Department needed a provider beginning April 1, 2014. It is noted that Keefe, however, did eventually agree to a short-term extension when it submitted its formal bid protest.

39. Keefe as the incumbent provider of the canteen services had a significant advantage over other bidders in being able to meet the April 1, 2014, deadline.

40. The ITB specifically provides that the winning bidder "must have the capability to commence services statewide no later than April 1, 2014." Section 2.4, revised in Addendum 1.

41. Section 3.5 in Addendum 1 provides, in pertinent part:

The Contractor shall have the capability to commence implementation of services no later than February 3, 2014, and full service delivery of canteen operations shall be completed at all institutions by April 1, 2014. The Contractor's Estimated Implementation Plan and Transition Date Schedule submitted with the bid (per Section 5.2.8) shall be adjusted as necessary and approved as Contractor's Final Implementation Plan and Transition Date Schedule by the Contract Manager. This plan shall be designed to provide for seamless transition with minimal interruption of sales or operations.

42. Section 5.2.8 of the ITB provides, in part:

The Bidder shall provide an Estimated Implementation Plan and Transition Date Schedule detailing the Contractor's plan and date of phase-in of service for each of the Department's institutional sites identified on Exhibit B to assure full implementation by April 1, 2014.

* * *

Implementation by this date is critical to service delivery and must be met to ensure contract compliance. The Estimated Implementation Plan is for informational purposes only. A Final Implementation Plan and Transition Date Schedule that meets the

objectives for service implementation, as outlined in Section 3.5 shall be agreed upon by the successful Bidder, the current canteen operator, and the Department, with copies provided by the Department to all parties.

43. Trinity's bid provided an Estimated Implementation Plan that contained a transition schedule that identified, by facility, the date that Trinity anticipated in being able to assume full canteen service operations, and a step-by-step implementation plan.

44. Trinity's bid provided that if it was the successful bidder, then Trinity would contact Keefe about purchasing the physical property and stock in the canteens. If Keefe was unwilling to sell the property, then there would need to be sufficient time for Keefe to remove their inventory. In its Estimated Implementation Plan, Trinity states the following:

11. As all canteens will come on line simultaneously, all canteens will close on April 1st for inventory of Keefe products and plan on reopening the following Monday (April 7). This will allow time to receive the initial orders and restock and ensure all staff are familiar with Trinity procedures. Each Warden will be requested to announce this closing and allow inmates sufficient time to purchase additional products prior to April 1. Individual facilities may open sooner than April 7 if all accountability and restocking is accomplished. Our goal will be to reopen in time for the Visitor Park canteen to function as normal on April 5.

45. Mr. Long, Trinity's chief executive officer, testified that in preparing the ITB, Trinity determined that it could meet

the implementation deadline, contrary to Mr. Hould's statement in the letter to the Department during the bid process. The undersigned finds that Mr. Long's assessment that Trinity could fully implement the canteen services on April 1, 2014, as overly optimistic, and not the basis for a finding of fact.

46. The ITB expressly provides the implementation date for full canteen services as April 1, 2014, and the Department characterized the implementation date as "critical" and "must be met to ensure contract compliance." § 5.2.8, ITB.

47. Trinity's bid, on its face, indicates that the canteens will close on April 1, 2014, and re-open the following week on April 7, 2014. Further, Trinity states in its bid that "[w]e recognize that we must be flexible in our schedule and will adjust as necessary to meet State requirements."

48. Trinity's bid candidly demonstrates the difficulty of a seamless one-day transition, from March 31 to April 1, 2014, by describing the tasks of either purchasing Keefe's stock, or allowing Keefe an opportunity to inventory and remove their stock, and for Trinity to order new products and re-stock the canteens. Moreover, Trinity would be required to train the inmate-employees with Trinity's procedures. Those tasks undercut the conclusion that Trinity would be able to fully operate the 267 canteens on April 1, 2014.

49. The undersigned finds that Trinity's bid stating that it will close the canteens on April 1, 2014, and re-open the following week on April 7, 2014, is a deviation from the specific date set out in the ITB.

50. Trinity's bid submission concerning the implementation date, however, is not a material deviation because it did not give Trinity an unfair competitive advantage over Keefe or Aramark.

