IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Howard Schwartz, Appellant	:	
v.	:	No. 1769 C.D. 2013
	:	Argued: April 22, 2014
Allegheny County, Pennsylvania and Value-Added Communications, Inc.	:	
Value-Added Communications, Inc.	:	
v.	:	
Securus Technologies, Inc. and The County of Allegheny	:	

BEFORE: HONORABLE ROBERT SIMPSON, Judge
HONORABLE ANNE E. COVEY, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE SIMPSON **FILED: May 23, 2014**

In this fact-sensitive appeal, Howard Schwartz[1] (Schwartz) asks whether the Court of Common Pleas of Allegheny County[2] (trial court) erred in denying his motion for a preliminary injunction through which Schwartz sought to enjoin Allegheny County's (County) award of a contract for an inmate telephone system for the County Jail and juvenile detention facility (collectively, the Jail) to the successful bidder, Value-Added Communications, Inc. (VAC). This is the third appeal since 2006 relating to the award of a contract for the Jail's inmate

[1] Securus Technologies, Inc. joins in the brief of Howard Schwartz.

[2] The Honorable Christine Ward presided.

telephone system; the trial court enjoined the award of the two prior contracts, and this Court affirmed.

In this appeal, Schwartz argues the trial court erred in preliminarily finding that VAC did not receive any unfair competitive advantage in a Request for Proposal (RFP) process when the County ignored VAC's non-compliance with six mandatory RFP requirements regarding compensation, gross revenue and fees, and failed to: (i) disqualify VAC; (ii) amend the RFP to provide for another round of bidding where all offerors had the same opportunity as VAC to offer a higher commission rate without having to comply with the same RFP requirements; or, (iii) reject all offers and conduct a re-bid. He also contends the trial court erred in denying his motion to preliminarily enjoin the County's award of a contract to VAC given that VAC's contract with the County, which incorporated VAC's non-compliant RFP response, did not contain all necessary terms regarding compensation, gross revenue and fees. Upon review, we affirm.

I. Background

The trial court set forth the following factual background to this dispute. Schwartz is an individual and resident of Upper St. Clair, Allegheny County, and as such pays taxes to the County and the Commonwealth. The County is a political subdivision of the Commonwealth, and a Home Rule Charter Municipality created under Pennsylvania law. VAC is a Delaware corporation with its principal place of business in Plano, Texas. Securus Technologies, Inc. (Securus) is also a Delaware corporation with its principal place of business in Plano, Texas.

The Jail uses telephone systems installed and maintained by third party vendors to provide telephone service for inmates. The system charges inmates, their families, or other end users for each call made. The vendor operating the telephone system retains a portion of the revenue generated for itself and provides a portion to the County. The funds paid to the County are referred to as commissions.

In 2006, the Honorable Judith L.A. Friedman of the trial court found that the County awarded the inmate telephone system contract on the basis of an arbitrary, capricious, and unfair evaluation method, and she ordered the County to vacate the contract awarded to its chosen bidder and issue the contract to Securus. On appeal, this Court affirmed the trial court's grant of a prohibitory preliminary injunction that barred the County's award of the contract where the record revealed the County's evaluation of proposals violated provisions of its Home Rule Charter, the Administrative Code of Allegheny County, and the RFP; however, we reversed the grant of a mandatory preliminary injunction that awarded the contract to Securus. See Lemansky v. Allegheny Cnty. (Pa. Cmwlth., Nos. 1057, 1078 & 1142 C.D. 2006, filed June 11, 2007) (unreported).

In 2011, the Honorable Timothy Patrick O'Reilly of the trial court found that the County engaged in many deviations from the standards set forth in the RFP. He further determined that a member of the County's evaluation committee manipulated a component of the RFP evaluation process in order to steer the award of a second inmate telephone contract away from Securus, to a different vendor. As a result, Judge O'Reilly ordered the County to commence a

new RFP process. This Court affirmed, and our Supreme Court denied allowance of appeal. See D'Eramo v. Allegheny Cnty. (Pa. Cmwlth., Nos. 1282 & 1283 C.D. 2011, filed January 12, 2012) (unreported), appeal denied, 46 A.3d 708 (Pa. 2012). The award of this third contract is the basis of the present litigation.

On June 1, 2012, the County publically advertised a *Request for Proposal for Inmate Telephone System and Related Technology for the Allegheny County Jail and Shuman Juvenile Detention Center*. The contract contemplated an initial three-year term with the possibility of renewal for two additional one-year periods. The RFP set forth detailed specifications and scoring criteria for the proposal evaluation process, and it was subsequently revised by five bulletins. The proposals were to be evaluated by an evaluation committee that would recommend a vendor. The evaluation committee consisted of County representatives and an independent consultant, none of whom served on the evaluation committees in the previous two inmate phone system proceedings. Four vendors submitted responses to the RFP: ICSolutions, Inc.; CenturyLink Correctional Communications Services; VAC; and Securus.

The evaluation committee reviewed and scored the vendor proposals. After the scoring was complete and the vendor references were checked, the vendors with the two highest scores, VAC and Securus, were invited to make presentations of their telephone systems, which were also scored. At the conclusion of this process, VAC was the highest scoring vendor, with 651.5 points out of a possible 674, and 45.7 points greater than Securus. As a result, VAC was

selected as the winning vendor.[3] The final contract incorporated by reference the entirety of the RFP and VAC's response.

In February 2013, Securus filed a bid protest with the County regarding the contract. The protest alleged the award of the contract to VAC was arbitrary and capricious and contrary to the terms of the RFP because:

- The County failed to reject VAC's proposal even though VAC admittedly failed to comply with the RFP's requirements with regard to paying commissions on fees;
- The County granted VAC an unfair competitive advantage by permitting only VAC to charge fees without paying commissions on the fees;
- The County failed to reject VAC's proposal even though it clearly failed to comply with the RFP's requirements to disclose all fees it would charge;
- The County arbitrarily and capriciously evaluated the Vendor Administrative Compliance Category and Vendor ITS Solution Category;
- The circumstances surrounding the County's RFP process reveal bias in favor of VAC and against Securus; and,
- The County evaluators submitted false information to the County Manager as to the amount of actual revenue VAC would provide the County.

