

Memorandum



Date: July 17, 2008

Agenda Item No. 12(B)2

To: Honorable Chairman Bruno A. Barreiro
and Members, Board of County Commissioners

From: George R. Burgess
County Manager

Subject: Report: Results of Arbitration with Airport Parking Associates

On September 18th, 2007, County staff recommended the Board of County Commissioners (BCC) award a competitively bid contract to the highest proposer, Airport Parking Associates (APA), to manage the public parking facilities at Miami International Airport. At that time, the Office of the Inspector General (OIG) was investigating allegations that APA had overbilled the County on its current contract with the Miami-Dade Aviation Department (MDAD). In light of the OIG's investigation, the Board deferred award of the contract to APA so that the OIG could finalize the investigation. Upon concluding its investigation of APA, the OIG report suggests that APA had overcharged the County for certain reimbursable expenses. Based upon the OIG's findings, MDAD decided to explore alternatives for the operation of the parking garages.

At its December 20, 2007 meeting, the Board did not approve the County Manager's recommendation that all four proposals received in response to a Request for Proposals for Non-Exclusive Operations of Public Parking Facilities at MIA be rejected in favor of operating the parking facilities in-house with County and temporary employees. The Board instead directed *"that the Miami-Dade Aviation Department Director be instructed to proceed with arbitration with the current provider, Airport Parking Associations (APA), to determine whether the contractor acted unethically or illegally by improperly billing the County; that the existing contract be continued on a month-to-month basis pending a decision from the arbitrator; that if the arbitrator rendered a decision determining the APA did not act in an unethical or illegal manner, the Aviation Department Director be instructed to enter into negotiations with APA; that if the arbitrator rendered a decision determining the APA acted unethically or illegally, the Aviation Department Director be instructed to enter into negotiations with the second-rated firm."*

Accordingly, APA and the County arbitrated this issue before George R. Canty, Jr. on March 26 and 27, 2008. At this arbitration, the County alleged that APA overbilled the County approximately \$600,000 (six hundred thousand dollars) from 1998 through 2007. These overbillings fall into three categories: 1) reimbursement for nonexistent 401(K) program payroll deductions (for APA workers not enrolled in the program); 2) reimbursement for workers compensation insurance at a higher rate than was actually paid by APA; and 3) reimbursement for general liability insurance in excess of market rate. APA denied these allegations, and argued that County staff was aware of the nature of these charges.

On June 5th, 2008, the arbitrator ruled that APA's conduct, while troubling, was neither illegal nor unethical. The arbitrator did find, however, that the County had been "taken advantage of," and suggested that the appropriate course of action would be for the County and APA to negotiate the repayment of some or all of the overbilled amounts.

Unless the Board directs us differently, we will bring the negotiated contract with APA to you for your approval.

Assistant County Manager

**COUNTY ATTORNEY
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MEMORANDUM

TO: Ysela Llort
Assistant County Manager
Stephen P. Clark Center, #2910
Miami, Florida 33128

FROM: David M. Murray 
Assistant County Attorney

DATE: July 9, 2008

SUBJECT: *In the Matter of the Arbitration between Miami Dade County Miami Dade
Aviation Department, Claimant
and
Aviation Parking Association, Respondent
Case No. 32 195 Y 00123 08*

Attached for your review is a copy of the Award of Arbitrator issued on June 5, 2008 by the American Arbitration Association in the above-referenced matter.