Master Canteen Product List

51. The provisions concerning the Master Canteen Product List in the ITB are found in sections 3.8 through 3.10, which are pertinent for this case.

52. The Master Canteen Product List contains the list of products that the Department approved for re-sale in the canteens.

53. Important for this case, section 3.10 provides a mechanism for the selected contractor to make substitutions for items on the Master Canteen Product list. Specifically, section 3.10 provides that:

the Contractor may request that items be substituted if no longer available from the manufacturer for resale. Substitutions will only be allowed if the item to be substituted is of the same or similar quality, packaging and price. Product substitutions shall be only for Brand Name Items. A contractor's request for a product substitution is

submitted to the Department's Contract Manager, and a decision given within 15 days of receipt.

54. Section 3.5 of the ITB specifically contemplates that the winning bidder may purchase the incumbent vendor's inventory during the transition between the two contracts.

55. During the ITB period, the bidders learned that one product, a 20-ounce V8 Vegetable Juice drink, listed on the Master Canteen Product List, did not exist. Further, during the ITB process, Keefe learned that two products, which it had supplied, would no longer be manufactured, beef stew by Armour and Hanes four pack of white boxer shorts. In both instances, the potential bidders were informed that section 3.10 concerning substitutions would apply for those products.

Information Technology

56. Section 5 of the ITB sets out what the bidders were required to submit. The bidder's "Transmittal Letter with Executive Summary" was to include a "synopsis of the bidder's method of delivering the required services in compliance with the minimum requirements and scope of services outlined in section 3, Scope of Services, of the ITB."

57. Section 3 of the ITB is detailed and, regarding technology, provides an explanation of how the system works and then lists 16 requirements for the point-of-sale system with which the vendor must comply.

58. Trinity certified that it would comply with all terms of the ITB, including the technology requirements.

59. Trinity's certification was supported by the credible testimony of Mr. Tolliver. Mr. Tolliver is Trinity's vice-president for Information Technology and was familiar with Trinity's ITB bid.

60. Mr. Tolliver testified that Trinity would provide a point-of-sale system which did not use a keyboard, Trinity's system did use a "store-and-forward" process in case of a failure of the Department's WAN, and that Trinity would be able to perform issues such as a "quick disconnect" if a security issue arose in the facilities.

61. Mr. Tolliver's testimony and Trinity's bid submission show that Trinity has the ability to meet its obligation concerning the information technology.

CONCLUSIONS OF LAW

62. DOAH has jurisdiction over the parties and subject matter of this cause pursuant to sections 120.569 and 120.57(3), Florida Statutes.

63. Keefe, as the party opposing the Department's decision to award Trinity the canteen contract, has the burden of showing "a ground for invalidating the award." State Contracting and Eng'g Corp. v. Dep't of Transp., 709 So. 2d 607, 609 (Fla. 1st DCA 1998); 120.57(3)(f), Fla. Stat. Keefe's challenge here is

governed by section 120.57(3)(f), Florida Statutes.^{12/} The issue, as framed by section 120.57(3)(f), is "whether the agency's proposed action is contrary to the agency's governing statutes, the agency's rules or policies, or the solicitation specifications."

64. Section 120.57(3)(f) provides that "the standard of proof for such proceedings shall be whether the proposed agency action was clearly erroneous, contrary to competition, arbitrary, or capricious." The statute's terms "clearly erroneous,"^{13/} "contrary to competition,"^{14/} "arbitrary or capricious"^{15/} have been defined in case law concerning bid protests. Finally, as the challenger to the Department's action, the law is clear that Keefe must establish its burden of proof by the preponderance of the evidence.^{16/}

65. The Florida Legislature expressly recognizes that "fair and open competition is a basic tenant of public procurement; that such competition reduces the appearance and opportunity for favoritism and inspires public confidence that contracts are awarded equitably and economically." § 287.001, Fla. Stat.

66. The objectives that the State seeks in having competitive procurements are the following:

[T]o protect the public against collusive contracts; to secure fair competition upon equal terms to all bidders; to remove not only collusion but temptation for collusion and opportunity for gain at public expense; to close all avenues to favoritism and fraud

in various forms; to secure the best values for the [public] at the lowest possible expense; and to afford an equal advantage to all desiring to do business with the [government], by affording an opportunity for an exact comparison of bids. Harry Pepper & Assoc. v. City of Cape Coral, 352 So. 2d 1190, 1192 (Fla. 2d DCA 1977), quoting Wester v. Belote, 138 So. 721, 723-724 (Fla. 1931).