[3] At that point, Joseph M. Webb, the evaluation committee's independent consultant, was asked to provide a calculation of expected revenue that would result from the contract as awarded to VAC, which would be included in the request for executive action sent to the County Manager requesting authorization of the award. The consultant made an obvious, but undetected mistake, resulting in the expected revenue being over-stated by nearly four times. Historic revenue for the County from the inmate telephone contract was approximately $3.3 million over the course of three years, whereas the number sent to the County Manager predicted nearly $13 million. Once again, the obvious mistake went undetected. The County Purchasing Department then included the revenue calculation in the request for executive action, which it submitted to the County Manager, who authorized the award of the contract to VAC.

The County denied the bid protest and refused to set aside the award of the contract to VAC.

Shortly thereafter, VAC filed a complaint for declaratory relief against Securus seeking to obtain a declaration that the County's award of the contract to VAC was valid. In addition, Schwartz filed a complaint challenging the award of the contract to VAC through which he sought preliminary and permanent injunctive relief in order to enjoin the award of the contract as well as a declaration that the award of the contract to VAC was unlawful and void. The trial court consolidated the actions.

Schwartz also filed a motion for temporary preliminary injunctive relief and a request for a preliminary injunction hearing and expedited discovery. The parties conducted expedited discovery, and a two-day hearing ensued before the trial court on Schwartz's motion for preliminary injunction.

Ultimately, the esteemed trial court issued an opinion in which it denied Schwartz's motion for preliminary injunction, concluding Schwartz did not show he was likely to prevail on the merits. Specifically, the trial court rejected Schwartz's arguments that: (1) VAC was granted an unfair competitive advantage that prevented an "apples-to-apples" evaluation of the bids from occurring; (2) the contract was invalid because there was no meeting of the minds; (3) the financial evaluation scoring was arbitrary and capricious; and, (4) awarding the contract on the basis of false information was arbitrary and capricious.

Schwartz appealed to this Court, and the trial court directed him to file a concise statement of the errors complained of on appeal, which he did. The trial court then issued a Pa. R.A.P. 1925(a) Opinion. This matter is now before us for disposition.

II. Issues

On appeal, Schwartz raises the following two issues:

> 1. Whether the [t]rial [c]ourt committed legal error by finding [VAC] had not received any unfair competitive advantage in an RFP process when [the County] ignored VAC's non-compliance with six mandatory RFP requirements regarding compensation, gross revenue and fees and failed to: (i) disqualify VAC; (ii) amend the RFP to provide for another round of bidding where all offerors had the same opportunity as VAC to offer a higher commission rate without having to comply with the same RFP requirements; or (iii) reject all offers and conduct a re-bid?
>
> 2. Whether the [t]rial [c]ourt committed legal error by denying a motion to preliminarily enjoin the County's award of a contract to VAC given that VAC's [c]ontract with the County, which incorporated VAC's non-compliant RFP [r]esponse, did not contain all necessary terms regarding compensation/gross revenue and fees?

Appellant's Br. at 3-4.

III. Discussion

A. Alleged Unfair Competitive Advantage

1. Contentions

Schwartz first argues the trial court erred in finding VAC did not receive an unfair competitive advantage during the RFP process. He asserts VAC

refused to comply with Sections IV(A) and (B) of the RFP, which contained six mandatory compensation, gross revenue and fees requirements, where VAC responded "Read and do not comply." See Reproduced Record (R.R.) at 1156a-58a; 1533a-34a. Specifically, Schwartz asserts VAC refused to comply with: (1) the mandatory requirement to pay commissions on gross revenue; (2) the definition of gross revenue; (3) the requirement that the County has a right to approve the charges and fees charged by VAC; (4) the $500 per day penalty provision for charging fees without approval; (5) the requirement to refund end-users for unapproved fees; and, (6) the requirement to pay commissions on additional fees/charges. Schwartz contends this noncompliance allowed VAC to submit a higher commission offering, technological offerings and other benefits to the County because, unlike its competitors, VAC would not be "burdened" by the same RFP requirements as other prospective vendors. R.R. at 1156a-58a.

However, Schwartz contends, the County ignored VAC's noncompliance by failing to either: (i) disqualify VAC; (ii) amend the RFP to provide for another round of bidding where all offerors had the same opportunity as VAC to offer a higher commission rate without having to comply with the same RFP compensation requirements; or, (iii) reject all offers and commence a re-bid. Because the County did nothing, it conducted an "apples-to-oranges" evaluation that compared VAC's non-compliant offer against compliant offers given by three other vendors.

Schwartz maintains the trial court never specifically addressed any of the six different unfair competitive advantages VAC received. Nor did the trial

court ever mention, let alone analyze, the exception language VAC included in its RFP response – which in itself demonstrated that VAC received an unfair competitive advantage. Ironically, even the trial court recognized during the hearing that VAC was an "outlier" that had not complied with RFP requirements that all other offerors complied with, and the trial court questioned the County as to why it never conducted "a second round of bidding" where all offerors had the same opportunity as VAC to offer a higher commission rate without having to comply with the same RFP compensation requirements. Appellant's Br. at 32-33; R.R. at 288-89a.

Despite the trial court's recognition of the flaws in the County's RFP process, Schwartz argues, the trial court issued a contrary legal opinion. The trial court found that because the RFP included a provision permitting an offeror to respond "Read and do not comply[,]" R.R. at 931a, the County was not required to disqualify VAC's noncompliant RFP response. Schwartz asserts this finding is irrelevant. An offeror could respond "Read and do not comply" at its own risk. Faced with such a response, the County could either: disqualify the offeror, or amend the RFP to provide for another round of bidding where all offerors had the same opportunity as VAC to offer a higher commission rate without having to comply with the same RFP requirements, or reject all bids and commence a re-bid. However, the County did nothing, ignored VAC's noncompliance, and compared apples to oranges. The trial court never explained how there could have been an apples-to-apples comparison here when the County ignored VAC's failure to comply with the RFP's compensation, gross revenue and fees provisions.

