



New Hampshire Liquor Commission

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February 11, 2013

Via Email

Attorney James J. Bianco
Bianco Professional Association
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RE: Response to XTL-NH, Inc.'s Protest Pursuant to RFP Section 1.24

Dear Attorney Bianco:

I. INTRODUCTION

The Protest Process, RFP, section 1.24, p. 16, is designed to identify objective errors in the award of the contract. As acknowledged in the XTL Proposal at page 3, at the very least, an objective error must be material. Discretionary decisions are not subject to challenge. The Commissioners chose the solution that best meets the needs of the NHSLC. The issue is whether that choice was based on a material objective error.

For the reasons discussed below, XTL's Protest is DENIED. To take this a step further, XTL's Protest betrays a failure to understand the basic terms of the RFP and generally ignores all amendments and clarifications. As a result, XTL repeatedly claims that Exel has failed to meet a requirement that does not exist.

II. PROTEST PROCESS

The process involves a Protest filed by an aggrieved party described as the Invoking Party. RFP section 1.24, p. 16-17. The Protest must be sent to the Issuing Officer, Chief of Administration Craig Bulkley (Chief Bulkley) with a copy to all other persons or entities that have submitted a Proposal.

During this process, the NHSLC has the authority to fashion a remedy if one is required. Depending upon the circumstances, the NHSLC has the authority to rescind a contract award. RFP, section 1.3, p. 6

On January 28, 2013, XTL filed a Protest regarding the award of the contract to Exel. [In its Proposal, XTL stated that it reviewed and understood the RFP Protest Process. XTL Proposal, p.24.]

Chief Bulkley sent a letter to XTL and Exel dated February 1, 2013, outlining the process as follows:

The Invoking Party is required to give notice to the "other party." XTL is the "Invoking Party." Exel is the "Other Party."

The NHSLC has the authority to review the Protest at two different levels. The first level runs for five business days from the filing of the Protest, in this case, until 4:00 PM on February 4, 2013. The "other Party" has until that deadline to provide information to the NHSLC.

Exel and XTL have taken the position that the NHSLC is the "Other party." The NHSLC disagrees. It is not necessary to resolve this issue in order to review the Protest. Exel filed comments on the Protest before the deadline.

The protest process is a document review. It does not involve a hearing.

At the first level Director Gerrish has reviewed the documents that have been submitted and other relevant material, including relevant portions of the Proposals, emails and the RFP as amended and clarified.

The parties to the Protest are required to use all reasonable efforts to attempt to resolve the dispute.

The NHSLC and XTL conducted a telephone conference on February 4, 2013. Director Gerrish, Chief Bulkley and Attorney Stephen Judge were present for the call. Attorney Bianco and Attorney Ferrari represented XTL. They were joined by XTL President Louis Cerone and Anthony Cerone. The NHSLC shared with XTL observations about a few of the items in the Protest. By agreement, XTL declined to respond during the conference.

The main item covered during the conference was a description by Attorney Judge of the context in which the remarks identified in Section E of the Protest were made. This matter will be discussed below.

XTL and Exel have until 4 PM on February 19, 2013 to file additional information, if any.

The two Commissioners will then review the matter and issue a written decision.

III. THE RFP PROCESS

The RFP solicited Proposals from international, national and local experts. It requested that these experts take the information provided and propose the best solution using their expertise. The Vendors were allowed to take exceptions to "mandatory requirements." The very definition of mandatory requirements stated that:

The identification of a requirement as "Mandatory" shall not limit the NHSLC, at its sole discretion, from accepting an alternative considered by the NHSLC to be equal or superior.

