

**STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND**

IN THE MATTER OF: BID PROTEST

UNION SUPPLY GROUP, INC.

v.

**SOUTH CAROLINA DEPARTMENT OF
CORRECTIONS**

**INMATE PACKAGING PROGRAM
SOLICITATION NO. 5400008644**

**BEFORE THE CHIEF PROCUREMENT
OFFICER**

DECISION

CASE NO. 2015-148

POSTING DATE: 5/12/2015

This matter is before the Chief Procurement Officer (CPO) pursuant to a request from Union Supply Group, Inc. (Union), under the provisions of §11-35-4210 of the South Carolina Consolidated Procurement Code, for an administrative review on the Inmate Packaging Program bid for the South Carolina Department of Corrections (DOC). Union protests DOC's posting of a Notice of Intent to Award a contract to Keefe Commissary Network, LLC (Keefe¹). On April 29, 2015, pursuant to S.C. Code Ann. §11-35-4210(4), the CPO conducted an administrative review by hearing. At the hearing, attorney E. Wade Mullins, III, represented Union; attorney M. Elizabeth Crum represented Keefe; and attorney Michael H. Montgomery represented DOC. Appearing as witnesses were Samuel T. Hanvey, the Procurement Officer for this procurement representing the Division of Procurement Services (DPS); Ruthie H. Bishop, Procurement Manager for DOC; Melissa Mims, a procurement manager for DOC; Chad Byrd with DOC facilities management; Randy McElveen, branch chief of the DOC Commissary; JeNeann Adams, with DOC Prison Industries; and L. D. Hay, Executive Vice President of Union. During the hearing, the CPOC received Exhibits 1 through 27 into evidence, heard oral arguments, and took testimony from all parties. The CPO makes this decision based on the allegations of the protest, evidence presented at the hearing, and applicable law and precedents.

NATURE OF THE PROTEST

Union's protest is incorporated herein by reference and attached hereto as Exhibit A.

¹ The final e in the name Keefe is silent.

RELEVANT FACTS

1. On October 8, 2014, DPS, on behalf of DOC, issued a request for proposals (“RFP”) to provide inmate packaging services. [Ex. 1]
2. On October 24, 2014, DPS issued Amendment 1 to the RFP [Ex. 2], the first of four amendments. [The other three amendments were received as Exhibits 3, 4 and 5.] Pages four and five of Amendment 1 made modifications to the RFP which are pertinent to this dispute.
3. By the date for receipt of proposals, DOC received offers from Keefe and Union. Each offer consisted of a technical/scope proposal, qualifications, revenue proposal, and price proposal. [See Ex. 8 and 11 for the Keefe proposal and Ex. 9 and 10 for the Union proposal]
4. On February 2, 2015, a panel of five DOC employees evaluated and ranked the technical/scope proposals using a scoring system. [Ex. 13 and 15] Because DOC had received only one reference for Union by the time of the evaluation, the Procurement Officer presented the evaluators with only one reference for each offeror. [Testimony of Ms. Bishop, Ms. Adams, and Mr. Hanvey]
5. Keefe received the highest score during the evaluation process whereupon the Procurement Officer initiated negotiations with Keefe. [Ex. 13 and 15 and testimony of Mr. Hanvey]
6. On or about February 17, 2015, a representative of Union improperly² contacted one or more DOC employees not involved in the conduct of the procurement to complain about the reference checking process. [Testimony of Ms. Bishop, Mr. Hay, and Mr. Hanvey] These complaints were forwarded to the Procurement Officer who, after consulting with his manager, suspended negotiations with Keefe,

² The solicitation included the following provision in its instructions to offerors:

RESTRICTIONS APPLICABLE TO OFFERORS (JAN 2004)

Violation of these restrictions may result in disqualification of your offer, suspension or debarment, and may constitute a violation of the state Ethics Act. (a) After issuance of the solicitation, *you agree not to discuss this procurement activity in any way with the Using Governmental Unit or its employees, agents or officials.* All communications must be solely with the Procurement Officer. This restriction may be lifted by express written permission from the Procurement Officer. This restriction expires once a contract has been formed. (b) Unless otherwise approved in writing by the Procurement Officer, *you agree not to give anything to any Using Governmental Unit or its employees, agents or officials prior to award.* [02-2A110-1]

(emphasis in original) The employees who were contacted acted properly by referring the inquiry to the procurement officer. See S.C. Code Ann. Reg. 19-445.2010(B).

instructed DOC to seek additional references for Union, and scheduled a meeting to re-evaluate proposals taking into consideration any additional references that DOC received. [Testimony of Mr. Hanvey]

7. On March 12, 2015, the evaluation panel met once again to re-evaluate proposals after receiving additional references for each offeror. [Ex. 14 & 16] After considering this additional information, the scores for each offeror remained unchanged. [Ex. 13 through 16]

8. On March 27, 2015, DPS posted a Notice of Intent to Award a contract to Keefe. [Ex. 6]

9. On April 6, 2015, Union timely protested the Intent to Award a contract to Keefe.

10. On April 10, 2015, Union timely amended its protest.

DISCUSSION

I. Union's Allegation That Keefe's Proposal is Non-Responsive

Union Supply contends Keefe is non-responsive because Keefe did not provide complete answers to certain requirements of the RFP. Specifically, its protest alleges that Keefe failed (a) to provide the minimum number of agency references and provide the mandatory information required for its references; (b) to provide a plan to reimburse DOC for a full time staff manager; (c) to address its willingness and ability to create and sustain an educational/vocational curriculum; (d) to provide a detailed logistics plan; and (e) to describe the training and support Keefe would provide DOC.

To be responsive, a proposal need not conform to all of the requirements of an RFP, instead the proposal "must simply conform to all of the essential requirements of the RFP." *In re: Protest of Value Options, et al.; Appeal by Value Options, et al.*, Case No. 2001-7 (Aug. 3, 2001) (emphasis in original). "[A] requirement is not 'essential' if variation from it has no, or merely a trivial or negligible, effect on price, quality, quantity, or delivery of the supplies or performance of the services being procured [A] requirement is not 'essential' simply because it is mandatory." *Id.*

A. Union Alleges Keefe Failed to Provide Required References

Section V of the RFP entitled "Qualifications" states in part:

SCDC will determine the success of programs operated by Offerors **through written references** and evaluation of programs currently operated by Offerors that consist of **same scope and size of SCDC ...**

Offeror must provide at least **3 references** where the vendor has provided **Order Management** support for a Package Program (orders placed by Family Members, Friends or Inmates) for State Department of Corrections of **similar inmate population and product selection** as South Carolina Department of Corrections within the last two (2) years.

Offeror must provide at least **3 references** where the vendor has **utilized inmates** housed by a State Department of Corrections **to fulfill orders** on site within a Correctional Facility for delivery within that Correctional Facility or throughout that State Department of Corrections within the last two (2) years. Operations used as references should be of **similar scope, size and inmate population** as South Carolina Department of Corrections.

[Amendment 1, Ex. 2, pp. 4 through 6 (emphasis added)]

In response to the requirement for three references for order management support, Keefe listed the Arkansas Department of Corrections, Georgia Department of Corrections, and Virginia Department of Corrections. [Keefe Technical Proposal, Ex. 8, pp. 5-7 through 5-11] At the hearing, Union did not argue that these references were not responsive to the reference requirement for order management.