Schwartz contends the trial court also found he had no clear right to relief because the County evaluators concluded that VAC's non-compliant RFP response "was, in fact, in compliance" with Sections IV(A) and (B). Tr. Ct., Slip Op., 9/9/13, at 14-15. Tellingly, the trial court never mentioned the actual exception language VAC included in its response (that was discussed extensively at the hearing) where, among other things, VAC stated it would not be "*burdened*" with complying with the RFP's compensation, gross revenue and fees requirements. R.R. at 1157a (emphasis added by Appellant).

Schwartz argues the trial court essentially held that whether an offeror is in compliance with an RFP requirement should be determined by the subjective belief of County evaluators instead of the actual words of the RFP response. The trial court cited no authority supporting its finding and permitting evaluators to disregard explicit "do not comply" language of an RFP response. Id. No such authority exists. If the law permitted municipalities to ignore the plain words of an offeror's response and instead rely on someone's subjective belief, it would open the floodgates for steering of awards and corruption.

In support of his position that the trial court should have granted a preliminary injunction, Schwartz relies on this Court's decision in Conduit & Foundation Corp. v. City of Philadelphia, 401 A.2d 376 (Pa. Cmwlth. 1979) (en banc). He argues the trial court's attempts to distinguish Conduit are unavailing. He also cites Shaeffer v. City of Lancaster, 754 A.2d 719 (Pa. Cmwlth. 2000). Schwartz maintains that in these cases this Court expressly rejected attempts to

allow one offeror to submit a unique offer that no other vendors know of because it prevents an apples-to-apples comparison.

In their joint brief, VAC and the County respond that this Court should affirm the denial of Schwartz's motion for preliminary injunction because, consistent with the standard of appellate review, apparently reasonable grounds exist for the trial court's decision that VAC did not receive an unfair competitive advantage in responding to the RFP.

Further, VAC and the County argue, this Court must be highly deferential to the trial court's finding that VAC's response to the RFP was compliant with the terms of the RFP. The RFP clearly permitted vendors to file a "Read and do not comply" response together with an exceptions addendum identifying the basis of the exception. R.R. at 931a. Here, VAC chose to respond to two sections of the RFP with a "Read and do not comply" response utilizing the "Exceptions Addendum" procedure to relate its understanding of the definition of "Gross Revenue." R.R. at 1157a-58a; 1533a-34a. VAC and the County maintain that VAC's "Read and do not comply" responses complied with Sections IV(A) and (B) of the RFP, and VAC's Exception Addendum was merely a clarification that did not take exception to Sections IV(A) and (B).

VAC and the County assert that the testimony amply supports the trial court's conclusion that there was no daylight between VAC's understanding of its commission payment obligation and the County's understanding of how commissions were to be calculated using gross revenue. VAC's "Read and do not

comply" response did not take exception to the requirements in the RFP that a vendor pay commissions on gross revenue, that the County approve all charges and fees, or that the County would assess a penalty if a vendor charged fees without approval. R.R. at 1157a-58a. Indeed, the County approved VAC's request for imposition of the single additional fee identified in the exceptions addendum before its imposition as envisioned by the RFP. Thus, the County and VAC contend that under the clear terms of the RFP, VAC accepted the RFP requirements regarding compensation, gross revenue, and fees.

While Schwartz attempts to distort the facts, the County and VAC argue, the record establishes VAC accepted and agreed to the RFP's requirements, and the County understood that VAC accepted these requirements. As a result, the trial court had apparently reasonable grounds upon which to conclude that VAC's bid complied with the RFP, that the County did not give VAC an unfair competitive advantage, and that, in turn, Schwartz was unlikely to prevail on the merits.

The County and VAC contend that Schwartz would have the courts issue preliminary injunctions whenever a party alleges a RFP process has any irregularities. This, they assert, is not the law in Pennsylvania. Rather, a review of Pennsylvania cases in the area of competitive bidding establishes that those decisions form a bulwark of historical deference to administrative agencies, and a presumption of validity in their decision making, such that any intervention in such matters, let alone a reversal of the reasonable and valid process in this case, are

limited to only the most extreme and egregious circumstances—none of which are present here.

In support of their position that the County did not violate competitive bidding principles, and properly awarded the contract to VAC, the County and VAC rely on Gaeta v. Ridley School District, 788 A.2d 363 (Pa. 2002), and Rainey v. Borough of Derry, 641 A.2d 698 (Pa. Cmwlth. 1994). They note that in Rainey, this Court distinguished Conduit, relied on by Schwartz. Additionally, the County and VAC assert the cases Schwartz cites are distinguishable and do not stand for the proposition that any and all procedural irregularities automatically entitle a disappointed bidder to a preliminary injunction.

In his reply brief, Schwartz argues that, the County and VAC misstate the applicable standard of review as "highly deferential" with affirmance required if there are any apparently reasonable grounds. Contrary to the assertions of the County and VAC, Schwartz asserts, an appellate court does not apply a highly deferential standard to a trial court's legal conclusions, such as those at issue here. Instead, this Court must reverse the denial of the preliminary injunction if the rule of law relied upon was palpably erroneous or misapplied. Schwartz maintains the trial court's erroneous legal conclusions are not entitled to deference from this Court.

Further, Schwartz contends, although the County and VAC argue that procedural irregularities and violations in the RFP process are insufficient to enjoin the award of a contract in the absence of bad faith, fraud or capricious action, this

Court rejected the same argument in D'Eramo. See Lasday v. Allegheny Cnty., 453 A.2d 949 (Pa. 1982); Am. Totalisator Co., Inc. v. Seligman, 414 A.2d 1037 (Pa. 1980); Shaeffer; Stapleton v. Berks Cnty., 593 A.2d 1323 (Pa. Cmwlth. 1991). In D'Eramo, which involved the prior bidding of the Jail's inmate telephone service contract, this Court held that procedural irregularities and violations of basic standards of fairness are sufficient in and of themselves to warrant an injunction, and this Court affirmed the grant of an injunction in that case.

