

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CENTURYLINK PUBLIC
COMMUNICATIONS, INC.,
d/b/a CENTURY LINK,

Petitioner,

vs.

Case No. 14-2828BID

DEPARTMENT OF CORRECTIONS,

Respondent,

and

GLOBAL TEL*LINK CORPORATION
AND SECURUS TECHNOLOGIES, INC.,

Intervenors.

SECURUS TECHNOLOGIES, INC.,

Petitioner,

vs.

Case No. 14-2894BID

DEPARTMENT OF CORRECTIONS,

Respondent,

and

GLOBAL TEL*LINK CORPORATION
AND CENTURYLINK PUBLIC
COMMUNICATIONS, INC.,
d/b/a CENTURY LINK,

Intervenors.

RECOMMENDED ORDER

Administrative Law Judge John D. C. Newton, II, of the Division of Administrative Hearings (DOAH), heard this case in Tallahassee, Florida, on July 17 and 18, 2014.

APPEARANCES

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STATEMENT OF THE ISSUE

Is Respondent, Department of Corrections' (Department), Notice of Intent to Award DC RFP-13-031 for Statewide Inmate Telecommunication Services to Intervenor, Global Tel*Link Corporation (Global), contrary to the governing statutes, rules, or policies or to the Department's Request for Proposal solicitation specifications?

PRELIMINARY STATEMENT

On March 7, 2014, the Department released Request for Proposal DC RFP-13-031 (RFP). The RFP sought a vendor to contract to provide statewide inmate telecommunication services. The RFP sought proposals to provide an inmate telephone system, inmate video visitation system, and other required services detailed in the document.

Petitioner, CenturyLink Public Communications, Inc., d/b/a Century Link (CenturyLink); Petitioner, Securus Technologies, Inc. (Securus); Global; and HomeWav, LLC (HomWav) submitted proposals. The Department determined that HomeWav's proposal was non-responsive. The Department accepted, reviewed, and scored the other proposals. The Department posted its notice of intent to award the contract to Global.

CenturyLink and Securus protested the intended award as provided by section 120.57(3), Florida Statutes (2014).^{1/} Both protests are consolidated in this proceeding. Securus intervened

in CenturyLink's protest, and CenturyLink intervened in Securus's protest. Global intervened in both protests. On June 18, 2014, the Department referred the matter to DOAH for conduct of a formal administrative hearing. Securus submitted an Amended Petition and proceeded in this cause upon it.^{2/}

The Department and Global seek a recommended order upholding the decision to award the contract to Global. CenturyLink asks for issuance of an order recommending award of the contract to CenturyLink or rejection of all proposals. Securus urges rejection of all proposals.

Joint Exhibits 1 through 8, 13 through 17, 19, 21 through 24, 29, 31, 37, 39 through 42, 46, and 48 were received into evidence. CenturyLink presented the testimony of Paul Cooper and Shane Phillips. CenturyLink presented portions of the deposition testimony of Jon Creamer and Sandra Jolene Bailey. CenturyLink offered Exhibits 1 and 2 and 4 through 8, all of which were received into evidence. CenturyLink proffered Exhibit 3 which was not admitted.

Securus presented the testimony of Stephen Viefhaus. Securus presented portions of the deposition testimony of Sandra Jolene Bailey, Rosalyn Ingram, Shane Phillips, Steve Wilson, Randy Agerton, Jon Creamer, Charles Lockwood and Julyn Hussey. The deposition excerpts were admitted as Securus Exhibits 16 through 23.

The Department presented the testimony of Sandra Jolene Bailey, Jon Creamer, Julyn Hussey and Charles Lockwood. The deposition transcripts of Randy Agerton and Steve Wilson were accepted as Department exhibits.

Global presented the testimony of Steve Montanaro. Global also presented portions of the deposition testimony of Paul Cooper and Stephen Viefhaus, which were received into evidence as Exhibits 26 and 27. Global Exhibits 9, 11 through 13 and 23 were received into evidence.

The parties provided cross designations of depositions that were admitted into evidence.

The parties timely filed proposed recommended orders. Those proposed orders have been considered in the preparation of this Recommended Order.

At hearing, the parties raised the issue of whether two deviations noted in CenturyLink's proposal made its proposal non-responsive. Those deviations involved the screen size of video visitation kiosks and the word recognition capability of the video visit security features. The parties do not address those issues in the proposed recommended orders. They are deemed abandoned.

During these proceedings, there was a dispute about the Department permitting Securus to provide complete financial documents after the proposals were opened. No party advanced

that argument in the proposed recommended order. It is deemed abandoned.

Issues related to a five-point error by Mr. Agerton in his scoring of Global's project staff and issues about "value added" options, offered by each vendor, have also been abandoned by the proposed recommended orders.

FINDINGS OF FACT

Background

1. The Legislature charged the Department with protecting the public through the incarceration and supervision of offenders and rehabilitating offenders through work, programs, and services. The Department is required to provide telephone access to inmates in its custody.

2. Inmate telecommunication services provide inmates the ability to stay in contact with friends and family. The services promote and support efforts to help inmates re-enter society by fostering communications with the community outside jail and prison.

3. The Department does not pay for these services. The inmates and their designated family members and friends pay for the services.

4. The contract to provide the telecommunications service generates revenue for the Department. The provider pays the Department for access to the consumers. The provider charges the

inmates and their designees for the service. The provider pays the Department a commission calculated as a percentage of revenues received. The commission is calculated as part of the charge for the services and is included in it. The price competition portion of the RFP is based on the prices charged to the inmates and designees and the commissions paid to the Department.

5. According to the RFP, the State of Florida presently has a total inmate population of approximately 102,000 people. In fiscal year 2010-2011, the inmate calling services generated total revenue of \$14,180,345 from 9,587,040 calls. In fiscal year 2011-2012, the inmate calling services generated total revenue of \$13,513,495 from 8,226,577 calls. And in 2012-2013, the inmate calling services generated total revenue of \$14,749,021 from 8,853,316 calls.

6. In 2012-2013, interstate calls generated 11.6 percent of calls and 12.9 percent of revenues from the contract.

7. Securus holds the contract with the Department to provide inmate telephone services and has for over six years. Before February 11, 2014, Securus paid a 35 percent commission to the Department on all of its call revenue from the contract. That changed as of February 11, 2014, when the Department interpreted a stayed order of the Federal Communications Commission (FCC), discussed in more detail later, to prohibit

collecting the commissions on interstate calls. The record does not reveal if Securus stopped collecting the commission portion of the rates charged to inmates and their designees.

8. The Department does not collect commissions because it interprets the FCC order to say that it cannot receive commission revenue because it is a state agency. The Department also declines to accept commissions because it fears finding itself in a position where it may have to refund money which has already been transferred to the general fund, possibly an earlier year's general fund.

9. During the RFP process, Securus was aware of the Department's interpretation of the FCC order, because it had negotiated the change to its existing contract to end commission payments. The changes did not affect Securus charging inmates the commission. The Department did not include its interpretation of the order in the RFP, as modified by the Addenda.

