In the Matter of Arbitration Between	:	
	:	
AMERICAN FEDERATION OF STATE, COUNTY	:	
AND MUNICIPAL EMPLOYEES,	:	
DISTRICT COUNCIL 89	:	BOM No. 2014-0662
	:	
AND	:	Subcontracting Bargaining Unit
	:	Work
SCHOOL DISTRICT OF LANCASTER	:	
	:	

OPINION AND AWARD

Hearing:

September 23, 2015 and December 10, 2015
Harrisburg, Pennsylvania

Appearances:

For AFSCME, District Council 89:
John R. Bielski, Esquire
Willig, Williams & Davidson

For School District of Lancaster:
Robert M. Frankhouser, Jr., Esquire
Barley Snyder, LLP

Before:

Lynne M. Mountz
Impartial Arbitrator

PROCEDURAL HISTORY

The instant dispute arises from a grievance filed by the American Federation of State, County and Municipal Employees, District Council 89 ("AFSCME" or "Union") alleging that the School District of Lancaster ("District") violated the terms and conditions of their collective bargaining agreement ("CBA") when it subcontracted bargaining unit work. (Exhibit J-2).

The matter, remaining unresolved between the parties, proceeded to arbitration before the undersigned at hearings held on September 23 and December 10, 2015. During the hearings, the parties were provided full opportunity to present testimony, examine and cross-examine witnesses, submit documentary evidence and make oral arguments in support of their respective positions.

The parties elected to file post-hearing briefs with the Arbitrator. Those briefs were timely filed whereupon the record was closed. The matter is now ready for disposition.

RELEVANT CONTRACT PROVISIONS

ARTICLE 1 - RECOGNITION OF UNION
DEFINITIONS:[1]

A. The School District of Lancaster, hereinafter "District", hereby recognizes Local 1758, affiliated with the American Federation of State, County and Municipal Employees, AFL-CIO, and its District Council 89, hereinafter "Union", as the sole and exclusive representative for the purpose of collective bargaining with respect to wages, hours and other conditions of employment for the employees of District included within a bargaining unit comprised of all secretarial/clerical, custodial/maintenance, food services, assistants/para-educators, health services and technical employees, as determined by the Pennsylvania Labor Relations Board in its Nisi Order of Certification, case no. PERA-A-1098-C, dated September 3, 1971, as amended, excluding supervisors, first level supervisors and confidential employees as defined in Act 195.

[1] Exhibit J-1, pp. 4-5.

In connection with the District's goal of reducing costs, improving efficiency, and increasing productivity, the District may utilize persons who are not employed by the District to provide work and/or services which are, or could be, performed by District's employees. However, the District agrees that it shall not contract or enter into volunteer agreements for any work, which is as July 1, 2005 being performed by bargaining unit employees without meeting the following criteria:

1. The District must demonstrate that contracted or volunteer services will provide the same or improved operational efficiencies. The District must supply the Union with all documentation relative to the contracted services, including all costing and other data.

2. The District may not utilize contracted or volunteer services if the Union provides an alternative plan to effect substantially the same cost savings and partnership relationships that would be obtained through the contracted or volunteer services.

3. Any employee who is displaced as a result of the District contracting for work or services or utilizing volunteer services will be offered, for a period of no more than fifteen months following his/her displacement, any vacant position in the district for which he/she is qualified.

ISSUE

Whether the District violated Article 1, Section A.1 of the CBA when it subcontracted bargaining unit work?

FACTUAL BACKGROUND

The subcontracting language in the current CBA, set forth above, was first negotiated by the parties and incorporated in the collective bargaining agreement in effect from 2002-2005.[2] (N.T. 130-133; Exhibit U-28). The language remained in the collective bargaining agreements in effect from 2005-2008 and 2008-2012. (N.T. 128-130, 133; Exhibits U-1, U-27). During the

[2] The only change is that the original language contained the date "July 1, 2002" in the second paragraph. The change was made to reflect "July 1, 2005" in the successor CBA and remains the same in the current CBA.

terms of the first two of these agreements, the District did not seek to subcontract any bargaining unit work.