2. Analysis

a. Preliminary Injunction Standards

To obtain a preliminary injunction, a petitioner must establish: (1) relief is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by monetary damages; (2) greater injury will occur from refusing to grant the injunction than from granting it; (3) the injunction will restore the parties to their status quo as it existed before the alleged wrongful conduct; (4) the activity he seeks to restrain is actionable, that his right to relief is clear, and that the wrong is manifest, or, in other words, that he is likely to prevail on the merits; (5) the injunction is reasonably suited to abate the offending activity; and (6) the public interest will not be harmed if the injunction is granted. Brayman Constr. Corp. v. Dep't of Transp., 13 A.3d 925 (Pa. 2011); Summit Towne Ctr., Inc. v. Shoe Show of Rocky Mount, Inc., 828 A.2d 995 (Pa. 2003).

While the parties disagree over the appropriate standard of review, appellate courts review a trial court's order refusing or granting a preliminary injunction for an abuse of discretion. Brayman Constr. This standard is applied as follows:

> [O]n an appeal from the grant or denial of a preliminary injunction, we do not inquire into the merits of the controversy, but only examine the record to determine if there were any apparently reasonable grounds for the action of the court below. Only if it is plain that no grounds exist to support the decree or that the rule of law relied upon was palpably erroneous or misapplied will we interfere with the decision of the Chancellor.

Id. at 935-36 (emphasis added) (citation omitted); see also Gaeta. Here, the trial court determined Schwartz was not likely to prevail on the merits. We examine the record to determine if there were any apparently reasonable grounds for the trial court's decision. Id.

b. Merits

In reviewing a public contract award, deference is afforded to governmental decision makers. Id.; Marx v. Lake Lehman Sch. Dist., 817 A.2d 1242 (Pa. Cmwlth. 2003). As our Supreme Court explained:

> By a host of authorities in our own and other jurisdictions it has been established as an elementary principle of law that courts will not review the actions of governmental bodies or administrative tribunals involving acts of discretion, in the absence of bad faith, fraud, capricious action or abuse of power: they will not inquire into the wisdom of such actions or into the details of the manner adopted to carry them into execution. It is true that the mere possession of discretionary power by an administrative body does not make it wholly immune from judicial review, but the scope of that review is limited to the determination of whether there has been a manifest and flagrant abuse of discretion or a purely arbitrary execution of the agency's duties or functions. That a court might have a different opinion or judgment in regard to the action of the agency is not a sufficient ground for interference; judicial discretion may not be substituted for administrative discretion.

Blumenschein v. Pittsburgh Hous. Auth., 109 A.2d 331, 334-35 (Pa. 1954) (citations and quotations omitted). Thus, principles of municipal law forbid the substitution of judicial discretion for administrative discretion. Am. Totalisator.

Nevertheless, "[t]he requirement in competitive bidding that there be fair and just competition and an absence of favoritism is violated whenever the bidders are treated otherwise than by a common standard." Gaeta, 788 A.2d at 367 n.8 (citation omitted). "[F]airness lies at the heart of the bidding process, and all bidders must be ... given the same fair opportunity to bid in free competition with each other." Carbo v. Redstone Twp., 960 A.2d 889, 902 (Pa. Cmwlth. 2008). As such, the award of a public contract may be enjoined when irregularities in the bidding process are shown. Am. Totalisator; Shaeffer; Stapleton.

Where a municipality "fail[s] to abide by the terms of its own request for proposal, it lack[s] … any discretion to award the … contract … thus warranting judicial intervention." Am. Totalisator, 414 A.2d at 1041. As such, this Court explains:

> It is well-settled that the specifications set forth in a bidding document are mandatory and must be strictly followed for the bid to be valid. Furthermore, an award of a contract in a competitive bidding process must be overturned if the mandatory requirements in the bid instructions are not strictly followed.

Smith v. Borough of E. Stroudsburg, 694 A.2d 19, 23 (Pa. Cmwlth. 1997) (citations omitted).

In addition, in American Totalisator, our Supreme Court rejected the argument that a tribunal must make a finding of bad faith, fraud or capricious action on the part of the contracting agency in order to justify judicial intervention. Rather, the Court held a contracting agency's failure to abide by the terms of its RFP and its violations of elementary principles of competitive bidding were sufficient to justify judicial intervention. Id. Also, in Lasday, our Supreme Court applied the holding in American Totalisator to a case involving an Allegheny County RFP for a revenue-producing contract, like the RFP here.

Here, in rejecting Schwartz's argument that VAC received an unfair competitive advantage because the County accepted VAC's proposal, which, unlike the other vendors, deviated from the RFP requirements, the trial court explained (with emphasis added):

> Much of Schwartz's case arises from VAC's responses to Sections IV(A) and (B) in its submitted proposal. For those two sections, instead of responding 'Read, agreed and will comply,' [VAC] stated 'Read and do not comply' and attached an Exceptions Addendum to [its] response. The Evaluation Committee determined that this response was in compliance with the requirements of the RFP. Schwartz argues that these responses show that VAC had not agreed to several key parts of the RFP, resulting in a proposal that was both vastly different than those submitted by the other companies and also intrinsically invalid. This Court finds that the clear language of the RFP shows that VAC's response was valid.
>
> It is clear from the RFP that a response of 'Read and do not comply' is expected and allowable. Section C of the Response Instructions for the RFP reads as follows:
>
> > C. Each Vendor must provide all documentation required. Responses should follow the same numerical sequence and structure as this RFP. **A complete**

> **response for each section and numbered condition of the RFP must be provided by Vendor. If Vendor is in full compliance with the section or numbered condition, the appropriate response is, 'Read, agreed and will comply.' Otherwise, Vendor's response should state, 'Read and do not comply.' Any exceptions to this RFP, where Vendor's response is 'Read and do not comply' must be addressed in an Exceptions Addendum to Vendor's RFP response.**
>
> (Emphases in original.)

There is nothing in the RFP that states a vendor will be disqualified for responding 'Read and do not comply.' Logically, such a response cannot be in and of itself a fatal error, or there would be no purpose in requiring an Exceptions Addendum. Neither does the RFP state that the vendor's score will be lowered by a set amount, or any amount at all, for a response of 'Read and do not comply' accompanied by an Exceptions Addendum.

