UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DETENTION WATCH NETWORK and CENTER FOR CONSTITUTIONAL RIGHTS, Plaintiffs, v. UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT and UNITED STATES DEPARTMENT OF HOMELAND SECURITY, Defendants.	14 Civ. 583 (LGS) **DECLARATION OF RONALD E. GATES**

I, Ronald E. Gates, pursuant to 28 U.S.C. § 1746, declare as follows:

1. My name is Ronald E. Gates, Vice President of Business Development and Contract Administration, Asset Protection & Security Services, LP (APSS). In this capacity, I am responsible for preparing technical and pricing proposals in response to government solicitations. I submit this declaration based on my personal knowledge in support of the motion by the U.S. Department of Homeland Security, Immigration and Customs Enforcement (DHS-ICE) in the above-captioned action to protect certain information in contracts between APSS and ICE pursuant to FOIA Exemption (b)(4), namely the bed-day rates and staffing plans associated with those contracts.

COMPANY BACKGROUND

2. APSS was founded in 1994 and is currently a mid-size security company that provides armed and unarmed security services to the Federal Government and primarily to ICE, at its various government-owned detention facilities. At these facilities, we provide program managers, training officers, armed and unarmed detention officers and armed ground transportation officers.

3. APSS currently provides these services as the Prime Contractor at the Florence Service Processing Center, in Florence, Arizona (November 2009 to present); as a Subcontractor (detention and transportation) at the Port Isabel Detention Center, in Los Fresnos, Texas (February 2015 to present); and is currently scheduled to assume Subcontractor services at the El Paso Service Processing Center, in El Paso, Texas, in December 2015.

4. APSS has previously served as the Prime Contractor at the El Centro Service Processing Center, in El Centro, California (July 2009 – September 2014); the Port Isabel Detention Center (July 2001 – July 2008, and as a Subcontractor, August 2008 – January 2015); and the Buffalo Federal Detention Facility, in Batavia, New York (April 2003 – November 2009). We also previously served as a Subcontractor at the Varick Federal Detention Facility in New York City (January 2008 through February 2010); and as a Subcontractor for Transportation Services within DHS-ICE's San Antonio Field Office Area of Operations (August 2012 through October 2013).

5. In providing services to DHS-ICE, as required by applicable rules, APSS (when the Prime Contractor) subcontracts with small and what are known as "disadvantaged" (i.e., women-, minority-, or veteran-owned) business (SDB) contractors to provide a percentage of detention officers and food services for the facility.

6. In all of ICE's "owned facilities", contractors are required to perform services in accordance with Performance Based National Detention Standards (PBNDS) and American Correctional Association (ACA) Standards. In addition, we are required to meet OSHA safety standards, Food and Drug Administration Standards, and various state licensure requirements for companies and employees.

7. APSS has been fairly successful in maintaining its contracts in follow-on competitions.

   a. **Port Isabel Detention Center (PIDC):** In 2008, due to APSS growth and increase in size from small business status, we paired with an SDB and were successful in obtaining a successor contract from 2008 through 2014. In 2014, we paired with another SDB and obtained a successor contract in late 2014, which is currently scheduled to run through 2021.

b. **El Centro Service Processing Center (ECSPC):** The government closed the facility in September 2014.

c. **Varick Federal Detention Facility (VFDF):** The government closed the facility in 2010.

d. **Buffalo Federal Detention Facility (BFDF):** APSS made the finals of the competition but was not awarded the contract, primarily due to price.

e. **Florence Service Processing Center (FSPC):** APSS is currently serving on a contract extension until such time as the government re-competes the contract, which is currently scheduled for early 2016.

f. **El Paso Service Processing Center (EPSPC):** This contract was just awarded to an SDB with APSS participating as a Subcontractor.

g. **San Antonio Field Office Transportation (SNA):** APSS and an SDB submitted a recent proposal for a successor contract that has yet to be awarded.

GOVERNMENT CONTRACTS

8. APSS competes against several large and small businesses for DHS-ICE contracts to provide services at ICE owned detention facilities. It should be noted that DHS-ICE currently owns only five detention facilities: FSPC, BFDF, PIDC, EPSPC, and the Krome Service Processing Center, in Miami. Additionally, in the recent round of proposals, DHS-ICE extended the contract lengths from 5 years to 7 years (BFDF, PIDC) to 10 years (Krome). This creates very competitive bidding for providing services at ICE detention facilities, as the opportunities come up less frequently.

9. APSS's main competitors are: Akal (leading company in providing Court Security Services and Detention services); Akima/Akal (SDB; current SDB Prime/Sub in BFDF and Krome); Doyon (SDB; former Prime at EPSPC); Ahtna Technical Services, Incorporated (APSS's former small business Prime at PIDC); Ahtna Support and Training Services, LLC (APSS's current small business Prime at PIDC); GEO Group (leading private prison company); and G4S (leading private prison company).

10. ICE, in the current round of proposals for its own-detention facilities (2013 to present), has imposed price limits for the first time since APSS began competing for these types of contracts

in 2001. This was done in part to induce lower prices from competing contractors as well as to force creative technological solutions to the detention environment, that would further reduce price.