10. Commissions on interstate calls are significant revenue for the Department.

11. This case involves the Department's second attempt to award a new contract for inmate telecommunication services. Earlier, the Department issued an Invitation to Negotiate for these services. CenturyLink, Global, and Securus all responded. The Department negotiated with all three.

12. The Department initially decided to award the contract to CenturyLink. Eventually, the Department rejected all bids after it determined that the scoring language and selection criteria were poorly worded. They were subject to different reasonable interpretations that made how the Department would select the winning vendor unclear and made the playing field for vendors unequal.

13. The vendors protested the decision to reject all bids. In upholding the decision to reject all bids, Administrative Law Judge Scott Boyd found at paragraph 70:

The Department concluded that the wording and structure of the ITN and RBAFO did not create a level playing field to evaluate replies because they were confusing and ambiguous and were not understood by everyone in the same way. Vendors naturally had structured their replies to maximize their chances of being awarded the contract based upon their understanding of how the replies would be evaluated. The Department concluded that vendor pricing might have been different but for the misleading language and structure of the ITN and RBAFO.

Global Tel Link Corp. v. Dep't of Corr., Case No. 13-3041BID

(Fla. DOAH Nov. 1, 2013), adopted in whole, except for correcting two scrivener's errors, FDOC Case No. 13-81 (Fla. DOC Nov. 25, 2013).

The Request for Proposals

14. The Department released the RFP seeking to establish a five-year contract with a vendor to provide inmate

telecommunications services on March 7, 2014. The Department subsequently issued Addenda 1, 2, and 3 to the RFP. The Addenda included vendor questions and the Department's answers. No vendor protested any term, condition, or specification of the RFP or the Addenda.

15. The RFP sought vendor proposals to provide an inmate telephone system, video visitation system, and other services for inmates housed in the Department's facilities. The requested services included the actual service, system design, equipment, installation, training, operation, repair, and maintenance at no cost to the Department. The RFP included security, reporting, auditing, and monitoring requirements. It also established the procurement process, including scoring criteria.

16. Of the RFP's 66 pages, only the commissions' role in pricing, scoring procedure, the score given Securus for its response to RFP section 3.15, and treatment of refunds are the focus of the disputes in this proceeding at this point.

Review and Scoring

17. The RFP established proposal scoring based upon four categories. The chart below reflects the categories, the tab of the RFP in which the scored categories are described, and the maximum points allowed for category.

Mandatory Responsiveness Requirements	0 points
Executive Summary and Other Proposal Submissions	0 points
Category 1--Business/Corporate Qualifications (Tab 3)	50 points
Category 2--Project Staff (Tab 4)	200 points
Category 3--Technical Response (Tab 6)	400 points
Category 4--Price Proposal	350 points
TOTAL POSSIBLE POINTS	1,000 points

18. The RFP breaks each of the categories into components, each referencing and correlating to specific RFP sections. These are found at RFP "Attachment 4--Evaluation Criteria." For each component, the Evaluation Criteria posed a question. For example, in Category 3, a question asks "How adequately does the Respondent describe their overall capability and process for providing a video visitation system?"

19. The RFP provides a maximum score for each scoring component, which range from 15 to 50 points depending on the relative importance of the particular component.

20. Each proposal was graded on the following qualitative scale: Omitted, Poor, Adequate, Good, and Exceptional. The RFP associates a point value with each qualitative description for each particular scoring component. For instance, if a component had a maximum score of 25 points, the scoring framework was as follows: Omitted--0; Poor--6.25; Adequate--12.5; Good--18.75; and Exceptional--25. A score of zero meant that a vendor completely omitted any information for the item from which a qualitative assessment could be made.

21. The RFP directed the vendors how to generally format and package their proposals. Specifically, RFP Section 5 (Proposal Submission Requirements) stated:

All Project Proposals must contain the sections outlined below. Those sections are called "Tabs." A "Tab," as used here, is a section separator, offset and labeled, (Example: "Tab 1, Mandatory Responsiveness Requirements"), such that the Evaluation Committee can easily turn [t]o "Tabbed" sections during the evaluation process. Failure to have all copies properly "tabbed" makes it much more difficult for the Department to evaluate the proposal.

22. Vendors were to include seven "tabs" within their proposals:

- a. Tab 1 Mandatory Responsiveness Requirements
- b. Tab 2 Transmittal Letter with Executive Summary
- c. Tab 3 Business/Corporate Qualifications
- d. Tab 4 Project Staff
- e. Tab 5 Respondent's Financial Documentation
- f. Tab 6 Technical Response
- g. Tab 7 Minority/Service Disabled Veteran Business Enterprise Certification

23. The RFP gave further instructions about the contents within each tab. RFP Section 5.6 provided the requirements for Tab 6, Technical Responses. It required vendors to provide a narrative technical response identifying how vendors will meet the scope of services required by the RFP and, more specifically, the scope of services described in RFP Sections 2 (Statement of Need/Services Sought) and 3 (Scope of Services). The RFP did not

mandate any other formatting requirements for the contents of Tab 6. This becomes significant in the analysis of Securus's response to section 3.15 of the RFP.

24. The RFP advised that the Department would assign an evaluation committee to evaluate proposals. It did not state how many evaluators would be selected to score proposals or whether evaluators would be responsible for scoring proposals in their entirety or just specific portions.

25. The Department appointed a team of six evaluators: Jon Creamer, Shane Phillips, Randy Agerton, Steve Wilson, Charles Lockwood, and Richard Law.

26. Mr. Law, a certified public accountant, reviewed each vendor's financial submissions on a pass/fail basis. The other five evaluators scored the technical responses, categories one through three.

27. Julyn Hussey, the procurement officer, trained the evaluators, except for Mr. Law. She provided the evaluators with a training manual, the RFP, the vendors' proposals, and scoring sheets. During training, Ms. Hussey instructed the evaluators to review proposals in their entirety to properly evaluate and score their various components.

28. The Department gave the evaluators approximately eight days to evaluate and score the proposals. The evaluators did not consult with each other during their evaluation. Each evaluator

turned his completed score sheet in to Ms. Hussey. She then compiled the technical response scores.

29. Ms. Hussey also calculated the price scores by taking the prices from the vendors' price sheet submissions and applying the RFP price scoring formula. The Department combined the technical and price scores to calculate each vendor's total score.

30. Global received the highest total score with 2,960.42 points. Securus was second with 2,911.04 points. CenturyLink was third with 2,727.94 points. Global outscored Securus by 49 points on a 3,600-point scale. Global outscored CenturyLink by 232.48 points. Securus outscored CenturyLink by 183.10 points.

Commissions, Pricing, and an FCC Order

31. The vendors' price proposal was a critical category of the RFP review and evaluation. It was worth 350 of the 1,000 points available. Only the technical response could score more points, 400. Of the 350 points, 300 points were directed toward the inmate telephone service price proposal and 50 points were for the video visitation service price proposal.

