SUPERIOR COURT OF CALIFORNIA

COUNTY OF SACRAMENTO

HRG DATE / TIME **JUDGE**	**September 10, 2021 / 9:30 A.M.** **James P. Arguelles**	**DEPT. NO.** **CLERK**	**17** **Ward**
SECURUS TECHNOLOGIES, LLC, **Petitioner,** **v.** **CALIFORNIA DEPARTMENT OF TECHNOLOGY et al.,** **Respondents,** **GLOBAL TEL*LINK CORPORATION, a Delaware Corporation,** **Real Party in Interest.**		**Case No.: 34-2021-80003594**	
Nature of Proceedings:	**Petition for Writ of Mandate – Final Ruling**		

The petition is granted, and the contract is set aside.

The complaint for declaratory and injunctive relief is dismissed as duplicative.

Real Party's objection, in which Respondents join, to the Supplemental Conklin Declaration as untimely is sustained.

Background

Securus Technologies, LLC (Securus) petitions for writ relief after a public contract on which it bid was awarded to Real Party in Interest Global Tel*Link Corporation (GTL). Respondents California Department of Technology (CDT) and California Department of Corrections and Rehabilitation (collectively "Respondents") were the awarding entities. Generally speaking, the point of the contract was to furnish state inmates with improved telecommunications, including domestic and international telephone calling as well as calling by video.

In August 2020, Respondents solicited bids by way of a request for proposals (RFP) followed by negotiations pursuant to Public Contract Code Section 6611.[1] That section authorizes CDT to procure information technology and telecommunications goods and services through a negotiation process in certain circumstances. (§ 6611(e).) The RFP is entitled "Part 1 – BIDDER INSTRUCTIONS FOR Communications and Technology Solution (CTS)." (Admin. Record (AR) 477.)[2] The RFP includes 231 pages of information, instructions and attachments. It advises that the RFP, evaluation of responses and the award would be made "in conformance with current competitive bidding procedures as they relate to the procurement of IT goods and services by public bodies in the State of California." (AR 522.)

Respondents evaluated bids under a points system contemplating a maximum of 2000 points. Thirty percent of available points were allocated to cost. The following sentence appears under a "Cost" heading:

> The State has established not-to-exceed (NTE) **rates** for this procurement. Bidder's [sic] **rates** for **calls** must not exceed $.05 per minute. Bidders may propose rates lower than the NTE identified.

(AR 566, boldface added and omitted.) The "Cost" section of the RFP does not define the terms "calls" or "rates." There is a glossary at the end of the RFP, but it does not define these terms either. The glossary does define "Call Detail Record" as a "data record produced by the CTS that documents the details of the telephone, video phone, VRS,[3] and the ASL-VCS." (AR 699.) "ASL-VCS" refers to "[v]ideo calls from a hearing impaired individual to a hearing impaired called person." (*Id.*)

The "Statement of Work" appended to the RFP contains a "Video Calling Services" section providing the following:

> VCS will be used to place **video calls** via the CTS. The Prime Contractor shall be responsible for all modifications to existing enclosures necessary to mount the proposed VCS set. The Prime Contractor shall install additional VCS equipment and related hardware over the term of the Contract, as required by the State, at no cost to the State, and no increase to the **calling rates**.

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[1] Undesignated statutory references shall be to the Public Contract Code.

[2] The administrative record is attached to the Conklin Declaration filed on July 27, 2021. As they appear under the Conklin Declaration, pages in the record are numbered with a prefix "CDT." The court refers to pages in the record without this prefix and without antecedent zeros, e.g., "CDT000566."

[3] VRS denotes "video relay service," which "enables persons with hearing disabilities ... to communicate with voice telephone users... ." (AR 703.)

(AR 912, emphasis added.) Other portions of the RFP and attachments advert to "phone rates," (AR 507), "Domestic Call Rates," (AR 706), "International Call Rates," (*id.*), and "Domestic and International ... Call Rates." (AR 870.) Further, a letter from CDT to Securus advised that "[e]ach Video Call ... is a per minute rate." (AR 2552.)

Securus and GTL were two of three companies that submitted proposals. Securus proposed the following rates for telephone and video calls: $0.99 per transaction for video calls; $0.009 per minute for adult local calls; $0.00 per minute for youth local calls; and $.005 per minute for international calls. GTL proposed $1.25 per transaction for video calls; $0.025 per minute for adult local calls; $0.00 per minute for youth local calls; and $0.10 per minute for international calls. Respondents rejected the third company's proposal and commenced negotiations with Securus and GTL.