The RFP encouraged vendors to question its requirements and propose alternatives. On April 19, 2012, the NHSLC stated:

The vendor must respond to every section in the RFP (Part I, Section 1.7.1). The response may be "understood" which shall signify that the vendor takes no exception. The vendor may, however, take an exception and clearly describe the alternative solution. If the alternative solution is agreeable to the NHSLC, the NHSLC has the authority to waive mandatory requirements and accept alternatives. (Part I, Section 1.7.2)

To hammer the point home, on May 1, 2012, the NHSLC stated:

The Vendors' attention is drawn to Sections 1.7.1, 1.7.2 and 1.7.3. Read in conjunction, these sections should be understood as described below:

The proposal must contain a written response to all portions of the RFP and appendices. The response shall at least be "understood," which means that the Vendor agrees and takes no exception to that portion of the RFP. Even where the RFP "requires" that a particular task be accomplished, the Vendor may take a clearly described exception and, if possible, suggest an alternative. The NHSLC may waive mandatory requirements and accept alternatives deemed to be in the best interest of the NHSLC. The Vendor should make every effort to agree to the requirements of the RFP to the greatest extent possible in order for the Evaluation Committee to be able to compare similar proposals.

In the answers to the questions previously submitted and to the questions contained in this document, the Evaluation Committee has provided as much clarity as possible regarding the requirements of the RFP. The overarching desire of the NHSLC is for the Vendors to propose a system that will provide the highest possible efficiencies at the lowest possible cost.

(Emphasis added).

And again:

This RFP contains a large number of basic, functional requirements that must be met in some fashion. **There is, however, an opportunity for the Vendor to propose a solution that reaches the same result but takes a different path.** The NHSLC has identified the price that it seeks for the two items. The NHSLC would be happy if a Vendor proposed a lower price. The NHSLC may agree if a Vendor proposes a higher price but demonstrates savings elsewhere that balance against the higher price.

May 1, 2012, Answer to Question 118. (Emphasis added).

It is important to note that these clarifications were provided to all interested parties before the Proposal were due.

Once the Proposals were filed, The NHSLC engaged in a lengthy and comprehensive exchange of emails with each Vendor to explore each Proposal. As a general rule, each Vendor received the same questions initially. On occasion, a Vendor received an email that only related to an aspect of its Proposal that was not relevant to the other Vendors. The NHSLC made certain that no Vendor knew anything about any other Vendor's Proposal or the answers provided by any other Vendor. In this way, the NHSLC preserved the flexibility of the RFP but kept the Vendors equally informed of the issues so that the NHSLC could compare Proposals and answers on an "apples to apples" basis.

XTL participated fully in the back and forth regarding its Proposal. The NHSLC has produced over 2,000 pages of documents describing the many Vendor face-to-face conferences, telephone conferences, email exchanges, clarifications and amendments, etc. that took place from March 28 to November, 2012. As one measure which probably contains duplication, XTL's correspondence alone totals 230 pages.

The Commissioners met separately with Exel and XTL. They toured each Vendor's proposed site including, XTL in Merrimack and Exel in Bow. Both sites require that a warehouse be built that is ready to run by November 1, 2013. Exel has agreed to be operational on time at its site in Bow and has provided a Transition Bond. XTL will need to use a different location on November 1, 2013 and then have a second transition to its Merrimack site. XTL agreed to be responsible for the cost of the transition to Merrimack.

The Vendors were kept on a level playing field at all times as a result of the conferences and communications with each Vendor.

XTL submitted a commendable Proposal. The differences between Exel and XTL are not great, but there are differences. Exel provided a better overall solution and a better IT solution.

In the final analysis, the Commissioners determined that Exel's solution best meets the needs of the NHSLC.

IV. EXEL CONTRACT

Exel brings a wealth of knowledge in logistics and warehouse operations to include experience with some of the largest wine and spirit suppliers in the world as well as some of the largest Fortune 500 companies. It also brings a wealth of talent in all aspects of warehouse operations to include a sophisticated IT capability and state-of-the-art warehouse management system software.