In response to the requirement for three references for order fulfillment, Keefe listed the New Mexico Department of Corrections/Correctional Industries, Kentucky Department of Corrections, and Idaho Department of Corrections. [Ex. 8, pp. 5-12 through 5-17] At the hearing, Union argued that these references did not comply with the requirement that references "should be of similar scope, size and inmate population as South Carolina Department of Corrections."

The Panel has held that the references provided by an offeror have to be similar to those requested in the RFP and that "similar" does not mean "identical". In *Appeal by AnyTransactions, Inc.*, Panel Case No. 2012-6, the Panel held:

[T]he Panel finds that Fieldware's submission of five references with narrative descriptions of the services being performed for each customer is fully responsive to the State's request for "comparable contracts" for the purpose of determining responsibility. See *In re: Protest of NBS Imaging Systems, Inc.*, Panel Case No. 1993-16 (September 1, 1993) (wherein the Panel found that a bidder's provision of a reference using a similar, but not identical, system to the one being procured for the State was sufficient to aid the State in determining responsibility).

At the hearing, the Procurement Officer testified that he reviewed Keefe's proposal for responsiveness before submitting it to the evaluation panel and considered the references provided by Keefe for order fulfillment to be responsive to the requirements of the RFP. Keefe provided information

on each of its references making clear the size of the program it had with each. This information was available to evaluators enabling them to take the size of the programs into consideration when evaluating Keefe's proposal.³ The reference information provided was sufficient to aid evaluators in evaluating Keefe's qualifications. Moreover, references were only a part of a much larger qualification section submitted to the evaluators, a section that included information on overall experience providing services to "714 correctional facilities totaling over 475,000 inmates nationwide." [Ex. 8, pp. 5-1 through 5-17]

B. Union's Alleges that Keefe Failed to Respond Properly to the Reimbursement Requirements in the Solicitation

Section 3.17 required each offeror to "describe its reimbursement and commission strategy" and further stated:

Offeror must make payments to the South Carolina Department of Corrections, Division of Prison Industries for the following:

- **SCDC will provide one full time staff manager for the project.**
- The Offeror will reimburse SCDC for the cost of at least one full time correctional officer with a rank of Sergeant or above for plant security. The estimated cost of this position \$50,000 per year which includes 44% for the State benefit package.
- Inmate pay will be reimbursed to the Division of Industries \$4.50 per inmate hour.
- The Offeror will reimburse utilities in full, estimated to be \$5,000 per year.
- SCDC will utilize Division of Industries existing fleet and its driver but will request reimbursement of the driver's partial salary and State benefits in the amount of \$21,800.
- The Offeror will reimburse SCDC for transportation cost on a per mile basis at a rate of \$1.22 per mile.
- **Once packages are delivered to the institution, they will be distributed by SCDC personnel to the inmate population.**

[RFP, Ex. 1, p. 27 (emphasis added)]

³ One of the evaluators, Ms. Adams, testified that, based on the information Keefe provided in its proposal, she did not consider the order fulfillment references to have programs similar in size to DOC's. However, this statement shows that Keefe provided sufficient information for the evaluators to evaluate Keefe's qualifications.

For five of the seven bulleted items, DOC provided exact reimbursement rates. However, for the two bolded items, DOC provided no reimbursement information at all—raising a question as to whether DOC intended to reimburse for these two categories. Neither party asked DOC to clarify this ambiguity before submitting proposals.

Keefe responded to Section 3.17 in its proposal stating:

Keefe Response: Keefe has read, understands and will adhere to all vendor requirements listed in Section 3.17 Reimbursement and Commission.

Keefe agrees to pay the commission rate as submitted with the RFP response on all net sales (net sales = gross sales minus sales tax and any shipping/handling/processing fee).

Keefe agrees to reimburse SCDC for One Correctional Staff member rank of Sergeant or higher estimated to be \$50,000 per year.

Keefe agrees to reimburse SCDC for transportation services at the rate of \$1.22 per mile.

Keefe agrees to reimburse SCDC for one driver's partial salary at the rate of \$21,800 per year.

Keefe agrees to reimburse SCDC for inmate labor at the rate of \$4.50 per hour per inmate, estimated to be 48,000 total man hours annually or \$216,000.

Keefe agrees to reimburse SCDC for all utilities for the warehouse location at Trenton, SC estimated to be \$5,000 per year.

[Keefe Price and Revenue Proposal, Ex. 11, p.4 (emphasis supplied)]

Keefe did not provide any reimbursement rates for or even mention the staff manager or the personnel distributing packages. Union argues that Keefe's failure to do so with respect to the "one full time staff manager" provided by DOC makes Keefe's bid non-responsive.⁴ Keefe submitted a Cover Page with its proposal, signed by its vice president. [Ex. 8, p. 2] The Cover Page reads in part: "By submitting a bid or proposal, You agree to be bound by the terms of the Solicitation." Beneath the signature line is the legend, "Person must be authorized to submit binding offer to contract on behalf of Offeror." *Id.* the RFP included the following clauses:

By submitting Your Bid or Proposal, You are offering to enter into a contract with the Using Governmental Unit(s). Without further action by either party, a binding contract

⁴ Union does not make the same argument with respect to Keefe's failure to mention the DOC personnel who would distribute the packages. Perhaps this is because Union omitted any reimbursement for these employees from its own proposal—suggesting that at least in part Union agreed with Keefe's interpretation. [Ex. 10]

shall result upon final award. Any award issued will be issued to, and the contract will be formed with, the entity identified as the Offeror on the Cover Page. An Offer may be submitted by only one legal entity; "joint bids" are not allowed. [02-2A015-1]

[Ex. 1, p. 10]

Offeror, by submitting an Offer, represents that it has read and understands the Solicitation and that its Offer is made in compliance with the Solicitation. Offerors are expected to examine the Solicitation thoroughly **and should request an explanation of any ambiguities**, discrepancies, errors, omissions, or **conflicting statements** in the Solicitation. Failure to do so will be at the Offeror's risk. **Offeror assumes responsibility for any patent ambiguity in the Solicitation that Offeror does not bring to the State's attention.**

[Ex. 1, p. 13 (emphasis supplied)]

Keefe led off its response to Section 3.17 by stating it would adhere to all the requirements. Nowhere in its proposal has it taken exception to any of the solicitation's terms. It submitted a signed Cover Page, indicating its offer to contract on the terms of the solicitation. Simply stated, there is nothing in Keefe's proposal to indicate it will not comply with the reimbursement requirements of Section 3.17.⁵

C. Union Alleges Keefe Failed to Respond Properly to the Educational/Vocational Requirements in the RFP

As a part of the requirements for Order Fulfillment references, Solicitation Amendment Number 1 stated:

Offeror must provide the following contact information:

- Name of other State Department of Corrections facilities that are similar in size and scope to The SC Department of Corrections. *(NO VENDOR IS ALLOWED TO USE THE SC DEPARTMENT OF CORRECTIONS AS A REFERENCE)*
- Name of contract representative from other Department of Corrections
- Email address
- Telephone number and fax number of contract representative for each program used as reference above.
- Offeror to provide the number of orders processed annually and the average inmate population for each program used as reference above.