DMM:ram

Attachment

American Arbitration Association
Commercial Arbitration Tribunal

In the Matter of the Arbitration between

Miami Dade County Miami Dade Aviation Department, Claimant
-and
Aviation Parking Association, Respondent

CASE NUMBER 32 195 Y 00123 08

AWARD OF ARBITRATOR

I, THE UNDERSIGNED ARBITRATOR, George R. Canty, Jr., having been designated in accordance with the Claimant's DEMAND FOR ARBITRATION dated February 8, 2008 rendered pursuant to the provisions of a certain Resolution dated December 18, 2007 of the County Board of County Commissioners of Miami Dade County (MDBCC"), subsequently agreed to by Respondent Aviation Parking Association ("APA,"), to determine if the Respondent had been remiss in its performance of its duties and obligations under a certain Nonexclusive Management Agreement for Operation of the Public Parking Facilities Miami International Airport (the "Agreement") and having considered the evidence and heard the arguments presented by the parties at the Evidentiary Hearings conducted in Miami, Florida on March 26 and 27, 2008, and the Exhibits and Post-Hearing Briefs tendered by both parties, DO HEREBY FIND as follows:

1. Arbitrator's Authority.

By agreement of the parties, the Arbitrator has been charged to determine if the Respondent had been guilty of unethical or illegal activity (or, in the words of the MDBCC, "illegal or guilty of taking advantage of Claimant in its billings to the Claimant for reimbursable expenses, such as Workmen's Compensation, General Liability Insurance and Plan 401-k retirement plan contributions in the course of its performance under the Agreement, but not to adjudicate financial damage payments, such issues to be resolved by a later negotiation between the parties. However, by further agreement of the parties at a Preliminary Hearing held on March 6, 2008, the Arbitrator was authorized to offer non-binding damages comments.

2. The subject matter. The Agreement, formed in 1997 for a 5-year term, and extended for further periods to the present (presently on one month term extensions pending the MDBCC's consideration of the extant dispute.

3. Background.

a. The Agreement.

The Miami-Dade Aviation Department ("MDAD") on January 23, 1997 entered into a Nonexclusive Management Agreement for the Operation of the Public Parking Facilities Miami International Airport (the "Agreement"). This Agreement was for an initial term of five (5) years, has since been extended, and while subject to possible renegotiation, remains in full force and effect pending the MDBCC's consideration of this Award.

The Agreement's purpose is to set forth the terms and conditions pursuant to which the Respondent would manage the multi-level parking facilities at the Miami International Airport (MIA), its toll plazas, revenue entrances and exits, and collect, account and remit to the Claimant all revenues earned at the Parking Facilities. For such services the Respondent is to be paid, pursuant to Art. 4.01 of the Agreement, a monthly management fee of Six Thousand Dollars, and pursuant to Art. 4.02 of the Agreement submit to the Claimant a Monthly Revenue/Expense Report ... summariz[ing] .. Reimbursable Expenses and serving as a monthly Reimbursable Expense Invoice to the Claimant.

More specifically, the Article goes on to define Reimbursable Expenses as "operating budgeted expenses incurred by the Respondent in the operation of the facilities .. and such further expenses as are approved by the Project Manager in writing, and that "original documentation of reimbursable expenses shall accompany the Monthly Revenue/Expense Report". The Article also provides that "the Project Manager shall have the right, as deemed necessary, to verify amounts claimed in the Monthly Revenue/Expense Report" and sets forth a formal expense disputes procedure.

Other provisions in the Agreement pertinent to this dispute include

- Art. 3.07 providing for annual MDAD audits;
- Art. 3.08 providing for MDAD's right to audit;
- Art. 3.12 relating to Respondent's provision of related party purchases and services; and
- Art. 14.01 governing Respondent's insurance provision requirements.

b. The conduct of the parties.

The record indicates that from the inception of the Agreement, the MDAD Landside Department's Project Manager, who been had designated as MDAD's coordinator with the Respondent, had been very satisfied with the Respondent's operational performance. As a result of this comfort level, the Project Manager tended to accept, without challenge, the Respondent's Annual Budget, and to approve for payment, also without challenge, all the Respondent's monthly Expenditure Reimbursement Requests (even when marked as "estimated").