Schwartz compares the present case with [Conduit], a public contract bidding case where the winning bidder submitted a bid listing multiple alternative equipment suppliers, where all other bidders listed one supplier. In that case, the court found that the specifications of the request for bids had led the other bidders to believe that only one supplier listing would be permitted, and as such accepting the bid [from] the only bidder who made alternative listings granted that bidder a competitive advantage. That court found that under the language of the bid instructions, the 'most reasonable interpretation' was that only one listing would be permitted, and cited to earlier Pennsylvania Supreme Court cases finding that '[t]here may be a great advantage to a bidder who has a certain understanding with which the public authorit[y] may agree, over a bidder whose understanding is otherwise' and that 'if bidders are misled by anything which the...[public authorities] may have done, or the notice may have required, the bidding was not on a common basis; the lowest figure submitted would not, in law, be the lowest bid, because it lacked fair competition.' Id. at 379-380 (alteration in original)(citations omitted). However, both Conduit and the cases it cites are factually distinguishable from the situation

> before us. We are not dealing with a case where the County misled the other bidders, or where the most reasonable interpretation of the RFP instructions was that which the other bidders followed and the County and VAC are adhering to a possible, but much less reasonable, interpretation. Instead, we have instructions that clearly give vendors a method by which they can take exception to portions of the RFP and propose alternate contract terms.
>
> Further, the County did not even consider VAC's response to be proposing alternate terms. Upon looking at the Exception[s] Addenda filed by VAC, the Evaluation Committee concluded that … VAC was basically reiterating the language of the RFP in slightly different terms. As such, though VAC responded 'Read and do not comply' to sections IV(A) and (B), the County concluded that VAC was, in fact, in compliance. (Dep. Test. of Joseph M. Webb 190-193; Trial Tr. Day 2, 58, May 3, 2013).

Tr. Ct., Slip Op., 9/9/13, at 14-15 (citation omitted). The record supports the trial court's preliminary determinations.

First, although Schwartz focuses on the fact that VAC's responses to Sections IV(A) and (B) of the RFP state: "Read and do not comply[,]" R.R. at 1157a-58a, 1533a-34a, as the trial court aptly observed, Section C of the RFP's "Response Instructions" specifically permitted such a response. R.R. at 931a. Clearly, VAC did not violate the RFP requirements merely because it responded "Read and do not comply" to Sections IV(A) and (B) and included an attached exceptions addendum. See R.R. at 1533a-34a. To the contrary, such a response is expressly allowed under the terms of the RFP. R.R. at 931a.

Further, no error is apparent in the trial court's preliminary determination that VAC's statements in its exceptions addendum regarding

Sections IV(A) and (B) of the RFP did not render its response non-compliant. Specifically, those Sections, and VAC's corresponding responses, state (with underlined emphasis added):

> IV. Compensation
>
> A. Vendor shall pay commissions calculated on all Gross Revenues generated by and through the ITS [(Inmate Telephone System)] including collect, debit and pre-paid inmate calls placed from the inmate telephone equipment located at the Facilities. Gross revenues are generated by completed calls (see description of a completed call). Any additional fees to be added to the called party's bill or paid by the called party (including those associated with establishing/funding pre-paid collect accounts) for inmate telephone calls from the Facilities must be approved by the [sic] Allegheny County *prior to implementation*. Any charges/fees added to the called party's bill without the express written consent of Allegheny County shall carry a fine of five hundred dollars ($500.00) per day from the date the additional charges/fees were first added through the date the charges/fees were discontinued. Additionally, Vendor shall refund each called party for the unapproved charges/fees from the date the charges/fees were implemented until the date the charges/fees were discontinued. The additional fees/charges will be commissioned at the proposed commission rate and shall follow Section VII — Commission Payment and Reporting.
>
> VAC RESPONSE: Read and do not comply.
>
> VAC charges fees as a means of cost recovery as they represent tangible costs to VAC and must be accounted for in the development of our commission offer. These additional costs are not attributable to the cost of originating and completing a telephone call, and they are not incurred by VAC on behalf of every called party VAC serves. Rather than embed these costs resulting from the optional services in the surcharges and rate per minute applied to all account holders, when not all account holders choose to avail themselves of the optional services, VAC provides consumers with a choice to use these services and accordingly charges a separate cost recovery fee.

VAC has outlined our fees and charges that may be charged to a called party. These fees may include, but are not limited to, a 'single bill' fee that recovers VAC's expense for having call charges printed on an account holder's LEC bill, credit card use fees that recover the payment to 3rd party banks for credit card processing, and credit card chargeback fees, which VAC remits to the credit card companies for every uncollectible dollar credit card companies endure when called parties either don't pay their bill or attempt to pay for inmate phone calls using stolen credit cards. The additional services result in incremental costs to VAC that are recovered through specific fees applied to the account.

VAC is able to offer Allegheny County the most attractive financial offer if VAC recovers its costs by charging cost recovery fees. In the absence of cost recovery fees, we offer a less attractive commission offer to Allegheny County as our financial model is 'burdened' with these incremental costs with no mechanism to recoup these costs thus the lower commission offer.

It is important to note that Federal, State, County or local telecommunications charges, FUSF charges, SUSF charges, and taxes are mandated and specified by Federal, State, County and Local agencies and are collected by VAC for pass-through to the appropriate collecting agency. These collections are not revenue and are not commissioned.

Gross revenue on which monthly commission will be paid does not include: (i) taxes and tax-related surcharges; (ii) credits; (iii) account transaction fees; and (iv) any amount VAC collects for, or pays to, third parties, including but not limited to payments in support of statutory or regulatory programs mandated by governmental or quasi-governmental authorities, such as the Federal Universal Service Fee, and any costs incurred by VAC in connection with such programs. Accordingly, VAC excludes fees from Gross Revenue and thus are not commissioned[.]

B. Gross Revenue includes, but is not limited to, all Local, IntraLATA/Intrastate, InterLATA/Intrastate, InterLATA/Interstate, and International revenues and any and all additional charges and fees generated by completion of all

> collect, debit, and pre-paid calls from Vendor's inmate telephones.
>
> VAC RESPONSE: Read and do not comply.
>
> Please see our response to IV.A Compensation above.

R.R. at 943a, 1157a-58a, 1533a-34a.

