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April 2, 2015

Via Electronic Mail (rdiclemente@saul.com) and USPS Regular Mail

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Subject: RFP #14-X-22648 - Protest of Scheduled Award of Contract T1934
Inmate/Resident Telephone Control Service

Dear Mr. DiClemente:

This letter is in response to your December 8, 2014 letter, by which you protest, on behalf of CenturyLink Public Communications, Inc. ("CenturyLink"), the scheduled award of the *Inmate/Resident Telephone Control Service* term contract to Global Tel*Link Corporation ("GTL"), as announced by the Procurement Bureau ("Bureau"), the unit of the Division of Purchase and Property ("Division") which conducts the Division's competitive procurement programs. CenturyLink contends that the Evaluation Committee ("Committee") misinterpreted RFP Section 3.3.1 to require that a piece of equipment must be located at each New Jersey Department of Corrections ("DOC") and Juvenile Justice Commission ("JJC") facility to store electronic copies of the calls made by inmates. CenturyLink contends that, based upon this misinterpretation, the Committee inappropriately deemed CenturyLink's proposal non-responsive. CenturyLink further asserts that while it does not agree with the Committee's interpretation, the technical components of GTL's proposal and CenturyLink's proposal were substantially similar such that GTL's proposal also did not provide for call storage technology located at each DOC/JJC facility as the Committee concluded. For the reasons set forth in its December 8, 2014 letter, CenturyLink requests that GTL's proposal be deemed non-responsive and that T1934 *Inmate/Resident Telephone Control Service* be rebid, or alternatively that CenturyLink's proposal be reopened and evaluated. CenturyLink's letter also requests the opportunity of an in-person presentation.

I have reviewed the Procurement Bureau's record of the subject procurement, commentary of the Bureau staff member who oversaw the subject procurement relative to the points of protest presented in CenturyLink's letter dated December 8 2014, GTL's April 1, 2015 response to CenturyLink's letter, and applicable statutes, regulations and case law. This review has provided

me with sufficient information to render an informed final agency determination regarding this matter. Therefore, an in-person hearing is not necessary. N.J.A.C. 17:12-3.3(d).

The record of this procurement reveals that the Committee, formed for the purpose of evaluation of the submitted proposals and comprised of representatives of DOC, JJC and the Procurement Bureau, evaluated proposals based upon the evaluation criteria set forth in the RFP in accord with standard procedure. The Committee utilized a technical scoring format based on assigning a relative importance, i.e., a weight to each of the three evaluation criteria listed in RFP Paragraph 6.7, *Evaluation Criteria*. The weights used for technical scoring of each criterion were established before the proposal opening date, with the total technical score valued at 60 percent and the pricing valued at 40 percent.

Technical Evaluations

Upon conclusion of its extensive technical review of the three proposals, the Committee determined that the proposals submitted by Securus and CenturyLink were non-responsive. The Committee concluded that Securus' proposal failed to provide an Implementation Plan as required in RFP Paragraphs 4.4.3, *Technical Proposal*, and 3.1.6, *Implementation Plan*, and thus deemed Securus' proposal to be materially non-responsive.

Also, the Committee determined that CenturyLink's proposal was not clear regarding on-site equipment to be installed at DOC/JJC locations, specifically equipment for the storage of call recordings. The Committee determined CenturyLink's proposal did not articulate how CenturyLink's proposed solution will maintain on-site storage of recorded inmate telephone calls, which resulted in the Bureau's request for clarification emailed to CenturyLink on October 21, 2014. CenturyLink responded on October 28, 2014, stating that its "proposed solution utilizes a centralized architecture as its primary method of processing and recording phone calls," and that its Network Attached Storage ("NAS") solution will "be installed at a single DOC/JJC site that would be determined in consultation with the State...." Based upon CenturyLink's proposal and its clarification thereof, the Committee deemed CenturyLink's proposal materially non-responsive.

The Committee found GTL's proposal to be responsive to all RFP requirements, which, in effect, rendered GTL's proposal the only responsive proposal.

CenturyLink's points of protest are addressed below.

I. CenturyLink contends that the Committee interpreted RFP Paragraph 3.3.1 incorrectly, thereby erring in declaring CenturyLink's proposal non-responsive.

