STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

GLOBAL TEL LINK CORPORATION, A
DELAWARE CORPORATION,

Petitioner,

and

SECURUS TECHNOLOGIES, INC.,

Intervenor,

vs. Case No. 13-3028BID

DEPARTMENT OF CORRECTIONS,

Respondent,

and

EMBARQ PAYPHONE SERVICES, INC.,
d/b/a CENTURYLINK,

Intervenor.
_______________________________/

EMBARQ PAYPHONE SERVICES, INC.,
d/b/a CENTURYLINK,

Petitioner,

and

GLOBAL TEL LINK CORPORATION, A
DELAWARE CORPORATION,

Intervenor,

vs. Case No. 13-3029BID

DEPARTMENT OF CORRECTIONS,

Respondent,

and

SECURUS TECHNOLOGIES, INC.,

Intervenor.
_______________________________/

SECURUS TECHNOLOGIES, INC.,

Petitioner,

and

GLOBAL TEL LINK CORPORATION, A
DELAWARE CORPORATION,

Intervenor,

vs. Case No. 13-3030BID

DEPARTMENT OF CORRECTIONS,

Respondent,

and

EMBARQ PAYPHONE SERVICES, INC.,
d/b/a CENTURYLINK,

Intervenor.
_______________________________/

GLOBAL TEL LINK CORPORATION, A
DELAWARE CORPORATION,

Petitioner,

and

SECURUS TECHNOLOGIES, INC.,

Intervenor,

and

EMBARQ PAYPHONE SERVICES, INC.,
d/b/a CENTURYLINK,

Intervenor,

vs. Case No. 13-3041BID

DEPARTMENT OF CORRECTIONS,

Respondent.
_______________________________/

RECOMMENDED ORDER

On September 11, 12, and 18, 2013, a duly-noticed hearing was held in Tallahassee, Florida, before F. Scott Boyd, an administrative law judge assigned by the Division of Administrative Hearings.

APPEARANCES

For Global Tel Link Corporation:

Robert H. Hosay, Esquire
James A. McKee, Esquire
Foley and Lardner, LLP
Suite 900
106 East College Avenue
Tallahassee, Florida 32301

John A. Tucker
Foley and Lardner, LLP
Suite 1300
One Independent Drive
Jacksonville, Florida 32202

For Embarq Payphone Services, Inc., d/b/a/ CenturyLink:

Amy W. Schrader, Esquire
William E. Williams, Esquire
GrayRobinson, P.A.
Post Office Box 11189
Tallahassee, Florida 32302

For Securus Technologies, Inc.:

W. Robert Vezina, III, Esquire
Eduardo S. Lombard, Esquire
Vezina, Lawrence and Piscitelli, P.A.
413 East Park Avenue
Tallahassee, Florida 32301

For Department of Corrections:

Jonathan P. Sanford, Esquire
James Fortunas, Esquire
Florida Department of Corrections
501 South Calhoun Street
Tallahassee, Florida 32399

STATEMENT OF THE ISSUE

Whether the Department of Corrections' action to withdraw its Intent to Award and to reject all replies to ITN 12-DC-8396 is illegal, arbitrary, dishonest, or fraudulent, and if so, whether its Intent to Award is contrary to governing statutes, rules, policies, or the solicitation specifications.

PRELIMINARY STATEMENT

On April 15, 2013, the Department of Corrections (the DOC or the Department) issued Invitation to Negotiate 12-DC-8396

(the ITN) to solicit competitive replies for the award of a contract to provide statewide inmate telephone services. The Department issued Addenda to the ITN on April 23, 2013, and May 14, 2013.

The Department posted a Notice of Intent to Negotiate with Embarq Payphone Services, Inc., d/b/a CenturyLink (EPSI), Global Tel Link Corporation (GTL), and Securus Technologies, Inc. (Securus). After negotiations, the Department issued its Request for Best and Final Offers on June 14, 2013. After receiving and considering offers, the Department announced its Notice of Agency Decision to award the contract to EPSI on June 25, 2013. Securus filed its Notice of Intent to Protest on June 28, 2013, and its formal protest on July 5, 2013. GTL filed its Notice of Intent to Protest on June 28, 2013, and its formal protest on July 8, 2013.

On July 23, 2013, the Department posted a Notice of Agency Decision advising of its intent to withdraw the Intent to Award and to instead reject all replies and re-issue the ITN. EPSI and GTL each filed a Notice of Intent to Protest the Department's decision to reject all replies on July 26, 2013, and filed their formal protests on August 5, 2013.

These four bid protests were referred to the Division of Administrative Hearings for assignment of an administrative law

judge. After a telephonic pre-hearing conference on August 19, 2013, the cases were consolidated for hearing.

After re-scheduling, the hearing was set for September 11, 12, and 18, 2013. At the hearing, 53 Joint Exhibits, J-1 through J-18, J-20 through J-24, J-28 through J-43, J-46, and J-48 through J-60 were admitted, with J-33 indicated as confidential. In addition, nine other exhibits were accepted: two offered by EPSI, E-2 and E-3; four from GTL, G-4 through G-7; and three from Securus, S-5 through S-7. A joint Stipulation of Facts was accepted and those facts are included below among the Findings of Fact. Seven witnesses testified. Mr. Paul Cooper, General Manager of CenturyLink's Public Access Group, and Mr. Shane Phillips, an operations manager with the Department, were called by EPSI. GTL called Mr. Steve Montanaro of GTL Marketing and Communications; Ms. Julyn Hussey, Purchasing Analyst with the Department; and Ms. Jodi Bailey, Director of Procurement and Contracts for the Department. Mr. Stephan Viefhaus, Sales Vice President of Securus, was called by Securus. The Department called Ms. Rosalyn Ingram, Chief of Procurement, Land Leasing, and General Services for the Department.

The five-volume Transcript of the proceedings was filed with the Division of Administrative Hearings on October 2, 2013.

All parties timely filed Proposed Recommended Orders, which were considered.

FINDINGS OF FACT

1. The DOC is an agency of the State of Florida that is responsible for the supervisory and protective care, custody, and control of Florida's inmate population. In carrying out this statutory responsibility, the Department provides access to inmate telephone services.

2. On April 15, 2013, the DOC issued the ITN, entitled "Statewide Inmate Telephone Services, ITN 12-DC-8396," seeking vendors to provide managed-access inmate telephone service to the DOC. Responses to the ITN were due to be opened on May 21, 2013.

3. The DOC issued Addendum #1 to the ITN on April 23, 2013, revising one page of the ITN.

4. The DOC issued Addendum #2 to the ITN on May 14, 2013, revising a number of pages of the ITN, and including answers to a number of vendor questions.