During negotiations, Securus informed Respondents that its $0.99 per-transaction rate for video calls assumed an average call time of 30 minutes. (Conklin Decl., ¶ 13.) CDT advised Securus that its rate for video calls needed to be expressed as a per-minute rate, rather than a per-transaction rate, and that Securus should assume an average call time of 15 minutes. (*Id.*, ¶ 14; AR 2552.) Respondents' negotiators advised Securus' negotiators that video calling rates needed to comply with the NTE. (Conklin Decl., ¶ 14.) CDT advised Securus and GTL of other desired adjustments to their respective proposals.

CDT invited Securus and GTL to submit their best and final offers (BAFOs). In its BAFO, Securus tendered a rate for video calls of $0.039 per minute. It tendered the same rate for local and international telephone calls. In its own BAFO, GTL tendered per-minute rates of $0.25 for video calls and $0.07 for international voice calls, both in excess of the $0.05 NTE. On CDT's request, GTL reduced its rate for video calls to $0.20 per minute, but that still exceeded the NTE.

GTL's BAFO reflected an overall annual price lower than Securus'. Respondents awarded the contract to GTL. GTL has commenced performance on the initial six-year term. (Respondents possess an option for an additional four-year term.) New services have gone live at one prison, installations elsewhere are underway, GTL has provided thousands of tablet computers for distribution to inmates, and it has entered into subcontracts with local vendors.

Standard of Review

Aggrieved competitive bidders as well as those engaged in negotiations pursuant to Section 6611 may seek ordinary mandate pursuant to Code of Civil Procedure Section 1085. The court's function in such a case is to decide whether the agency's decision is supported by substantial evidence. (*See DeSilva Gates Constr., LP v. Department of Transp.* [*DeSilva*] (2015) 242 Cal.App.4th 1409, 1417.) "'[R]eview is limited to an examination of the proceedings to determine whether the public entity's actions were arbitrary, capricious, entirely lacking in evidentiary support, or inconsistent with proper procedure. There is a presumption that the public agency's actions were supported by substantial evidence ... . [The court] may not

reweigh the evidence and must view it in the light most favorable to the public agency's actions, including all reasonable inferences in support of those actions.'" (*Id.*, pp. 1417-1418, additional brackets omitted.) The burden is on the petitioner to prove that the agency's actions were not supported by substantial evidence. (See *Ghilotti Constr. Co. v. City of Richmond* [*Ghilotti*] (1996) 45 Cal.App.4th 897, 903.)

Discussion

Securus argues that Respondents were under a duty not to award the contract to GTL given that GTL's BAFO did not comply with the NTE for video calls or international voice calls. Respondents do not deny that the NTE was a key requirement that bidders were required to meet. A CDT procurement employee testified at deposition that a bidder's failure to comply with the NTE compelled rejection of the bid. (See Supp. Wickard Decl., ¶ 2 and Exh. 1, p. 40.) Nor do Respondents deny that awarding the contract to a nonresponsive proposal was impermissible.

Instead, Respondents argue that the NTE only applied to domestic telephone calls. Respondents point out that their interpretation of the RFP is entitled to deference. (See *Blue Cross of Calif. v. State Dep't of Healthcare Svcs.* (2007) 153 Cal.App.4th 322, 330 ["Public agencies are entitled to significant deference when making interpretations that are within their particular expertise"].) Not much expertise is involved on construing the terms "calls" and "rates." But even according due deference, the court concludes that Respondents' interpretation is untenable.

As noted above, the RFP does not define the terms "calls" or "rates." The record does not contain substantial evidence that industry practice defines these terms in any particular or special way, such that, for example, the term "calls" in understood to mean "domestic telephone calls."[4] Accordingly, the court gives these terms their ordinary meanings. Given this, and in light of the RFP as a whole, it is clear that the term "calls" denotes telephone as well as video calling, and that the term "rates" refers to charges for such calling. What follows is a conclusion that the NTE, which caps "rates for calls," does not refer solely to domestic calls, but refers to international and video calls as well. That the RFP refers to "not-to-exceed (NTE) rates" in the plural supports the view that such rates were not limited to domestic telephone calls. Likewise, the fact that the term "domestic" is used to describe calls elsewhere in the RFP, but is not used to describe the NTE, plainly indicates that the NTE is not limited to domestic calls.