32. The RFP subdivides the inmate telephone service points into 150 possible points for the provider offering the highest commission payments to the Department; 125 points for the lowest intralata, interlata, intrastate, and interstate per-minute

rates; and 25 points for the lowest local and local extended area per-minute rates. The vendor with the most favorable numbers in each subcategory received the maximum points. The rest received a percentage of the maximum points based on a ratio between their bid and the most favorable bid

33. RFP Section 3.8.3, "Rate and Call Charge Requirements"^{3/} provided:

For the price sheet, the Respondent shall establish a separate single, blended rate per minute, inclusive of all surcharges and department commission rate on the price sheet (attachment 5) for the inmate telephone service and the video visitation service.

Local and local extended area service calls shall be billed as local calls and shall not exceed \$0.50 for a 15 minute phone call.

For the price sheet, the Respondent shall establish a single, blended rate per minute, inclusive of all surcharges, for all calls on the North American Dialing Plan, including intralata, interlata, intrastate, and interstate calls which shall not exceed the maximum rate per minute allowed by the Federal Communications Commission (FCC) and appropriate regulatory authority during the time the call is placed. In addition to the FCC, vendors can contact the state consumer protection agency, Better Business Bureau, or State Attorney General's Office to obtain maximum rate per minute information.

Note: In accordance with Federal Communications Commission 47 CFR Part 64 [WC Docket No. 12-375; FCC 13-113]--Rates for Interstate Calling Services--effective February 11, 2014, no commission shall be paid on revenues earned through the completion of interstate calls of any type received from the Contract

Call charges for international calls shall not exceed the maximum rate allowed by the appropriate regulatory authority during the time the call is placed.

Local call charges for coin-operated telephone calls at the Work Release Centers shall not exceed thirty-five cents (.35) per local call plus the Local Exchange Carrier (LEC) charges, which vary between LEC's. Long distance call charges for coin-operated phones at the Work Release Centers shall be at the same rates for inmate telephone calls. The Contractor shall agree that charges for calls shall include only the time from the point at which the called party accepts the call and shall end when either party returns to an on-hook condition or until either party attempts a hook flash. There shall be no charges to the called party for any setup time.

The Contractor shall not charge, pass on, or pass through to the customer paying for collect or prepaid calls any charges referred to as Local Exchange Carrier's (LEC's) or Competitive Local Exchange Carrier's (CLEC's) billing costs, or any bill rendering fee or billing recovery fee. The Contractor shall also ensure that LEC's and CLEC's do not charge or pass on to the customer any additional fee or surcharges for billing. The Contractor shall be responsible for any such LEC or CLEC surcharges incurred if billing through the LEC or CLEC.

In addition, the Contractor shall not charge, pass on, or pass through to the customer paying for the collect, prepaid calls or video visitation visits any of the following charges and/or fees:

Bill Statement Fee, Funding Fee, Mail-In Payment Fee, Western Union Payment Fee, Refund Fee, Regulatory Recovery Fee, Wireless Admin Fee, Single Bill Fee, Paper Statement

Fee, Account Setup Fee, Account Maintenance Fee, Inactive Account Fee, Account Close-Out Fee, Non-Subscriber Line Charge, Inmate Station Service Charge, Third-Party Payment Processing Fee, State Regulatory Recovery Fee, Check/Money Order Processing Fee, Biometric Service Charges, JPay Payment Fee, Federal Regulatory Cost Recovery Fee, Regulatory and Carrier Cost Recovery Fee, Validation Surcharge or Wireless Termination Surcharge.

The Contractor shall ensure, inmates' family and friends utilizing the Florida Relay Service to receive calls from inmates are charged the same rates as those family and friends receiving calls from inmates not utilizing this service. [emphasis added].

34. The Department intended for the boldface note to advise responding vendors that the vendor would not pay commissions on interstate call revenues. The language raised questions which the Department replied to in the Addenda issued after the RFP issued.

35. None of the Addenda modified the plain statement in section 3.8.3 that "the Respondent shall establish a separate single, blended rate per minute, inclusive of all surcharges and department commission rate on the price sheet (attachment 5) for the inmate telephone service."

36. Section 7.3.1 of the RFP established the requirements for commission and monthly payments. It states:

The Contractor shall pay to the Department a monthly commission based on the percentage of gross revenues as determined through this RFP process. The Department will begin to

receive payment for a facility on the date the Contractor assumes responsibility for the operation of that facility's inmate telecommunication service in accordance with the Final Transition and Implementation Plan.

37. Sections 7.3.2 through 7.3.4 contain additional requirements for commission payments, supporting documentation for the commission calculation, and penalty, if the vendor does not timely make the final commission payment at the end of the contract. They make the importance of commission payments to the Department clear.

38. Attachment 5 is a mandatory form for vendors to provide their proposed call and commission rates. It contains the same boldface note about the FCC order as section 3.8.3.

39. The form solicited a blended rate and a single commission rate for telephone services.

40. FCC, 47 C.F.R. Part 64 (WC Docket No. 12-375; FCC 13-113) (FCC order), referred to in RFP Section 3.8.3 and Attachment 5, is a commission decision and regulation, effective May 31, 2013, addressing a need for reform in what the FCC determined were "egregious interstate long distance rates and services" in the inmate telecommunications business. The FCC identified paying commissions to correctional institutions and including them in the rates charged inmates and their families and other designees as a significant factor contributing to unreasonably high rates for inmate telecommunications services.

The decision also addressed surcharges and fees. The FCC determined that inmate telecommunications charges must be cost-based and that commission payments, among other things, could not be included in the costs. The FCC adopted subpart FF to 47 C.F.R. part 64 of its regulations to regulate inmate calling services.

41. The FCC included in subpart FF, section 64.010, titled, cost-based rates for inmate calling services. It states: "All rates charged for Inmate Calling Services and all Ancillary Charges must be based only on costs that are reasonably and directly related to the provision of ICS [inmate calling services]." This is the rule implementing the FCC's decision that commission payments are not included in the reasonably and directly related costs.

42. The FCC made clear that it was not prohibiting payment of or collection of commissions, only prohibiting including them in the costs determining the fee paid by inmates and their designees.

43. The FCC addressed this in paragraph 56 of the order, which states:

We also disagree with ICS providers' assertion that the Commission must defer to states on any decisions about site commission payments, their amount, and how such revenues are spent. We do not conclude that ICS providers and correctional facilities cannot have arrangements that include site

commissions. We conclude only that, under the Act, such commission payments are not costs that can be recovered through interstate ICS rates. Our statutory obligations relate to the rates charged to end users—the inmates and the parties whom they call. We say nothing in this Order about how correctional facilities spend their funds or from where they derive. We state only that site commission payments as a category are not a compensable component of interstate ICS rates. We note that we would similarly treat "in-kind" payment requirements that replace site commission payments in ICS contracts.

44. Providers of inmate calling services, including all three vendors in this proceeding, sought review of the decision and regulation by the United States Court of Appeals for the District of Columbia Circuit. The court stayed section 64.010, along with sections 64.6020, and 64.6060.

45. Following release of the RFP, the Department received and answered inquiries from vendors. The inquiries, the Department's responses, and changes to the RFP are contained in Addenda 1, 2, and 3 to the RFP. Rates and commissions received a fair amount of attention in the process.