⁵ At the hearing, Ms. Adams testified that the inmate work portion of this program would be under her, that she and her superior participated in the development of the RFP, and that DOC intended to provide and pay for the full time staff manager. Under the interpretation given the solicitation by the program manager, Keefe's proposal was literally responsive to the requirements of the RFP.

- Offeror must acknowledge its ability and willingness to work with South Carolina Division of Prison Industries and employ SCDC's inmates in a controlled environment.
- Offeror must provide information stating its willingness and ability to create and sustain an educational/vocational curriculum associated with an inmate work program.⁶

[Ex. 2, p. 6]

In response to these requirements Keefe's proposal states:

Keefe Response: Keefe has read, understands and adhered [sic].⁷

Keefe process more than a 150,000 packages per month that are fulfilled on-site in correctional locations using inmate labor. Some of these locations (NM DOC) are conducted in partnership with Correctional Industries and some are done with contracts directly with the Department of Corrections.

Keefe satisfies the 4 bullet points listed above for Order Fulfillment using inmate labor on-site in correctional locations. Between the extensive on-site experiences that Keefe has regarding Order Fulfillment coupled with the years of Package Program Order Management- Keefe is the industry leader in these two areas.

Please see pages 5-13-5-17 for references that will confirm Keefe's ability to provide superior order fulfillment services using inmate labor and managing on-site inventory.

[Ex. 8, p. 5-12]

Union argues that this response is non-responsive with regard to the requirement that the "Offeror must provide information stating its willingness and ability to create and sustain an educational/vocational curriculum associated with an inmate work program." At the hearing, Union suggested that Keefe should have submitted a plan, something the RFP does not require. While Keefe's response may be minimal, it does indicate a willingness to create and sustain an "educational/vocational curriculum associated with an inmate work program." Moreover, these bullet points are a part of the RFP's reference requirements for order fulfillment and Keefe's response does provide references that DOC could contact to confirm Keefe's ability to create such a program. In short, Keefe was responsive. The quality of Keefe's response

⁶ Union treated the last two bullet points as requirements that were independent of the reference requirements whereas Keefe treated them as a part of the reference requirements.

⁷ A review of Keefe's entire proposal makes clear this is a typographical error and Keefe intended to state "and will adhere" or "adheres."

is a matter for the evaluators to score. *IN RE: Appeals by Arkansas Foundation for Medical Care and Keystone Peer Review Organization, Inc.*, Cases No. 2011-6 and 7.

D. Union Alleges Keefe Failed to Respond Properly to the RFP Logistical Plan Requirements

Solicitation Section III, Scope of Work, describes the scope of the work the successful offeror will be required to provide under the contract. This Section includes a requirement for an Implementation and Operations Plan. [Ex. 1, p. 24] As a part of this plan, the vendor must provide:

A detailed logistics plan, including laying out the time frames for bulk inventory shipments to the South Carolina Department of Corrections, Division of Prison Industries packaging facility (located at Trenton Correctional Institution), inventory handling and storage procedures, and a loss prevention plan.

[Ex. 1, p. 25, Sect 3.15.12]

Union alleges that Keefe's proposal was non-responsive to this requirement because Keefe did not include a logistics plan in its proposal. However, nothing in the RFP required offerors to submit a detailed logistics plan in their proposals.

Solicitation Section IV, Information Offerors to Submit, sets forth the information offerors must include in their proposals. This section of the RFP requires at a minimum that in response to the scope of work requirements offerors should "restate each requirement as listed in section III and respond directly below the requirement, as applicable, as how they [sic] proposed solution will meet or exceed the requirement as listed." Keefe's response recites Section 3.15.12 and then states:

Keefe has read, understands and will adhere.

Keefe proposes to fulfill the orders over a 45 day calendar period - Monday through Friday. To support this production schedule Keefe proposes to delivery inventory on a weekly or semi-weekly schedule from our Jacksonville, FL warehouse.

The first delivery will occur approximately 7 calendar days prior to the first day of order fulfillment. Subsequent deliveries will occur at a minimum weekly until that order fulfillment period is completed at which time deliveries would cease until the next Quarter's order fulfillment period began.

Please refer to Exhibit D: Standard Receiving Practices for documentation.

Loss prevention is achieved by proper product rotation, adequate shelf life on product when received and by Keefe utilizing its Warehouse Management System "WMS" system to track product location and expiration dates at a specific warehouse location. This process will be used at the Trenton, SC location.

Keefe's response provides the outlines of a logistics plan and is responsive to the requirements of the RFP. The sufficiency and completeness of Keefe's solution is a matter for the evaluators to score.

E. Union Alleges Keefe Failed to Respond Properly to the RFP Training and Support Requirements

Section 3.15.20 of the Scope of Work states:

Describe in detail the training and support, they will provide to the South Carolina Department of Corrections, Division of Prison Industries throughout the term of this contract. This Contract will be for One (1) year with the option to renew for four (4) additional 1 year periods.

Keefe's response recites this requirement in its proposal and then states:

Keefe has read, understands and will adhere.

Keefe will train SCDC PI employees in all phases of program management.

- Inventory Control
- Bay Layout
- Production Scheduling
- Delivery Scheduling
- Labor planning
- Product Selection Product Pricing

Keefe's response is responsive to the requirements of the RFP. The sufficiency and completeness of Keefe's solution is a matter for the evaluators to score.

II. Union Alleges the Conduct of the Evaluation Process and Award Determination Violated the Consolidated Procurement Code

A. Union Alleges the Review and Consideration of Offeror References Violated the Consolidated Procurement Code

Union alleges eleven significant errors made and improper actions taken by DOC and the Procurement Officer in gathering and presenting references to the evaluators. The CPO addresses each of these allegedly significant errors.

1. Union asserts: "The Department, who handled obtaining the reference checks, initially erroneously mis-typed the email addresses for several of Union Supply's references, impacting the responses."

The testimony of Ms. Bishop confirms that DOC did in fact initially mis-type some email addresses; however, this error was corrected upon receipt of undeliverable email messages within minutes of the emails initially being sent out. [Ex. 22, 7th and 8th page from front]

2. Union asserts: “The Department did not contact all of Union Supply's references.”⁸

Nothing in the RFP stated that DOC would contact all references. Nonetheless, Ms. Bishop sent out an email to four state departments of correction Union used as reference on January 29, 2015. [Ex. 22]

The RFP asked for three references for Order Management and three references for Order fulfillment. Union listed four states with two contacts each generally. [Ex. 8, Qualification pages 10 through 24] Union used these same four references for both Order Management and Order Fulfillment. Ms. Bishop contacted these four references. [Ex. 22] In addition to providing four references for each category, Union listed a fifth reference for Order Management, Alabama. It does not appear that Ms. Bishop attempted to contact Alabama. However, Union had no reasonable expectation that DOC would contact all references provided, the RFP imposes no such obligation and Ms. Bishop’s failure to contact Alabama was not a violation of the Procurement Code.

3. Union asserts: “The initial reference communication to Union Supply's references erroneously stated it was being made on behalf of Keefe.”