Further, no problem areas in respect of Respondent's Expense Reimbursement Requests were detected in the course of MDAD's annual audits of Respondent's accounts throughout the term of the Agreement, and a further audit by an outside accounting firm during the year 2006 did not reveal any adverse findings.

c. the Respondent's Expense Reimbursement Requests.

These included, *inter alia*, requests for the reimbursement of moneys expended for

- i. Workmen's Compensation insurance premiums; These were calculated in accordance with a statutorily imposed formula;
- ii. The satisfaction of MDAD's matching payment obligations to its 401-k Retirement Plan participating garage employees. These were calculated in accordance with the *estimated* percentages rendered by the Respondent.
- iii. Comprehensive General Liability Insurance (CGL). Up to 2006, the Respondent had pursued a two layer program, self-insuring for the first layer of \$350,000, and purchasing insurance covering the second layer from an independent insurance company. Accordingly, Respondent's CGL Expense Reimbursement Requests effectively were a combination of the amounts charged by the Respondent and the independent company. This two-stage program was terminated in 2006, when Claimant caused the commencement of a new total "first dollar" CGL insurance policy from an independent company.

d. As at 2006, the Agreement remained in full force and effect, without any operational problems then apparent. The workmen's compensation and 401-k Employee Retirement Plan Expense Reimbursement programs (the former, from the Agreement's inception, and the latter from 2002), remained in their original Expense Reimbursement mode, the Requests being routinely approved by the Laneside Project Manager. However, the general liability policy coverage had in 2006 been transferred from a two-step (the first layer coverage of \$350,000 and a second layer covering exposures beyond that level), to a single total coverage policy by an independent insurance company

e. The Miami-Dade OIG Investigation.

During the year 2006, MDBCC, after receiving a number of anonymous telephone calls questioning the expense reimbursement charges being made by garage operators to other Miami-Dade public institutions, instructed its Office of Inspector General (OIG) to examine whether, and to what extent, any Expense Reimbursement overcharges were being made by the Respondent to MDAD in the performance of the Agreement.

OIG was directed to focus its examination on the three above referenced areas, of Workmen's compensation, 401-k employee retirement plan and general liability insurance payment reimbursements. Overall, the OIG found problems in each of these areas, prompting MDBCC to determine to submit to arbitration the questions as to whether the Respondent had been guilty of illegal/unethical conduct and/or whether the Claimant had been "taken advantage of".

4. Discussion. First generally, and then as to the three above cited areas.

a. Generally, there was found to be a close working relationship between the Respondent's airport garage supervisory personal and the MDAD Project Manager, who had formed a strong sense of comfort with Respondent growing out of its performance under the Agreement, which had influenced the Project Manager to summarily approve Respondent's Expense Reimbursement Requests, without first availing of the documents review and like capabilities provided under Art.4.02 of the Agreement and consulting with MDAD specialists (e.g., Risk Management, Finance, Legal) in respect of areas in their expertise.

Similarly, MDAD had permitted its audits to be conducted by auditors without such expertise.

This problem appears to have been corrected with the transfer of the Expense Reimbursement Request approval responsibility to another MDAD function, together with the more active participation in the process of the MDAD Risk Management and Finance functions.

b. Going on to the three above referenced major areas of concern,

While it found that the Respondent had made available to the MDAD Project Manager the necessary documentation supporting its Expense Reimbursement claims, the OIG's more intensive scrutiny, assisted at this point by MDAD management, found problems in all of the above referenced areas.

i. Workmen's compensation. That at a certain point in time, the Respondent did not continue to make differing charges for the clerical and garage personnel, but began to set charges at the same rate for both categories. (i.e., not charging at a lower rate for the clerical), and further, improperly including overtime in the overall calculation base.

ii. 401-k employee retirement plan contributions, that Respondent had applied an *estimated* rate of 2.5%, rather than the lower 2.2% rate determined to be appropriate to the MDAD garage employee group.

- iii. General comprehensive liability insurance. That while not as susceptible to mathematical calculation, that the Respondent's charges during the eight years the Respondent's two-tier program had been in effect had been substantially in excess of the present single tier policy charges.