The new warehouse will be located on Route 3A in Bow, NH and will open on time. This is an excellent location in that it is a geographically central location within the state as well as being in close proximity to the Commission headquarters in Concord. Exel has hired Pro Con Incorporated in Manchester, NH to be the general contractor for this design build warehouse. The NHSLC has had excellent experience with Pro Con in that it built the new Nashua liquor and wine outlet in 2011. This was also a design/build project. There is every expectation that Pro Con will repeat its stellar performance with Exel's new warehouse.

The NHSLC's business partners will see a reduction in warehouse rates totaling approximately \$4 million over the first thirty-month period as compared to our current rates. The Commission will see a reduction in warehouse rates of approximately \$3 million over the first thirty-month period as compared to our current rates.

V. REVIEW OF PROTEST

The issues raised by the Protest are addressed in the order they are raised in the January 28, 2013 letter.

Scoring

In its Protest, XTL states that it has reviewed "a portion" of the EC's scoring and claims that it "learned that it was the lowest qualified and responsive bidder to the RFP." This claim is curious. The scoring was largely a matter of judgment but as a tool the RFP set a total of 100 points. In terms of numbers, the object was to be the highest qualified and responsive bidder. Exel was the highest qualified and responsive bidder. XTL finished second in total points.

In order to address XTL's claim, it is reasonable to conclude that the scoring information XTL reviewed is in Exhibit A attached to the Evaluation Committee (EC) memorandum. This Exhibit is posted on the NHSLC's website. The Exhibit contains the scores for all four criteria. It is difficult, if not impossible, to examine Exhibit A and only view one of the four

scores. Apparently XTL failed to review the other three scores or chose to ignore them; therefore, a review of the scores is instructive.

To begin, the financial criterion was worth 40 points. At the end of the EC review, XTL and EXEL provided their best and final numbers for the identical one warehouse scenario. XTL confirmed that its price for the initial 30 month period was \$26,484,586. Exel's confirmed price for the same period was \$27,000,000. The difference is \$515, 414. The difference for each of the 30 months is \$17,000. For a point of reference, Law was a distant third at \$27,875,457, approximately \$1,400,000 greater than XTL.

The EC used a mathematical calculation to compare the prices and award the 40 points. XTL had the lowest cost and received all 40 points. Exel was a very close second and its score was calculated as 39.24. With 40 points awarded, XTL was ahead by .76, less than one point.

The remainder of the review was an application of judgment. Points were assigned as a tool for ranking Vendors but the overall question was a judgment to determine which solution was better. With that caution in mind, of the remaining 60 points, Exel was awarded 54 for a total of 93.24. XTL was awarded 51 for a total of 91. Law finished third in every category with a total of 82 points.

The numbers have been identified and discussed but the overall decision was a question of judgment.

There was no objective error.

RSA 91-A, Right-to-Know

XTL and Law filed RSA 91-A requests. In response, the NHSLC released over 2,000 pages of governmental records. Law filed an action in Superior Court seeking all information including information that is exempt under RSA 91-A. The Superior Court denied the petition. XTL filed no petition. The broad statement that "only incomplete information" has been released is rejected.

A. Disqualification

There is no support for XTL's efforts to disqualify Exel.

Legal Statements

General statements of law with no citation other than "legislative intent" of RSA 21-I:22-a and b require no response and raise no objective errors. Nevertheless, the RFP falls squarely within the parameters of RSA 21-I:22. (**Nothing in this subdivision shall prevent the state or a state agency as defined in RSA 21-I:11, I(b), including those agencies referenced in**

RSA 21-I:18, from making judgments on the capabilities of vendors to complete the work requested if this option is clearly stated in the body of the document and if used as the reason for the award, is so stated.) The RFP clearly states, in many sections including those cited in Section III of this document that the NHSLC's intention is to make judgments and use those judgments as the reason for the award. No objective error alleged or proven.

1. One v. Two Warehouses

XTL claims that Exel must be disqualified for submitting a one warehouse scenario but failing to submit a two warehouse scenario in its Proposal. XTL fails to establish any objective error.

