

WEST VIRGINIA LEGISLATURE
Performance Evaluation and Research Division

Building 1, Room W-314
1900 Kanawha Boulevard, East
Charleston, West Virginia 25305-0610
(304) 347-4890
(304) 347-4939 FAX



John Sylvia
Director

September 4, 2015

The Honorable Craig Blair
Room 217W, Bldg. 1
1900 Kanawha Blvd. E.
Charleston, WV 25305

The Honorable Gary G. Howell
Room 213E, Bldg. 1
1900 Kanawha Blvd. E.
Charleston, WV 25305

Dear Chairmen:

Pursuant to W.Va Code §4-2-5, the Legislative Auditor requested that the Performance Evaluation and Research Division (PERD) review the process by which the West Virginia Regional Jail and Correctional Facility Authority (Authority) awarded a food service contract to Trinity Services Group, Inc. (Trinity) in 2015.

The RFP Process for Awarding Contract RJC708

Trinity was originally awarded a contract (RJC702) to provide food services to the State's regional jail facilities from April 1, 2014 through April 1, 2015. This contract had the option to be renewed up to four times, however, the Authority decided to rebid the services when the contract expired. The Authority indicated that the decision not to renew the services was due to numerous complaints received concerning the quality of the food provided under the contract. A condensed timeline for the process of rebidding the services is as follows:

- 11-14-14 The RJC708 Request for Proposals (RFP) was released by the Authority.
- 2-4-15 Bid opening
- 2-11-15 Oral presentations were held with the four vendors who submitted proposals: Trinity, Aramark Correctional Services (Aramark), Aviands Food and Services Management (Aviands), and CBM Managed Services (CBM).
- 3-9-15 The evaluation committee made an official recommendation to award the contract to CBM, the highest scoring vendor. Vendor scores are detailed in Table 1.

Table 1			
Vendor Scores for RFP RJC708			
Vendor	Technical Score	Cost Score	Total Score
CBM	70	30	100
Aramark	65	25	90
Aviands	52	28	80
Trinity	50	29	79

Source: Recommendation for Award memorandum submitted by the evaluation committee

- 3-12-15 The Authority contacted Trinity and requested a 60-day extension of the current contract to allow for transitioning to CBM¹. Trinity offered 90 days and CBM agreed to the 90-day transition period.
- 3-13-15 – Ongoing discussions were held between Trinity, CBM and the Authority to work
4-6-15 out the transition plan. An agreement could not be reached. On April 6, 2015, CBM agreed to take over all facilities in one day and the Authority asked CBM to provide it with a cost quote for doing so. The Authority sent Trinity a letter notifying it that CBM would take over providing all food services on May 7, 2015.
- 4-8-15 A contract was sent to CBM for review.
- 4-10-15 Trinity formally agreed to the extension of RJC702 through May 7, 2015.
- 4-13-15 CBM’s transition cost estimate was \$210,000, which the Authority indicated it could not accept. CBM opted to withdraw from the RFP process.
- 4-14-15 The Authority had discussions with Aramark (the second highest scoring bidder) regarding its ability to take over services on May 7, 2015. Aramark indicated that it could be done with no additional cost, but that the “transition may have some bumps during the first 30 days or so because of the compressed time.”
- 4-20-15 The Authority decided to renew RJC702 with Trinity instead of awarding RJC708. In an email to Aramark notifying it of this decision, the Authority indicated that it would be rebidding the contract once the renewal expires.
- 4-23-15 Trinity formally agreed to the renewal of RJC702 through March 31, 2016.

According to a legal opinion received from Legislative Services, the Authority was within its rights to decline to award RJC708 and opt to renew RJC702 instead (see the legal opinion provided in Appendix A). However, a great deal of time and state resources were spent

¹ PERD inquired of the Authority why the 60-day extension was requested, since CBM’s proposal had indicated a four week transition plan. The Authority indicated that CBM did not request additional time for the transfer, but the Authority was unable to explain why it chose to request the extension. None of the correspondence involving the RFP indicated why this decision was made and the individuals involved are no longer employed with the Authority.

developing, bidding, awarding, and attempting to execute the transition to RJC708. The Authority may rebid the services when the contract renewal expires and indicated that it plans to avoid the transition issues that led to the cancellation of the RFP for RFJ708 in the future, but does not have a specific plan for how that will be accomplished.

A Legal Opinion States That the Authority Is Not Exempt from Purchasing Division Jurisdiction

The Authority has policies and procedures regarding purchasing that are based on the *West Virginia Purchasing Division Policies and Procedures Handbook*. According to the Purchasing Division, the Authority is exempt from the Purchasing Division's Authority (established in *W.Va. Code §5A-3-1 et seq.*) based on *W.Va. Code §31-20-5* and *§31-20-5a*. However, a legal opinion obtained from Legislative Services indicates that these sections of Code do not exempt the Authority from the Division's purview. The legal opinion, which is provided in Appendix B, states in part:

W.Va. Code §5A-3-1 states that article three applies to every "spending unit" of state government except as otherwise provided in the law. A "spending unit" is defined as "a department, bureau, department, division, office, board commission, authority, agency or institution of the state government for which an appropriation is requested of the Governor, or to which an appropriation is made by the Legislature, unless a specific exemption from this chapter is provided in this code." W.Va. Code §5A-1-1. In 1990, the definition of "spending unit" was revised to include any "authority" of state government and to make clear that a "specific exemption from this chapter" must be contained in any code section purporting to exclude its application to a "spending unit." See W.Va. Code §5A-1-1 (1985). Based upon the change in definition, it appears that the Legislature sought to ensure broad application by expanding the definition of "spending unit..."