5. EPSI, GTL, and Securus are providers of inmate telephone systems and services. Securus is the incumbent contractor, and has been providing the Department with services substantially similar to those solicited for over five years.

6. No party filed a notice of protest to the terms, conditions, or specifications contained in the ITN or the

Addenda within 72 hours of their posting or a formal written protest within 10 days thereafter.

7. Replies to the ITN were received from EPSI, GTL, Securus, and Telmate, LLC. Telmate's reply was determined to be not responsive to the ITN.

Two-Part ITN

8. As amended by Addendum #2, section 2.4 of the ITN, entitled "ITN Process," provided that the Invitation to Negotiate process to select qualified vendors would consist of two distinct parts. In Part 1, an interested vendor was to submit a response that described certain Mandatory Responsiveness Requirement elements, as well as a Statement of Qualifications, Technical Response, and Financial Documentation. These responses would then be scored using established evaluation criteria and the scores would be combined with cost points assigned from submitted Cost Proposals.

9. In Part 2, the Department was to select one or more qualified vendors for negotiations. After negotiations, the Department would request a Best and Final Offer from each vendor for final consideration prior to final award decision. The ITN provided that the Department could reject any and all responses at any time.

High Commissions and Low Rates

10. Section 2.5 of the ITN, entitled "Initial Cost Response," provided in part:

> It is the Department's intention, through the ITN process, to generate the highest percentage of revenue for the State, while ensuring a quality telephone service with reasonable and justifiable telephone call rate charges for inmate's family and friends similar to those available to the public-at-large.

11. Section 2.6 of the ITN, entitled "Revenue to be Paid to the Department," provided in part that the Department intended to enter into a contract to provide inmate telephone service at no cost to the Department. It provided that, "[t]he successful Contractor shall pay to the Department a commission calculated as a percentage of gross revenues."[1/]

12. The commission paid by a vendor is the single largest expense in the industry and is an important aspect of any bid.

Contract Term

13. Section 2.8 of the ITN was entitled "Contract Term" and provided:

> It is anticipated that the initial term of any Contract resulting from this ITN shall be for a five (5) year period. At its sole discretion, the Department may renew the Contract in accordance with Form PUR 1000 #26. The renewal shall be contingent, at a minimum, on satisfactory performance of the Contract by the Contractor as determined by the Department, and subject to the availability of funds. If the Department

> desires to renew the Contracts resulting from this ITN, it will provide written notice to the Contractor no later than thirty days prior to the Contract expiration date.

Own Technology System

14. Section 3.4 of the ITN provided in part:

> The successful Contractor is required to implement its own technology system to facilitate inmate telephone service. Due to the size and complexity of the anticipated system, the successful Contractor will be allowed a period of transition beginning on the date the contract is executed in which to install and implement the utilization of its own technology system. Transition, implementation and installation are limited to eighty (80) days. The Department realizes that some "down time" will occur during this transition, and Respondents shall propose an implementation plan that reduces this "down time" and allows for a smooth progression to the proposed ITS.

15. GTL emphasizes the language stating that the successful contractor must implement “its own” technology system, and asserts that the technology system which EPSI offers to install is not owned by it, but by Inmate Calling Solutions, LLC (ICS), its subcontractor. However, EPSI demonstrated that while the inmate telephone platform, dubbed the “Enforcer System,” is owned by ICS now, that EPSI has a Master User Agreement with ICS and that an agreement has already been reached that before the contract would be entered into, a

Statement of Work would be executed to create actual ownership in EPSI for purposes of the Florida contract.

16. GTL alleges that in EPSI's reply, EPSI relied upon the experience, qualifications, and resources of its affiliated entities in other areas as well. For example, GTL asserts that EPSI's claim that it would be providing 83 percent of the manpower is false, since EPSI has acknowledged that EPSI is only a contracting subsidiary of CenturyLink, Inc., and that EPSI has no employees of its own. While it is clear that EPSI's reply to the ITN relies upon the resources of its parent to carry out the terms of the contract with respect to experience, presence in the state, and personnel, EPSI demonstrated that this arrangement was common, and well understood by the Department.

17. EPSI demonstrated that all required capabilities would be available to it through the resources of its parent and subcontractors at the time the contract was entered into, and that its reply was in conformance with the provisions of the ITN in all material respects.

18. EPSI has the integrity and reliability to assure good faith performance of the contract.

Call Recording

19. Section 3.6 of the ITN, entitled "Inmate Telephone System Functionality (General)," provided in part:

> The system shall provide the capability to flag any individual telephone number in the inmate's 'Approved Number List' as 'Do Not Record.' The default setting for each telephone number will be to record until flagged by Department personnel to the contrary.

20. Securus alleges that section 3.6 of the ITN implements Department regulations[2/] and that EPSI's reply was non-responsive because it stated that recording of calls to specific telephone numbers would be deactivated regardless of who called that number. Securus alleges that this creates a security risk because other inmates calling the same number should still have their calls recorded.

21. EPSI indicated in its reply to the ITN that it read, agreed, and would comply with section 3.6. While EPSI went on to say that this capability was not connected to an inmate's PIN, the language of section 3.6 does not mention an inmate's PIN either. Read literally, this section requires only the ability to "flag" any individual <u>telephone number</u> that appears in an inmate's number list as "do not record" and requires that, by default, calls to a <u>telephone number</u> will be recorded until it is flagged. EPSI's reply indicated it could meet this requirement. This provision says nothing about continuing to record calls to that same number from other inmates. Whether or not this creates a security risk or is what the Department actually desired are issues which might well be discussed as

part of the negotiations, but this does not affect the responsiveness of EPSI's reply to section 3.6. Furthermore, Mr. Cooper testified at hearing that EPSI does have the capability to mark a number as "do not record" only with respect to an individual inmate, at the option of the Department.

22. EPSI's reply conformed to the call-recording provisions of section 3.6 of the ITN in all material respects.

<u>Call Forwarding</u>

23. Section 3.6.8 of the ITN, entitled "System Restriction, Fraud Control and Notification Requirements," provided that the provided inmate telephone services have the following security capability:

> Ability to immediately terminate a call if it detects that a called party's telephone number is call forwarded to another telephone number. The system shall make a "notation" in the database on the inmate's call. The system shall make this information available, in a report format, to designated department personnel.

24. In response to an inquiry noting that, as worded, the ITN did not technically require a vendor to have the capability to detect call-forwarded calls in the first place, the Department responded that this functionality was required.

25. Securus alleges that EPSI is unable to comply with this requirement, citing as evidence EPSI's admission, made some months before in connection with an RFP being conducted by the

Kansas Department of Corrections, that it did not yet have this capability.