67. Section 287.057(1)(a)4., provides that the award of a contract, in an invitation to bid competitive solicitation process, shall be made to the "responsible and responsive vendor who submits the lowest responsive bid." Consequently, the determination that the winning bidder is responsible and responsive, as defined by chapter 287, is an integral part of the decision to award a contract.

68. The term "responsible vendor" is defined as "a vendor who has the capability in all respects to fully perform the contract requirements and the integrity and reliability that will assure good faith performance." § 287.012(25), Fla. Stat. Further, the term "responsive bid" means "a bid, or proposal, or reply submitted by a responsive and responsible vendor which conforms in all material respects to the solicitation." § 287.012(26), Fla. Stat. Finally, a "responsive vendor" means a "vendor that has submitted a bid, proposal, or reply that conforms in all material respects to the solicitation." § 287.012(27), Fla. Stat. As these definitions show, the bidder

must submit a bid that "conforms in all material respects to the solicitation."

69. "The test for measuring whether a deviation . . . is sufficiently material to destroy its competitive character is whether the variation affects the amount of the bid by giving the bidder an advantage or benefit not enjoyed by other bidders."

Harry Pepper, 352 So. 2d at 1193.

70. Keefe challenges whether Trinity and Aramark submitted responsive and responsible bids, in response to the ITB. Keefe argues that it is the only entity that provided a responsive and responsible bid because neither Trinity nor Aramark stated the ability to fully implement all canteen services on April 1, 2014. Keefe also argues that neither Trinity nor Aramark are responsive bidders because neither bidder is able to provide all of the products listed on the Master Product Canteen List, which contains products that are proprietary to Keefe. Finally, Keefe argues that Trinity is not a responsible bidder because it failed to show its experience in providing canteen services and is vague on the details concerning the implementation of the required information technology services.

71. Applying the rules of law to the facts here, the undersigned finds that Keefe has failed to meet its burden of proof.

72. The first consideration is whether Trinity's bid is responsive concerning the canteen contract's implementation date.^{17/}

73. At the onset, the undersigned recognizes that Trinity's bid failed to show a full implementation of statewide canteen services on April 1, 2014. Although Trinity's bid shows that during the implementation period, Trinity would take significant steps in order to be ready to comply with the April 1, 2014, deadline, the bid on its face shows that the canteens would be closed from April 1 through April 7, 2014, to allow for re-stocking and training of inmate-employees. Part of the delay identified by Trinity in implementing full service would be the incumbent provider's removal and inventory of its stock, if the incumbent chose not to sell the inventory to Trinity.

74. The undersigned finds that the short interval that Trinity was proposing to close the canteens, in order to fully implement canteen service, is not a material deviation from the ITB. The Department's delay in releasing the ITB as well as Keefe's refusal to allow a short-term contract extension or create a transition schedule 180 days before the March 31, 2014, contract termination, as required under the existing contract, created a situation where Keefe had a significant advantage in the ITB. Keefe as the incumbent would have no hardship transitioning from the contract termination date of March 31,

2014, to the beginning of the new contract on April 1, 2014. In contrast, both Trinity and Aramark would have to install new technology, train the inmate-employees, and re-stock the canteens, in a day.

75. Trinity's bid is not a material deviation because it did not give Trinity an unfair competitive advantage. Rather than creating an unfair advantage, the Department's interpretation of the implementation schedule provided the State with competitive bids. In contrast, to accept Keefe's argument, the competitive procurement would have resulted in only one bidder.

76. The next consideration is Keefe's argument is that it is the only responsive bidder because neither Trinity nor Aramark could provide all of the items in the Master Canteen Product List attached to the ITB.

77. The Department's determination that Trinity's bid is responsive concerning the Master Canteen Product List is neither clearly erroneous, contrary to competition, nor is the Department's decision arbitrary or capricious.