46. In response to inquiries about section 3.8.3 and Attachment 5, the Department changed both with Addendum 2. The questions and Department responses follow.

47. Question No. 4 states:

Page 30: 3.8.3 - Rate and Call Charge Requirements and Attachment 5 - Blended Call Rates. Regarding the blended rate (inclusive

of all surcharges) to be bid - the current wording could be opportunistically misinterpreted in a few different ways:

First in the treatment of per-call versus per-minute fees, based on our understanding, one bidder could possibly offer a flat \$1.80 per call fee for non-local inmate telephone calls and claim to have the same blended rate ($\$1.80/15 \text{ minutes} = \0.12) as someone bidding \$0.12 per minute with no per-call fee. This could occur even though calls average less than 15 minutes (and many calls are less than 10 minutes), meaning these two offers are not comparable in terms of overall cost to family members.

Second, the RFP wording could also possibly be interpreted as allowing a Contractor to set different rates for different call types (collect/prepaid, intraLATA/interstate) and then averaging them using assumptions they define.

Question 1: To minimize cost to family members and make offers comparable, would the Department please explicitly disallow per-call fees for the inmate telephone system (for example, per-call setup charges, per-call surcharges), allowing only a true per-minute rate?

Question 2: If no to Question 1, would the Department require separate disclosure of per-call fees and per-minute rates?

Question 3: Would the Department please verify that ALL non-local domestic calls-- intraLATA, interLATA, and interstate, for both collect and prepaid--must be charged at an identical rate?

48. Answer No. 4 states:

Question 1: Per this Addendum #2, the following revisions will be made to Section 3.8.3:

In 3rd paragraph after first sentence **add:**
The Respondent shall establish a separate single, blended rate per minute inclusive of all surcharges for all local and local extended area calls. These per minute rates **delete:** which

Delete 4th paragraph beginning with Note.

In 6th paragraph first sentence revised to read: Local call charges for coin-operated telephone calls at the Work Release Centers shall not exceed forty-five cents (.45) per local call plus the Local Exchange Carrier (LEC) charges, which vary between LEC's.

In 9th paragraph following In addition, the Contractor shall not charge, pass on, or pass through to the customer paying for the collect, prepaid calls or video visitation visits any of the following charges and/or fees: **Add** Pre-call setup charges, Pre-call surcharges,

Delete last paragraph;

Question 2: Not applicable,

Question 3: Confirmed, per Section 3.8.3 all non-local and local extended area calls **must** be charged at an identical rate.

49. Question No. 5 states:

Attachment 5 - Price Sheet.

Page 30--Section 3.8.3 states that on the price sheet, the Respondent will provide a "single, blended rate per minute, inclusive of all surcharges" Attachment 5 states "Blended Telephone Rate for All Calls . . ." To eliminate ambiguity, would the Department consider changing the language in Attachment 5 to read "Blended Telephone Rate Per Minute for All Calls" [sic]

50. Answer No. 5 states:

Attachment 5 will be revised to include "Blended Telephone Rate Per Minute for All Calls".

51. Question No. 6 states:

Page 30: 3.8.3 - Rate and Call Charge

Requirements. The fourth paragraph states that *"In accordance with Federal Communications Commission 47 CFR Part 64 [WC Docket No. 12-375; FCC 13-113]--Rates for Interstate Calling Services--effective February 11, 2014, no commission shall be paid on revenues earned through the completion of interstate calls of any type received from the Contract."*

Respectfully, this interpretation of the FCC's Order is incorrect. The Order, without question, does not prohibit the payment of commissions on interstate calls. Also, rules regarding future cost-based regulation (including consideration of commissions in rate-setting) have been stayed by the D.C. Circuit Court of Appeals, and FL DOC interstate rates are well below the FCC rate caps that have been left in place by the Court. This is why most providers have continued to pay commissions on interstate calling, in compliance with their contracts.

Q. Will the State consider removing this paragraph from the RFP in order to ensure revenue for the State and a level playing field across providers?

52. Answer No. 6:

Section 3.8.3 and Attachment 5--Price Sheet is amended, per this Addendum to remove the paragraph. In addition, Section 7.3.1 has also been amended, per this Addendum, to state that commissions will be paid in accordance with all Federal, State and Local regulations and guidelines.

53. Further questions and clarifications followed. They are found in Addendum 3 to the RFP.

54. Question No. 2 states:

In Addendum No. 2; Answer #4 Revises Section 3.8.3 by revising the 3rd paragraph

Instructions are to add the following language:

The Respondent shall establish a separate single, blended rate per minute inclusive of all surcharges for all local and local extended area calls. These per minute rates (delete: which)

For the price sheet, the Respondent shall establish a single, blended rate per minute, inclusive of all surcharges, for all calls on the North American Dialing Plan, including intralata, interlata, intrastate, and interstate calls which shall not exceed the maximum rate per minute allowed by the Federal Communications Commission (FCC) and appropriate regulatory authority during the time the call is placed. **The Respondent shall establish a separate single, blended rate per minute inclusive of all surcharges for all local and local extended area calls. These per minute rates (delete [sic]: which).** In addition to the FCC, vendors can contact the state consumer protection agency, Better Business Bureau, or State Attorney General's Office to obtain maximum rate per minute information.

The instructions to add "These per minute rates (delete: which)" does not fit with the instructions. The word "which" is not included in this area of paragraph 3. Question #2: Can the Department please clarify?

55. Answer No. 2 states:

To further clarify 3.8.3, paragraph 3 is revised to read as follows:

For the price sheet, the Respondent shall establish a single, blended rate per minute, inclusive of all surcharges, for all calls on the North American Dialing Plan, including intralata, interlata, intrastate, and interstate calls. The Respondent shall also establish a separate single, blended rate per minute inclusive of all surcharges for all local and local extended area calls. Both of these per minute rates shall not exceed the maximum rate per minute allowed by the Federal Communications Commission (FCC) and appropriate regulatory authority during the time the call is placed. In addition to the FCC, vendors can contact the state consumer protection agency, Better Business Bureau, or State Attorney General's Office to obtain maximum rate per minute information.

56. Question No. 3 states:

Question: Is the Department requiring the successful Respondent to pay commissions on revenues generated through the completion of interstate calls?

57. Answer No. 3 states:

The Department's position is that the collection of commission rates will be determined by the FCC ruling 47 CFR Part 64 [WC docket no. 12-375; FCC13-113].

For purposes of this solicitation the Department requests respondents submit a commission rate for interstate calls. The Department will comply with any future FCC ruling.

58. Question No. 10 states:

Section 7.3.1 was revised to include:

"Commissions will be paid in accordance with all Federal, State and Local regulations and guidelines." There are no Federal, State, or Local regulations and guidelines which require phone vendors to pay commissions on interstate calling. Thus, in not paying commissions on interstate calling, there would be no violation of any Federal, State, or Local regulation or guideline. The requirement as to whether or not commissions will be paid on interstate calling must come from FL DOC and must be clearly indicated in the RFP. If not clearly indicated one way or another, we fear some vendors may have an unfair advantage as commissions are not currently being paid and there does not seem to be a compliance issue with the current contract which requires such commissions.

a. Please, clearly specify whether or not commissions are required to be paid on interstate calls.