In March 2011, the District notified the Union that it was considering subcontracting custodial and building engineer positions to an outside vendor. (N.T. 25-26, 222; Exhibit U-2). The District issued a Request for Proposal ("RFP") for custodial services on or about April 26, 2011. (Exhibit U-4).

On or about May 13, 2011, GCA Services Group ("GCA") submitted a proposal in response to the District's RFP. (Exhibit U-5). GCA was one of four bidders that the District determined to be qualified. (N.T. 241-243; Exhibit School District 1). After completing the interview process, the District selected GCA on the basis of their credentials and their cost analysis. (N.T. 244-245).

The District, however, did not subcontract with GCA at the time. (N.T. 31, 245-246). After a series of negotiations, the District and the Union entered into an "Extended Negotiations Agreement" that was effective from July 1, 2011 through June 30, 2013. (Exhibits U-6, U-7). Pursuant to that Agreement, the parties agreed, in relevant part to: (1) a wage freeze for bargaining unit employees from July 1, 2011 through June 30, 2013; (2) a staffing level of 86 building engineers and custodial workers; and (3) the District would not outsource any bargaining unit positions from July 1, 2011 through June 30, 2013. (N.T. 31, 222-223, 246-247; Exhibits U-6, U-7).

The parties successfully negotiated the terms of a successor agreement, the current CBA, in the spring of 2013. (N.T. 35). During the negotiations that led to the current CBA, both parties submitted proposals regarding subcontracting language. (N.T. 35-40; Exhibits U-8, U-9).

Neither proposal was accepted and the subcontracting language that had last been in the 2008-2012 agreement was reinstated. (N.T. 40, 225-226; Exhibit J-1).

At its meeting on February 18, 2014, the District's Board of School Directors ("Board") authorized Matthew Przywara, Chief Financial and Operations Officer, to solicit proposals for contracted services for classifications of employees that included: assistant/para-educator, health services, maintenance/custodial, and management staff. (N.T. 247-249; Exhibit U-43).

By correspondence dated March 12, 2014, an Administrative Assistant to Mark Holman, Human Resources Director, advised Ed Potts, District Council 89 Representative, and Luz Tiru, Local Union President, that the District was looking at proposals to outsource some of its services under the CBA. At the time, they were considering the possibility of outsourcing positions through attritional losses. (Exhibit U-10).

Mr. Przywara contacted GCA and asked them to update the proposal they had submitted in the spring of 2011. (N.T. 249-250; Exhibits U-11, U-12). On or about June 5, 2014, GCA provided the District with an updated proposal. (Exhibit U-16). Mr. Przywara then provided the Union with a cost analysis to reflect what the District considered to be the annual savings in the 2014-2015 and 2015-2016 school years that would result by contracting custodial services[3] with GCA. (N.T. 250-252; Exhibit U-15).

Throughout the next several months, the parties engaged in negotiations regarding the District's plan to subcontract the custodial work. The District's negotiators were Mr. Przywara,

[3] The term "custodial services" is used throughout as a matter of convenience and, unless specified otherwise, is meant to include all of the positions that were affected in this dispute. Those positions are building engineers, groundskeepers and custodians.

Mr. Holman and Attorney Michael King. The Union negotiators were District Council 89 Director Michael Fox, Mr. Potts and Ms. Tiru.

On or about July 7, 2014, the District provided the Union with a proposal to enhance the benefits and wages to those employees that elected to work with GCA and to waive the contractual notice requirement for retiring employees to receive post-retirement health benefits. (Exhibit U-33).

On or about September 23, 2014, the District provided the Union with another proposal. In this proposal, the District agreed that its contract with GCA would require that GCA offer employment to all incumbent employees who are in good standing and who are eligible for hire under all applicable provisions of law. The District also provided for an increase in the enhanced wage rates and benefits it had previously proposed in July. (Exhibit U-19). Along with its proposal, the District provided a cost analysis to reflect the annual savings in years 2014-2015 and 2015-2016 if it contracted custodial services with GCA, including the proposed wage and benefit enhancements. (Exhibit U-20).

Also on September 23, 2014, the Union presented a counterproposal to the District. Pursuant to this proposal, the Union sought: to expand the payment of accrued leave to the affected employees; to insure that employees who accepted jobs with GCA would be full-time at 40 hours per week; and to further increase the wage rate and health benefits to the affected employees. (Exhibit U-21).