[4] At oral argument, counsel for Respondents argued that the deposition transcripts and declarations before the court contain such evidence. The transcript of the deposition of Katie DeAngelis, a CDT senior procurement officer, reflects her understanding that the term "calls" reasonably may be understood to include video calls. The declarations say nothing about industry usage of "calls" or "rates."

Respondents pluck the following sentence from the RFP in an attempt to show that the NTE was limited to domestic calls: "The expectation is that phone rates will be lowered or remain at the current rate, but not be increased." (AR 878.) Respondents juxtapose this sentence with language elsewhere in the RFP referring to other types of communications (e.g., e-letters, video clips and video calls) without an accompanying expectation for the same or lower rates. As to these services, the RFP provides that "cost must be fair and reasonable and emphasis placed on providing the lowest cost to allow for more communication and minimize the financial burden to family and friends." (AR 879.) Respondents suggest that this juxtaposition implies that the NTE's reference to "calls" and "rates" is limited to domestic calls. The court is not persuaded.

The sentence describing an expectation for "phone rates" is not limited to domestic rates. Hence, that term does not furnish a reason to exclude international calls from the NTE. Further, the fact that Respondents did not express an expectation for the same or lower rates for communications other than telephone calls is explained by the fact that these other services were not yet available. (See AR 879 ["In terms of communication services, the most significant change is the implementation of live video calling and electronic messaging"].) Nor is a reference to fair, reasonable and low costs for such new services inconsistent with the NTE.

Next, Respondents argue that Securus should have known about a "prevailing practice of differential rates for domestic, international, and video calls." (See Opp. at 11:17-22.) Again, though, differences among calling rates is not inconsistent with a cap on all.

Respondents argue that Securus is the one that suggested an NTE in the RFP, and that the suggestion reflects an understanding that the NTE would only cover domestic telephone calls. According to Respondents, Securus proposed cribbing language from a New York procurement document that read, "[t]he rate proposed and charged shall be a single, per minute rate ... for all calls within the United States, its territories and protectorates, and Canada[.]" (See Opp. at 12:25-13:2, brackets in original, italics omitted.) Respondents ignore that fact the NTE in this case makes no similar reference to particular countries or other limitations. Differences between the New York NTE and the one in this case support Securus' position rather than Respondents.'

Respondents argue next that Securus should have sought written clarification if it believed that the NTE was ambiguous. Because the NTE is not ambiguous, but rather applies to all rates for calls, Securus cannot be faulted for failing to seek clarification.

Next, Respondents argue that Securus wrongly relied on the formers' employees' oral statements during negotiations that the NTE applied to all calls. Any such reliance is beside the point. The RFP itself applies the NTE to rates for all calls, and Respondents did not withdraw or alter the NTE during negotiations.

The court rejects the argument that Respondents possessed discretion to assign meaning to the NTE that is inconsistent with the NTE's plain terms. In its separate response to the opening brief, GTL argues that the negotiation process available under Section 6611 entitled

Respondents to deviate from requirements in the RFP. GTL adds that an agency procuring a public contract acts in a legislative capacity, and that the judicial branch may not encroach on discretion that the agency exercises. (See *Mike Moore's 24-Hour Towing v. City of San Diego* (1996) 45 Cal.App.4th 1294, 1303 [acts of public contracting leading to award are legislative in character].)

There is a provision in the RFP indicating that Respondents were entitled to alter "scoring criteria" during negotiations to "obtain a value effective solution." (AR 590.) Assuming that Section 6611 and the RFP entitled Respondents to alter bid specifications during negotiations, they were not entitled to alter requirements for one bidder without applying the alterations to the other. The cases and other authorities that GTL cites do not espouse inequities of this sort. Yet, Respondents ultimately held Securus alone to the NTE while allowing GTL to exceed it for video calls and international telephone calls. In this way, Respondents granted GTL an unfair advantage that California law proscribes. (See *Konika Bus. Machs. U.S.A. v. Regents of Univ. of Cal.* (1988) 206 Cal.App.3d 449, 451, 455-456 [mathematical precision not required to determine whether one bidder's deviation from requirements yielded competitive advantage].) That GTL's overall pricing was lower than Securus', and thus provided the best value to Respondents, does not excuse Respondents' failure to apply the same mandatory requirements to each bidder.