11. Pricing is based on either an aggregate Cost Line Item per month or on a "per detainee per day" rate. The recent contracts are all firm fixed-price "aggregate" cost contracts, not directly based on the detainee population. The government requires the contractor to price based on minimum "guarantees" of total population and the contractor's estimate of staffing required to provide services while meeting PBNDS/ACA Standards.

12. When pricing these contracts, APSS must first develop a staffing plan based on all required security posts (from an "example" provided by the government). Then we must pare down our staffing in order to be competitive by substituting technology where possible (such as additional remote surveillance cameras and electronic wrist bands). Once staffing is determined, our pricing is based on anticipated "productive" (i.e., working) hours based on the applicable collective bargaining agreements' listed hourly wages and benefits (e.g., health insurance and pension), and anticipated "unproductive" hours such as vacation, sick leave, and training. In addition to direct employee costs, we must take into account employer-paid employment taxes and insurance, General & Administrative (G&A) costs, and profit. (G&A costs include corporate expenses such as salaries, mortgage, utilities, legal fees, office supplies, general liability insurance, and other overhead expenses not directly attributed to a contract. Profit is the fee charged for contract labor and direct expenses related to the contract. A contractor's G&A and profit markups are highly sensitive information which could be extrapolated by a competitor knowing either the aggregate price or individual bed day or hourly fully burdened labor rates.) These aggregate costs are then divided by the "guaranteed" number of beds per year to derive a

"bed day rate"; or, in the current round, added together and divided by 12 months to get a monthly firm fixed rate.

SAMPLE CONTRACT

13. I understand that the parties have selected an APSS contract as a sample for use in this litigation. APSS (as the Prime Contractor) was awarded contract #HSEDM-09-D-00003 for providing Detention (i.e., correctional officers), Transportation, and Food Services at the Florence Service Processing Center in May 2009. The specific sample contract document, labeled as Contract Document 6 (Bates number ICE2014FOIA03585.017352-54), represents a June 1, 2009, modification of the approved contract to incorporate a wage increase ordered by the U.S. Department of Labor. After a delay caused by a bid protest from the previous contractor, APSS assumed contract services on November 1, 2009. The original contract was due to end on October 31, 2014; however, ICE has extended it from November 1, 2014, to the present. We understand that the government is preparing to re-compete the contract, and should issue a Request for Proposals before the end of 2015.

14. APSS was told that it was awarded the contract in 2009 due to it offering the "best value" and "low price". In the proposal process, APSS displaced the then-current contractor Akal Security, which had held the previous contract for the facility for the previous 5 and a half years. APSS's staffing strategy (which contributes to over 75% of the final contract price, coupled with our competitive markups for overhead (G&A) and profit margins and competitive pricing for the newly established transportation function) contributed significantly to APSS's success in the procurement.

15. Contract pricing was based on ranges of "bed days" (i.e., detainees per day). Since FSPC has a capacity of 748 detainees, bidders were asked to provide a price for staffing the facility when it is holding 1-374 detainees and a price for 374-748 detainees. (The minimum bed days provided

in the contract do not reflect the actual number of detainees that will be housed in the facility, but rather the minimum number of detainee bed-days for which the contractor will be paid, regardless of whether there were fewer detainees present. Since contract performance in a detention center involves the staffing of a certain minimum number of posts per day (which in this case the government provided), APSS determined that the same level of staffing was necessary whether the facility held 200 detainees or 700. In other words, all required functions (security, transportation, food service) are to be performed each day, almost regardless of the facility population. In this instance, APSS determined that all costs would be divided by the aggregate minimum guaranteed population for the higher detainee range, or 374 detainees. For example, if $1,000,000 were the total cost, the bidder would divide its total costs by 374 detainees x 365 days, or 136,510 "bed days", to derive its bed day rate (thus, $1,000,000/136,510 = $7.32 per detainee per day). Transportation Services were proposed via a separate Cost Line Item at an hourly rate, plus a Cost Line Item for mileage. Additional Cost Line Items were provided for Transportation "overtime" labor.

16. The bed-day rates included in the final contracts are the same as those included by the contractor in the initial bid. Similarly, the staffing plans often attached to the final contracts are those submitted by the contractor in connection with its bid.

17. If the bed-day rate or any of the cost "variables" are publicly disclosed, APSS's competition could easily determine, through extrapolation, APSS's mark ups for overhead and profit. Our competitors could use known variables such as wages set by DOL order or CBA and payroll taxes, as well as easy to estimate costs such as uniforms, equipment, and materials (which are generally sourced from national vendors), to estimate our overhead/profit pool. Disclosure of the "final" numbers in Cost Line Item prices would thus disclose APSS's pricing strategies and enable the competition to determine our price and then price their proposals lower.