The testimony of Ms. Bishop confirms that DOC did in fact initially misstate the request was made on behalf of Keefe; however, this error was quickly corrected and a revised email sent to Union Supply’s references. [Ex. 22, 7th and 8th page from front]

4. Union asserts: “The uniform reference communication by the Department and accompanying questionnaire failed to adequately inform the references as to whether they were to provide information on Order Management or Order Fulfillment. The information solicited from the reference checks was not sufficient or relevant to ensure compliance with the requirements of the RFP.”

⁸ The solicitation asked for three references for Order Management and three references for Order Fulfillment. Union listed four states with two contacts each for general references. For Order Management, Union refers DOC to the general references and adds Alabama. For Order Fulfillment, Union uses the same four references as it used for general references. Therefore, Union only provided five different states as references in response to the section of the solicitation requesting references.

The reference questionnaire asks broad question concerning the vendor's performance and is adequate to elicit responses about a vendor's overall performance regardless of whether the reference was listed for Order Management or Order Fulfillment. Presumably, if the vendor's performance is inadequate in either Order Management or Order Fulfillment this fact will be noted in the responses. As it was, all references received for both offeror's were positive.

5. Union asserts: "The Department initially reported to the Procurement Officer and/or the evaluation panel that after "several" attempts they had received only one reference for Union Supply and four references for Keefe as of February 2, 2015. Upon information and belief, this was not correct."

The exhibits and the unrefuted testimony presented at as of February 2, 2015, DOC received only one reference for Union Supply and four references for Keefe. Moreover, Ms. Bishop stated this fact to the Procurement Officer in the presence of the evaluators. Union presented no evidence or testimony to show this was incorrect.

6. Union asserts: "The Procurement Officer and/or Department and/or evaluation panel determined that they would proceed with evaluating the Qualifications and Experience Section using only one reference from each Offeror. There is no indication as to whether these were references for Order Fulfillment or Order Management or whether any consideration was given to the impact of those actions on the scoring."

The CPO notes that neither DOC nor the Procurement Officer can compel a reference to respond to a request for information. The Procurement Officer testified that after DOC notified him that they only had one reference for Union, he decided that out of fairness to Union, he would only submit one reference per offeror to the evaluators for consideration. While these actions were reasonable, there was nothing to prevent the Procurement Officer from presenting all available references to the evaluators. The Procurement Officer's decision to do otherwise was harmless and arguably benefitted Union rather than Keefe.

7. Union asserts: "The effort to unilaterally select one reference for each Offeror, if in fact that is what occurred, was not permitted or contemplated by the RFP."

The RFP does not state how many references would be provided to the evaluators. Moreover, there was no effort to unilaterally select one reference for Union. The state only had one reference for Union. That reference was provided to the evaluators. If there was error, the error was harmless error in unilaterally selecting one reference for Keefe.

8. Union asserts: “The Procurement Officer and or Department provided reference checks to the evaluation panel that did not comply with the requirements of the RFP.”

A protest must be stated with “enough particularity to give notice of the issues to be decided. SC Code Ann §11-35-4210(2). This item of protest is so vague as to be impossible to determine what issues are to be decided.

9. Union asserts: “After determining that errors had occurred in the original efforts to obtain references for Union Supply (through no fault of Union Supply), the Department again solicited responses from Union Supply's references but also solicited responses from individuals and agencies not listed as references in Keefe's proposal.”

The testimony showed that contrary to the assertion of Union, neither the Procurement Officer nor the Division of Procurement Services determined there had been error in the original effort to obtain references. Instead, they made a decision to re-solicit reference responses as a result of complaints made by one of Union’s attorneys to Department of Corrections management. This decision was made out of an abundance of caution, not out of a belief that there had been error. Having made the decision, to re-solicit responses from Union’s references and to include references not previously solicited, the Procurement Officer directed DOC to treat Keefe equally by doing the same with Keefe’s references. This course furthered the purpose of the Code, to treat all persons involved in a procurement fairly and equitably. S.C. Code Ann § 11-35-20(f). Union’s complaint, however, is that in following the Procurement Officer’s instructions, DOC solicited a reference for Keefe that Keefe did not include in its response to Section V of the RFP. Moreover, Union complains the Procurement Officer provided the response from that entity to the evaluators when the evaluation committee reconvened to re-evaluate the proposals using the new and additional reference responses. Even assuming this to be error, it was harmless error. See *In re: Protest of First Sun EAP Alliance, Inc.*, Panel Case No. 1994-11. The evidence shows that this additional reference had no impact on Keefe’s ranking. Keefe’s score after the re-evaluation of proposals was the same score it received in the first evaluation.

10. Union asserts: “Both efforts to obtain reference checks contained unreasonable time restrictions for responding that impacted the responses.”

The time frame for the response of references for both offeror’s was the same. Even if there were error (and there was not), each offeror was affected equally.

11. Union asserts: “The Department provided reference information from the second round of reference checks for the "re-scoring" that included information that did not comply with the requirements of the RFP and contained information from sources not listed as references in the proposal submitted by Keefe.”

A protest must be stated with “enough particularity to give notice of the issues to be decided. SC Code Ann §11-35-4210(2). This item of protest is so vague as to be impossible to determine what issues are to be decided. Moreover, the last clause in this item of protest is a restatement of item 9 above. To the extent this allegation complains about the result of the second round of checks, the record includes nine responses for Union and four for Keefe, which Mr. Hanvey submitted to the evaluators when they reconvened. Not only was there no error, the re-solicitation of references clearly benefited Union. To the extent this allegation suggests that the do-over of references somehow favored Keefe, Union failed to prove it. Keefe’s score stayed the same after the panel considered the additional references.

B. Union Alleges the Evaluators Failed to Take into Account or Score Union’s Financial Plan

This item of protest is a restatement of ground of protest ground I(b) discussed above with the twist that Union alleges that the evaluators failed to consider and score its own financial proposal. Union included additional reimbursements not required by Section 3.17 of the Solicitation in its Pricing/Revenue Proposal. Union contends these reimbursements should have been scored by the panel or considered in the procurement officer’s formula to determine scoring for the pricing and revenue proposals.

The RFP required bidders to submit a Price and Revenue proposal:

OFFEROR shall provide the information requested in Section VIII of this RFP. Offerors should return the completed spreadsheet in Attachment A and the Bidding Schedule as a separate document as stated on page 3.

[Ex. 1, p. 31]

Under “Award Criteria, the RFP stated:

Offers will be evaluated using only the factors stated below. Evaluation factors are stated in the relative order of importance, with the first factor being the most important. Once evaluation is complete, all responsive offerors will be ranked from most advantageous to least advantageous. [06-6065-1]

1. Technical/Scope of Proposal

The degree, completeness and suitability of the Offerors proposed solution to meet or exceed the requirements as stated in Section III of this RFP

2. Qualifications

The Offeror's qualifications as listed in Section V - Qualifications.

3. Revenue Proposal

The commission percentage (%) offered to the State, as stated in Section VIII. -

4. Price Proposal

The Offerors total price for all products listed in Attachment A, as stated in: Section VIII.

Section VIII of the RFP included a bidding schedule that requested a "Price Proposal Amount" and a "Revenue Proposal Amount." The latter figure was equal to

...the total potential five (5) year commission paid to the Division of Support Services (Canteen Branch), as stated in your response to the Revenue Proposal.