59. Answer No. 10 states:

Please see answer to question 3.

60. The Department never definitively stated whether it would ultimately collect commissions on interstate revenues. Nor did it provide a means for vendors to propose rates or commissions based upon whatever the Department concluded were the most likely scenarios resulting from the FCC order and appeal. But the Department's RFP persisted in the RFP requirement that the bidders must include the commission in the calculation of their blended rate for the price proposal. This stands in

contrast to the RFP's lengthy list of items, such as bill statement fees, paper statement fees, and account setup fees, which could not be included in the rate. These are items, like the commissions, that the FCC order said could not be part of the fee base.

61. A vendor, who did not calculate the commission in the blended rate, would have a significant price advantage over a vendor who included the commission in its blended rate. It could propose lower rates and/or higher commissions while maintaining its profit margin. That is because although the price sheet identifies a commission, the commission is not accounted for in the blended rate.

62. CenturyLink included payment of a commission rate of 65.3 percent on interstate calls in the blended rate it provided on Attachment 5. This action is a reasonable application of the statements of the RFP and the Addenda about blended rates, commissions, and the cryptic statement about plans to follow the FCC order.

63. CenturyLink proposed a blended rate that did "establish a separate single, blended rate per minute, inclusive of all surcharges and department commission rate."

64. If CenturyLink had not included the commission payment on interstate calls in its blended rates, it could have bid higher commissions, lower rates, or a combination of both.

65. Securus identified a commission percentage for all calls of 73 percent on its Attachment 5 price sheet. Securus did not include the cost of paying a commission on interstate calls in calculating the blended rate that it submitted. This allowed Securus to submit a lower blended rate than it would otherwise have had to submit to achieve the same revenue from the contract.

66. The blended rate that Securus proposed did not "establish a separate single, blended rate per minute, inclusive of all surcharges and department commission rate."

67. Global identified a commission percentage of 46 percent for all calls in its Attachment 5 price sheet. In determining the proposed rates for interstate calls, Global did not include or assume payment of the commission percentage rate. This allowed it to submit lower blended rates and/or a higher commission rate.

68. Global did not intend to or think it would be required to pay commission rates on interstate calls. This was based on its evaluation of the FCC order, the appeal, and the Department's decision not to accept commission payments on interstate calls under its current contract with Securus. This is why it did not include the commission as a cost when calculating the blended rate.

69. Global chose to take the business risk that its evaluation of the FCC order would be correct. If it was

incorrect and a commission payment was required, Global was prepared to make the payment, even though it would not have been collected from inmates and their designees through the blended rate.

70. The blended rate proposed by Global did not "establish a separate single, blended rate per minute, inclusive of all surcharges and department commission rate."

71. Ms. Hussey applied the formula in the RFP to determine points awarded each vendor for its price proposal. This calculation was a ministerial function that did not call for any exercise of judgment or discretion.

72. The overall cost ranking scores were: Global 280.42, Securus 276.04, and CenturyLink 232.94.

73. The scores for the commissions were: Global 94.52, Securus 150, and CenturyLink 134.18.

74. The scores for the blended rates for inmate telephone services that included interstate services were: Global 125, Securus 56.25, and CenturyLink 50.90. This difference reflects the vendors' differing treatment of commissions when proposing their blended rates.

75. The Department did not know during the evaluation process that Global and Securus had not included or assumed payment of the commission in its proposed rates for interstate

calls. The Department learned this during discovery in this proceeding.

76. Not including commission payments on interstate calls in the proposed blended rate was contrary to the instructions of the RFP.

Securus Response to RFP Section 3.15

77. The Department awarded Securus zero points for the question of "[h]ow adequate is the Respondent's plan to meet the performance measures outlined in section 3.15 of the RFP?" This criterion related to the performance measures of RFP Section 3.15, for which proposals could earn 125 total points. The difference between zero and the possible maximum points would have made a difference in winning and losing the contract award for Securus.

78. The score of zero is a factual finding by the Department that Securus's 600-plus-page proposal had no information from which evaluators could qualitatively assess the proposal by that criterion.

79. A score of zero is not a qualitative assessment, like a score of "poor" or "exceptional." A score of zero reflects a finding that information is completely absent.

80. The evaluation criteria score sheet, RFP Attachment 4, provided factors to be considered in evaluating and scoring proposals. It presented the factors to evaluators in the form of questions to evaluators. For section 3.15, the question and

accompanying scores allowed were: How adequate is the Respondent's plan to meet the performance measures outlined in section 3.15 of this RFP? (Omitted-0; Poor-6.25; Adequate-12.5; Good-18.75; and Exceptional-25.)

81. Because the Department allowed each evaluator to score this factor, a total of 125 points was ultimately available to the vendors.

82. RFP Section 3.15 provides:

3.15 Performance Measures

Upon execution of this contract, Contractor agrees to be held accountable for the achievement of certain performance measures in successfully delivering services under this Contract. The following Performance Measure categories shall be used to measure Contractor's performance and delivery of services.

Note: the Contractor shall comply with all contract terms and conditions upon execution of contract and the Department may monitor each site upon implementation of services at that site to ensure that contract requirements are being met. **The Department reserves the right to add/delete performance measures as needed to ensure the adequate delivery of services.**

- 1) Performance Outcomes and Standards; and
- 2) Other Contract Requirements.

A description of each of the Performance Measure categories is provided below:

83. RFP Section 3.15 was divided into two components. Section 3.15.1 listed key "Performance Outcomes and Standards"

deemed most critical to the success of the contract and required that "the contractor shall ensure that the stated performance outcomes and standards are met." The key elements were: (1) Completion of Routine Service, (2) Completion of Major Emergency Repair Service, and (3) Commission and Call/Video Visitation Detail Report (Invoice Documentation).

84. The first is RFP Section 3.15.1. It provides:

3.15.1 Performance Outcomes and Standards

Listed below are the key Performance Outcomes and Standards deemed most crucial to the success of the overall desired inmate telecommunication service. The contractor shall ensure that the stated performance outcomes and standards (level of achievement) are met. Performance shall be measured as indicated, beginning the second month after which service has been fully implemented.

1. Completion of Routine Services

Outcome: All requests for routine service (as defined in Section 1.22) shall be completed within twenty-four (24) hours of request for service from the Department, unless otherwise instructed by the Department.

Measure: Compare the date/time that service is completed to the date/time that the request for service was received from the Department by the Contractor. (**Measure Monthly**).

Standard: Ninety percent (90%) of routine service requests shall be completed within twenty-four (24) hours of notice from the Department.

2. Completion of Major Emergency Repair Service

Outcome: All major emergency repair service (as outlined in Section 3.10.8) shall be completed within twelve (12) hours of request for repair from the Department, unless otherwise instructed by the Department.