The RFP provides, in pertinent part, **It's envisioned that one strategically located Warehouse operation will provide optimal service to our internal and external customers, while reducing operating cost.**

RFP p. 18, section 2.1

If the NHSLC determined to utilize a two warehouse solution then any Vendor who made no such proposal would be eliminated. As XTL was informed, and as is clear from XTL's August 13, 2012 email, the one warehouse XTL template and November 1, 2012 email, contained in Exhibit I to the EC memo, the process narrowed to one warehouse solutions. It was not an objective error only to submit a one warehouse scenario.

Later in the document, XTL makes the claim that the Exel contract is a two warehouse solution. A fuller response will be found below but the contract is not a two warehouse solution.

2. Appendices D and D-1

XTL claims that Exel was required to file Appendix D-1. Appendix D-1 was required in order to identify costs to the NHSLC. Exel's Proposal contained no costs to the NHSLC and stated this result. There was no need for Exel to provide a blank Appendix D-1 or for the NHSLC to require a blank template. There is no objective error.

3. a. Future Rates capped by CPI.

XTL claims that rates after the initial 30 month period were required to be capped by increases in the CPI. Again, there was no objective error. The RFP provides:

Rate changes may be negotiated at the end of each subsequent thirty (30) month period for the next thirty (30) months giving consideration to the Consumer Price Index (CPI)....

The operative word is “may.” The RFP allowed the NHSLC to modify this objective to meet the best needs of the state. XTL fully understood the fluid nature of the process and ultimately proposed fixed future rates. These rates were “in lieu of the CPI increase.” XTL’s BAFO Response August 3, 2012. Exel’s Proposal complies with the RFP.

3.b. Warehouse size.

XTL claims that Exel did not propose a warehouse solution designed to handle increases in Product over the term of the 20 year contract. There is no objective error. Exel responded to section 3.0.6 and Appendix C, II regarding the warehouse capabilities for the term of the contract in the Concept of Operations section of the Proposal, including pages 5-17 of 28.

3.c. Warehouse license

XTL claims that the RFP required Vendors to submit a warehouse license or application and that Exel failed to do so. There is no objective error. By way of example, using XTL’s criteria, its warehouse application was not complete because it did not have town approval or identify a completed warehouse. To state in the Protest that “XTL-NH fully complied with this requirement” strains the bounds of credulity.

Further, XTL lacks any support for its claim that the RFP required a warehouse license or application. On May 1, 2012, before Proposals were due, the NHSLC clarified this issue in its answer to Question 123:

Question 123: 3.0.14 Fire, page 27 of 156 – If the Warehouse bidder is proposing the construction of a new facility, fire permits will not be available until after the facility construction is completed. In this scenario, how can a bidder comply with the RFP requirement of attaching copies of permits to the Proposal?

Answer: **As with the warehouse license**, a Vendor may submit an application for a permit or explain how and when it plans to obtain a required permit. (Emphasis added)

If XTL had any doubt, on July 27, 2012, the NHSLC amended the RFP as follows:

The NHSLC hereby amends Appendix A, 3.4, Warehouse License, Page 39, by striking the last sentence. In its place, the following is inserted: **“A Vendor who has a NH Warehouse license shall submit a copy of the current license. A Vendor who does not have a NH Warehouse license shall be prepared to provide such a license upon demand by the NHSLC.”** For example, the requirement in Exhibit C, Paragraph 1.14.1.6, Page 66, is a requirement that will need to be met in the future. The same is true for similar requirements in the RFP including, but not limited to, Exhibit C, Paragraph 2, Page 63, and Appendix C, VII, Paragraph 11, Page 46.

The RFP was designed to be flexible. The Vendors were notified of material developments as they occurred. This argument is completely without foundation and is rejected.