[Ex. 1, p. 48] On the following page, the solicitation stated:

All Offerors are to provide the total Commission rate provided to SCDOC, based on the formula provided as the unit price in the online system, as well as stated below:

Commission Rate: The Offeror will pay SCDC – Division of Support Services (Canteen BRANCH) a minimum of 18% commission on gross sales excluding sales tax and shipping and handling charges. **SCDC will not accept anything less than an 18% commission. The Offeror may offer SCDC a commission higher than 18% and the commission rate will be determined at the time the proposal is awarded.**

The gross sales for the 2014 Spring Sales event were \$1,159,945.00 and since the SCDOC wants to extend this out to four (4) sales per year, the total potential annual sales would be \$4,639,780.00 per year, which equates a total potential amount for five (5) year contract term to be \$23,198,900.00.

Therefore, for evaluation purposes only, the State will use the following formula to determine the total potential commission rate based off of \$23,198,900.00:

\$23,198,900.00 x _____% commission offered (must be a minimum of 18%) =
\$ _____ (minimum guaranteed return commission to the Division of Support Services (Canteen Branch)).

Note: this is the amount you will enter into the online system and will be evaluated.

Id., p. 49 (emphasis in original).

Under the structure of the RFP, the procurement officer evaluated the Pricing and Revenue Proposals using a long-accepted formula, and provided the scores to the evaluators after they scored the Technical Proposals/Qualifications. Since it would have been improper for the procurement officer to provide Union's Pricing/Revenue Proposal to the evaluators, he advised them that Union was fully

responsive to the reimbursement requirements of Section 3.17. Union complains that the procurement officer failed to tell the evaluators that its response to Section 3.17 included an alternative plan, or that he should have read the relevant portion of the financial proposal to the evaluators. However, the procurement officer scored Union's Price and Revenue proposals exactly as the RFP required. Union alleges no error that would entitle it to relief in this ground of protest.

III. Union Alleges that the Evaluator Scoring was Arbitrary and Capricious, the Evaluators Failed to Follow the Published Award Criteria, and Consider Matter Outside the Solicitation

Relying on all the alleged errors discussed above, Union argues that the evaluators were arbitrary and capricious in their scoring. The CPO will not once again discuss those alleged errors. Union presented no actual evidence that any evaluator was arbitrary or capricious in her scoring. Union argues that the fact that each offeror's score remained unchanged after they received additional references and re-evaluated proposals manifestly shows that the evaluators were arbitrary and capricious. However, the unrefuted testimony and the references themselves show that the references provided no additional information that would necessarily change the scores for either offeror. The references for both Union and Keefe were uniformly positive.

Union does raise one allegation under this item of protest that was not previously discussed above. Union alleges that the evaluators were not advised of the weightings provided to the two award criteria they evaluated and, therefore, they could not have scored the proposals in accordance with the published award criteria. However, the testimony refuted this allegation.

The evaluators' determination of which offer is the most advantageous to the State is "final and conclusive unless it is clearly erroneous, arbitrary, capricious, or contrary to law." S. C. Code Ann. § 11-35-2410(A). As such, the CPO will not "substitute its [his] judgment for the judgment of the evaluators, who are often experts in their fields, or disturb their findings so long as the evaluators follow the requirements of the Procurement Code and the RFP, fairly consider all proposals, and are not actually biased." *In re: Protest of Nalco Co.; Appeal of Garratt Callahan*, Panel Case No. 2004-7. The evaluation process "does not need to be perfect so long as it is fair." *Id; see, e.g., Protest of Santee Wateree Regional Transportation Authority*, Panel Case No. 2000-5 (reaffirming that the evaluation process need not be perfect as long as it's fair and the Panel will not re-evaluate proposals); *Protest of Transportation Management Services, Inc.*, Panel Case No. 2000-3 (finding that the evaluation process is not required to be perfect and that the Panel will not re-evaluate proposals); *Protest of First Sun EAP Alliance*, Panel Case No. 1994-11 (noting that the Panel will not disturb the evaluators' findings so long as they following

the Code and the RFP's requirements, fairly consider all proposals and are not actually biased); *Protest of Volume Services*, Panel Case No. 1994-8 (holding that the Panel will not substitute its judgment for that of the evaluators).

IV. Union Alleges the Procurement Officer Conducted Negotiations in Violation of the Procurement Code

After the evaluators evaluated proposals the first time, the Procurement Officer initiated negotiations with Keefe. The evaluators did not participate in the negotiations. After Union complained to DOC's management and the decision was made to solicit additional references and re-evaluate proposals, the Procurement Officer suspended negotiations until DOC could obtain additional reference responses and the second evaluation was complete. Since the additional references did not change the evaluators' scores, Keefe was still the highest ranked offer after the second evaluation and the Procurement Officer resumed negotiations with Keefe.

Union argues that the initiation of Negotiations with Keefe after the first evaluation was error. This assumes that the first evaluation itself was fraught with error. As discussed above, this was not the case. Union cannot complain that after improperly contacting parties other than the Procurement Officer to complain about the reference check process, the Procurement Officer responded to those complaints by suspending negotiations with Keefe and giving Union a second chance, a chance he did not have to give. Union presented no evidence that the Procurement Officer committed error in the conduct of negotiations.

DETERMINATION

The CPO finds that Union has failed to meet its burden of proof and that Keefe's proposal was responsive, that any error by the Procurement Officer during the procurement was harmless, and that the scoring of the evaluators was not arbitrary, capricious, or contrary to law . The protest is therefore denied.



John St. C. White
Chief Procurement Officer
For Construction



Date

Columbia, South Carolina

STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW
Protest Appeal Notice (Revised October 2014)

The South Carolina Procurement Code, in Section 11-35-4210, subsection 6, states:

(6) Finality of Decision. A decision pursuant to subsection (4) is final and conclusive, unless fraudulent or unless a person adversely affected by the decision requests a further administrative review by the Procurement Review Panel pursuant to Section 11-35-4410(1) within ten days of posting of the decision in accordance with subsection (5). The request for review must be directed to the appropriate chief procurement officer, who shall forward the request to the panel or to the Procurement Review Panel, and must be in writing, setting forth the reasons for disagreement with the decision of the appropriate chief procurement officer. The person also may request a hearing before the Procurement Review Panel. The appropriate chief procurement officer and an affected governmental body shall have the opportunity to participate fully in a later review or appeal, administrative or judicial.

Copies of the Panel's decisions and other additional information regarding the protest process is available on the internet at the following web site: <http://procurement.sc.gov>

FILE BY CLOSE OF BUSINESS: Appeals must be filed by 5:00 PM, the close of business. *Protest of Palmetto Unilect, LLC*, Case No. 2004-6 (dismissing as untimely an appeal emailed prior to 5:00 PM but not received until after 5:00 PM); *Appeal of Pee Dee Regional Transportation Services, et al.*, Case No. 2007-1 (dismissing as untimely an appeal faxed to the CPO at 6:59 PM).