Measure: Compare the date/time that major emergency repair service is completed to the date/time that the request for major emergency repair service was received from the Department by the Contractor. **(Measure Monthly)**.

Standard: Ninety percent (90%) of routine service requests shall be completed within twelve (12) hours of notice from the Department.

3. Commission and Call/Video Visitation Detail Report (Invoice Documentation):

Outcome: The Contractor shall provide the Commission and Call/Video Visitation Detail Report to the Contract Manager or designee as specified in Section 7.3.3 within thirty (30) days of the last day of the Contractor's regular billing cycle.

Measure: Compare the date the Commission and Call/Video Visitation Detail Report was received with the last day of the Contractor's regular billing cycle. **(Measure Monthly)**.

Standard: One hundred percent (100%) of Commission and Call Detail Reports shall be received within thirty (30) days of the last day of the Contractor's regular billing cycle.

Upon execution of this Contract, the Contractor hereby acknowledges and agrees that its performance under the Contract shall meet the standards set forth above. Any

failure by the Contractor to achieve any outcome and standard identified above may result in assessment of Liquidated Damages as provided in Section 3.17. Any such assessment and/or subsequent payment thereof shall not affect the Contractor's obligation to provide services as required by this Contract.

85. Section 3.15.2 advised that the Department will monitor the contractor's performance to determine compliance with the contract. It states:

3.15.2 Other Contract Requirements

Standard: The Department will monitor the Contractor's performance to determine compliance with other contract requirements, including, but not limited to, the following:

- Video Visitation System (as outlined in Section 3.7)
- Inmate Telecommunication System Functionality (as outlined in Section 3.7)
- Transition/Implementation/Installation of System
- Bi-Annual Audit
- Timely Submittal of Corrective Action Plans (when applicable)

Measure: Failure to meet the agreed-upon Final Transition/Implementation/Installation schedule or failure to meet (compliance with other terms and conditions of the contract or contract requirements listed above) may result in the imposition of liquidated damages

86. Each of the three items in section 3.15.1 and the five items in section 3.15.2 relate directly to a particular provision within RFP Section 3 titled, "Scope of Services."

87. Section 3.15.1 related to RFP Sections 1.22 and 3.10.7 (Routine Maintenance), 3.10.8 (Major Emergency Repair Service), and 7.3.3 (Detail Report). Section 3.15.1 specifically identifies the last two.

88. Similarly, section 3.15.2 cross referenced section 3.7 (Telecommunications Services System Functionality) for the first two performance measure items.

89. Two others items relate directly to sections 3.5 (Facility Implementation Plan and Transition of Service), 3.6 (Installation Requirements), and 3.11 (Bi-Annual Audit). This is significant because Sections 3.5, 3.6, and 3.11 were independently scored.

90. In other words, the RFP required that the proposals contain a narrative explaining how vendors planned to provide the services required by each of those sections.

91. The RFP did not require the proposals to contain a separately delineated section titled, "3.15." It only required that each proposal include, under "Tab 6," a narrative description of the vendor's solution and plan to meet the performance measures.

Evaluation of Responses to Section 3.15

92. Global included a specifically labeled section 3.15 in its response. It essentially copied and pasted the RFP language for Sections 3.15, 3.15.1, and 3.15.2, and after each subsection,

inserted the words "GTL [Global] Response: GTL understands and complies." Global did not provide a substantive narrative under the heading, section 3.15. CenturyLink's labeled response to section 3.15 was very similar.

93. The evaluators reviewed the section of Global's proposal labeled as responsive to section 3.15. The maximum score the evaluators could award per evaluator was 25 points. Global earned scores of 25, 18.75, 12.5, 12.5, and 12.5 from Messrs. Lockwood, Agerton, Phillips, Creamer, and Wilson, respectively.

94. The evaluators reviewed CenturyLink's proposal labeled as responsive to section 3.15. It also earned scores of 25, 18.75, 12.5, 12.5, and 12.5 from Messrs. Lockwood, Agerton, Phillips, Creamer, and Wilson, respectively.

95. All five evaluators reviewed copies of the vendors' proposals. Some evaluators performed a section-by-section and some performed side-by-side evaluations of the proposals.

96. Since Securus did not have a labeled section 3.15 and the other proposers did, the evaluators scored Securus's proposal as "Omitted-0" for section 3.15.

97. After their initial review of Securus's proposal, three evaluators raised concerns with the Department's procurement officer, Ms. Hussey, over their inability to find a section in the Securus proposal specifically identified as a response to Section 3.15.

98. Ms. Hussey reiterated the instruction given during evaluator training to review proposals in their entirety when scoring any component of the RFP.

99. None of those evaluators changed their scores of "omitted" for section 3.15 of Securus's proposal after receiving Ms. Hussey's additional instruction and presumably performing a second review of Securus's proposal.

100. RFP Section 3.15 included cross references to sections 3.7 and 3.10.8. Following these referenced sections to the matching section numbers in the Securus proposal reveals narratives addressing the section 3.15 requirements. In addition, these cross-referenced sections were separately scored by each evaluator during his review of each vendor's Telecommunications Service System Functionality and Telecommunication Service Equipment Requirements.

101. Securus's proposal complied with the RFP specifications by affirming Securus's commitment to comply with section 3.15 throughout the proposal. Although Securus's proposal did not include a separate tabbed section addressing Securus's plan to meet the section 3.15 performance measures, Securus provided a narrative explaining how Securus would meet each performance measure required in section 3.15. Securus also provided narratives explaining how it would meet and provide the scope of service of each one of the performance measures of Section 3.15.

102. The first performance measure in RFP Section 3.15.1 required that 90 percent of all routine service be completed within 24 hours of the Department giving notice to the vendor. The routine service requirement was located at section 3.10.7.

103. In its proposal, behind Tab 6 and labeled "3.10.7 Routine Service," on page 388, Securus's response stated:

All routine service shall be completed within twenty-four (24) hours of the initial system failure notice, service request for service or equipment failure or liquidated damages may be imposed as stated in Section 3.17.

Securus has read, understands, and complies.

Securus Field Repair staff is strategically located throughout the state to be able to respond to all repair service needs in order to meet all repair service needs. Securus will continue to complete all routine service, as we do under the existing contract, within twenty-four (24) hours if the initial system failure notice, service request for service or equipment failure or liquidated damages may be imposed as stated in Section 3.17.

104. This response complied with the RFP requirement. It could not rationally be deemed omitted.

105. The second performance measure in RFP Section 3.15.1 required that 90 percent of all major emergency repair services (as outlined in section 3.10.8) be completed within 12 hours of the Department giving notice to the vendor. This performance measure cross-referenced section 3.10.8.

106. Securus's proposal behind Tab 6 and labeled "3.10.8 Major Emergency Repair Service," addressed the emergency repairs stating:

All major emergency service shall be completed within twelve (12) hours of the initial system failure notice request or liquidated damages may be imposed as stated in Section 3.17.

Securus has read, understands, and complies.