3.d. Transition Periods

There are two transition periods described in the RFP. One involves the transition from the incumbent location to a new location. The other involves a transition twenty years from now at the end of the contract. XTL attempts to raise a single issue regarding sections 1.25 and 3.0.11. Each of these sections applies to a different scenario.

1.25 applies to the contract awarded as a result of this RFP. It has no effect until the contract expires or is terminated. XTL complains that Exel stated in its Proposal that shortages will need to be resolved between the “old’ warehouse and the Product Vendor or NHSLC....” Under the 1.25 scenario, Exel is the “old warehouse.” XTL’s complaint is particularly troubling in light of the extensive discussion of this subject in the April 19, 2012 and July 27, 2012 Clarification of the Contract Transition Period.

3.0.11 is titled “Transition from the Current Contract.” (Emphasis added). In pertinent part, 3.0.11 provides:

All reasonable costs associated with the transfer of Product and control from the existing Warehouse (s) (“old”) to the Warehouse of the successful Vendor (“new”), including handling and incurred within 150 days from the effective date of the contract shall be borne by the NHSLC at its discretion.

There is discussion in 3.0.11 of a net financial obligation among the NHSLC, the “old” (Law) and the “new” warehouse (Exel). There is no reasonable interpretation that the “new” warehouse will incur a liability for overs and shorts during the transfer of Product. The new warehouse will determine whether there are overs or shorts. The suggestion that Exel’s response is “materially non-compliant” is misguided at best. There is no error.

3.e. Annual Physical Inventory

XTL complains that Exel in its Proposal “wishes to discuss the requirement for an annual physical inventory.” XTL characterizes this as an unwillingness to comply with a mandatory requirement. There is nothing in the RFP that prevents a Vendor from discussing a subject. In fact, such discussions are encouraged. For example, Section 2.1 states: **Vendors are encouraged to propose any arrangement of Warehouse services that will best meet the NHSLC needs as described herein.** (Emphasis added). Section 1.7.3 seeks innovative ideas.

Exel’s response was an alternative arrangement that will reduce costs. It cannot be implemented immediately. In Exhibit A of the Contract on page 7, Exel agreed to conduct an

annual physical inventory. This is no error, it is, however, another example of XTL's failure to understand the RFP.

3.f. Insurance

XTL claims that Exel did not follow the requirements of the RFP in regard to insurance. The RFP allowed Vendors to take exceptions. Section 1.7.1 provides, **"if there is an exception, the Vendor must clearly describe the exception and suggested alternative, if any."** (Emphasis added).

The answer to Question 33, May 1, 2012, states:

The NHSLC requires the maximum coverage from all perils to its product. It wants to be clear that the insurance required is not for the structure which is not owned by the NHSLC; rather it is for the Product. An "all risks" insurance policy does not necessarily cover all risks. **If the Vendor has an alternative solution, propose it.**

(Emphasis added).

In regard to insurance, Exel explained that its insurance policy was designed to pay Exel in the first instance and then pay the NHSLC. It complied with the RFP. There is no objective error.

3.g. Location of Personnel; Location of General Manager and Project Manager

Exel did identify its personnel in its Proposal under the tab "Response to RFP" on Pages 33–35 of 62 and in the resumes attached to the Proposal. Exel explained its practice regarding identifying specific individuals closer in time to the beginning of the project. There is no objective error.

3.h. Certified Copy of Insurance Policy

RFP p.45 requires a successful vendor to file a certified copy **of the insurance policy**. XTL claims that Exel refused to meet this requirement. This requirement was amended on May 1, 2012:

Question 35: Yes, the NHSLC will accept a **certificate of insurance** with the proposal. Appendix C, VII, 8, page 45 is a requirement that is triggered after the successful Vendor negotiates a contract.

On page 38 of its Proposal, Exel stated that it would provide certificates of insurance but could not file the **actual** policy. There was no request for the actual policy. Exel provided a certificate of insurance. There was no objective error; XTL fails to understand the RFP.