In briefing and at oral argument, counsel for GTL argued that Securus failed to meet an evidentiary burden to flesh out the impact of its competitive disadvantage. Counsel argued that any disadvantage was inconsequential because GTL would have received the winning score and the award anyway. Counsel argued that Securus was required to explain what it would have done differently absent the disadvantage, and how such action would have altered the award.

The cases do not impose the burdens GTL would assign.[5] The cases do distinguish between consequential and inconsequential deviations from bid requirements. The *Ghilotti* court, for example, wrote:

> "A basic rule of competitive bidding is that bids must conform to specifications, and that if a bid does not so conform, it may not be accepted. [Citations.] However, it is further well established that a bid which substantially conforms to a call for bids may, though it is not strictly responsive, be accepted **if the variance cannot have affected the amount of the bid or given a bidder an advantage or benefit not allowed other bidders** or, in other words, if the variance is inconsequential. [Citations.]"

[5] Two cases that GTL cites for the proposition that its deviation from the NTE requirements was immaterial are *Cypress Security, LLC, supra*, and *Bay Cities Paving & Grading, Inc. v. City of San Leandro* (2014) 223 Cal.App.4th 1181. Neither of these factually inapposite cases holds that the materiality of a deviation depends on proof of a probability that, absent the deviation, the disappointed bidder would have received the award.

[¶¶]

"The test for measuring whether a deviation in a bid is sufficiently material to destroy its competitive character is **whether the variation affects the amount of the bid by giving the bidder an advantage or benefit not enjoyed by the other bidders.**" [Citation.]

(*Id.*, pp. 904, 906-907, emphasis added.) Other decisions are in accord. (See *DeSilva*, *supra*, 242 Cal.App.4th at 1422-1423 ["[A] bid which substantially conforms to a call for bids may, though it is not strictly responsive, be accepted if the variance cannot have affected the amount of the bid or given the bidder an advantage or benefit not allowed by other bidders"].) The court finds no case in the briefing identifying an additional evidentiary burden, i.e., one beyond showing a variance affecting bid amounts or providing a competitive disadvantage. Because Respondents held Securus to a price constraint that was not imposed on GTL, Securus has met its burden.

The *Ghilotti* decision does contain references to the comparative strength of bids. The issue there was not a deviation from a price constraint, but rather the winning bidder's allocation of more than 50 percent of the work to subcontractors, which violated specifications. (See 45 Cal.App.4th at 900-901.) It turned out that the disappointed bidder had violated the same specification in a prior contract but had retained the award by paying for subcontractors' materials and thus reducing its subcontractors' overall contribution to the project. (See *id.*, pp. 901-902.) The winning bidder in *Ghilotti* demonstrated that it could come into compliance similarly and without raising its price. The disappointed bidder conceded that there was no evidence the winner's compliance would have increased the winner's bid price, and the Court of Appeal construed the concession as a basis to affirm the award. (See *id.*, p. 906.) The court emphasized, however, that the awarding body had designated the winner's deviation insubstantial. Had the awarding body waived altogether the subcontracting cap for the winner, then other bidders "would have been disadvantaged." (*Id.*, p. 907.)

Respondents in the instant case did not determine that GTL committed an inconsequential deviation from the NTE. To the contrary, their final Evaluation and Selection Report indicates that all deviations from mandatory requirements, unless corrected during negotiations, compelled rejection of the bid. (See AR 9 ["Any outstanding deviations or non-compliant BAFOs were not considered for contract award"].) Rather, Respondents only imposed the NTE requirement on one bidder, and that created the unfair advantage that the *Ghilotti* court determined was not present there.

Nor has Securus conceded, as the disappointed bidder did in *Ghilotti*, that GTL would have or could have retained its bid price had it complied with the NTE. Frankly, the court does not see how Securus could have proved as much without engaging in considerable discovery, which is not generally allowed in mandate actions. (See *Carrancho v. Calif. Air Resources Bd.* (2003) 111 Cal.App.4th 1255, 1269; see also *Cypress Security, LLC v. City and County of San Francisco* (2010) 184 Cal.App.4th 1003, 1014 ["[W]e may consider only matters that were before the decision maker at the time of its decision"].) As a practicable matter, it is quite likely that, had GLT

reduced its video calling by 15 cents per minute, its overall price would have been different. Nothing in the record suggests that Respondents came to a different conclusion.