The legal opinion further states that *W.Va. Code §31-20-5* and *§31-20-5a* only address the Authority's ability to enter into contracts. Because these sections of Code do not contain any specific language exempting the Authority from the Department of Administration or Purchasing Division statutes, it is the opinion of Legislative Services that the Legislature did not intend the Authority to be exempt. Based on these findings, **the Legislative Auditor recommends that the Authority begin conducting purchasing in compliance with *W.Va. Code §5A-3-1 et seq.***

Sincerely,



John Sylvia

Enclosures

INTER

LEGISLATIVE
SERVICES

OFFICE

MEMO

To: Tina Baker, Post Audit Division
From: Anne Ellison, Counsel
Subject: West Virginia Regional Jail and Correctional Facility Food Services Contract Negotiation and Award
Date: July 27, 2015

I am writing in response to a request for opinion as to whether the food services contract between the West Virginia Regional Jail and Correctional Facility Authority ("WVRJA") and Trinity Services Group, Inc. ("Trinity") was appropriately renewed.

You have presented the following facts: Food services were provided by Trinity under contract RJC702 beginning April 1, 2014. This contract was for one year "or until such 'reasonable time' thereafter as is necessary to obtain a new contract or renew the original contract." The contract included a renewal provision stating that it could be renewed up to four times. The Authority released RFP RJC708 in November 2014 to rebid the services. The highest scoring vendor, CBM, was selected to be awarded this contract, but ultimately pulled out. Conversations were had with the second highest scoring vendor, Aramark, about the contract, but ultimately the Authority opted to renew contract RJC702 rather than awarding RJC708. Page 5 of the RFP (attached) provides that "WVRJA reserves the right to withdraw this RFP at any time and for any reason... A contract based on this RFP and the vendor's proposal may or may not be awarded. Any contract resulting in an award of this RFP is not valid until properly approved as to form by the Attorney General."

The Agency Contract between the WVRJA and Trinity Services Group, Inc. provides, in pertinent part:

This will be effective on April 1, 2014 and extends for a period of one year or until set reasonable time thereafter as is necessary to obtain a new contract or renew the original contract. The "reasonable time" period shall not exceed 12 months. During the "reasonable time" period the vendor may terminate the contract for any reason giving WV Regional Jail Authority ninety 90 day written notice. Notice by the

vendor of intent to terminate will not relieve the vendor of the obligation to continue to provide service pursuant to the terms of the contract.

Renewal: this contract may be renewed upon the written mutual consent of the vendor and the West Virginia Regional Jail Authority. Such renewal shall be in accordance with the terms and conditions of the original contract and shall be limited to four (4) one year periods. Prices will remain firm for the initial contract year.

part: The Request for Proposal (RFQ Number) RJC708 provides, in pertinent

Rejection of proposals:

The evaluation committee shall select the best value solution for the WVRJA according to the evaluation criteria however, the agency reserves the right to accept or reject any or all proposals, in part or in whole at its discretion. The WVRJA reserves the right to withdraw this RFP at any time and for any reason. Submission of or receipt by the WVRJA of proposals confers no rights upon the vendor nor obligates to WVRJA or the State in any manner.

A contract based on this RFP and the vendors proposal may or may not be awarded. Any contract resulting in an award from this RFP is not valid until properly approved as to form by the Attorney General.

(p. 5)

...

Evaluation process:

Method of evaluation:

The WVRJA will select the successful vendors proposal based on best value purchasing which is not necessarily the low better. Cost is considered but is not the sole determining factor for award. The WVRJA does reserve the right to accept or reject any or all of these proposals, in whole or in part, if to do so is in the best interest of the state and the WVRJA.

(p. 28)

After reviewing the existing contract between Trinity and the WVRJA, and the RFP708, it appears that the WVRJA was in a strong position contractually, having the discretion to accept or reject a proposal by the bidders and having flexibility to renew the existing contract with Trinity. Although the WVRJA initially awarded the contract to CBM, the facts presented indicate CBM removed itself from contention for the contract. Following that event, the WVRJA was under no obligation to accept any the remaining proposals. The WVRJA then renewed its contract with Trinity. Ultimately, the terms of the contract and the RFP supported renewing the existing contract if the RJA determined that was its best option.

I hope this opinion satisfies your request. If you have any additional questions regarding this matter, please do not hesitate to contact me.