26. EPSI indicated in its reply to the ITN that it read, agreed, and would comply with this requirement. As for the Kansas solicitation, EPSI showed that it now possesses this capability, and has in fact installed it before.

27. EPSI's reply conformed to the call-forwarding provisions of section 3.6.8 of the ITN in all material respects.

Keefe Commissary Network

28. Section 5.2.1 of the ITN, entitled "Respondents' Business/Corporate Experience," at paragraph e. directed each vendor to:

> [P]rovide and identify all entities of or related to the Respondent (including parent company and subsidiaries of the parent company; divisions or subdivisions of parent company or of Respondent), that have ever been convicted of fraud or of deceit or unlawful business dealings whether related to the services contemplated by this ITN or not, or entered into any type of settlement agreement concerning a business practice, including services contemplated by this ITN, in response to a civil or criminal action, or have been the subject of any complaint, action, investigation or suit involving any other type of dealings contrary to federal, state, or other regulatory agency regulations. The Respondent shall identify the amount of any payments made as part of any settlement agreement, consent order or conviction.

29. Attachment 6 to the ITN, setting forth Evaluation Criteria, similarly provided guidance regarding the assessment of points for Business/Corporate Experience. Paragraph 1.(f) provided: "If any entities of, or related to, the Respondent were convicted of fraud or of deceit or unlawful business dealings, what were the circumstances that led to the conviction and how was it resolved by the Respondent?"

30. Addendum #2. to the ITN, which included questions and answers, also contained the following:

> Question 57: In Attachment 6, Article 1.f. regarding respondents "convicted of fraud, deceit, or unlawful business dealing . . ." does this include associated subcontractors proposed in this ITN?
>
> Answer 57: Yes, any subcontractors you intend to utilize on this project, would be considered an entity of and related to your firm.

31. As a proposed subcontractor, ICS is an entity of, or related to, EPSI. There is no evidence to indicate that ICS has ever been convicted of fraud or of deceit or unlawful business dealings. There is no evidence to indicate that ICS has entered into any type of settlement agreement concerning a business practice in response to a civil or criminal action. There is no evidence to indicate that ICS has been the subject of any complaint, action, investigation, or suit involving any other

type of dealings contrary to federal, state, or other regulatory agency regulations.

32. The only evidence at hearing as to convictions involved "two individuals from the Florida DOC" and "two individuals from a company called AIS, I think that's American Institutional Services." No evidence was presented that AIS was "an entity of or related to" EPSI.

33. Conversely, there was no evidence that Keefe Commissary Network (KCN) or anyone employed by it was ever convicted of any crime. There was similarly no evidence that KCN entered into any type of settlement agreement concerning a business practice in response to civil or criminal action. It was shown that KCN "cooperated with the federal government in an investigation" that resulted in criminal convictions, and it is concluded that KCN was therefore itself a subject of an investigation involving any other type of dealings contrary to federal, state, or other regulatory agency regulations.

34. However, KCN is not an entity of, or related to, EPSI. KCN is not a parent company of EPSI, it is not a division, subdivision, or subsidiary of EPSI, and it is not a division, subdivision, or subsidiary of EPSI's parent company, CenturyLink, Inc.

35. EPSI’s reply conformed to the disclosure requirements of section 5.2.1, Attachment 6, and Addendum #2 of the ITN in all material respects.

Phases of the ITN

36. Section 6 describes nine phases of the ITN:

> Phase 1 – Public Opening and Review of Mandatory Responsiveness Requirements
>
> Phase 2 – Review of References and Other Bid Requirements
>
> Phase 3 – Evaluations of Statement of Qualifications, Technical Responses, and Managed Access Solutions[3/]
>
> Phase 4 – CPA Review of Financial Documentation
>
> Phase 5 – Review of Initial Cost Sheets
>
> Phase 6 – Determination of Final Scores
>
> Phase 7 – Negotiations
>
> Phase 8 – Best and Final Offers from Respondents
>
> Phase 9 – Notice of Intended Decision

Evaluation Criteria in the ITN

37. As amended by Addendum #2, the ITN established scoring criteria to evaluate replies in three main categories: Statement of Qualifications (500 points); Technical Response (400 points); and Initial Cost Sheets (100 points). It also provided specific guidance for consideration of the commissions and rates shown on the Initial Cost Sheet that made up the

pricing category. Section 6.1.5 of the ITN, entitled "Phase 5 – Review of Initial Cost Sheet," provided in part:

> The Initial Cost Proposal with the **highest commission** (percentage of gross revenue) to be paid to the Department will be awarded 50 points. The price submitted in Table 1 for the Original Contract Term, and the subsequent renewal price pages for Table 1 will be averaged to determine the highest commission submitted. All other commission percentages will receive points according to the following formula:
>
> (X/N) x 50 = Z
>
> Where: X = Respondents proposed Commission Percentage to be Paid. N = highest Commission Percentage to be Paid of all responses submitted. Z = points awarded.
>
> * * *
>
> The Initial Cost Proposal with the **lowest telephone rate** charge will be awarded 50 points. The price submitted in Table 1 for the Original Contract Term, and the subsequent renewal price pages for Table 1 will be averaged to determine the highest commission submitted. All other cost responses will receive points according to the following formula:
>
> (N/X) x 50 = Z
>
> Where: N = lowest verified telephone rate charge of all responses submitted.
> X = Respondent's proposed lowest telephone rate charge. Z = points awarded.

38. The ITN as amended by Addendum #2 provided instructions that initial costs should be submitted with the most favorable terms the Respondent could offer and that final

percentages and rates would be determined through the negotiation process. It included the following chart:[4/]

COST PROPOSAL

	INITIAL Contract Term 5 years	ONE Year Renewal	TWO Year Renewal	THREE Year Renewal	FOUR Year Renewal	FIVE Year Renewal
Initial Department Commission % Rate Proposed						
Initial Blended Telephone Rate for All Calls* (inclusive of surcharges)						

39. The ITN, including its Addenda, did not specify selection criteria upon which the determination of best value to the state would be based.

Allegation that EPSI Reply was Misleading

40. On the Certification/Attestation Page, each vendor was required to certify that the information contained in its reply was true and sufficiently complete so as not to be misleading.

41. While portions of its reply might have provided more detail, EPSI did not mislead the Department regarding its legal structure, affiliations, and subcontractors, or misrepresent what entity would be providing technology or services if EPSI was awarded the contract. EPSI's reply explained that EPSI was a wholly owned corporate subsidiary of CenturyLink, Inc., and described many aspects of the contract that would be performed

using resources of its parent, as well as aspects that would be performed through ICS as its subcontractor.