FILING FEE: Pursuant to Proviso 108.1 of the 2014 General Appropriations Act, "[r]equests for administrative review before the South Carolina Procurement Review Panel shall be accompanied by a filing fee of two hundred and fifty dollars (\$250.00), payable to the SC Procurement Review Panel. The panel is authorized to charge the party requesting an administrative review under the South Carolina Code Sections 11-35-4210(6), 11-35-4220(5), 11-35-4230(6) and/or 11-35-4410...Withdrawal of an appeal will result in the filing fee being forfeited to the panel. If a party desiring to file an appeal is unable to pay the filing fee because of financial hardship, the party shall submit a completed Request for Filing Fee Waiver form at the same time the request for review is filed. The Request for Filing Fee Waiver form is attached to this Decision. If the filing fee is not waived, the party must pay the filing fee within fifteen days of the date of receipt of the order denying waiver of the filing fee. Requests for administrative review will not be accepted unless accompanied by the filing fee or a completed Request for Filing Fee Waiver form at the time of filing." PLEASE MAKE YOUR CHECK PAYABLE TO THE "SC PROCUREMENT REVIEW PANEL."

LEGAL REPRESENTATION: In order to prosecute an appeal before the Panel, business entities organized and registered as corporations, limited liability companies, and limited partnerships must be represented by a lawyer. Failure to obtain counsel will result in dismissal of your appeal. *Protest of Lighting Services*, Case No. 2002-10 (Proc. Rev. Panel Nov. 6, 2002) and *Protest of The Kardon Corporation*, Case No. 2002-13 (Proc. Rev. Panel Jan. 31, 2003); and *Protest of PC&C Enterprises, LLC*, Case No. 2012-1 (Proc. Rev. Panel April 2, 2012). However, individuals and those operating as an individual doing business under a trade name may proceed without counsel, if desired.

**South Carolina Procurement Review Panel
Request for Filing Fee Waiver
1105 Pendleton Street, Suite 202, Columbia, SC 29201**

Name of Requestor

Address

City

State

Zip

Business Phone

1. What is your/your company's monthly income? _____
2. What are your/your company's monthly expenses? _____
3. List any other circumstances which you think affect your/your company's ability to pay the filing fee:

To the best of my knowledge, the information above is true and accurate. I have made no attempt to misrepresent my/my company's financial condition. I hereby request that the filing fee for requesting administrative review be waived.

Sworn to before me this
_____ day of _____, 20_____

Notary Public of South Carolina

Requestor/Appellant

My Commission expires: _____

For official use only: _____ Fee Waived _____ Waiver Denied

Chairman or Vice Chairman, SC Procurement Review Panel

This _____ day of _____, 20_____
Columbia, South Carolina

NOTE: If your filing fee request is denied, you will be expected to pay the filing fee within fifteen (15) days of the date of receipt of the order denying the waiver.

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AUTHOR'S E-MAIL: WMULLINS@BRUNERPOWELL.COM

April 10, 2015

VIA EMAIL protest-mmo@mmo.sc.gov
AND HAND DELIVERY

Chief Procurement Officer
Materials Management Office
1201 Main Street, Suite 600
Columbia, South Carolina 29201

**Re: Protest of Award of Contract for Solicitation No. 5400008644
S.C. Department of Corrections - Inmate Packaging Program**

Our File No.: 7-2665.100

Dear Sir:

As you know, this firm has been retained to represent Union Supply Group, Inc. ("Union Supply") in connection with the intent to award the Contract for the S.C. Department of Corrections – Inmate Packaging Program to Keefe Commissary Network, LLC ("Keefe"). Pursuant to S.C. Code Ann. § 11-35-4210, Union Supply hereby supplements its protest filed on April 6, 2015. Union Supply reiterates and incorporates by reference its protest grounds set forth in our letter of April 6th and asserts the following supplemental factual and legal bases for the protest:

INTRODUCTION AND SOLICITATION SUMMARY

On October 8, 2014, the Materials Management Office ("MMO") issued specifications for Solicitation No. 5400008644. The solicitation sought proposals on behalf of the South Carolina Department of Corrections ("Department") Division of Support Services and Prison Industries to enter into an agreement with it to provide an Inmate Packaging Program (the "Contract"). The RFP specified that the Division of Prison Industries and the Division of Support Services sought proposals from experienced and qualified Offerors to enter into an agreement for the design and implementation of a customized inmate packaging program on defined dates that would enable eligible inmates and inmates' friends and family members to place orders for packages of pre-approved products for delivery to inmates housed in Department

facilities. Venture operations were to be located at the Division of Support Services and Prison Industries site at Trenton Correctional Institution.

The solicitation required prospective vendors to submit a Technical Proposal, Qualifications and Experience, and a Financial Plan with separate price and revenue proposals, including revenue share and reimbursement components. After submission, each Offeror's Technical Proposal was to be, first, judged by MMO for responsiveness and, after responsiveness was determined, evaluated and scored by an evaluation panel along with the Qualifications pursuant to the published criteria in the RFP. Presumably, the Price and Revenue Proposals likewise were to be, first, judged for responsiveness by MMO and, after responsiveness was determined, evaluated and scored by MMO.

Section III, Scope of Work/Specifications, of the RFP set forth the scope and detailed requirements of the Contract, including numerous mandatory requirements. Section IV, Information for Offerors to Submit, specified all of the information that was required to be submitted with a proposal. This included a Financial Plan that described in detail the payment process, costs, reimbursements and revenue sharing offered in connection with the program.

Section V, Qualifications, which was revised through Amendment 1 to the RFP, required Offerors to submit detailed information concerning their experience and qualifications to provide services of the same scope and size as those being sought by the Department. Specifically, the Offerors were required to list all experience within the past three years where they performed services substantially similar to those sought in the solicitation, that is, operating a large, Statewide Inmate Package Program in a joint venture with Prison Industries. In addition, Offerors were required to submit at least three references where they provided Order Management for a Package Program for States of similar inmate populations and product selection. Offerors were also required to provide at least three references for Order Fulfillment, where the Offeror utilized inmates to fulfill orders within a Correctional Facility. The Qualifications Section further contained mandatory performance requirements. This information was critical as Qualifications was listed as the second most important evaluation criteria and ultimately accounted for 25% of the scoring. The RFP specifically stated that the Department would determine the success of the programs operated by Offerors (Qualifications) through review of the written references and evaluations of those programs.

According to the RFP, the following evaluation factors were listed in relative order of importance with the first factor being the most important:

- (1) Technical/Scope of Proposal
- (2) Qualifications
- (3) Revenue Proposal
- (4) Price Proposal

Four amendments to the solicitation were issued; ultimately, the deadline for proposal submission was January 15, 2015. The only two Offerors to submit proposals were Union Supply and Keefe.

After receiving the proposals, MMO transmitted the Technical Proposals to an evaluation panel for scoring. MMO and the Department also provided the evaluation panel with certain responses to reference checks obtained by the Department to be considered as part of the Qualifications review. The evaluation panel met on February 2, 2015, to score the proposals. However, upon information and belief, incomplete and/or incorrect information was provided to the panel regarding the Offerors' respective references. The panel nevertheless completed its scoring on February 2nd with incomplete and/or incorrect information regarding the Qualifications; and, when the scoring for the revenue and price proposals were applied to the panel scoring, Keefe was the apparent highest scoring Offeror. The Procurement Officer then began negotiations with Keefe.