A. The Committee's interpretation of RFP Paragraph 3.3.1 was correct.

CenturyLink asserts that the Committee for the first time interpreted RFP Paragraph 3.3.1 to require that electronic copies of calls made by inmates be stored at each DOC/JJC facility and that, based upon this incorrect interpretation, deemed CenturyLink's proposal non-responsive. To support its assertion of an incorrect interpretation, CenturyLink quotes one segment of RFP Paragraph 3.3.1, which states, in pertinent part:

The DOC/JJC locations require monitoring and recording of all individual Inmate calls. Monitoring equipment shall be provided by the Contractor in each correctional facility. On site storage of these recorded calls shall be maintained for the life of the contract.

By asserting that the paragraph calls for on-site storage of monitoring equipment, but not on-site storage of recording equipment, I find that CenturyLink has attempted to draw a distinction between the requirements for monitoring equipment and the requirements for recording equipment.

There is a flaw in CenturyLink's reasoning, namely, the plain reading of the quoted paragraph, which shows that the RFP required recorded inmate calls to be stored "on site," i.e., that recorded inmate calls be stored at each DOC/JJC facility. This is further evidenced by reading the entirety of RFP Paragraph 3.3.1, which outlines the features required for the inmate/resident telephone control system, including the requirement that the system "have the capability to monitor and record all calls on each line as needed from a central point in each facility. . . ." These statements lead only to the conclusion that the RFP required the inmate/resident telephone system to have the capability to both monitor and record all calls and for the system to be installed at each correctional facility. Correspondingly, DOC advises that the RFP required recording and on-site storage of phone calls at each DOC/JJC facility comports with its core mission to protect the public by operating safe, secure and humane correctional facilities. As part of this mission, DOC determined that it requires that a phone recording be immediately available to police and prosecutors. Due to this criticality, DOC maintains that redundancy requires not only off-site backup and storage of recorded calls, but also on-site recording and storage capabilities. DOC portends that on-site recording and storage mitigates the risk to its critical mission to protect the public in the event of network failures. Accordingly, I cannot find merit in CenturyLink's argument that the RFP did not require telephone call recordings be stored at each DOC/JJC facility.

B. The Committee correctly found CenturyLink's proposal to be non-responsive.

CenturyLink contends that its proposal should not have been declared non-responsive, but rather should have been evaluated and scored. CenturyLink argues that it "complied with the RFP by, among other things, suggesting on-site storage at one or more of the DOC/JJC facilities while providing for separate redundant storage locations for backup and disaster recovery." The Committee had a different view of CenturyLink's proposal.

The Committee noted that both CenturyLink's proposal and its October 28, 2014 clarification letter indicated the proposed solution "utilizes a centralized architecture as its primary method of processing and recording phone calls, and that its inmate/resident telephone control system (NAS solution) will "be installed at a single DOC/JJC site that would be determined in consultation with the State...." The Committee therefore determined that CenturyLink's proposal did not comply with the RFP requirement and deemed CenturyLink's proposal materially non-responsive. As more fully set forth below, my independent review of the record supports this conclusion.

In its October 28, 2014 letter responding to the Committee's request for clarification, CenturyLink stated, in pertinent part:

Like all modern inmate telephone systems, CenturyLink's proposed solution utilizes a centralized architecture as its primary method of processing and recording inmate telephone calls. The on-site equipment is comprised of inmate telephones and monitoring workstations, as well as networking equipment that connect these devices to the centralized platform for call completion and operation. As a significant further benefit, CenturyLink's proposed solution also includes a secondary, geographically separate data center with a full back-up of the database and call recordings.

Given the State's unique requirement for "on-site storage of recorded calls for the life of the contract", (sic) CenturyLink offered a third site on NJ DOC premises with a Network Attached Storage (NAS) solution as referenced in the State's clarification letter.

In both its proposal and clarification letter, CenturyLink proposed to provide one site on DOC premises as a solution to the on-site recording of calls at each facility. Although the Director has the right to waive "minor irregularities" pursuant to Section 6.1 of the RFP, this section cannot be used to permit CenturyLink's non-compliance with the requirement to have on-site recording and storage of calls in each location set forth in RFP Paragraph 3.3.1. While this requirement is not mandated by law, it is a mandatory requirement that was met by a responsible bidder who submitted a responsive proposal. The absence of on-site recording and storage at each facility would materially affect both the procurement and the State's interests in the procurement. With respect to the materiality of on-site recording access in each location, the New Jersey courts have developed a two-prong test to consider the materiality of a deviation and whether the deviation can be waived. In re Protest of the Award of the On-Line Games Production & Services Contract, Bid No. 95-X-20175, 279 N.J. Super. 566, 594 (App. Div. 1995), the Appellate Division affirmed the criteria used by the Law Division in Township of River Vale v. Longo Constr. Co., 127 N.J. Super. 207, 216 (Law Div. 1974). In River Vale, the Court ruled that in considering the materiality of a deviation or exception and whether it can be waived, one must determine