Department Evaluation of Initial Replies

42. The information on the Cost Proposal table was reviewed and scored by Ms. Hussey, who had been appointed as the procurement manager for the ITN. Attempting to follow the instructions provided in section 6.1.5, she added together the six numbers found in the boxes indicating commission percentages on the Cost Proposal sheets. One of these boxes contained the commission percentage for the original five-year contract term and each of the other five boxes contained the commission percentage for one of the five renewal years. She then divided this sum by six, the number of boxes in the computation chart ("divide by six"). In other words, she calculated the arithmetic mean of the six numbers provided in each proposal.

43. The Department had not intended for the commission percentages to be averaged in this manner. Instead, they had intended that a weighted mean would be calculated. That is, they intended that five times the commission percentage shown for the initial contract term would be added to the commission percentages for the five renewal years, with that sum then being divided by ten, the total number of years ("divide by ten").

44. The Department did not clearly express this intent in section 6.1.5. Mr. Viefhaus testified that based upon the

language, Securus believed that in Phase 5 the Department would compute the average commission rate the way that Ms. Hussey actually did it, taking the arithmetic mean of the six commission percentages provided by each vendor, and that therefore Securus prepared its submission with that calculation in mind.[5/]

45. Mr. Montanaro testified that based upon the language, GTL believed that in Phase 5 the Department would "divide by ten," that is, compute the weighted mean covering the ten-year period of the contract, and that GTL filled out its Cost Proposal table based upon that understanding.

46. The DOC posted a notice of its intent to negotiate with GTL, Securus, and EPSI on June 3, 2013. Telmate, LLC, was not chosen for negotiations.[6/]

47. Following the Notice of Intent to Negotiate was this statement in bold print:

> Failure to file a protest within the time prescribed in Section 120.57(3), Florida Statutes, or failure to post the bond or other security required by law within the time allowed for filing a bond shall constitute a waiver of proceedings under Chapter 120, Florida Statutes.

48. On June 14, 2013, the DOC issued a Request for Best and Final Offers (RBAFO), directing that Best and Final Offers (BAFO) be provided to the DOC by June 18, 2013.

Location-Based Services

49. The RBAFO included location-based services of called cell phones as an additional negotiated service, requesting a narrative description of the service that could be provided. The capability to provide location-based services had not been part of the original ITN, but discussions took place as part of the negotiations.

50. Securus contends that EPSI was not a responsible vendor because it misrepresented its ability to provide such location-based services through 3Cinteractive, Inc. (3Ci).

51. EPSI demonstrated that it had indicated to the Department during negotiations that it did not have the capability at that time, but that the capability could easily be added. EPSI showed that due to an earlier call it received from 3Ci, it believed that 3Ci would be able to provide location-based services to it. EPSI was also talking at this time to another company, CTI, which could also provide it that capability.

52. In its BAFO, EPSI indicated it could provide these services, explained that they would require payments to a third-party provider, and showed a corresponding financial change to their offer.

53. No competent evidence showed whether or not 3Ci was actually able to provide that service on behalf of EPSI, either

at the time the BAFO was submitted, or earlier. EPSI showed that it believed 3Ci was available to provide that service, however, and there is no basis to conclude that EPSI in any way misrepresented its ability to provide location-based services during negotiations or in its BAFO.

Language of the RBAFO

54. The RBAFO provided in part:

> This RBAFO contains Pricing, Additional Negotiated Services, and Value Added Services as discussed during negotiation and outlined below. The other specifications of the original ITN, unless modified in the RBAFO, remain in effect. Respondents are cautioned to clearly read the entire RBAFO for all revisions and changes to the original ITN and any addenda to specifications, which are incorporated herein and made a part of this RBAFO document.
>
> Unless otherwise modified in this Request for Best and Final Offer, the initial requirements as set forth in the Department's Invitation to Negotiate document and any addenda issued thereto have not been revised and remain as previously indicated. Additionally, to the extent that portions of the ITN have not been revised or changed, the previous reply/initial reply provided to the Department will remain in effect.

55. These two introductory paragraphs of the RBAFO were confusing. It was not clear on the face of the RBAFO whether "other specifications" excluded only the pricing information to be supplied or also the specifications indicating how that

pricing information would be calculated or evaluated. It was not clear whether "other specifications" were the same thing as "initial requirements" which had not been revised. It was not clear whether scoring procedures constituted "specifications." While it was clear that, to the extent not revised or changed by the RBAFO, initial replies that had been submitted -- including Statements of Qualifications, Technical Response, Financial Documentation, and Cost Proposals -- would "remain in effect," it was not clear how, if at all, these would be considered in determining the best value to the State.

56. In the RBAFO under the heading "PRICING," vendors were instructed to provide their BAFO for rates on a provided Cost Proposal table which was virtually identical to the table that had been provided earlier in the ITN for the evaluation stage, including a single square within which to indicate a commission rate for the initial five-year contract term, and five squares within which to indicate commission rates for each of five renewal years.

57. The RBAFO stated that the Department was seeking pricing that would provide the "best value to the state." It included a list of 11 additional services that had been addressed in negotiations and stated that, "in order to provide the best value to the state," the Department reserved the right to accept or reject any or all of these additional services. It

provided that after BAFOs were received, the Negotiation Team would prepare a summary of the negotiations and make a recommendation as to which vendor would provide the "best value to the state."

58. The RBAFO did not specify selection criteria upon which the determination of best value to the State would be based.

59. In considering commission percentages as part of their determination as to which vendor would receive the contract, the Negotiation Team decided not to consider commissions that had been listed by vendors for the renewal years, concluding that the original five-year contract term was all that was assured, since renewals might or might not occur.

60. On June 25, 2013, the DOC posted its Notice of Agency Decision stating its intent to award a contract to EPSI.

Protests and the Decision to Reject All Replies

61. Subsequent to timely filing notices of intent to protest the intended award, Securus and GTL filed Formal Written Protests with the DOC on July 5 and 8, 2013, respectively.

62. The Department considered and compared the protests. It determined that language in the ITN directing that in Phase 5 the highest commission would be determined by averaging the price for the original contract term with the prices for the renewal years was ambiguous and flawed. It determined that use

of a table with six squares as the initial cost sheet was a mistake.

63. The Department determined that the language and structure of the RBAFO could be read one way to say that the Department would use the same methodology to evaluate the pricing in the negotiation stage as had been used to evaluate the Initial Cost sheets in Phase 5, or could be read another way to mean that BAFO pricing would not be evaluated that way. It determined that the inclusion in the RBAFO of a table virtually identical to the one used as the initial cost sheet was a mistake.