As the trial court explained, the County's evaluation committee did not view the language utilized by VAC in its exceptions addendum as proposing alternate terms. The testimony of Joseph M. Webb, the independent consultant selected by the County to assist in preparation of the RFP and evaluation of vendor proposals, and a member of the evaluation committee, supports the trial court's view. More particularly, the following colloquy with Webb reveals that the evaluation committee believed that VAC intended to comply with the RFP's provisions on compensation, gross revenue and fees, and VAC's responses to these provisions in its exceptions addendum essentially reiterated the relevant requirements:

> Q. Do you see Section B [of Section IV of the RFP (relating to "Compensation")]?
>
> A. Yes, yep.
>
> Q. Do you agree with me that VAC said they would not comply?
>
> A. Yes.
>
> Q. And when you were in your evaluation committee meetings, you discussed the fact that VAC was not agreeing with your definition of gross revenue, didn't you?

> A. We — I don't recall us having any real discussion about it mainly because they filed – I forget what it's called, but it was an exception to the specification. And that exception -- in this response here, which was identical, they talk about the fees being charged in that the fees could not be part of what was compensated. And we went back and looked and said, well, we're not sure what they're talking about because they're basically saying what we're saying in the specification, which is you can't charge these fees.
>
> And then we defined gross revenue as the charges to complete the call, not the fees. So our confusion initially was, all right, they're saying they do not comply, but when we read this, they are almost reiterating what we just said. So we took the exception to it and read it and said, well it actually is not an exception. It's stating agreement even though they don't think it is, so they must be interpreting something wrong. And that's why we did not see them as not being noncompliant, even though they said they are.
>
> * * * *
>
> A. … And B [of Section IV (relating to "Gross Revenue")] which they referred back to. So it was both A and B.
>
> Q. Okay. And so -- now you said that there wasn't any discussion on the evaluation committee about it?
>
> A. I don't remember. I had read it and said that – when I read the proposal, I didn't see how they were noncompliant. So I — we didn't really bring this up as a discussion mainly because when you look at it[,] it was stating, what we had stated, so it wasn't – it wasn't a big discussion point as we went forward.

R.R. at 2138a (emphasis added); see also R.R. at 473a-74a.[4] Our independent review of VAC's responses confirms the evaluation committee's reading of VAC's responses.

[4] Schwartz points to Webb's testimony that universal service fees and taxes were to be included as "gross revenue." Reproduced Record (R.R.) at 658a. However, within 30 days of **(Footnote continued on next page…)**

In addition, Steve Montanaro, VAC's Vice President of Sales and Marketing Operations, explained that VAC filed the exceptions addendum as an "anticipatory" measure because the County's third-party auditing firm will, at times, dispute whether certain fees are contained within the definition of "gross revenue," and, therefore, are commissionable fees. R.R. at 437a-38a, 443a. Montanaro also testified that any charges and fees not generated by the completion of collect, debit and pre-paid calls from VAC's inmate telephone system were not commissionable under the County's own definition. R.R. at 435a-38a.

Moreover, contrary to Schwartz's assertions, there is no indication that the County's evaluation was not an "apples-to-apples" comparison. Schwartz maintains that all other vendors were of the belief that they were required to pay the County commissions on the fees and charges beyond those generated by completed calls, but the record belies this contention.

Each vendor was given the same opportunity to propose a percentage commission based on the "per minute calling rates" and "surcharges" set by the County. R.R. at 1041a. Also, in a separate table, each vendor was given the right to identify any "additional charges and fees" that it requested that the County approve prior to implementation. Id.; R.R. at 1043a. The County notified each vendor that the evaluation committee would not evaluate these "additional fees or

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(continued…)

his deposition testimony Webb completed and signed an errata sheet in which he indicated that universal service fees and taxes were not to be included as "gross revenue," and he explained the reason for the clarification. R.R. at 594a.

charges" in its consideration of the bids received. R.R. at 1012. Thus, all of the vendors' proposals were evaluated on the commission percentage the County would receive based on the applicable per minute calling rates and surcharges, and not based on any additional fees or charges. Indeed, the RFP made clear that each vendor's financial proposal would be scored solely on the vendor's proposed commission rate, which was based on the applicable calling rates and surcharges set by the County for collect, pre-paid collect and debit or inmate based pre-paid calls. R.R. at 1012a, 1041a.

Consistent with this evidence (and contrary to Schwartz' assertions), Michael Hamann, *Securus'* account manager, testified it was clear the County would score the vendors' proposals on their proposed commission offers only. Further, he agreed that no matter how many additional charges or fees were identified by a vendor, there would be no difference in the County's scoring of the vendors' financial offers under the terms of the RFP. R.R. at 390a-96a.

Nevertheless, as further support for his argument that the commission payable to the County included charges and fees, Schwartz points to the final sentence of Section IV(A) of the RFP. That Section states, in relevant part:

> Any additional fees to be added to the called party's bill or paid by the called party (including those associated with establishing/funding pre-paid collect accounts) for inmate telephone calls from the Facilities must be approved by the [sic] Allegheny County *prior to implementation*. Any charges/fees added to the called party's bill without the express written consent of Allegheny County shall carry a fine of five hundred dollars ($500.00) per day from the date the additional charges/fees were first added through the date the charges/fees were discontinued. Additionally, Vendor shall refund each

> called party for the unapproved charges/fees from the date the charges/fees were implemented until the date the charges/fees were discontinued. The additional fees/charges will be commissioned at the proposed commission rate and shall follow Section VII — Commission Payment and Reporting.

R.R. at 943a. Schwartz asserts the last sentence of this provision indicates that vendors were also required to pay commissions on fees and charges (in addition to the revenue generated by completed calls).

Contrary to this assertion, when read in context, the "additional fees/charges" referred to in the last sentence relate to the penalties for unapproved fees and charges set forth in the two preceding sentences. This interpretation is bolstered by Webb's testimony. Webb explained: "We told [the vendors] that they weren't allowed to charge fees without approval of the [C]ounty, and then we told them if they did charge fees that there would be a punishment which was basically a fine, the refund of fees and the bringing of a commission to the [C]ounty on the fees they charged they hadn't been approved." R.R. at 2137a (emphasis added).