78. A review of the Master Canteen Product List and the record shows that the Department took great efforts to remove all items from the ITB that Keefe had an exclusive or proprietary right to sell in the canteens. The purpose of removing

proprietary items from the Master Canteen Product List was to open competition for all bidders.

79. Moreover, the Department specifically addressed questions from potential bidders about whether or not bidders were required to submit a product list with the bid submission. These questions arose because potential bidders recognized that some of the products found on the Master Canteen Product List contained items that Keefe had an exclusive sales agreement or owned a proprietary interest in the product. The Department's answers to the questions referred the potential bidders to section 3.10 of the ITB which sets out the process for the winning bidder to add, delete, or substitute products on the Master Canteen Product List during the term of the contract.

80. The Department's interpretation of allowing the winning bidder to seek a substitution of an unavailable product is permitted by the ITB. Clearly, if Keefe has an exclusive right with a manufacturer, then Keefe's exclusive product is not available and may be substituted pursuant to section 3.10. It is interesting to note that all of the bidders here would be required to seek substitutions for several products on the Master Canteen Product List. For example, it was undisputed that the Campbell Soup's 20-ounce V8 vegetable drink does not exist and that during the procurement process two products were being discontinued by the manufacturers. Consequently, all of the

bidders would be required to use section 3.10 in order to provide the products listed.

81. The Department's interpretation in recognizing that the winning bidder would seek substitutions or be able to purchase the incumbent vendor's inventory is not clearly erroneous or contrary to competition.

82. As discussed concerning the implementation period, if one adopted Keefe's analysis, the result would be that only Keefe could ever provide a responsive bid. In contrast, the Department's interpretation consistently provided a level playing field in which all bidders had an opportunity to offer the State the best value.

83. An additional consideration in this case is that this competitive bid procurement is different from bid procurements where the Department is seeking to buy products or services. Unlike most cases, the instant case involves potential bidders informing the Department what per diem rate the bidders will pay for the opportunity to sell products in the Department's facilities. This per diem rate is a flat rate paid by the vendor to the Department based on the inmate count each night. The per diem rate paid to the Department does not vary based on the sales, the costs or the revenue. The winning bidder's ability to earn a profit will be based on its profit margin for the products it sells. However, the products' prices are set by the

Department based on a statutory formula. In the instant case, there was no credible evidence showing that Trinity received an unfair competitive advantage by the Department's interpretation that the winning bidder could seek a substitution of an unavailable product under the process outlined in section 3.10 of the ITB.

84. Finally, assuming for argument's sake, that Trinity's inability to provide all of the products identified in the ITB was a deviation from the ITB's specifications, the undersigned finds that the deviation is not material.

85. A deviation is considered material "if it gives the bidder a substantial advantage over the other bidders and thereby restricts or stifles competition." Tropabest Foods, Inc. v. Dep't of Gen. Serv., 493 So. 2d 50, 52 (Fla. 1st DCA 1986). In the instant case, only ten items out of the Master Canteen Product List of approximately 294 items, from 17 different menus, has been shown to be exclusive to Keefe. Trinity did not receive a competitive advantage by the Department recognizing that the selected bidder would be able to substitute unavailable products. All potential bidders had the same ability to seek substitution of any unavailable product. Moreover, there was no showing that Trinity received an unfair advantage over Keefe in being able to request a substitution of a product, if selected as the winning bidder. Consequently, any deviation in allowing Trinity to

substitute unavailable products, if selected as the winning bidder, is not a material deviation.

Information Technology

86. A review of Trinity's bid shows that it was responsive concerning the ITB's specifications concerning Information Technology and implementation of technology services. Trinity's bid contains an Implementation Plan and Transition Date Schedule. Trinity's ability to perform timely was further supported by the testimony of Mr. Tolliver and Mr. Long.

Trinity as a responsible vendor

87. The final consideration is Keefe's argument that Trinity is not a responsible vendor because Trinity's bid and the facts do not show that it has the needed experience to operate a large commissary canteen contract, like the Department's contract. The record clearly shows that Trinity has extensive experience in commissary canteen contracts in correctional facilities and food service. This experience is set out in its subsidiaries, Swanson and A & S, and supported by Mr. Long's testimony. Further, the Department officials credibly testified that they were familiar with Trinity and found the organization to be a responsible bidder.