64. The Department determined that the language and the structure of the RBAFO could be read one way to require further consideration of such factors as the Statement of Qualifications and Technical Response in determining best value to the State, or could be read another way to require no further consideration of these factors.

65. The Department prepared some spreadsheets demonstrating the varying results that would be obtained using "divide by six" and "divide by ten" and also considered a spreadsheet that had been prepared by Securus. The Department considered that its own Contract Manager had interpreted the Phase 5 instructions to mean "divide by six," while the

Department had actually intended the instructions to mean "divide by ten."

66. The Department had intended that the Negotiation Team give some weight to the renewal-year pricing, and had included the pricing table in the RBAFO for that reason, not simply to comply with statutory requirements regarding renewal pricing. The Department determined that the way the RBAFO was written and the inclusion of the chart required at least some consideration of ten-year pricing, and that vendors had therefore been misled when the Negotiation Team gave no consideration to the commission percentages for the renewal years.

67. Specifically, based upon the Securus protest, the Department determined that the RBAFO language had been interpreted by Securus to require that the Phase 5 calculation of average commission percentage be carried over to evaluation of the pricing in the BAFOs, which Securus had concluded meant "divide by six."

68. The Department further determined that based upon the GTL protest, the RBAFO language had been interpreted by GTL to require the Department to consider the renewal years in pricing, as well as such things as the Statement of Qualifications and Technical Response in the BAFO stage.

69. The Department determined that had "divide by six" been used in evaluating the BAFOs, Securus would have a computed percentage of 70 percent, higher than any other vendor.

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.

71. The Department did not compute what the final award would have been had it applied the scoring procedures for the initial cost sheets set forth in section 6.1.5 to the cost elements of the BAFOs. The Department did not compute what the final award would have been had it applied the scoring procedures for the Statement of Qualifications and Technical Response set forth in section 6.1.3 to the BAFOs.

72. Ms. Bailey testified that while she had originally approved the ITN, she was unaware of any problems, and that it was only later, after the protests to the Notice of Intended Award had been filed and she had reviewed the specifications

again, that she had come to the conclusion that the ITN and RBAFO were flawed.

73. Following the protests of the intended award by GTL and Securus, on July 23, 2013, the DOC posted to the Vendor Bid System a Notice of Revised Agency Decision stating the DOC's intent to reject all replies and reissue the ITN.

74. On August 5, 2013, EPSI, GTL, and Securus filed formal written protests challenging DOC's intended decision to reject all replies. Securus subsequently withdrew its protest to DOC's rejection of all replies.

75. As the vendor initially notified that it would receive the contract, EPSI's substantial interests were affected by the Department's subsequent decision to reject all replies.

76. GTL alleged the contract had wrongly been awarded to EPSI and that it should have received the award, and its substantial interests were affected by the Department's subsequent decision to reject all replies.

77. The Department did not act arbitrarily in its decision to reject all replies.

78. The Department did not act illegally, dishonestly, or fraudulently in its decision to reject all replies.

79. EPSI would likely be harmed in any re-solicitation of bids relative to its position in the first ITN, because potential competitors would have detailed information about

EPSI's earlier reply that was unavailable to them during the first ITN.

80. An ITN requires a great deal of work by the Department and creates a big demand on Department resources. The decision to reject all replies was not undertaken lightly.

81. The State of Florida would likely benefit in any new competitive solicitation[7/] because all vendors would be aware of the replies that had been submitted earlier in response to the ITN, and bidders would likely try to improve upon those proposals to improve their chances of being awarded the contract.

CONCLUSIONS OF LAW

82. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties in this case under sections 120.569 and 120.57(3), Florida Statutes (2013).

83. All four protests were timely filed.

84. Petitioners protesting the Department's proposed agency actions bear the burden of proof. § 120.57(3)(f); State Contr. and Eng'g Corp. v. Dep't of Transp., 709 So. 2d 607, 609 (Fla. 1st DCA 1998).

Point of Entry to Challenge Responsiveness

85. Section 287.057(1)(c)4. provides in part:

> The agency shall evaluate replies against all evaluation criteria set forth in the invitation to negotiate in order to establish a competitive range of replies reasonably susceptible of award. The agency may select one or more vendors within the competitive range with which to commence negotiations.

86. Consistent with this statute, the Department posted its Notice of Intent to Negotiate with EPSI, GTL, and Securus, including point of entry language.

87. Prior to hearing, and in response to pleadings indicating that GTL and Securus sought to challenge the responsibility of EPSI or the responsiveness of its reply, EPSI sought to limit any evidence as to these issues. EPSI argued that the Notice of Intent to Negotiate offered the appropriate point of entry, and that failure to raise these issues at that time meant that they had been waived. EPSI cited Verizon Business Network Services, Inc. v. Department of Corrections, Case No. 07-2468BID at ¶¶ 39, 40, 60j (Fla. DOAH Aug. 13, 2007), rejected in part (Fla. DOC Sept. 18, 2008), a case in which the Department previously determined that the Notice of Intent to Negotiate had provided such a point of entry.[8/]

88. GTL and Securus countered that at the time the Notice of Intention to Negotiate was issued, EPSI's reply to the solicitation remained confidential and was exempt from the Public

Records Act under section 119.071(1)(b)2. They argued that the Department's purported creation of a clear point of entry beginning at the time of the Notice of Intent to Negotiate was thus "illusory" and contrary to statute. It would be absurd, they argued, to conclude that they had waived their right to challenge before they even had access to the facts that would be required to support such a challenge.

89. An agency normally has some discretion in determining at what point "the necessary or convenient procedures, unknown to the APA, by which an agency transacts its day-to-day business"[9/] crystallize into "agency action" and so necessitate the offering of a point of entry. A point of entry, once offered, can be waived if the challenge is not timely asserted. Dickerson, Inc. v. Rose, 398 So. 2d 922, 924 (Fla. 1st DCA 1981).

90. An agency is not writing with a free hand, however, when conducting bid protest proceedings, because the statute requires that certain points of entry must be offered. Section 120.57(3)(a) provides that an agency shall provide a notice of rights to accompany "a decision or intended decision concerning a solicitation, contract award, or exceptional purchase by electronic posting." Section 120.57(3)(b) then goes on to expressly provide that failure to file a notice of protest within 72 hours after notice of an agency "decision or intended

decision” followed by a formal written protest within 10 days constitutes waiver.

91. Florida Administrative Code Rule 28-110.002(2) defines “decision or intended decision” for purposes of contract solicitation and award:

> (2) “Decision or intended decision” means:
>
> (a) The contents of a solicitation, including addenda;
>
> (b) A determination that a specified procurement can be made only from a single source;
>
> (c) Rejection of a response or all responses to a solicitation; or
>
> (d) Intention to award a contract as indicated by a posted solicitation tabulation or other written notice.