3.i. Executive Summary Exceeds 10 Pages.

XTL states that Exel's Executive Summary exceeded the 10 page requirement by 5 pages. This is not a material error and requires no response. In the event that a response is needed, the RFP contemplated that Vendors would submit "boxes" of information. RFP, section 1.6, p. 9. XTL's Proposal is over 250 pages.

The first page of Exel's Executive Summary is a graphic with four words that might be considered informative. There are a number of graphics and bullet points in the fourteen remaining page. If this rises to the level of an error, it is not material.

B. Award of Contract for Two Warehouses

XTL claims that it was error to perform the financial scoring of the Proposals based on a one warehouse scenario. It claims that the financial scoring should have been done by comparing the two warehouse scenarios. The basis for this claim is that the Concord warehouse will "remain open and in use" and that XTL was never informed that the Concord warehouse will remain open under the one warehouse scenario a subject that "was not ever discussed with XTL-NH as a viable scenario." Scoring the one warehouse scenario was not an error; XTL's Protest is based on a failure to understand the RFP.

RFP section 2.1 p. 18 states that **"It's envisioned that one strategically located Warehouse operation will provide optimal service to our internal and external customers, while reducing operating cost."** (Emphasis added).

Nothing in the RFP requires the NHSLC to abandon the Concord warehouse. RFP, section 3.0.2 specifically reserves the ability of the NHSLC to retain Product at the Concord Warehouse. On April 18, 2012 in the answer to Question 6, the NHSLC stated:

Should it become clear that a single warehouse is the favorable solution, the Concord warehouse will be used for storing state-owned products.

(Emphasis added).

In Question 15, the NHSLC stated in its answer:

... under the one-warehouse scenario, the Concord warehouse will continue to be utilized to store state-owned product and other special items and will be staffed by state employees. (Emphasis added).

The answer on May 1, 2012 to Question 122 described the scenarios as follows:

The two warehouse scenario will involve the existing Concord warehouse. The Concord warehouse will also be used in the one warehouse scenario. Under the one warehouse scenario, it is expected that the Concord warehouse will not

continue to function and operate as it currently does. It may not function as it currently does under the two warehouse scenario depending on how the Vendors construct their Proposals.

(Emphasis added).

It is surprising, to say the least, that XTL claims it was not aware that the Concord warehouse will remain open under the one warehouse scenario.

The RFP contemplated a single warehouse based on the combined volume of the two existing warehouses. RFP section 1.1 (A), p. 4.

Today, the Concord warehouse stores about half of the spirits sold in the state. In the contract, those spirits will be combined with the Product previously stored by Law into a single warehouse. It was a projection of this volume, excluding NH product and special buys that was used multiple times by XTL in submitting its one warehouse solutions and in responding to numerous comments from the EC.

Therefore, it is unfounded for XLT to claim that this scenario was “not ever discussed.”

As described in the RFP, in the future, the Concord warehouse will be used for NH product and special buys.

The contract is not a two warehouse solution. There is absolutely no basis for making this claim.

C. “Open-Ended Contract” with Exel

As a preamble, this section again reveals that XTL has a fundamental misunderstanding of the RFP, clarifications and amendments, the contract and written communications during the process. The contract is not “open-ended.” It is consistent with the RFP as clarified and amended and legal authority. The criteria were known to XTL and contained in the RFP. There was no prejudice to XTL. It identifies no error.

1. Adequate Warehouse Capacity

In the contract, Exel and the NHSLC, after the initial 30 month period, will determine adequate capacity for the following 30 month period. Exel has the right to request a rate increase from the NHSLC after the initial 30 month period if inventory exceeds that agreed warehouse capacity. The NHSLC has the ability to deny this request if it is unreasonable. These rates will not be charged to the NHSLC.