The court has reviewed additional cases addressing the materiality of deviations from bidding requirements. This review does not disclose a rule obligating an aggrieved bidder to demonstrate that its bid would have contained the lowest price, or would have received the highest score, absent an unauthorized deviation. Instead, focus is placed on the existence *vel non* of an unfair advantage or effect on bid amounts. (See, e.g., *Eel River Disposal & Resource Recovery, Inc. v. City of Humboldt* (2013) 221 Cal.App.4th 209, 238-239 [even absent favoritism, fraud or corruption, relief was granted because bidders did not compete on level playing field].) The unfair advantage that Respondents created in this matter entitles Securus to relief.

GTL further argues that RFP Section 7.3.2 authorized Respondents to award the contract to a bidder notwithstanding deviations or defects in the bidder's proposal. That section reads:

> The State may reject any or all proposals and may waive any deviation or defect in a proposal. The State's waiver of any deviation or defect shall in no way modify the solicitation documents or excuse the Bidder from full compliance with the solicitation specifications if awarded the Contract.

(AR 578.) Given the second sentence, which requires ultimate compliance with solicitation specifications, the first sentence cannot be read to authorize an award to a bidder who fails to meet mandatory specifications. Indeed, Section 7.5 of the RFP, which explains how the contract would be awarded after negotiations and submissions of BAFOs, identifies the first scoring element to be "Meets all Administrative, Mandatory and Optional Mandatory Requirements." (AR 592.) Consequently, the court construes the first sentence of RFP Section 7.3.2 merely to provide that Respondents were entitled to reject a nonconforming proposal but were not required to do so. Respondents were entitled to proceed to negotiations and BAFOs even with bidders whose interim proposals did not meet all requirements. But they were not entitled to hold bidders to differing mandatory requirements.

Respondents and GTL both argue that the action is moot because GTL has commenced performance. GTL has not competed performance, and there are years of performance remaining in the initial term alone. Because the court can provide meaningful relief, the action is not moot.

Because failure to impose the NTE requirement on GTL warrants a writ of mandate setting the contract aside, the court need not decide whether relief is also warranted on the ground that Respondents failed adequately to evaluate GTL's references.

Securus' request for a writ directing Respondents to award the contact to it is denied. The RFP entitled Respondents to rejects both BAFOs, and an award to Securus would trample on Respondents' discretion.

Disposition

The petition is granted, and the contract is set aside.

The complaint for declaratory and injunctive relief is dismissed as duplicative.

Nothing in this ruling precludes GTL from continuing to provide critical digital forensics, described in the Babby Declaration, or other existing services to Respondents pursuant to one or more interim arrangements reached independently from the contract.

Once entered, judgment shall be stayed for a period of 30 days so that any party may file a notice of appeal and/or seek additional postjudgment relief.

Pursuant to Cal. R. Ct. 3.1312, counsel for Securus shall serve and then lodge (1) for the court's signature a proposed judgment that incorporates this ruling as an exhibit and (2) for the clerk's signature a proposed writ of mandate.

Unless otherwise ordered, any administrative record, exhibit, deposition, or other original document offered in evidence or otherwise presented at trial, will be returned at the conclusion of the matter to the custody of the offering party. The custodial party must maintain the administrative record and all exhibits and other materials in the same condition as received from the clerk until 60 days after a final judgment or dismissal of the entire case is entered.

SO ORDERED.

Dated: September 14, 2021

Hon. James P. Arguelles
California Superior Court Judge
County of Sacramento

CERTIFICATE OF SERVICE BY MAILING
(C.C.P. Sec. 1013a(4))

I, the Clerk of the Superior Court of California, County of Sacramento, certify that I am not a party to this cause, and on the date shown below I served the foregoing **AMENDED PETITION FOR WRIT FOR MANDATE – FINAL RULING** by depositing true copies thereof, enclosed in separate, sealed envelopes with the postage fully prepaid, in the United States Mail at 720 9th Street, Sacramento, California, 95814 each of which envelopes was addressed respectively to the persons and addresses shown below:

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I, the undersigned deputy clerk, declare under penalty of perjury that the foregoing is true and correct.

Dated: September 15, 2021

Superior Court of California, County of Sacramento

By: D. Ward, Deputy Clerk