92. Whatever its discretion to offer other points of entry, the Department is thus statutorily compelled to offer an opportunity for hearing at the time it gives notice of its intention to award a contract. Section 287.057(1)(c)4. provides that the award shall be made to the “responsible and responsive vendor that the agency determines will provide the best value to the state, based on the selection criteria.” The determination that the winning bidder is responsible and responsive is thus an integral part of the decision to award. An agency cannot effectively rewrite the statute through procedures that purport to winnow off and insulate from later challenge various

components of its intended decision before that decision has even been announced. Statutorily mandated points of entry cannot be modified or vitiated by such agency initiatives.

EPSI's Responsibility and Responsiveness

93. Although the pre-hearing ruling thus denied EPSI's motions to limit the introduction of evidence as to its responsibility or the responsiveness of its reply, no pre-hearing motion was filed contesting EPSI's standing. Cf. Peace River/Manasota Reg'l Water Supply Auth. v. IMC Phosphates Co., 18 So. 3d 1079, 1081 n.2 (Fla. 2d DCA 2009)(though standing is usually a threshold issue, where facts need to be developed to a great degree, judicial economy may be served by considering standing in the hearing on the merits).

94. Section 287.012(24) defines a responsible vendor as "a vendor who has the capability in all respects to fully perform the contract requirements and the integrity and reliability that will assure good faith performance."

95. EPSI demonstrated at hearing that it had the capability to fully perform the contract requirements utilizing the resources of its parent company and those of subcontractors and it made no misrepresentations regarding its structure or relationship with other entities. It showed that it had the integrity and reliability to assure good faith performance of the contract. EPSI was a responsible vendor.

96. A responsive vendor is defined by section 287.012(26) as "a vendor that has submitted a bid, proposal, or reply that conforms in all material respects to the solicitation."

97. EPSI demonstrated at hearing that its reply was responsive to provisions of the ITN relating to call-recording, call-forwarding, business and corporate experience disclosures, and capabilities to perform the contract, and that its reply otherwise conformed in all material respects to the solicitation. EPSI was a responsive vendor.

98. GTL also demonstrated that it had the capability in all respects to fully perform the contract requirements and the integrity and reliability to assure good faith performance, and so was a responsible vendor. GTL similarly demonstrated that its reply conformed in all material respects to the solicitation, and that it was a responsive vendor.

99. In order to demonstrate standing, a party must show: 1) that he will suffer injury in fact which is of sufficient immediacy to entitle him to a section 120.57 hearing, and 2) that his substantial injury is of a type or nature which the proceeding is designed to protect. The first aspect of the test deals with the degree of injury. The second deals with the nature of the injury. Agrico Chem. Co. v. Dep't of Envtl. Reg., 406 So. 2d 478, 482 (Fla. 2d DCA 1981).

100. The Department had announced that EPSI would be awarded the contract. As a responsive and responsible vendor, EPSI's substantial interests were thus affected by the subsequent decision to reject all replies, and EPSI has standing. Westinghouse Elec. Corp. v. Jacksonville Transp. Auth., 491 So. 2d 1238, 1240 (Fla. 1st DCA 1986). GTL, a responsive and responsible vendor alleging irregularities in evaluation of the BAFOs and an incorrect award to EPSI, also has standing to challenge the rejection of all replies. Couch Constr. Co. v. Dep't of Transp., 361 So. 2d 172 (Fla. 1st DCA 1978).

Rejection of All Replies

101. In a proceeding brought to protest intended rejection of all competitive proposals, the applicable standard of review is that developed in Department of Transportation v. Groves-Watkins Constructors, 530 So. 2d 912, 914 (Fla. 1988), a case in which the Florida Supreme Court held that the administrative law judge's responsibility "is to ascertain whether the agency acted fraudulently, arbitrarily, illegally or dishonestly." The statute was later amended to reflect that this is the applicable standard when all replies are rejected. § 120.57(3)(f).

102. This is a stringent burden. As the First District has stated, "an agency's rejection of all bids must stand, absent a showing that the 'purpose or effect of the rejection is

to defeat the object and integrity of competitive bidding.'" Gulf Real Props., Inc. v. Dep't of HRS, 687 So. 2d 1336, 1338 (Fla. 1st DCA 1997).

103. No party here has alleged that the Department acted fraudulently or dishonestly. There has been no evidence that the rejection of all replies was illegal, as distinct from contentions that it was arbitrary. This leaves only the question of whether the Department's intended decision to reject all replies is arbitrary.

104. An arbitrary decision is one that is not supported by facts or logic, or is despotic. Agrico Chem. Co. v. Dep't of Envtl. Reg., 365 So. 2d 759, 763 (Fla. 1st DCA 1978).

105. Where an agency, in deciding to reject all replies, has engaged in an honest, lawful, and rational exercise of its "wide discretion in soliciting and accepting bids for public improvements," its decision will not be overturned, even if it may appear erroneous and even if reasonable persons may disagree. Dep’t of Transp. v. Groves-Watkins Constructors, 530 So. 2d 912, 913 (Fla. 1988) (quoting Liberty Cnty. v. Baxter's Asphalt & Concrete, 421 So. 2d 505, 507 (Fla. 1982)).

106. An agency's discretion to reject all replies is not unbridled, however. In applying the "arbitrary or capricious" standard of review, it must be determined whether the agency has: (1) considered all the relevant factors; (2) given actual,

good faith consideration to those factors; and (3) used reason rather than whim to progress from consideration of each of these factors to its final decision. Adam Smith Enters. v. Dep't of Envtl. Reg., 553 So. 2d 1260, 1273 (Fla. 1st DCA 1989). If agency action is justifiable under any analysis that a reasonable person would use to reach a decision of similar importance, the decision is neither arbitrary nor capricious. Dravo Basic Materials Co. v. Dep't of Transp., 602 So. 2d 632, 634 n.3 (Fla. 2d DCA 1992).

107. Evidence was adduced at hearing regarding the factors considered by the Department in making its decision to reject all replies. The Department considered spreadsheets comparing "divide by six" and "divide by ten" using the commission numbers supplied by the vendors. The Department considered that its own Contract Manager had interpreted the Phase 5 instructions to mean "divide by six," though the Department had actually intended them to mean "divide by ten." The Department considered that the protests indicated that Securus had interpreted the RBAFO to require "divide by six" and GTL had interpreted the RBAFO to bring over elements of the initial evaluation and require the Department to give some consideration to commission percentages. It considered that its Negotiation Team had not done this.