88. Keefe has failed to meet its burden of proof showing that the Department's intended action in awarding the canteen

contract was clearly erroneous, contrary to competition, or arbitrary or capricious.

89. Finally, the Department's decision awarding Trinity with the canteen contract is neither arbitrary nor capricious. The Department's award of the contract here is based on which bidder offered the State of Florida the highest per diem rate per inmate count. Clearly, Trinity presented the Department with the highest amount of per diem rate, and created the best value for the citizens of Florida.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department award Trinity Services Group, Inc. with the contract that is the subject of Invitation to Bid, DOC ITB-13-015.

DONE AND ENTERED this 9th day of June, 2014, in Tallahassee, Leon County, Florida.



THOMAS P. CRAPPS
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 9th day of June, 2014.

ENDNOTES

^{1/} All references to Florida Statutes shall be the 2013 version, unless otherwise specified.

^{2/} The Joint Exhibits were provided in a notebook. Exhibits numbered 9, 12, and 30 were identified as "reserved" because there was not an agreement as to those numbers contained in the notebook.

^{3/} In order to efficiently present the testimony, the parties agreed that the Department, Trinity and Aramark will ask questions of Ms. Ingram and Mr. Creamer outside the scope of direct examination.

^{4/} The terms "canteen and commissary services" are used interchangeably. The canteen and commissary services provide an inmate or visitor with the opportunity to purchase items, such as food or snacks.

^{5/} Keefe began canteen service operations for the Department in November 2003, and has continued after being selected in competitive procurements in 2007 and 2009.

^{6/} The number of inmate canteens, 267, and the number of visiting parks, 106, is greater than the total number of Department facilities because some facilities have more than one canteen.

^{7/} Section 2.4 of the ITB, as it was initially released, reads as follows:

The Contractor must have the capability to commence implementation of services no later than the start date of the resulting Contract and to complete full service delivery of canteen operations at all institutions by April 1, 2014.

Pursuant to Section 5.2.8 of the ITB, each bidder shall submit an Estimated Implementation and Transition Date Schedule in their response to this ITB. The estimated plan will be adjusted , as necessary, and approved as Contractor's Final Implementation Plan and Transition Date Schedule by the Contract Manager. The plan shall be designed to provide for seamless transition with minimal interruption of sales or operations.

After execution of the Contract resulting from this ITB, the Department will allow a maximum of a ninety (90) day "start up" period, for the initial delivery of equipment, supplies and hiring and training of Contractor staff and transition of services from the current contractor.

^{8/} Addendum 1 deleted section 2.4 and substituted the following:

The Department's current contract ends on March 31, 2014. The successful Contractor must have the capability to commence services statewide no later than April 1, 2014.

Implementation Period- February 3, 2014 through April 1, 2014.

Significantly, the Department deleted the ITB's language stating that the Department would allow a 90-day "start-up" transition period.

^{9/} Addendum 1 shows the following specific questions and answers addressing the products that the ITB sought a vendor to provide:

Question #7: Can canteen products list be confirmed as current? For example, the list has Uncle Al's Chocolate Chip 5 oz. cookies, but a 6 oz. bag was observed during the walkthrough.

Answer #7: Several items for sale in the inmate and/or visiting park canteens were not included on the Master Canteen Products List because they are specifically packaged and/or manufactured for the current contractor.

Question #10: We do not stock the identical item as the current contractor, who is a competitor. Is it a requirement of the submission to provide a product list based on the products and pricing given in Exhibit A or is this determined during negotiations? If it is a required submission, is the product brand and size sufficient or do we need to identify which items are being substituted?

Answer #10: Per Section 3.1 of the ITB, the contractor shall provide all products for resale as identified on the Department's Master Canteen Product List. Section 3.10 describes the process for additions/deletions and substitutions to the Master Canteen Product List.

Question #37: Section 3.9, Master Canteen Products List Pricing and Price Increases, requires that "The Contractor shall make all items contained on the Master Canteen Products List available for purchase at the price(s) indicated." This list appears to consist of the current vendor's menu. In some cases the current vendor may have negotiated exclusive rights to carry the exact sizes or items listed. "Cajun Shrimp" flavored Maruchan ramen for instance is a flavor that Maruchan sells exclusively through the current vendor. There are other brands of ramen that offer similar flavors to other bidders and other flavors that Maruchan sells on the open market; but if every bidder has to exactly match Exhibit A then there can be only one bidder and the State will not get the benefit of a competitive bid process.