...first, whether the effect of a waiver would be to deprive the municipality of its assurance that the contract will be entered into, performed and guaranteed according to its specified requirements, and second, whether it is of such a nature that its waiver would affect competitive bidding by placing a bidder in a position of advantage over other bidders or by otherwise undermining the necessary common standard of competition.

I have reviewed CenturyLink's deviation from the requirements of RFP Paragraph 3.3.1 through the lens of the River Vale criteria, and have determined that CenturyLink's exception to this RFP requirement rises to the level of a non-waivable material deviation. As iterated above, RFP Paragraph 3.3.1 sets forth specific requirements to fulfill the needs of the State. While the State understands that access would still be provided through alternative means, it cannot be understated that this deprivation of the RFP requirements in Paragraph 3.3.1 potentially jeopardizes the health, safety, and welfare by not providing immediate on-site access to the recordings. Therefore, I find that the first prong of the River Vale test is satisfied, as CenturyLink's failure to provide on-site recording and storage in each DOC facility deprives the State of its assurance that the contract would be entered into in accordance with its specified requirements.

Further, in considering the second prong of the River Vale test, I have determined that waiver of the requirement to provide on-site recording and storage in each facility set forth in Section 3.3.1 would undermine the standard of competition by placing CenturyLink in a position of advantage. The N.J. Supreme Court's advice in Hillside Township v. Sternin is particularly relevant here.

The conditions and specifications must apply equally to all prospective bidders. Otherwise, there is no common standard of competition. Every element which enters into the competitive scheme should be required equally for all and should not be left to the volition of the individual aspirant to follow or to disregard and thus to estimate his bid on a basis different from that afforded the other contenders.

Hillside Township v. Sternin, 25 N.J. 317, 322-23 (1957).

I conclude that CenturyLink's solution does not offer on-site call recording equipment installed at each DOC/JJC facility and therefore uphold the Committee's determination that CenturyLink's proposal was materially non-responsive.

CenturyLink also contends that its proposal could provide a large cost savings over the life of the contract. I note, however, that the Division's authorizing statute for publicly advertised procurement, N.J.S.A. 52:34-12, states in pertinent part:

(g) award shall be made with reasonable promptness, after negotiation with bidders where authorized, by written notice to that responsible bidder whose bid, conforming to the invitation for bids, will be most advantageous to the State, price and other factors considered.

The RFP, at Paragraph 1.1, also clearly indicates the State's intent as follows in pertinent part:

The intent of the RFP is to award a contract to that responsible bidder whose proposal, conforming to this RFP, is most advantageous to the State, price and other factors considered.

As set forth in the RFP and discussed by the Committee, the proposals were evaluated based upon the technical criteria set forth and the weights assigned to each of these criteria prior to the proposal opening. The fact that the Committee determined that CenturyLink's proposal was non-responsive meant that, pursuant to the Division's authorizing statute, the Committee could not evaluate CenturyLink's pricing.

II. CenturyLink alleges that GTL's proposal was also non-compliant with the on-site storage requirement and the award of the contract must be vacated.

CenturyLink argues that GTL's proposal does not provide call recording storage at each DOC/JJC facility. CenturyLink alleges that this is evident based upon the diagram provided in GTL's proposal which identifies two types of facilities in the DOC/JJC network showing Large Phone Count Facilities and Small Phone Count Facilities, and that this distinction between facility types is a critical flaw in GTL's proposal because the diagram identifies on-site storage for Large Phone Count Facilities, while it does not show on-site storage for Small Phone Count Facilities.

CenturyLink further contends that GTL's proposal gives GTL sole discretion to determine which facilities constitute a Large or Small Phone Count Facility and that since GTL's proposal does not state that the Dell PowerEdge T620 Tower Server all-in-one call

processor/database/recording/storage unit, the only device listed for on-site storage, is being installed at each facility, GTL has not complied with the RFP requirement for on-site storage of recorded calls. Thus, CenturyLink believes that GTL's proposal fails for the same reason that CenturyLink's proposal was deemed non-responsive. These contentions are not supported by the record.