Subsequent to the scoring by the evaluation panel, however, it was determined that, through no fault of Union Supply, errors had occurred that resulted in an incomplete review of Union Supply's Qualifications. Upon information and belief, the Procurement Officer undertook efforts to correct the errors in the review and scoring of Union Supply's Qualifications criteria. During this same time, additional reference checks were sought for Keefe. The additional information was provided to the evaluation panel for rescoring of the Proposals. The "rescoring" by the evaluation panel did not result in any revision to the scoring and Keefe was deemed the highest scoring Offeror.

The scoring of the proposals was performed with each Offeror eligible for 100 points as follows:

Technical/Scope of Proposal	30
Qualifications	25
Revenue Proposal	25
Price Proposal	20

The evaluation panel scored the Technical/Scope of Proposal and Qualification Sections applying a score of 1-10 for each section. The Procurement Officer then converted that score based upon the weight assigned by the Procurement Officer. The Procurement Officer also applied a formula for converting the Revenue and Price Proposals to the potential points available for those Sections. The result of the scoring process applied by the Procurement Officer reflects a determination that Keefe's average score was 77.94 and Union Supply's average score was 71.24.

Upon information and belief, MMO and the Department elected to continue its negotiations with Keefe that had started prior to the discovery of errors in the evaluation that resulted in Keefe being the apparent highest scoring Offeror. On March 26, 2015, negotiations with Keefe were concluded. The Notice of Intent to Award was issued on March 27, 2015, reflecting the proposed award to Keefe.

PROTEST GROUNDS

Union Supply contends that the proposed award to Keefe is improper and contrary to the Procurement Code. First, Union Supply contends that Keefe submitted a non-responsive proposal that materially deviated from the requirements of the RFP. Keefe's proposal should have, therefore, been rejected and not submitted to the evaluation panel for evaluation. Second, Union Supply contends that the means and methods in which the evaluation process was conducted and award determination made were in violation of the Procurement Code. The review and consideration of the proposals and the Offerors' respective qualifications were conducted erroneously, negligently and in a manner that failed to achieve the objective of the RFP. In other words, the review was simply not conducted in accordance with the Code. Keefe was afforded disparate favorable treatment and alone had the improper opportunity to enhance its proposal. At the same time the evaluation panel was provided incorrect, incomplete information concerning the purportedly unfavorable qualifications of Union Supply versus the purportedly favorable qualifications of Keefe. Furthermore, the evaluation, scoring and ranking of the proposals did not comply with the process, policies and procedures established by the State and were in violation of the Code. Fourth, the evaluation panel's scoring was arbitrary and capricious; did not follow the published award criteria in making the determination; and otherwise considered matters outside of the RFP or matters outside of the Proposals submitted. Finally, the negotiations that occurred were conducted in violation of the Procurement Code.

In short, the integrity of the entire evaluation process was tainted, did not comply with the Procurement Code, and unfairly prejudiced Union Supply. The award to Keefe was, therefore, improper.

- I. Keefe's proposal is non-responsive in that it fails to comply with the essential requirements of the RFP pursuant to S.C. Reg. 19-445.2070(A) and/or seeks to modify or impose conditions upon the State in violation of S.C. Reg. 19-445.2070(D).**
 - a. The RFP is clear in its requirements concerning what information an Offeror was required to submit regarding its qualifications, including a specific number of references for Order Management and Order Fulfillment of similar size and scope to the scope under consideration. Keefe's proposal failed to comply with the specific requirements concerning Qualifications and Experience, including failing to provide the minimum number of agency references and failing to provide the mandatory information required for its references. The failure to abide by the requirements of the RFP by excluding these requirements reflects a non-responsive bid that seeks to modify essential requirements of the RFP.
 - b. The RFP in numerous instances (Sec. 3.17, Section IV and Section VIII) required the Offeror to describe its reimbursement strategy setting forth what and how much the Offeror would reimburse the Department for specific matters, including reimbursing the Department for providing one full time staff manager for the Project. Keefe specifically excluded reimbursement for this full time staff manager from its reimbursement plan. Keefe's failure to reimburse the Department for this manager

was significant as to cost and performance of the Contract. The failure to abide by the requirements of the RFP by excluding reimbursement for this position reflects a non-responsive bid that seeks to modify essential requirements of the RFP.

- c. The RFP required the Offeror to provide information stating its willingness and ability to create and sustain an educational/vocational curriculum associated with an inmate work program. (Amendment 1, p. 6). Keefe failed to respond in any fashion or address in any way its willingness or ability to create and sustain this curriculum. The failure to abide by the requirements of the RFP by excluding this requirement reflects a non-responsive bid that seeks to modify essential requirements of the RFP.
- d. Section 3.15.12 required the Offeror to submit a detailed logistics plan, including time frames for bulk inventory shipments, inventory handling, storage procedures and a loss prevention plan. Keefe's proposal failed to provide a logistics plan. The failure to provide a logistics plan reflected non-compliance with a material term of the RFP and renders Keefe's bid non-responsive.
- e. Section 3.15.20 required the Offeror to describe in detail the training and support the Offeror would provide to the Department and Prison Industries throughout the contract. Keefe's proposal failed to describe in detail the training and support Keefe would be willing to provide which reflects non-compliance with a material term of the RFP and renders Keefe's bid non-responsive.

II. The means and methods by which the evaluation process was conducted and the award determination made violated the Procurement Code.

- a. The review and consideration of the Offerors' qualifications were conducted erroneously, negligently and in a manner that failed to achieve the objectives of the RFP.**

As set forth above, the Qualifications section of the RFP was a critical component in the State's determination as to which proposal was deemed most advantageous to the State. It comprised 25% of the scoring. The RFP was very specific in terms of requirements for references and specifically stated that the review of the references from programs of similar size and scope would be the basis for determining the success and, thus, qualifications of each Offeror.

Despite the materiality of this information to the evaluation, significant errors were made and improper actions were taken by the State in gathering and presenting the references to the evaluation panel. These include, but are not limited to, the following:

- i. The Department, who handled obtaining the reference checks, initially erroneously mis-typed the email addresses for several of Union Supply's references, impacting the responses;
- ii. The Department did not contact all of Union Supply's references;

- iii. The initial reference communication to Union Supply's references erroneously stated it was being made on behalf of Keefe;
- iv. The uniform reference communication by the Department and accompanying questionnaire failed to adequately inform the references as to whether they were to provide information on Order Management or Order Fulfillment. The information solicited from the reference checks was not sufficient or relevant to ensure compliance with the requirements of the RFP;
- v. The Department initially reported to the Procurement Officer and/or the evaluation panel that after "several" attempts they had received only one reference for Union Supply and four references for Keefe as of February 2, 2015. Upon information and belief, this was not correct;
- vi. The Procurement Officer and/or Department and/or evaluation panel determined that they would proceed with evaluating the Qualifications and Experience Section using only one reference from each Offeror. There is no indication as to whether these were references for Order Fulfillment or Order Management or whether any consideration was given to the impact of those actions on the scoring;
- vii. The effort to unilaterally select one reference for each Offeror, if in fact that is what occurred, was not permitted or contemplated by the RFP;
- viii. The Procurement Officer and or Department provided reference checks to the evaluation panel that did not comply with the requirements of the RFP;
- ix. After determining that errors had occurred in the original efforts to obtain references for Union Supply (through no fault of Union Supply), the Department again solicited responses from Union Supply's references but also solicited responses from individuals and agencies not listed as references in Keefe's proposal;
- x. Both efforts to obtain reference checks contained unreasonable time restrictions for responding that impacted the responses;
- xi. The Department provided reference information from the second round of reference checks for the "re-scoring" that included information that did not comply with the requirements of the RFP and contained information from sources not listed as references in the proposal submitted by Keefe.