Following all of these discussions and negotiations, the parties agreed that a Memorandum of Agreement, regarding the terms and conditions of the contract between the District and GCA, would be provided to the Union membership for a ratification vote. (Exhibit

U-24). The ratification vote occurred on December 5, 2014, at which time the custodians and groundskeepers rejected the proposed agreement. (N.T. 108). The District was informed of the result. (N.T. 108-109).

The District proceeded with its decision to contract the custodial services with GCA. (N.T. 110, 261, 311). The instant grievance ensued.

POSITIONS OF THE PARTIES

UNION

The District violated Article 1 of the CBA when, prior to subcontracting bargaining unit work, it failed to (1) demonstrate that the contracted services would provide the same or improved operational efficiencies and (2) supply the Union with all documentation relative to the contracted services, including all costing and other data. Both are affirmative duties imposed upon the District by the contract.

The District has misinterpreted the meaning of Article 1, Section A. That provision clearly states that subcontracting shall not occur unless certain criteria are met. Contrary to the District's assertion, this provision cannot be met by simply presenting a cost analysis chart that purports to show that the subcontracting would be less expensive. Rather, the District's obligation is to demonstrate that subcontracting "will provide the same or improved operational efficiencies." The District failed to make that showing either to the Union prior to subcontracting or even at the arbitration hearing.

The District instead asserts that it complied with the contract language by essentially substituting the phrase "more economical services" for the negotiated phrase "improved

operational efficiencies." That interpretation is contrary to the unambiguous contract language.

The information that the District provided to the Union throughout this process actually increased, not diminished, the Union's concern whether subcontracting as proposed would be properly staffed with employees performing the full panoply of duties as done by the custodians and groundskeepers employed by the District.

The District supplied confusing data by providing three separate organizational charts describing how GCA would staff the services. While the District was seemingly increasing the staffing levels that GCA would utilize during negotiations with the Union, there was no legal commitment on the contractor to maintain such manpower. This failure to demonstrate a staffing level alone establishes that the District failed to prove that GCA would provide the same or improved operational efficiencies.

Nor was there adequate information to establish that GCA's employees would work a 40 hour week as the employees of the District had done. GCA's manual defines regular full-time employees as those working thirty hours or more per week.

The District also failed to demonstrate what specific job duties GCA's custodians and groundskeepers would be required to perform. In 2011, GCA offered only a cursory list of job duties for custodians and groundskeepers. Moreover, in 2014, GCA failed to provide any job descriptions in its updated proposal. Job descriptions ultimately provided to the Union by Mr. King did not contain the actual job duties, but were simply "guides." The fact that former bargaining unit employees are now performing the work for GCA does not correct the problem

because the District was obligated to meet the contractual requirements before it subcontracted.

There is no basis to conclude that the subcontracting plan would be cost effective since the District never demonstrated that GCA's plan would provide similar or improved operational efficiencies. Additionally, the numbers provided by the District on September 23, 2014 only showed an approximate savings after concessions were made on wage enhancements and health benefits.

The cost analysis is also questionable because GCA's proposed cost in 2014 with 94 employees was lower than its proposed cost in 2011 with 78 employees. This discrepancy was never explained.

Any suggestion by the District that it did not violate the CBA because the Union failed to offer an alternative plan is without merit. The District has an affirmative obligation to meet the conditions set forth in Article 1, Section A.1. By contrast, the Union has the opportunity to offer an alternative plan under Article 1, Section A.2, but is under no contractual obligation to do so.

The District also violated the CBA by failing to provide all documentation relative to its subcontracting plan. The provision includes no express terms requiring the Union to make a request to the District before the information is supplied. Nor is the District limited to providing only costing information. Even when the Union made requests for information, the District ignored the requests, objected to them, or provided inadequate information.

DISTRICT

Article 1, Section A, of the CBA is clear an unequivocal. The District has the right to contract for work that is or could be performed by District employees provided that the District meets the three enumerated criteria. Only one of the criteria is at issue in this case, that being the requirements set forth in subparagraph A.1. The District has clearly complied with those requirements.