RFP Paragraph 3.3.1, *Authorized System Features*, requires the proposed system to have the capability to monitor and record all calls on each line as needed from a central point in each facility without detection. GTL addresses the requirement for on-site storage of recorded calls by stating in pertinent part:

The Focus Inmate Telephone System is completely integrated for call recording of phone conversations. All calls made on the Focus system are recorded by the system 24 hours a day, seven days a week (unless explicitly exempted from recording by "non record" Class of Service controls). All call recordings are available on-line to authorized personnel at NJDOC and JJC facilities 24 hours a day, seven days a week from the onsite GTL workstations or any remote PC with authorized access to the Focus system for the life of the contract.

See GTL's April 4, 2014 Proposal at p. 141 (emphasis added).

GTL goes on to state, in pertinent part, under "Call Recordings & Storage" that:

To provide a high level of call recording service to the DOC GTL is offering a multi-level recording solution for all NJDOC and JJC facilities.

All call recordings for the Focus system will be stored on-site at NJDOC and JJC facilities on storage servers utilizing RAID Redundant Array of Independent Disk-Level 5 (RAID-5), for the life of contract, providing redundancy and completely secure storage of critical persistent data such as call recordings.

See GTL's April 4, 2014 Proposal, p. 149 (emphasis added).

GTL's proposal further supports its compliance with the RFP's on-site storage requirements, by stating that "each time a recording is stored on the on-site Focus dedicated RAID, a call record is also stored to accompany that recording. . . . As inmate calls are placed and completed, call records are created and saved to the facility on-site hard drive RAID array...." Id. at 150 (emphasis added). Further, GTL proposal indicates:

Voice Recording Storage: Upon completion of a call at a NJDOC and JJC (sic) facility, a copy of the call's recording will be stored at the facilities Raid array storage service for the duration of the contract. In addition, a redundant copy of the call recording is automatically copied to the fully integrated back-up storage device at the facility. . . .

Id. at 216.

Based upon these statements and its review of the GTL proposal, the Committee concluded that GTL satisfied the requirements of the RFP. My independent review of the record supports this

conclusion. I find GTL's proposal shows GTL's compliance with the RFP requirement for the proposed solution to have the capability to record and storage all calls on-site at each facility.

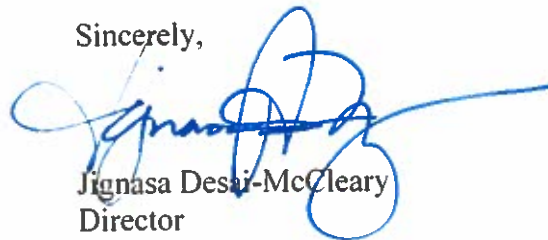
As to CenturyLink's assertion that the network diagram for Large Phone Count Facilities and Small Phone Count Facilities does not show on-site storage of recorded call for Small Phone Count Facilities, I note that RFP Paragraph 6.7.3, *Proposal Discrepancies*, as part of RFP Section 6.0, *Proposal Evaluation*, provides that in "evaluating proposals, discrepancies between words and figures will be resolved in favor of words." Here, any discrepancies between the network diagram and the affirmative statements in GTL's proposal provides for recording and storage of inmate calls at each facility are resolved in favor of the words in the GTL proposal.

I therefore find that GTL's proposal complied with the RFP requirements and that despite any similarities in the two proposals, CenturyLink's proposal failed to provide for on-site storage of recordings. Additionally, the record reflects that an analysis of GTL's proposed cost for inmate/resident telephone services is competitive with similar contracts, leading to the conclusion that this contract results in pricing that is, at a minimum, fair and competitive. Accordingly, I find no basis to rescind the Procurement Bureau's notice of intent to award the contract to GTL.

In light of the foregoing, the Procurement Bureau's notice of intent to award the contract resulting from RFP #14-X-22648 to GTL is hereby upheld. This is my final agency determination regarding the points of protest submitted by CenturyLink.

Thank you for your interest in doing business with the State of New Jersey and for registering your firm with **NJ START**, the State's new eProcurement system.

Sincerely,



Jignasa Desai-McCleary
Director

JD-M/MG

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