108. Petitioners can prove the Department's action arbitrary if they demonstrate that these factors were irrelevant, that good faith consideration was not given to them, or that the Department did not use reason in progressing from these factors to its decision.

109. EPSI asserts that any flaw in the scoring formula in section 6.1.5 is irrelevant. It correctly points out that no vendor was prejudiced by the Department's application of the scoring formula to the initial cost proposals in Phase 5 because the purpose of that scoring was simply to select vendors for negotiation, and in fact the Department entered into negotiation with all three vendors. However, it does not follow that the Department's determination that the scoring formula language was flawed is therefore irrelevant in this proceeding.

110. The Department determined that Securus read language in the RBAFO to mean that the flawed scoring formula for Phase 5 had been incorporated by reference as selection criteria in determining the best value to the State. The Department thus determined that it was the cumulative effect of these two poorly worded documents, considered together, that misled Securus. The language of section 6.1.5 is therefore relevant.

111. Consideration must also be given to the language of section 287.057(1)(c), which provides in part:

> 3. The criteria that will be used for determining the acceptability of the reply and guiding the selection of the vendors with which the agency will negotiate must be specified.
>
> 4. The agency shall evaluate replies against all evaluation criteria set forth in the invitation to negotiate in order to establish a competitive range of replies reasonably susceptible of award. The agency may select one or more vendors within the competitive range with which to commence negotiations. After negotiations are conducted, the agency shall award the contract to the responsible and responsive vendor <u>that the agency determines will provide the best value to the state, based on the selection criteria</u>. (emphasis added).

112. It appears that the reference to "the selection criteria" at the end of subparagraph 4. relates back to the criteria used to determine acceptability of replies and select vendors for negotiation, mentioned immediately before in the same subparagraph and in subparagraph 3. If the statute does in fact strictly require an agency to apply these exact same criteria at the award stage, the Invitation to Negotiate process has lost a tremendous amount of flexibility. When, as here, that agency has established a detailed and reasonably objective scoring system to be applied as the standard for determining the acceptability of replies and selection of vendors for negotiations, it might limit the determination of best value to simple mathematical recalculation based upon changes in offers by vendors.

113. On the other hand, the phrase "based on the selection criteria" might be interpreted more loosely to allow an agency to establish and describe distinct selection criteria to be applied in determining best value. Exactly how close a relationship these criteria must have to the standards that were used to determine the acceptability of replies and select vendors for negotiation will likely be a matter considered by courts in the future. In any case, the legislative history of the statute dictates that some additional criteria beyond the old "best value to the state" mantra must be applied. The phrase "based on the selection criteria" was not added until eight years[10/] after the Legislature created the "best value" standard.[11/] A statute must be interpreted to give effect to every clause in it, and to accord meaning and harmony to all of its parts. Larimore v. State, 2 So. 3d 101, 106 (Fla. 2008); Jones v. ETS of New Orleans, Inc., 793 So. 2d 912, 914-15 (Fla. 2001). The modifying phrase "based on the selection criteria" must be given meaning. An agency must establish selection criteria to determine the best value to the state.

114. It is not necessary, however, to determine whether or not the Department here violated section 287.057(1)(c)4., either by failing to apply the exact criteria it had earlier used to select vendors for negotiation or alternatively by failing to establish and apply distinct criteria to determine best value to

the State.[12/] While there is no reason to conclude that the Department's rejection of all replies was predicated upon any conviction that it had violated this statute, the record does indicate that the Department based its decision to reject all replies on a closely related issue: that the ITN specifications and RBAFO, taken together, were not clear as to how the Department was going to select the winning vendor.

115. The goals and purposes of competitive procurement statutes are clear:

> [T]he object and purpose of this statute is 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 its various forms; to secure the best values for the county at the lowest possible expense, and to afford an equal advantage to all desiring to do business with the county, by affording an opportunity for an exact comparison of bids.

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

116. In Caber Systems, Inc. v. Department of General Services, 530 So. 2d 325, 334 (Fla. 1st DCA 1988), it was held that it was not arbitrary for an agency to reject all bids where there was ambiguity in the bid specifications:

> Some bidders prepared their bids based upon the historical method of award, and others followed more literal readings of the invitation to bid. Thus, the specifications

did not adequately apprise the bidders of the method of award that would be used.

117. There is evidence supporting the Department's determination that Securus interpreted the language of the ITN very literally and read it in conjunction with the language and structure of the RBAFO to conclude that the Department was required to "divide by six" in evaluating BAFOs. Evidence also supports the Department's determination that GTL read both documents differently, to require consideration of broader aspects from the initial evaluation, and also require the Department to give some consideration to renewal years. EPSI interpreted different language in the RBAFO to allow the Department to base its award only on the commission percentage for the initial contract term, and to provide no restriction on how the Department would determine the "best value to the state".

118. The Department reasonably concluded that the introductory language in the RBAFO, along with the Cost Proposal table there, when considered in light of the detailed directions as to what and how the initial replies would be evaluated, had led to ambiguity as to the selection criteria the Department would be using to determine which vendor offered the best value to the State. It further concluded that it had failed to apprise vendors of the criteria for award, and had affected the

preparation of their replies. See Aurora Pump, Div. of Gen. Signal Corp. v. Goulds Pumps, Inc., 424 So. 2d 70, 74-75 (Fla. 1st DCA 1982).

119. The Department's conclusion that these ambiguities destroyed its ability to fairly compare replies cannot be said to be irrational. There was evidence upon which the Department could conclude that the vendors conformed their commission pricing to their respective interpretations of the ITN and RBAFO to maximize their opportunity to be awarded the contract, and this evidence was before the Department at the time it made the decision to reject all replies.

120. There are few, if any, aspects of a solicitation more fundamental and material than the basis of award. The evaluation of the commission percentage alone would be material, for the commission paid by a vendor is the single largest expense in the industry. If vendors were misled as to the selection criteria, rejection was appropriate. Cf. Capeletti Bros. v. State Dep't of Gen. Servs., 432 So. 2d 1359, 1363 (Fla. 1st DCA 1983)(error in site drawings was not so material as to require agency to reject all bids where there was no evidence that anyone was misled).

121. GTL argues that the case of Austin Construction Corporation v. Department of Management Services, Case No. 94-006082BID (Fla. DOAH Dec. 16, 1994; Fla. DMS Dec. 21, 1994),

instructs that if bids can be accurately compared by conducting a simple mathematical calculation, that should be done, and in such a case all bids should not be rejected. While the principle of Austin is undoubtedly correct, it is not applicable in the instant case. The Department's motivation here to reject all replies was not because different methods had been used to convey pricing in the various replies, which could be made uniform by subjecting them to a simple mathematical calculation. Instead, the Department concluded that the ITN and RBAFO misled vendors into making different bids than they would have made had the selection criteria been made clear. If the Department is correct, no after-the-fact mathematical adjustment could remedy that error.