The uncontroverted testimony establishes that the District has demonstrated that subcontracting the custodial services has provided the District with "the same or improved operational efficiencies." In many instances the same work crews remained within the buildings and the District benefited by GCA's bulk buying power of supplies. As demonstrated by the abundance of exhibits, the District met its obligation to provide the Union with "all documentation relative to the contractual services, including all costing and other data."

District Council 89 Director Fox acknowledged that the District had the contractual right to subcontract if it met the criteria for doing so. He candidly admitted that the District's anticipated savings in year one was "amazingly close" to the District's PSERS' contribution for the displaced bargaining unit employees. Mr. Fox further acknowledged that the PSERS' contributions would always result in the bargaining unit employees being more expensive than a subcontractor.

The District anticipated receiving the same functions and services provided by the bargaining unit employees at significantly lower costs through subcontracting. The Union has not presented any evidence to the contrary and has effectively acknowledged the economic reality.

The contract language does not require that the District obtain the Union's consent prior to subcontracting bargaining unit work. Once the District has met the two criteria for subcontracting, the Union has ample opportunity to provide an alternative plan demonstrating that substantially the same cost savings are achievable. The Union did not do so in this case. The District established that by subcontracting the custodial services, the annual savings would be in excess of $500,000 in the first year and $725,000 in the second year.

The specific language of Article 1, A.1 of the CBA does not obligate the District to require a subcontractor to utilize the same number of employees, the same number of hours, or the same level of compensation and benefits that existed when the employees were working for the District. The only contractual requirement is that there would be "the same or improved operational efficiencies." That standard has been abundantly satisfied by the District.

The District also complied with its obligation to provide the Union with all documentation relative to the contracted services. Although the Union asserts that they did not receive satisfactory answers to their questions, those questions were always answered. The District was not obligated to provide the Union with answers that it wanted to hear. There was no request by the Union for information that was not fulfilled.

Finally, any suggestion that the District's decision to subcontract the custodial services should be negated because the District failed to competitively bid for those services is without merit. First, services of the nature presented in this matter are professional and exempt from normal statutory competitive bidding requirements. Second, the April 26, 2011 RFP specifically sought the special expertise of a responsible bidder experienced in providing custodial services

to a large, public entity. Third, even if the District had the obligation to "bid" the custodial services, the Union has no authority to challenge that process through this grievance.

DISCUSSION

The essential facts in this matter are not in dispute. In March 2011, the District notified the Union that, in accordance with the CBA, it was planning to subcontract the custodial and grounds keeping services to a third party vendor. The District issued an RFP and received four qualified bids in response. The District selected GCA as the vendor with whom it would contract the custodial services.

The District and the Union entered into negotiations regarding the District's decision to subcontract the custodial work. An agreement was reached in which the bargaining unit agreed to accept a wage freeze from July 1, 2011 through June 30, 2013. The District, in turn, agreed that it would not outsource any bargaining unit work during that same time period.

The parties thereafter negotiated the terms of the current CBA, effective July 1, 2013 through June 30, 2016. The subcontracting provision that had been in place prior to the 2011-2013 extended agreement was reinstated in the CBA. That provision permitted the District to subcontract bargaining unit work if certain enumerated criteria were met.

In March 2014, the District again advised the Union that it was considering subcontracting some of the bargaining unit work. Initially, it was unclear what positions the District was considering to subcontract and whether those positions would be outsourced through attritional loss. The focus eventually again centered on the custodial services and the District requested GCA to update its 2011 proposal to provide those services.

After protracted negotiations, the District and the Union failed to achieve an agreement with respect to subtracting the custodial services. The District proceeded to contract with GCA for those services in December 2014 and the instant grievance followed.

At issue is whether the District violated Article 1 of the CBA when it subcontracted the custodial services. Specifically, the inquiry involves a determination as to whether the District fulfilled its contractual obligations under Article 1, Subsection A.1, which states:

> In connection with the District's goal of reducing costs, improving efficiency, and increasing productivity, the District may utilize persons who are not employed by the District to provide work and/or services which are, or could be, performed by District's employees. However, the District agrees that it shall not contract or enter into volunteer agreements for any work, which is as July 1, 2005 being performed by bargaining unit employees without meeting the following criteria.
>
> 1. The District must demonstrate that contracted or volunteer services will provide the same or improved operational efficiencies. The District must supply the Union with all documentation relative to the contracted services, including all costing and other data.