Securus Field Repair staff is strategically located throughout the state to be able to respond to all repair service needs in order to meet all repair service needs. Securus will continue to complete all major emergency service, as we do under the existing contract, within twelve (12) hours if the initial system failure notice, service request for service or equipment failure or liquidated damages may be imposed as stated in Section 3.17.

Securus's response complied with the RFP requirement. It could not rationally be deemed omitted.

107. The third performance measure in RFP Section 3.15.1 required that the Commission and Call/Video Visitation Detail Report (Invoice Documentation) be provided to the contract manager or designee, as specified in section 7.3.3 at the end of every month with the contractor's regular billing cycle. Securus addressed this requirement behind Tab 6 in a section labeled "2.4 Revenue to be Paid the Department," on page 107.

108. Securus's response stated:

This RFP will result in a Revenue Generating Contract. The Contractor shall pay the Department a commission based on a percentage of gross revenue. The Contractor shall be responsible for collections and fraud, and shall not make any deductions from gross revenue for uncollectible accounts, billing fees or other administrative costs prior to applying the commission percentage. Notwithstanding the above, gross revenue shall not include taxes charged by an appropriate governmental entity. The monthly commission amount is obtained by multiplying the commission percentage times each month's total charges.

The successful contractor shall submit a Commission and Call/Video Visitation Detail Documentation for Monthly Payment report as indicated in Section 7.3.3 with the monthly commission payment.

Securus has read, understands and complies.

Securus will provide the monthly payment report as required and will provide all appropriate auditing detail required upon request from the Department.

109. This response complies with the RFP requirement and cannot rationally be deemed omitted.

110. Some evaluators acknowledged that they did not factor Section 3.15.2 into their scoring of Securus's proposal.

111. The terms of the RFP require considering section 3.15.2 during the scoring of section 3.15. It is part of that section. Failing to consider Securus's narrative related to section 3.15.2 is not rational.

112. As with section 3.15.1, Securus's proposal complied with the RFP Section 3.15.2. Securus committed to complying with the requirements of section 3.15.2 throughout its proposal.

113. The record does not prove whether each evaluator re-reviewed the cross-referenced sections identified in Section 3.15. But Mr. Phillips did. Despite seeing the exact language in those sections as required in the "Outcome" portion of Section 3.15, Mr. Phillips awarded Securus a score of zero because, in his mind, "key parts of 3.15" were not addressed.

114. The conclusion that Securus entirely omitted a plan to address Section 3.15's requirements is irrational and clearly erroneous. Something was there. A score of omitted is not supported.

115. Mr. Phillips also did not score section 3.15 consistently with the way he scored another section of Securus's proposal. He originally gave Securus a score of zero for section 3.14 entitled, Training, because he did not find a specifically delineated section titled section 3.14 in Securus's response.

116. But Mr. Phillips changed his score before submitting it to Ms. Hussey because upon further review of Securus's proposal, he found some aspects that addressed the training requirements of section 3.14. He scored that section accordingly. This

highlights the error in evaluators not doing the same with section 3.15.

117. The evaluators irrationally concluded that Securus failed to include in its technical proposal any information explaining how it would meet the performance standards and outcomes of section 3.15. Some evaluators relied on the theory that Securus did not "acknowledge" the outcomes and standards. As established above, Securus acknowledged that "the Performance Outcomes and Standards are crucial to the success of the overall inmate telephone service," and throughout its technical response, Securus addressed all the required outcomes and standards.

118. Securus mentioned and acknowledged the performance outcomes and standards a total of six times in its proposal: twice on page 42 and once on each of pages 100, 138, 160, and 392. Three of those pages were narrative responses to sections 3.7 and 3.11, which are specifically included as part of section 3.15.

119. Some evaluators also claimed that Securus never expressly agreed to be bound by the performance measures of section 3.15. That may theoretically affect the qualitative evaluation of the response, but it does not support a finding that the information was omitted.

120. Also, the RFP did not require a vendor to specifically delineate each of the 18 subsections of section 3 in its response. To comply with the Technical Response section of the RFP, a vendor

needed to address, in narrative form, its plan to provide the scope of services outlined in section 3.

121. This was not disputed. Several Department employees testified and agreed that a response to the RFP did not require specifically delineated sections of the response that mirrored the delineation of the RFP.

Inclusion of Prohibited Fees

122. In Addendum 2, the Department asked the vendors to provide a sample refund policy. The policies were not described as or intended to be final refund policies that would be used in administration of the contract. The terms of a refund policy, if any, would be negotiated with the winning vendor, subject to the requirements of the RFP, including the prohibition against including fees in the blended rate.

123. The sample policies of Securus and Global included some costs or forfeitures for obtaining a refund depending on how and when the inmate sought the refund. These are not prohibited fees or even items agreed to in the RFP. They are only samples. The evidence does not prove that the sample refund policies violate the requirement of section 3.8.3.

Scoring

124. The review and evaluation process described in section 6 of the RFP identified the maximum number of points that could be awarded for each part of the inmate calling services

project. The total number of possible points was 1,000. The sections and points allotted to them were as follows: Mandatory Responsiveness Requirements--0, Executive Summary and Other Proposal Submissions--0, Business/Corporate Qualification--50, Project Staff--200, Technical Response--400, and Price Proposal--350. This allowed 350 points for the pricing section and 650 for the remaining technical sections.

125. Because each evaluator scored the technical sections, the cumulative totals of their scores exceed 1,000. Securus maintains that this scoring is inconsistent with the process described in the RFP.

126. But each evaluator scored the technical portion of the proposals within the maximum 650 total points available to each vendor. And the procurement staff scored the price proposals within the maximum 350 points available for price to each vendor.

127. Applying the RFP's mathematical scoring methodology to the price proposals, the procurement staff scored the pricing as follows: Global 280.42, Securus 276.04, and CenturyLink 232.94. The scoring for each was within the RFP's 350-point maximum.

128. The scores given by each evaluator for the technical portion of the vendors' proposals are as follows:

EVALUATORS:	Shane Phillips	Steve Wilson	Jon Creamer	Charles Lockwood	Randy Agerton
CenturyLink	722.94	857.94	707.94	776.69	734.19
Securus	749.79	808.54	702.29	834.79	779.79
Global	782.92	880.42	751.67	859.17	802.92

129. Each evaluator's technical score when combined with the pricing score was within the RFP's 1,000-point maximum.

130. Ms. Hussey totaled all the evaluator's technical scores for each vendor with the pricing score for that vendor. The resulting number exceeded 1,000. The award memorandum presented the totals, as follows:

Ranking = Cost + Total Evaluator Scores (As Posted)

	Commission + Rates	Evaluation Scores	Total	Ranking
Global	280.42	2,680.00	2,960.42	1
CenturyLink	232.94	2,495.00	2,727.94	3
Securus	276.04	2,635.00	2,911.04	2

131. This method of compilation did not affect the relative ranking of the vendors.

132. If the technical scores awarded by the five evaluators are averaged and added to the pricing scores, the points total for each vendor is under 1,000. And the ranking of the vendors does not change.