COMPETITION FOR GOVERNMENT CONTRACTS

18. My understanding is that although the government conducts proposal evaluations on a "best value" basis, where price is less important than a contractor's technical approach, the recent implementation of cost limits in my view tilts the landscape towards "price" becoming an increasingly important factor. This was evidenced in our bid for the Krome Service Processing Center in 2013: Our technical proposal was rated higher than the winning proposal submitted by Akima/Akal, and yet APSS and its SDB Prime Contractor partner were not awarded the contract due to our higher price. While the bidder with the lowest price has not always "won" recent competitions for ICE contracts, we believe that the lower the price the greater the chance of a contract award.[1]

19. In these contract competitions, all cost elements are competitively priced, with the exception of wages controlled by collective bargaining agreements, which exist at all DHS-ICE owned facilities. Each bidder must bid the "minimum" hourly wage rates as listed in the CBA for the base period; and the only "competitive" factor is the level of management staffing, supervisor staffing (if not under a CBA), and markups for General & Administrative costs and profit on labor and other direct cost elements.

20. Pricing varies widely in competitions, based on the various bidders' understanding of government requirements. However, a spread of just a few million dollars between the winning contractor and the next lowest price (and so on down the ladder) is not uncommon. Considering that most DHS-ICE detention contracts are above the $200 million aggregate range,

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[1] The competitive landscape is not limited to contracts with ICE for detention facilities. In a recent competition by U.S. Customs and Border Protection, like ICE a component within DHS, APSS underbid the incumbent, G4S, by over $3 million on a $200 million contract to provide Transportation Service all along the Southwest Border Region (California to Texas). APSS's technical approach was graded in a virtual "tie" with G4S, but the final decision was based on the difference in price not being substantial enough to risk taking on a new contractor. This emphasizes the importance of pricing in DHS contract competitions.

$4 million is only a 2% differential between winning and losing. If the winning bidder's bed day rate is $150.00 per day, the next lowest price might be $153.00. While total price is subject to public disclosure, it is detrimental to contractors to disclose individual Cost Line Item "hourly" rates, as such a disclosure could be used to reverse-engineer a contractor's pricing strategy due to "known factors" such as the base hourly rates listed in the CBAs.

21. Though one might think incumbency would provide a company in such a position with a "leg up" on the competition, that is seldom the case. In the recent round of competitions (Krome, BFDF, PIDC and EPSPC):

    a. Krome: The large business subcontractor (Akal Security) split from its former SDB Prime Contractor (Doyon Limited) and paired with a different SDB (Akima Global Services, LLC) to displace Doyon Limited.

    b. BFDF: Akima Global Services, LLC (and large business partner Akal Security) displaced the incumbent, Valley Metro Security, LLC (SDB)/Barbosa Group (large business partner).

    c. PIDC: Ahtna Support and Training Services (ASTS)/APSS (incumbent subcontractor) won the successor competition from Ahtna Technical Services, Inc. (ATSI)/APSS. (Ahtna Technical Services, Inc., was not eligible to compete as an SDB, and therefore Ahtna Inc. (SDB) substituted ASTS for ATSI.)

    d. EPSPC: Global Precision Systems LLC (SDB)/APSS displaced Doyon, Limited/Akal Security.

LIKELIHOOD OF FINANCIAL HARM

22. If individual bed day rates were disclosed to our competitors, it is likely that APSS would suffer a substantial competitive injury, as APSS's pricing strategy could be quickly reverse engineered, as two cost line items are present in each contract (in addition to bed-day costs, whether per-bed or aggregately priced): (i) Stationary Guard Service cost line item calls for hourly pricing for "extra" guards; and (ii) Transportation Hourly Rate and/or Overtime Rate.

23. Knowing these hourly rate "variables" would enable the competition to determine APSS's overhead, G&A, and Profit ratios to fixed (CBA) hourly rates. For example, if the CBA hourly rate

for Detention Officers is $20.00, and APSS's overall hourly rate is $30.00, a competitor would subtract fixed FICA rates (7.65%) from the $30.00 to determine APSS's markup for the hourly rate ($20.00 x 7.65% = $1.53; $30.00 - $1.53 = $28.47; $8.47 = markup for overhead, G&A and profit). Then, by reviewing the CBA or DHS-ICE's request for proposal for items like uniform or equipment requirements, a competitor could determine our overhead (for example, $250 for uniforms/2,080 hours worked per employee per year = $0.12 per hour, per employee; other required equipment (office, computers, tablets, etc.): $0.25, etc.), until only G&A and profit remained.

24. In an aggregate pricing scenario, disclosure of the firm fixed price for detention services would enable a competitor to reverse engineer our pricing as well, especially if the staffing plan were also revealed to the competition. The staffing plan is required to be provided in the technical proposal; therein, the bidder lists each position it intends to provide and the numbers of employees and productive hours provided by each type of employee. Again, by using the CBA hourly rates as a "fixed" variable (apples to apples), a competitor could quickly distinguish our "labor costs" from the "overhead" costs and cut its pricing based on these calculations. Knowing how to "staff" a detention facility is critical "proprietary" information, and while one company might staff differently from another, providing this information to the competition would irreparably impair APSS's "experience" factor gained by 15 years' experience in the DHS-ICE detention environment, and thus it would likely cause APSS a substantial competitive injury-.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 17th day of December 2015, in Corpus Christi, Texas.

Ronald E. Gates
Vice President, Business Development and
Contract Administration
Asset Protection & Security Services, LP