(Exhibit J-1).

The Union does not dispute the right of the District to subcontract bargaining unit work if the District meets the elements set forth in this provision.[4] The Union's position is that the District completely failed to comply with either obligation.

Turning to the first element, the District is required to "demonstrate that contracted or volunteer services will provide the same or improved operational efficiencies." The term "efficiency" has been defined as:

1. the quality or degree of being efficient

2. a: efficient operation

[4] The criteria set forth in Article 1, Sections A.2 and A.3 are not at issue in this dispute.

b (1): effective operation as measured by a comparison of production with cost (as in energy, time, and money)[5]

Applying this definition to the contract language requires the District to demonstrate that the projected contracted services would be similar or superior to what was being supplied by the District's employees, but at a lesser cost to the District.

The Union contends that the District has essentially defined "operational efficiency" to mean "economical", thus reducing their burden to proving only that the contracted services cost less without regard to the services being supplied. There is no question that the District subcontracted, in large part, to save money. Both Mr. Holman and Mr. Przywara testified that the decision to consider subcontracting some bargaining unit work in 2013, like in 2011, was prompted by financial concerns. (N.T. 227, 248). That said, a careful review of the extensive testimony and documentation presented in this case supports a finding that the District did consider the ability of the contractor to provide comparable services as well as to do so for less cost.

The District initially issued an RFP in 2011 that set forth in fairly detailed fashion the requirements and minimum acceptable standards that a vendor would be expected to meet. (Exhibit U-4). GCA was one of the vendors that submitted a proposal in response to the RFP. (Exhibit U-5). After reviewing all of the qualifying bidders and engaging in interviews with them, the District selected GCA as the successful vendor.

Mr. Przywara, who was on the selection committee, testified that GCA was selected even though they were not the lowest bidder. (Exhibit School District 1). He testified that the goal was to select the lowest responsible bidder, one that could achieve savings but also

[5] See, www.merriam-webster.com

provide the same or better service level. (N.T. 242-243). Mr. Przywara further testified that the committee was impressed with GCA's credentials, including the level of services, the regional presence, experience with other school districts and their delivery model as it related to the size of the District. (N.T. 245).

By virtue of the Extended Agreement entered into by the parties in 2011, the District did not contract with GCA at the time. When the District again decided that it wanted to subcontract the custodial services, it did not sent out a new RFP.[6] The District instead asked GCA to update their 2011 proposal. (Exhibits U-11, U-12). GCA submitted an updated proposal. (Exhibit U-16).

The existence of the 2011 RFP and the 2011 and 2014 proposals from GCA formed the framework of the anticipated services expected by the vendor. Those documents, along with an updated cost analysis, was sent to the Union. (N.T. 250-251; Exhibit U-15). Mr. Przwara testified that the cost analysis was for 94 full time positions because the functions and the number of employees were to remain the same. (N.T. 251-252).

While engaging in negotiations with the District,[7] the Union was legitimately concerned that it did not have sufficient information to determine whether the District had satisfied its contractual obligation to demonstrate that there would be the same or improved operational efficiency by contracting with GCA. The Union conceded that the cost analysis reflected a savings, but expressed concern that the services to be provided, the number of employees and the hours worked per employee were not equivalent. Accordingly, the Union requested

[6] The propriety of the District selecting a vendor without bidding the contract is not an issue properly before me.
[7] Mr. Fox testified that after the District announced its intent to subcontract for the custodial services, the Union adopted a three-prong approach. Specifically, the Union would challenge the decision politically, pursue all rights under the CBA, and, in the event subcontracting was going to occur to secure the best possible outcome for the affected employees. (N.T. 142-145).

additional information during negotiations and through subsequent correspondence. (Exhibits 36, U-40).

The District provided responses to the Union's requests. (Exhibits U-35, U-38). In those documents the District established that GCA would keep the number of employees at 94 and would maintain the number of hours worked per week at 40. (N.T. 294-295). The District had a contract with GCA for the management services of the affected employees for two years. Because the District anticipated that most, if not all, of the District employees would transition to GCA, the District believed that the staffing would essentially remain the same. (N.T. 231; Exhibit U-35).