Ranking = Cost + Evaluator Scores (Evaluator Scores Averaged)

	Commission + Rates	Evaluation Scores	Total	Ranking
Global	280.42	535.00	815.42	1
CenturyLink	232.94	499.00	731.94	3
Securus	276.04	527.00	803.04	2

133. Averaging in this fashion is consistent with the RFP.

134. The evidence does not prove the Department erred in scoring the proposals.

CONCLUSIONS OF LAW

135. The Division of Administrative Hearings has jurisdiction over the parties and of the subject matter of this proceeding. §§ 120.569 and 120.57, Fla. Stat.

136. CenturyLink and Securus bear the burden of proving the proposed award of the contract to Global does not comply with legal standards. § 120.57(3)(f), Fla. Stat.

137. This is a de novo proceeding. § 120.57(3)(f), Fla. Stat. But it is not a typical de novo proceeding in which a factual basis for the Department's decision or error must be proven by the evidence. The Florida Legislature has established a specific standard of review and standard of proof for administrative hearings on protests to the Department's proposals to contract through the competitive procurement process.

138. These statutory standards do not require a determination that the Department has made the best decision or the only decision or the decision that the trier-of-fact would have made. The legislatively established standards state:

Unless otherwise provided by statute, the burden of proof shall rest with the party protesting the proposed agency action. In a competitive-procurement protest, other than a rejection of all bids, proposals, or replies, the administrative law judge shall conduct a de novo proceeding to determine whether the agency's proposed action is contrary to the agency's governing statutes, the agency's rules or policies, or the solicitation specifications. The standard of proof for

such proceedings shall be whether the proposed agency action was clearly erroneous, contrary to competition, arbitrary, or capricious. § 120.57(3)(f), Fla. Stat.

139. The Recommended Order in Health Management Systems v. Agency for Health Care Administration, Case No. 08-2566BID at 21 (Fla. DOAH Aug. 15, 2008; Fla. AHCA Aug. 28, 2008), defines "clearly erroneous, contrary to competition, arbitrary, or capricious," as:

Agency action will be found to be "clearly erroneous" if it is without rational support and, consequently, the trier-of-fact has a "definite and firm conviction that a mistake has been committed." U.S. v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948).

49. An act is "contrary to competition" if it unreasonably interferes with the objectives of competitive bidding, which are:

To protect the public against collusive contracts; to secure fair competition upon equal terms to all bidders; to remove not only collusion but temptation for collusion and opportunity for gain at public expense; to close all avenues to favoritism and fraud in various forms; to secure the best values for the [public] at the lowest possible expense; and to afford an equal advantage to all desiring to do business with the [government], by affording an opportunity for an exact comparison of bids.

Wester v. Belote, 138 So. 721, 723-24 (Fla. 1931).

50. "An action is 'arbitrary if it is not supported by logic or the necessary facts,' and 'capricious if it is adopted without thought or reason or is irrational.'" Hadi

v. Liberty Behavioral Health Corp., 927 So.
2d 34, 38 (Fla. 1st DCA 2006).

Pricing

140. The facts proven by the preponderance of the persuasive evidence in this cause prove that Global and Securus submitted prices that did not include, as section 3.8.3 of the RFP required, "a separate single, blended rate per minute, inclusive of all surcharges and department commission rate on the price sheet (attachment 5) for the inmate telephone service and the video visitation service." The facts also prove that they did not disclose this information to the Department.

141. Awarding the inmate telecommunications service contract to either of them would be contrary to the RFP's solicitation standards.

142. The Global and Securus proposals also undermine the Department's ability to secure the best value for the public at the lowest possible expense. Since they do not include all of the price elements required by the RFP, the Department cannot and did not conduct a meaningful price comparison of them and the CenturyLink proposal.

143. This is not a minor irregularity as defined in section 1.19 of the RFP. It affects approximately 12 percent of the revenue under the proposed contract and provided Global a substantial advantage. Tropabest Foods, Inc. v. Dep't of Gen.

Serv., 493 So. 2d 50, 52 (Fla. 1st DCA 1986). Commissions are also critical factors both to the price paid by inmates and their designees and the Department, should it collect the revenue. They are also an important variable considered by vendors when they construct their proposals. Basing a decision on prices that do not include commissions when the RFP required including them, is contrary to competition, clearly erroneous, arbitrary, and capricious. See Pro Tech Monitoring, Inc. v. Dep't of Corr., Case No. 11-5794 BID (DOAH April 4, 2012; Fla. Dep't of Corr. May 1, 2012) (Vendor's decision not to list all state, federal, and government contracts for electronic monitoring as required by the RFP provided direct competitive advantage; Department's failure to enforce the requirement was clearly erroneous, contrary to completion, arbitrary, and capricious.)

144. Not including the commissions in the blended rate also made the competition between the three vendors unfair and unequal.

145. This is not a matter of raising a specifications protest in an award protest. This is a matter of specifications not being followed. At the least, the parties had differing interpretations of the meaning and effect of the FCC order. The RFP provided no guidance on the issue. Awarding the contract in these circumstances denies CenturyLink the equal advantage the

competitive procurement laws were enacted to provide. Wester v. Belote, 138 So. 721, 723-24 (Fla. 1931).

RFP Section 3.15

146. The documents proved, and several Department representatives acknowledge, that the Securus proposal contained the required narrative responsive to, at a minimum, some of the elements of section 3.15. The failure to consider and award some points for the Securus response is not rational, not supported by logic, and clearly erroneous. The effect is contrary to competition because it severely undermined the ability of the Department to award the contract to a competent possible provider.

Scoring

147. Section 287.057(1)(b), Florida Statutes, governing requests for proposals, requires that the RFP state the "relative importance of price and other evaluation criteria."

148. The Department stated the relative importance of price and the other evaluation criteria in its RFP. CenturyLink and Securus argue, however, that the Department failed to follow its RFP or to comply with section 287.057(1)(b)2.b. The findings of facts do not support a conclusion that the Department's application of the RFP scoring system was arbitrary or capricious. They also do not support a conclusion that

assembling the scores in the fashion urged by CenturyLink and Securus would have caused a different result.

Conclusion

149. CenturyLink and Securus have met the burden imposed by section 120.57(3)(f). The Department's intended award to Global, where price proposals of two vendors do not comply with the RFP specifications and the scoring of Securus's proposal incorrectly awarded zero points out of the possible 25 for its response to section 3.15, together, require concluding that the preponderance of the credible persuasive evidence establish a "definite and firm conviction that a mistake has been committed."

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Corrections enter a final order rejecting all proposals for Request for Proposal DC RFP-13-031.

DONE AND ENTERED this 4th day of September, 2014, in Tallahassee, Leon County, Florida.



JOHN D. C. NEWTON, II
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Filed with the Clerk of the
Division of Administrative Hearings
this 4th day of September, 2014.

ENDNOTES

- ^{1/} All references to the Florida Statutes are to the 2014 codification, unless otherwise noted.
- ^{2/} The Pre-Hearing Order granted the unopposed motion to amend.
- ^{3/} Boldface type shown in quotations of the RFP appeared in the original.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 10 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.