It would appear that the alleged overcharges in the first of these two areas are readily susceptible to mathematical calculation, and that a major underlying factor in their happening had been the administrative oversight lapses of the MDAD staff who had been charged with the Respondent's supervision, with authority to approve, question or disapprove Respondent's Cost Reimbursement Requests, in not submitting these Requests to MDAD professional staffs for comment and further approval. This practice has been revised and Reimbursement Requests are now being handled by a different MDAD function, not in daily contact with Respondent personnel, with the active involvement also of both the MDAD Risk Management (as to insurance charges) and Finance function (as to budget matters).

The comprehensive general liability insurance program has been altered, with one outside carrier handling this area on a so-called "first dollar" (i.e., one tier) basis. The amounts being charged MDAD for this coverage have been materially reduced, and this no longer appears to be a problem area.

Nonetheless, during the eight year period during which the Respondent had provided two-tier coverage, there were periods when no "first dollar" coverages were available from the insurance industry due to such factors as the carriers' reluctance to quote rates for such reasons as their underwriters' unwillingness to undertake future risks which might be encountered from Florida hurricanes, 9/11 airport security debacle problems, in turn making it difficult to make a precise comparison between the Respondent's self-insurance and publicly available rates.

Two discouraging aspects respect the Respondent's corporate affiliate having reported in its public documents that the provision of airport garage general liability insurance constituted a major earnings source/profit center, and the substantial differences between the amounts which been charged by Respondent and the new carrier for like overages.

The Arbitrator's Findings

1. As to the areas of workmen's compensation and, 401-k employee retirement plan contributions, there have been no acts amounting to illegal acts, acts of misconduct or intentions "to take advantage of". Rather, despite the failure of the Claimant's own administrative staff to have timely challenged disputed amounts in the manner proscribed by Art 4.02, there would be no reason why Respondent's now-disputed Requests might be again reviewed, and issues thereby resolved (or, in the language of the MDBCC, negotiated") in the spirit of Art. 4.02.

2. As to the area of general comprehensive liability charges, there is clear evidence that at times "first tier" coverage was not readily available, and that even in good times, that premium levels are a matter to be negotiated between an insured's agent or Risk Manager, with different carriers quoting different rates, and accordingly not susceptible to precise mathematical valuation computations as in the instance of the above referenced workmen's compensation and 401-k employee benefits plan areas.

Nonetheless, while the Arbitrator finds that he has not been offered clear evidence that the Respondent had acted illegally in the charging for its first-tier coverage, the reference in its affiliate's public documents filings to the character of its garage general comprehensive insurance business as a major earnings source/profit center, the substantial lower charges recently obtained from its new carrier, and the knowledge that the Project Manager regularly did not submit the Respondent's charges to the MDAD Risk Manager for review are factors which have prompted the Arbitrator to have formed a strong sense

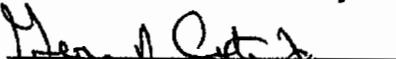
that the Respondent had capitalized on its "sole source" position to have charged amounts quite likely substantially in excess of its Agreement cost recovery entitlements, effectively rendering the Claimant in a position of "having been taken advantage of".

Given that the Claimant now has a more acceptable CGL insurance policy in place, and the satisfaction demonstrated with Respondent's dependable airport garage management performance, the Council may wish to refer this matter to negotiation with the active involvement of the parties' insurance professionals.

Further, the Arbitrator finds

1. That the parties shall each bear the fees and expenses of their respective attorneys.
2. That the administrative filing and case service fees of the AAA totaling \$8,500.00 shall be borne equally by the parties.
3. That the fees and expenses of the Arbitrator totaling \$9,718.17 shall be borne equally by the parties.

SO BE IT ORDERED this 5th day of June, 2008


George R. Canty, Jr. Esq., Arbitrator