- a) Will the State permit bidders to submit variations, comparable items or equivalent items rather than the exact brand/size/item listed on the Master Canteen list?
- b) Would the Master Canteen List committee like to review samples or approve any variations or substitutions for the current contractor's menu items prior to accepting bids?
- c) If so, to where and whom should we submit sample merchandise and/or item specifications?

Answer #37: The Department has provided the Master Canteen Products List the successful contractor will be required to follow in Exhibit A. Revised 1, 10, and 14 of this ITB.

Per section 3.28 of this ITB, unless otherwise indicated or determined by the institution's Warden, all items on the approved Master Canteen Products List must be available in the inmate canteens for resale to the inmates.

After contract execution, the successful contractor will have opportunities to request changes to the Master Canteen Products List Exhibit A in accordance with Section 3 scope of service of the ITB. With the above explanation, please see the answers below to questions a), b), and c):

a) No variables, comparable items, equivalents or substitutions to the Master Canteen Products List will be allowed at bid submittal.

b) Samples are not required with bid submittal.

c) See answer to a and b above.

Question #50: Section 3.9 states: "The Contractor shall make all items contained on the Master Canteen Products List available for purchase at the price(s) indicated." Will any substitution of name brand product be allowed on the ITB's Master Canteen Products List for evaluation of this ITB?

Answer #50: No.

^{10/} The following are the questions and revised answers concerning the Master Canteen Product List:

Question #10: We do not stock the identical item as the current contractor, who is a competitor. Is it a requirement of the submission to provide a product list based on the products and pricing given in Exhibit A or is this determined during negotiations? If it is a required submission, is the product brand and size sufficient or do we

need to identify which items are being substituted?

Answer #10: ~~Per section 3.1 of the ITB, the contractor shall provide all products for resale as identified on the Department's Master Canteen Product List. Section 3.10 describes the process for additions/deletions and substitutions to the Master Canteen Product List~~

No, it is not a requirement of the submission to provide a product list.

Section 3.10 outlines the process for the successful Contractor to add, delete and substitute Master Canteen Products during the term of the Contract.

Question #37: Section 3.9, Master Canteen Products List Pricing and Price Increases, requires that "The Contractor shall make all items contained on the Master Canteen Products List available for purchase at the price(s) indicated." This list appears to consist of the current vendor's menu. In some cases the current vendor may have negotiated exclusive rights to carry the exact sizes or items listed. "Cajun Shrimp" flavored Maruchan ramen for instance is a flavor that Maruchan sells exclusively through the current vendor. There are other brands of ramen that offer similar flavors to other bidders and other flavors that Maruchan sells on the open market; but if every bidder has to exactly match Exhibit A then there can be only one bidder and the State will not get the benefit of a competitive bid process.

a) Will the State permit bidders to submit variations, comparable items or equivalent items rather than the exact brand/size/item listed on the Master Canteen list?

b) Would the Master Canteen List committee like to review samples or approve any variations or substitutions for the current contractor's menu items prior to accepting bids?

c) If so, to where and whom should we submit sample merchandise and/or item specifications?

Answer #37: ~~The Department has provided the Master Canteen Products List the successful contractor will be required to follow in Exhibit A. Revised 1, 10, 14, of this ITB.~~

~~Per section 3.28 of the ITB, unless otherwise indicated or determined by the institution's Warden, all items on the approved Master Canteen Products List must be available in the inmate canteens for resale to the inmates.~~

~~After contract execution, the successful contractor will have opportunities to request changes to the Master Canteen Products List Exhibit A in accordance with Section 3 scope of service of the ITB. With the above explanation, please see the answers below to questions a), b), and c):~~

~~a) No variables, comparable items, equivalents or substitutions to the Master Canteen Products List will be allowed at bid submittal.~~

~~b) Samples are not required with bid submittal.~~

~~c) See answer to a and b above.~~

The product list is not required with bid submittal. However, Section 3.10 outlines the process for the successful Contractor to add, delete and substitute Master Canteen Products during the term of the Contract.