As the negotiations continued, the District agreed to enhanced wages and health benefits for the employees who elected to work for GCA if the subcontracting occurred and provided a cost analysis for the same. That information continued to reflect a cost savings to the District. (Exhibits U-19, U-20).

Finally, after negotiations between the parties failed to produce a mutually acceptable agreement, the District decided to honor the proposed agreement that was rejected by the affected employees in December 2014 and advised the Union of that fact. That agreement required that as part of the contract with GCA: the District employees would be offered continued employment with GCA, would receive enhanced wages and health benefits through June 30, 2016 and would work 40 hours per week.

Although it is unknown how many District employees transitioned to GCA,[8] the District expressed an interest in retaining those employees in order to utilize their expertise in carrying out the same functions. The District's willingness to enhance its contract with GCA to further that possibility, in conjunction with the documentation regarding the services to be provided and cost analyses, result in the conclusion that the District did demonstrate that its contract with GCA would result in the "same or improved operational efficiency."

The Union next asserts that even if can be established that the District complied with the first requirement under Article 1, Section A.1, it clearly did not comply with the second requirement. That provision requires the District to provide the Union "with all documentation relative to the contracted services, including all costing and other data."

The Union contends that this language requires the District to provide all information relative to the contracted services and is not limited to "all costing and other data." In this regard, the Union asserts that the District failed to provide adequate information concerning several issues, such as workers compensation claims, transparency of contract performance, other GCA contracts, and methods to monitor the contract. The District, in turn, argues that it answered all of the questions raised by the Union, even if the Union did not like the answers.

I find that the District's contractual obligation to provide documentation to the Union, while broad, must be viewed in context of Article 1, Section A, as a whole. In order to meet its obligation to "demonstrate that contracted services will provide the same or improved operational efficiencies" it is incumbent upon the District to provide any and all

[8] Because the CBA requires that the District demonstrate "the same or improved operational efficiencies" prior to subcontracting, no evidence was adduced from either party regarding what occurred after the contract went into effect.

documentation required to satisfy that obligation. Additionally, the Union has the opportunity to provide an alternative plan "to effect substantially the same cost savings and partnership relationships that would be obtained through the contracted services." (Exhibit J-1, Article 1, A.2). Any information that the Union requests in order to consider an alternative plan, must be provided. The documentation required, however, must relate to the contracted services, i.e., the obligations and expectations of the contractor and the vendor, including the supporting costing and data.

I find that the documentation and information supplied by the District fulfills this contractual mandate. The District provided documentation that included the data and cost analyses it relied upon in making its decision to contract with GCA and the parameters of that projected contract. (Exhibits U-4, U-5, U-15, U-16, U-19, U-20). Additionally, the information supplied in response to the Union's questions sufficiently addressed the concerns raised insofar as the answers "related to the contracted services." (Exhibits U-18, U-35, U-38). Some of the answers to the questions were decidedly limited, for example, those regarding workers compensation and transparency. Nonetheless, the answers addressed how the items would be covered in the contract with GCA, satisfying the District's obligations under Article 1.

I fully recognize the importance of this case to both parties and the decision that I reached was not easy. The Union makes a compelling argument that the decision to contract the bargaining unit work in this matter has potentially serious implications not only for the affected employees and the Union, but for the students and the general public as well. The decision to subcontract the custodial services was particularly troubling insofar as it was made

shortly after the parties had entered into a new CBA that provided the employees with a wage increase, the same employees who had previously agreed to a two year wage freeze.

Notwithstanding these concerns, I am bound by the terms of the CBA and my authority extends only to a determination whether the District's contract with GCA violated the same. The CBA permits subcontracting of bargaining unit work if certain criteria are met. The District has met those contractual obligations.

Based upon the record as a whole, and for all of the reasons set forth above, I am constrained to find that the District did not violate the CBA when it contracted with GCA for custodial services. Accordingly, the grievance must be denied.

AWARD

The Grievance is Denied.

_____

Lynne M. Mountz, Arbitrator

Dated: May 26, 2016

Harrisburg, PA