122. While reasonable persons might disagree with the Department's conclusion that Securus and GTL were misled by Department documents, and that this affected their replies and the fairness of the solicitation, there is evidence to support it, and there is no reason to conclude that the Department's determination was not made in good faith. The Department's decision to reject all replies was not arbitrary.

123. Petitioners have not met their burden to show that the rejection of all replies was illegal, arbitrary, dishonest, or fraudulent.

Award to EPSI

124. As it has been determined that the Department's intended decision to reject all replies is not illegal, arbitrary, dishonest, or fraudulent, the earlier intended decision to award the contract to EPSI need not be considered.

RECOMMENDATION

Upon consideration of the above findings of fact and conclusions of law, it is

RECOMMENDED:

That the Department of Corrections issue a final order finding that the rejection of all replies submitted in response to ITN 12-DC-8396 was not illegal, arbitrary, dishonest, or fraudulent, and dismissing all four protests.

DONE AND ENTERED this 1st day of November, 2013, in Tallahassee, Leon County, Florida.

F. SCOTT BOYD
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 1st day of November, 2013.

ENDNOTES

[1/] The ITN also called for telephone rates to be paid by inmates and their families, including rates for renewal years. The solicitation of telephone rates is barely discussed here because it raises issues similar to those involving commission percentages and there is less variation in telephone rate pricing.

[2/] The ITN provision does not appear to implement Florida Administrative Code Rule 33-602.205(3) at all, but instead appears to be seeking to establish a new system. The rule actually provides that if an attorney telephone number is placed on an inmate's telephone list, it is thereby subjected to recording. The rule requires the use of a specially designated phone that is not even connected to the monitoring system if a call is not to be recorded. The ITN, in contrast, describes a system with capability to "turn off" the recording function with respect to certain telephone numbers that appear on the list.

[3/] Addendum #2 eliminated Managed Access Solutions from the solicitation and struck references to it.

[4/] A second table was also provided to contain commission rates and telephone rates applicable to proposals including managed access, but, as noted, this option was later abandoned.

[5/] "Divide by six" is not a logical method of computing average commission percentage because it bears no relationship to the actual contract term. The arithmetic mean calculated from the commission rates supplied by Securus could not actually ever be realized. However, if Securus was correct in its belief that this was the method that the Department was required to use (or would use), it would be logical for Securus to use "divide by six" in preparing its reply, perhaps especially so if it correctly believed others would not do so.

[6/] Although Telmate's bid was found non-responsive, it is clear from the language of section 287.057(1)(c)4. that those vendors not found responsible or responsive and those vendors with whom the agency negotiates are not necessarily exclusive categories. Based upon criteria set forth in an ITN, an agency is free to choose not to negotiate with a responsible and responsive bidder, or even one that falls "within the competitive range." Although Ms. Hussey testified that Telmate was not included on the short list because they were "nonresponsive" on their financials, the ITN provided at section 2.4 that the Department intended to

conduct negotiations with "one or more" qualified respondents while introductory provisions in section 6 stated that the Department would establish a committee to evaluate and select the "three highest ranking responses."

7/ It is not clear that an ITN would be appropriate because the Department may now know what additional services it desires and because the managed access component that provided major justification for that type of procurement is evidently no longer being solicited.

8/ It appears that the arguments found persuasive here as to the effect of rule 28-110.002(2) and the point of entry mandated by section 120.57(3)(b) were not presented to the ALJ or to the Department in Verizon. Given the conclusion that section 120.57(3)(b) offers a point of entry upon the posting of the decision or intended decision, the issue of lack of authority of the Department to provide additional points of entry without modification of either the statute or the uniform rules, as suggested by GTL and Securus, does not arise under the facts of this case. However, assuming the Department has such authority, it must be exercised in such a manner as to provide effective access to a substantial interests hearing. A point of entry may be too early as easily as too late. Cf. Gen. Dev. Utils. v. Fla. Dep't of Envtl. Reg., 417 So. 2d 1068, 1070 (Fla. 1st DCA 1982)("simply providing a point of entry is not enough if the point of entry is so remote from the agency action as to be ineffectual as a vehicle for affording a party" a fair opportunity to challenge). A point of entry at the Notice of Intent to Negotiate may well be premature, at least as to chosen vendors seeking to challenge the responsiveness of their competitors' replies, as opposed to a vendor challenging its own non-selection. It is recommended that in its final order the Department explain this and recede from its conclusion in Verizon. The Department might also wish to re-examine its purposes in providing this earlier point of entry not discussed in the ITN.

9/ Capelletti Bros., Inc. v. Dep't of Transp., 362 So. 2d 346, 348 (Fla. 1st DCA 1978).

10/ Section 19 of chapter 2010-151, Laws of Florida, added "based upon the selection criteria."

11/ Section 15 of chapter 2002-207, Laws of Florida, codified the "best value to the state" language.

[12] No vendor here filed a timely challenge to the specifications for failing to set forth the selection criteria to be used in determining the best value to the state, and so any protest on this ground was waived. Consultech of Jacksonville v. Dep't of Health, 876 So. 2d 731, 734 (Fla. 1st DCA 2004). Neither has any vendor argued that the failure of the Department to subsequently establish such criteria in the RBAFO was contrary to the statute.

COPIES FURNISHED

Jonathan P. Sanford, Esquire
James Fortunas, Esquire
Department of Corrections
501 South Calhoun Street
Tallahassee, Florida 32399

Robert H. Hosay, Esquire
Foley and Lardner, LLP Suite 900
106 East College Avenue
Tallahassee, Florida 32311

John A. Tucker, Esquire
Foley and Lardner, LLP Suite 1300
1 Independent Drive
Jacksonville, Florida 32202

W. Robert Vezina, III, Esquire
Eduardo S. Lombard, Esquire
Vezina, Lawrence and Piscitelli, P.A.
413 East Park Avenue
Tallahassee, Florida 32301

Amy W. Schrader, Esquire
William E. Williams, Esquire
GrayRobinson, P.A. Suite 600
301 South Bronough Street
Tallahassee, Florida 32301

Michael D. Crews, Secretary
Department of Corrections
501 South Calhoun Street
Tallahassee, Florida 32399-2500

Jennifer Parker, General Counsel
Department of Corrections
501 South Calhoun Street
Tallahassee, Florida 32399-2500

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

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