In addition, the primary cases cited by Schwartz are distinguishable. Unlike Shaeffer[5] and Conduit,[6] this is not a case in which the successful bidder

[5] In Schaeffer v. City of Lancaster, 754 A.2d 719 (Pa. Cmwlth. 2000), we enjoined the award of a publicly bid contract to a bidder who violated bid specifications by offering the city a $1,200 "contract credit" that would effectively reduce its total bid and render it the lowest bidder. Id. at 721. We explained the successful bidder's inclusion of such a credit, which was not permitted by the bid specifications, conferred upon it an express competitive advantage over other bidders. This Court stated, "[o]nly if the [s]pecifications permitted the use of contract credits would the bidding have been fair and on a common basis." Id. at 723.

[6] In Conduit & Foundation Corp. v. City of Philadelphia, 401 A.2d 376 (Pa. Cmwlth. 1979) (en banc), we enjoined the award of a publicly bidded construction contract where the **(Footnote continued on next page…)**

unlawfully deviated from the bid specifications by availing itself of a purported ambiguity in the bid instructions and receiving a resultant unfair advantage. Rather, as the trial court preliminarily found, the RFP here clearly set forth a process through which bidders could state exceptions to the RFP, which VAC utilized. Moreover, as explained above, the trial court here made a preliminary finding that the evaluation committee did not interpret the exceptions language used by VAC as a deviation from the relevant RFP provisions.

(continued…)

lowest bidder listed alternative suppliers for the project's components, while all other bidders listed a single supplier for each component. After the bids were opened, the city contacted the successful bidder and allowed it to designate specific suppliers for the project's components. Determining the successful bidder received an unfair advantage, this Court held:

> The most reasonable interpretation [of the bid instructions] seemed to be that only one [supplier] listing would be permitted, and that was in fact how all the other bidders understood the instruction. The notice at best left room for an unfair advantage to be taken by a bidder. …
>
> Because the city's specifications have led the bidders to believe that only one listing would be permitted, and the city then accepted the low bid from the only bidder who made alternative listings, we believe that the case falls, by analogy, under the line of cases raising the issue, not as to the city's discretion, but as to whether a bidder had a competitive advantage in preparing his bid because of the city's incomplete or misleading bid specifications or the city's having negotiated after the formal bid-opening[.]
>
> Therefore, we agree that [the successful bidder's] multiple listing of subcontractors deprived this bidding of the statutory requisite of open competition, and was thus not such an irregularity as could be waived in the city's discretion.

Id. at 379-380 (citations omitted).

Further, this case differs from D'Eramo, in which we upheld the trial court's grant of a preliminary injunction enjoining the award of the inmate phone services contract for the Jail. In D'Eramo the trial court's supported determinations revealed several improprieties in the County's evaluation of proposals it received, including: (1) alteration of the mandatory award criteria; (2) manipulation of the scoring of the proposals; and, (3) elimination of one of the RFP requirements. Most notably, in D'Eramo, the trial court credited testimony that one of the members of the County's prior evaluation committee (who did not serve on the evaluation committee for the RFP at issue in the present case) was on a course to steer the contract to a particular vendor.[7]

[7] Schwartz also briefly points to the fact that the County's Executive Action approving the award of the contract to VAC included an indisputably false projection of the amount of commission VAC would provide to the County over the three-year term of the contract. In fact, Schwartz argues, the Executive Action contains an amount nearly $10 million higher than the County's actual current inmate telephone revenue. Rejecting this argument, the trial court stated, in pertinent part:

> Schwartz argues that the fact that the County Manager was provided with a false revenue projection before approving the award of the [c]ontract to VAC means that the award was arbitrary and capricious. VAC and the County argue that the mistake in the revenue projection, as it occurred after the Evaluation Committee had already decided to award the contract, had no influence on the award, did not convey any competitive advantage to VAC, and does not support overturning the award. …
>
> Schwartz … argues that the Courts must not condone a situation that 'reveals a clear potential to become a means of favoritism' under [Conduit], regardless of malicious intent or mistake, and for this reason the error in the request for executive action requires a preliminary injunction. While this correctly states the conclusion of Conduit, Schwartz fails to argue convincingly that the calculation error created a situation which made the process vulnerable to favoritism or fraud. The irregularity in Conduit gave a competitive advantage to one of the bidders and directly influenced the awarding of the contract in question. In the present case, however, VAC had already been found to be the highest-scoring vendor in the RFP process and the vendor which would provide

(Footnote continued on next page…)

For all the reasons stated above, we reject Schwartz's arguments on this point.

B. "Meeting of the Minds"

1. Contentions

Schwartz next argues the trial court erred in finding the contract between the County and VAC contained all necessary terms regarding compensation, gross revenue and fees. He asserts that, in order for there to be an enforceable contract, the nature and extent of its obligation must be certain; the parties themselves must agree on the material and necessary details of the bargain. Commonwealth v. On-Point Tech. Sys. Inc., 821 A.2d 641, 649 n.12 (Pa. Cmwlth. 2003); see also NVC Computer Sales, Inc. v. City of Phila., 695 A.2d 933, 936 (Pa. Cmwlth. 1997).

Schwartz maintains that compensation is a material term of a contract. See Hanisco v. Twp. of Warminster, 41 A.3d 116, 126 n.15 (Pa. Cmwlth. 2012).

(continued…)

> the County the greatest revenue from the phone contract. Given this, the County Manager had a fiduciary obligation to award the contract to VAC — it didn't matter whether VAC's expected revenue was three million or thirteen million. Consequently, the incorrect revenue projection gave no competitive advantage to VAC, and does not have a 'clear potential to become a means of favoritism.'

Tr. Ct., Slip Op., at 17, 19 (emphasis added). Our review of the record confirms that the mistaken revenue projection, which resulted from a mathematical error Webb made on an Excel spreadsheet (and was used by the County's purchasing agent without verification of the accuracy of the calculation), occurred after the evaluation committee selected VAC as the highest scoring vendor, R.R. at 2134a-35a, and, as a result, had no impact on the evaluation of the bids the County received.

No contract exists between the government and a bidder when the agreement lacks material terms such as compensation. See, e.g., On-Point Tech., 821 A.2d at 649 n.12.