While the steps taken by the Procurement Officer may have reflected a good faith effort to cure the defects in the initial scoring by the panel, these efforts failed. The evaluation panel's bias, confusion and misunderstanding of the requirements of the RFP arising out of the qualification information that was provided to them during their two efforts to score the proposals are undeniable. The fact that the errors resulted in several rounds of information being provided to the panel, coupled with the fact that the panel's scoring did not change in any way after the initial scoring, reflects an evaluation process that did not accurately assess the proposals in accordance with the requirements of the RFP.

b. The evaluation of the Proposals failed to take into account or otherwise score the Financial Plan that was required to be submitted pursuant to the requirements of the RFP.

Section 3.17 and Section IV of the RFP specifically required the submission of a Financial Plan that described in detail the Offeror's reimbursement and commission strategy. Upon information and belief, the respective Financial Plans submitted by the Offerors were not provided to the evaluation panel for scoring. Furthermore, only the commission offered was scored by the Procurement Officer but not the mandated reimbursements. As such, a specific requirement of the RFP was not evaluated in any way. It was impossible to determine which proposal was most advantageous to the State without properly evaluating each Offeror's Financial Plan, an evaluation which was required to be done by the appointed panel at a minimum.

III. The evaluation panel's scoring was arbitrary and capricious; did not follow the published award criteria; and considered matters outside of the RFP.

a. The evaluation panel's scoring was arbitrary and capricious.

As set forth above, Keefe's proposal was non-responsive in a number of respects. At a minimum, certain evaluators' scores did not reflect the significance of Keefe's failure and refusal to comply with the requirements of the RFP or the failure to address significant items in the RFP. Whether that was a result of evaluators being in possession of inaccurate information, not fully understanding the requirements of the RFP or not fully reviewing Keefe's proposal, the result was that the scoring was arbitrary and did not reasonably reflect a full and complete application of the award criteria to the proposals.

Union Supply contends that the panel's scoring was arbitrary and capricious in the following particulars:

- i. The panel scoring regarding the Offerors' Qualifications failed to take into account that Keefe's proposal did not provide a sufficient number of references that complied with the requirements of the RFP. The arbitrary and capricious nature of the Qualification scoring is manifested further in the fact that the scoring for this Section did not change after receiving significant additional information (reflecting Union Supply's compliance and Keefe's non-compliance) from the Procurement Officer during the "re-scoring;"
- ii. The panel scoring failed to take into account that Keefe's proposal did not comply with the reimbursement requirements of Section 3.17 and that Union Supply offered a significantly more robust and entirely compliant reimbursement program;
- iii. The panel scoring failed to take into account that Keefe did not provide or address in any way its willingness or ability to create and sustain an educational/vocational curriculum;

- iv. The panel scoring failed to take into account that Keefe did not submit a detailed logistics plan as required by Section 3.15.12; and
- v. The panel scoring failed to take into account that Keefe's proposal did not describe in detail the training and support Keefe would provide to the Department and Prison Industries as required by Section 3.15.20.

b. The evaluation panel considered matters outside the RFP and did not follow the published award criteria.

As set forth above, the panel was provided reference information for Keefe from agencies and individuals that were not identified as references in Keefe's proposal. Regardless of the reason that reference information was solicited from agencies that were not listed as references, this tainted the evaluation process and provided Keefe with a material, unfair advantage. These actions were in violation of the provisions of the Code, contradicted the requirements of the RFP, and undermined the integrity of the process.

Moreover, the RFP listed the award criteria in order of importance. The RFP did not provide the weightings for the evaluation criteria. The procurement file reflects that the weightings for the Technical Proposal and Qualifications were set at 30 and 25 points, respectively. The file also reflects that the evaluation panel scored the two criteria by assigning a score between 1 and 10 for each criteria. To the extent that the panel was not advised of the weightings assigned to the two award criteria, the scoring could not have been done in accordance with the published award criteria. In other words, if the panel believed it was simply assigning a score between 1 and 10 for each criteria then the panel members could not have been aware of the weighting which may very well have affected the scoring. If, indeed, the panel was not made aware of the true weighting, then the evaluation was conducted erroneously and in violation of the Code.

IV. The negotiations that occurred were conducted in violation of the Procurement Code.

The mandated process for negotiations is set forth in S.C. Code Ann. § 11-35-1530(9). Negotiations are to be conducted with the highest ranked responsive Offeror. In light of the above, it was error for the State to engage in negotiations with Keefe for a number of reasons. First, Keefe's proposal was non-responsive and improperly determined to be the highest ranked Offeror. Second, despite the Procurement Officer's determination that the individual scoring had been done erroneously, negotiations continued even though, at that time, Keefe could not have been the highest ranked Offeror because scoring necessarily was incomplete. The second round of negotiations was improper as well given the non-responsive nature of the Keefe proposal.

Finally, negotiations are required by the Code to be meaningful and done with the purpose of maximizing the State's ability to obtain the best value. The Record of Negotiations reflect that Keefe "agreed to provide the four (4) programs for calendar year 2015" to meet the needs of the Department. Upon information and belief, the first program is not being provided as part of the Contract. Rather, it is being provided pursuant to a contract the Department had with Keefe that expired in January, 2015. It is unclear whether that contract was properly extended.

Regardless, it was improper for work being performed by Keefe under a separate contract to be considered as part of the negotiations under the subject Contract. Furthermore, it appears that the Department agreed that the first program performed by Keefe under the Contract would be fulfilled by Keefe offsite, at its own facility, which does not meet the needs of the Department as stated in the RFP. In light of the above, the Record of Negotiations thus reflects that an unfair advantage may have been provided to Keefe by virtue of its status as an incumbent vendor.

Union Supply does not invoke its rights to protest under the Procurement Code lightly. Its review of the Keefe proposal and the means and methods of the proposed award has raised serious concerns that the award of this Contract was done in such a way as to ensure that the Keefe proposal was most advantageous to the State. The evaluation did not result in a true comparison of the proposals. If there was no true comparison, there was no meaningful competition. Without competition, there is no way to determine if the State is accepting the most advantageous offer.

For the foregoing reasons, the notice of award to Keefe should be cancelled. Union Supply contends that Keefe's bid should have been rejected as non-responsive. With the rejection of Keefe, Union Supply, therefore, would be the highest ranked Offeror. As such, Union Supply is requesting the Chief Procurement Officer issue a decision to award the Contract to Union Supply.

Union Supply will rely on these arguments and such additional information as may become available through the course of our Freedom of Information Act request(s) and further investigation. We request an administrative review and hearing of this protest and look forward to addressing the issues with you in person and presenting our proof.

Sincerely,



E. Wade Mullins III

EWM/rdd

cc: Butch Bowers, Esquire
Alison Maker, Esquire