INTER

LEGISLATIVE
SERVICES

OFFICE

MEMO

To: **Tina Baker, Post Audit Division**
From: **Anne Ellison, Counsel**
Subject: **West Virginia Regional Jail and Correctional Authority – Application of Purchasing Statutes (Revised from 7/26/2015 Version)**
Date: **August 11, 2015**

I am writing in response to your request for an opinion as to whether the Department of Administration's Purchasing Division statutes apply to the West Virginia Regional Jail and Correctional Authority ("WVRJA").

The Department of Administration, through its Purchasing Division, provides very specific guidelines for purchasing practices throughout the spending units of state government. Specifically, the statute provides that:

(a) The Purchasing Division within the Department of Administration is continued. The underlying purposes and policies of the Purchasing Division are:

(1) To establish centralized offices to provide purchasing and travel services to the various state agencies;

...

(4) To make as consistent as possible the procurement rules and practices among the various spending units;

(5) To provide for increased public confidence in the procedures followed in public procurement;

(6) To ensure the fair and equitable treatment of all persons who deal with the procurement system of this state;

...

(c) The provisions of this article apply to all of the spending units of state government, except as otherwise provided by this article or by law.

(d) The provisions of this article do not apply to the judicial branch, the legislative branch, to purchases of stock made by the Alcohol Beverage

Control Commissioner and to purchases of textbooks for the State Board of Education.

(e) The provisions of this article apply to every expenditure of public funds by a spending unit for commodities and services irrespective of the source of the funds.

W.Va. Code §5A-3-1.

W.Va. Code §5A-3-1 states that article three applies to every "spending unit" of state government except as otherwise provided in the law. A "spending unit" is defined as "a department, bureau, department, division, office, board commission, **authority**, agency or institution of the state government for which an appropriation is requested of the Governor, or to which an appropriation is made by the Legislature, unless a specific exemption from this chapter is provided in this code." W.Va. Code §5A-1-1. In 1990, the definition of "spending unit" was revised to include any "authority" of state government and to make clear that a "specific exemption from this chapter" must be contained in any code section purporting to exclude its application to a "spending unit." See W.Va. Code §5A-1-1 (1985). Based upon the change in definition, it appears that the Legislature sought to ensure broad application by expanding the definition of "spending unit."

The Purchasing Statutes provide for a number of requirements for purchases of commodities, including competitive bidding for purchases over twenty five thousand dollars. W.Va. Code §5A-3-10. In addition, spending units must ensure that any vendors from whom they purchase goods or services do not owe any debts to the state.

The WVRJA is an authority within the state of West Virginia, and receives an appropriation from the Legislature. W.Va. Code § 31-20-5 sets forth the WVRJA's powers, which include its ability "[t]o make contracts of every kind and nature and to execute all instruments necessary or convenient for carrying on its business, including contracts with any other governmental agency of this state or of the federal government or with any person, individual, partnership or corporation to effect any or all of the purposes of this article." In 1985, the Legislature enacted W.Va. Code §31-20-5a, which states:

When the cost under any contract or agreement entered into by the authority other than compensation for personal services involves an expenditure of more than two thousand dollars, the authority shall make a written contract with the lowest responsible bidder after public notice published as a Class II legal advertisement in compliance with the provisions of article three, chapter fifty-nine of this code, the publication area for such publication to be the county or counties wherein the work is to be performed or which is affected by the contract, which notice shall state the general character of the work and general character of the materials to be furnished, the place where plans and specifications

therefor may be examined and the time and place of receiving bids, but a contract for lease of a correctional facility or regional or county jail project constructed and owned by the authority is not subject to the foregoing requirements and the authority may enter into such contract for lease pursuant to negotiation upon such terms and conditions and for such period as it finds to be reasonable and proper under the circumstances and in the best interests of proper operation or efficient acquisition or construction of such projects. The authority may reject any and all bids. A bond with good and sufficient surety, approved by the authority, shall be required of all contractors in an amount equal to at least fifty percent of the contract price, conditioned upon faithful performance of the contract.

Both code sections address WVJRA's ability to enter into contracts. The latter section more specifically addresses the WVRJA's bidding procedures for contracts. Neither section, however, contains any language exempting the WVRJA from application of the Department of Administration or Purchasing Division's statutes. Further, the Legislature has clearly exempted other "spending units" through the use of specific language regarding the Purchasing Division and/or the Department of Administration. (See W.Va. Code §12-5-7, which states "...all selections of professionals shall be competitive, but the bidding **shall not be required to comply with the provisions of article three, chapter five-a** of this code."; W.Va. Code §8-22-18a(6) provides " [t]he oversight board **is exempt from provisions of article three, chapter five-a of this code** for the purpose of contracting for actuarial services, including the services of a reviewing actuary"; W.Va. Code §29-22A-19(d) includes "[t]he Department of Health and Human Resources is not subject to **the purchasing requirements as set forth in the legislative rule of the Purchasing Division** of the Department of Administration."). Based upon the following, it does not appear as though the Legislature intended the WVRJA to be exempt from the Department of Administration and/or Purchasing Division statutes.

I hope this opinion satisfies your needs. If you have any additional questions, please do not hesitate to contact me.