Without any real discussion here, Schwartz maintains, the trial court held that the contract between the County and VAC contained the necessary terms regarding compensation, gross revenue and fees. Schwartz contends this was legal error.

To that end, Schwartz maintains, the trial court erred in finding there was a meeting of the minds between the County and VAC regarding the key terms of compensation, gross revenue and fees. The sole basis for this conclusion was the trial court's finding that VAC was "agreeing to any portion of IV(A) and (B) which it does not contradict." Tr. Ct., Slip Op. at 15. However, the trial court again never even mentioned, let alone analyzed, VAC's RFP exception language where VAC not only stated it would not comply with Sections IV(A) and (B), but went on to specifically contradict the RFP's requirements regarding compensation, gross revenue and fees. The record shows there could have been no meeting of the minds on the necessary terms regarding compensation, gross revenue and fees because the County had no idea what VAC was or was not agreeing to. Thus, the trial court should have found Schwartz's right to relief was clear because the contract between VAC and the County lacked the necessary terms regarding compensation, gross revenue and fees.

The County and VAC respond that, because, as set forth above, VAC agreed to the RFP's requirements, there were reasonable grounds to support the trial court's conclusion that there was a meeting of the minds between the County and VAC.

In reply, Schwartz contends the record reveals there was no meeting of the minds on all necessary material terms regarding compensation, gross revenue and fees. With little explanation, Schwartz argues, the County and VAC merely state there was a meeting of the minds. One need look no further than the contract to see that it lacks any material terms regarding compensation, gross revenue and fees and is therefore void. The contract incorporates VAC's RFP response where VAC indisputably refused to comply with the compensation, gross revenue and fees requirements in Sections IV(A) and (B) of the RFP. Thus, Schwartz asserts, there could be no meeting of the minds on these necessary terms.

2. Analysis

This issue is closely related to Schwartz's first issue. In particular, Schwartz contends the contract between the County and VAC incorporated VAC's alleged noncompliant RFP response to the RFP provisions concerning compensation, gross revenue and fees in Sections IV(A) and (B); thus, Schwartz argues, the contract lacks any material terms regarding compensation, gross revenue and fees and is, as a result, void. This argument fails.

"In order to form a contract, there must be an offer, acceptance, and consideration or a mutual meeting of the minds." Ribarchak v. Mun. Auth. of City

of Monongahela, 44 A.3d 706, 708 (Pa. Cmwlth.), appeal denied, 57 A.3d 73 (Pa. 2012). Without mutual assent of the contracting parties, a valid contract does not exist. Degenhardt v. Dillon Co., 669 A.2d 946 (Pa. 1996). A meeting of the minds requires the concurrence of both parties to the agreement, or they have failed to execute an enforceable contract. City of Erie v. Fraternal Order of Police, Lodge 7, 977 A.2d 3 (Pa. Cmwlth. 2009). Further, there must be a meeting of the minds on all terms of the contract. Id.

Here, in rejecting Schwartz's contention that there was no meeting of the minds between the County and VAC, the trial court stated (with emphasis added):

> Schwartz's allegation that the meeting of the minds required to make a valid contract was not present here is based in the following argument: when VAC responded 'Read and do not comply' to sections IV(A) and (B) of the RFP, it was stating that it would not comply with any part of those sections, and the text of the Exceptions Addendum replaced the sections entirely. There were many material terms in those sections which VAC did not discuss in the Addendum, either to agree with them or offer an alternative, as such, were Schwartz's interpretation correct, then the final contract lacked the terms and meeting of the minds necessary to be valid. VAC has countered this interpretation by arguing that an Exceptions Addendum is a place to discuss exceptions, not agreements, and as such its response is agreeing to any portion of IV(A) and (B) which it does not contradict. This Court finds it reasonable to interpret the responses as VAC proposes, an approach which is both logical and efficient, and believes that the County did so as well. Consequently, this Court finds that when the County awarded the contract to VAC it understood all the necessary terms of the contract, and there was a meeting of the minds.

Tr. Ct., Slip Op. at 15-16. No error is apparent in the trial court's determination.

As set forth above, with regard to the filing of an exceptions addendum, the RFP instructions state, in relevant part:

> If Vendor is in full compliance with the section or numbered condition, the appropriate response is, 'Read, agreed and will comply.' Otherwise, Vendor's response should state, 'Read and do not comply.' Any exceptions to this RFP, where Vendor's response is 'Read and do not comply' must be addressed in an Exceptions Addendum to Vendor's RFP response.

R.R. at 931a (emphasis added).

Here, our review of VAC's exceptions addendum reveals that VAC did not take exception to: the requirement that it pay commissions on gross revenue; the requirement that the County approve all charges and fees; or, the requirement that penalties would be assessed for charging fees without approval. R.R. at 1157a-58a, 1533a-34a. As a result, under the express terms of the RFP, as reasonably interpreted by the trial court, VAC accepted these requirements. Further, the record supports the trial court's preliminary determination.

To that end, Montanaro, VAC's representative, confirmed that, by not taking exception to these RFP requirements, VAC intended to comply with them. R.R. at 458a-59a. Also, as set forth above, Webb, the independent consultant who served on the County's evaluation committee, testified that he considered VAC's responses to Sections IV(A) and (B) in its exceptions addendum to be compliant with the RFP requirements. R.R. at 2138a. As such, both the County and VAC agreed that VAC's bid complied with the disputed RFP requirements and that VAC's exceptions addendum did not deviate from the RFP.

In short, because there are apparently reasonably grounds for the trial court's preliminary determination that there was a meeting of the minds on the disputed contract terms, we decline to disturb that determination.

For all the foregoing reasons, we affirm.

ROBERT SIMPSON, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Howard Schwartz, Appellant	:	
v.	:	No. 1769 C.D. 2013
Allegheny County, Pennsylvania and Value-Added Communications, Inc.	:	
Value-Added Communications, Inc.	:	
v.	:	
Securus Technologies, Inc. and The County of Allegheny	:	

O R D E R

AND NOW, this 23rd day of May, 2014, the order of the Court of Common Pleas of Allegheny County is **AFFIRMED**.

ROBERT SIMPSON, Judge