Question #50: Section 3.9 states: "The Contractor shall make all items contained on the Master Canteen Products List available for purchase at the price(s) indicated." Will any substitution of name brand product be allowed on the ITB's Master Canteen Products List for evaluation of this ITB?

Answer #50: No. See Answers to Questions 10 and 37.

^{11/} The bid prices for the three bidders were the following:

Trinity: \$37,912.635.78;
Aramark: \$34,560,730.17; and
Keefe: \$32,868,465.35.

^{12/} Section 120.57(3)(f), Florida Statutes, provides, in pertinent part:

Unless otherwise provided by statute, the burden of proof shall rest with the party protesting the proposed agency action. In a competitive-procurement protest, other than a rejection of all bids, proposals, or replies, the administrative law judge shall conduct a de novo proceeding to determine whether the agency's proposed action is contrary to the agency's governing statutes, the agency's rules or policies, or the solicitation specifications. The standard of proof for such proceedings shall be whether the proposed agency action was clearly erroneous, contrary to competition, arbitrary, or capricious. In any bid-protest proceeding contesting an intended agency action to reject all bids, proposals, or replies, the standard of review by an administrative law judge shall be whether the agency's intended action is illegal, arbitrary, dishonest, or fraudulent.

^{13/} A decision is "clearly erroneous" when, although there is evidence to support it, after review of the entire record the tribunal is left with the definite and firm conviction that a mistake has been committed. United States v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948); see also, Floridian Constr. & Dev. Co., Inc. v. Dep't of Env'tl. Prot., Case No. 09-0858BID, 18 (DOAH May 1, 2009) ("a decision is clearly erroneous when unsupported by substantial evidence or contrary to the clear weight of the evidence or is induced by an erroneous view of the law.").

^{14/} An agency decision is "contrary to competition" when it unreasonably interferes with the objectives of competitive bidding.

^{15/} An "arbitrary or capricious" decision in the context of a bid protest means "an action is 'arbitrary if it is not supported by logic or the necessary facts,' and 'capricious if it is adopted without thought or reason or is irrational.'" Hadi v. Liberty

Behavioral Health Corp., 927 So. 2d 34, 38-39 (Fla. 1st DCA 2006). To determine whether an agency acted in an arbitrary or capricious manner, it must be determined "whether the agency: (1) has considered all relevant factors; (2) has given actual, good faith consideration to those factors; and (3) has used reason rather than whim to progress from consideration of these factors to its final decision." Adam Smith Enter. v. Dept. of Env'tl. Reg., 553 So. 2d 1260, 1273 (Fla. 1st DCA 1989). However, if a decision is justifiable under any analysis that a reasonable person would use to reach a decision of similar importance, the decision is neither arbitrary nor capricious. Dravco Basic Materials Co. v. Dep't of Transp., 602 So. 2d 632, n. 3 (Fla. 2d DCA 1992).

^{16/} Section 120.57(1)(j), Florida Statutes, provides that findings of fact shall be based upon a preponderance of the evidence, except in penal or licensure disciplinary proceedings or except as otherwise provided by statute.

^{17/} Because the undersigned finds that Trinity's bid is responsive to the implementation date, the undersigned does not address whether Aramark's bid is also responsive to the implementation date.

COPIES FURNISHED:

David C. Ashburn, Esquire
Greenberg Traurig, P.A.
Post Office Drawer 1838
101 East College Avenue
Tallahassee, Florida 32302

Jonathan P. Sanford, Esquire
Florida Department of Corrections
501 South Calhoun Street
Tallahassee, Florida 32399

Karen D. Walker, Esquire
Holland and Knight, LLP
315 South Calhoun Street, Suite 600
Tallahassee, Florida 32301

Brittany Adams Long, Esquire
Radey Thomas Yon and Clark, P.A.
301 South Bronough Street, Suite 200
Tallahassee, Florida 32301
Michael D. Crews, Secretary

Department of Corrections
501 South Calhoun Street
Tallahassee, Florida 32399-2500

Jennifer Parker, General Counsel
Department of Corrections
501 South Calhoun Street
Tallahassee, Florida 32399-2500

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 10 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.