XTL’s claim regarding inadequate capacity is confusing. It notes that the NHSLC has not guaranteed future volume. It then makes a leap to the conclusion that warehouse capacity cannot

be determined in the future. A closer reading of the contract in Exhibit A, paragraph 4, quickly clears up the apparent confusion. It provides:

The Contractor will use industry standards to calculate the adequate warehousing storage capacity required to safely and efficiently provide the Services ("Warehouse Capacity"). These calculations will take into account trends, growth and the seasonality of the business. The Warehouse Capacity shall be reviewed starting ninety (90) days prior to the end of the first and each subsequent thirty (30) month period and the parties will mutually agree to the adequate Warehouse Capacity required for the next thirty (30) month period.

(Emphasis added).

In sum, adequate capacity will be set throughout the contract. Suppliers have the ability to control their inventory. If the inventory exceeds what is adequate, a reasonable rate increase will be charged. This is no error.

2. Premium

The concept of charging a premium is contained in the RFP. Section 1.10.3 requires Vendors to set base rates. The amounts that were compared during the evaluation process were the base rates.

Even if XTL did not understand this concept, setting a premium above the base rates that will pass to the NHSLC with no charge is, at best, neutral to Exel and, at worst, increases its cost. There is no disadvantage to XTL. There is no error.

3. Twenty Year Rates

XTL argues that Exhibit C, paragraph 5.2 of the RFP required the vendor to keep rates constant for the 20-year term of the contract and that the contract with Exel violated this provision by allowing the possibility of a rate change after 30 months. XTL then argues that it provided rates for the entire 20-year contract.

This argument has no merit. First, while XTL proposed rates for the 20-year term, the rates were not constant and rose every 30-month period. Second, Paragraph 5.2 was amended before the Proposals were due in order to comply with RFP sections 1.10.3 and 1.10.4 which require rates be set for the initial 30-month period with changes for subsequent 30-month periods. Third, in its proposal, XTL acknowledged in response to 1.10.3 that it was filing rates for the initial 30 months of the contract. Finally, XTL filed a number of templates containing rates for the initial 30-month period during the process. It would be clear to any reasonable Vendor that the initial 30-month period was used to compare rates.

4. Rate Changes

XTL claims that the contract conflicts with Section 1.10.4 of the RFP which limited rate changes to the Consumer Price Index.

Ultimately, XTL proposed rates that were “in lieu of the CPI.”

Exel took an exception to this section and proposed an alternative. Furthermore, XTL and Exel were each sent an email on August 10, 2012:

We understand your proposal regarding Section 1.10.4 – Rate Changes – Page 11 and, during the next phase, Contract Negotiation, are prepared to negotiate that item.

(Emphasis added).

5. Additional Rate Adjustments

See answer to C.4. above.

6. Key Performance Indicators

Bearing in mind the numerous references in both the RFP and this document to the NHSLC's request for innovation and alternative ideas, there was a specific explanation of this issue. All Vendors were informed about this issue in the RFP on page 42 and on May 1, 2012 in three questions and answers:

Question 41:

Regarding Appendix C, VII, 10, page 46, would the NHSLC consider a more broad method for measuring service levels and a different approach to incentivizing attainment of these service levels?

Answer: Yes, if a selected Vendor makes an alternative proposal, it will be discussed in the negotiation phase. However, accountability must be maintained.

Question 115:

The second paragraph of the General Requirements on page 42 asks the Vendors to “Use the following task descriptions as your point of departure. Modifications of the task descriptions are permitted; however, reasons for changes should be fully explained. If more than one approach is possible, comment on why you chose your approach”. As there are no task descriptions in General Requirements, where can we find these task descriptions? (Emphasis added).

Answer: While there are many task descriptions which follow Appendix C, II, page 42, in the interest of clarity, the word “following” is deleted. The task descriptions are contained throughout the RFP particularly in Part 3 and Appendix C.

Answer to Question 118, in pertinent part:

This RFP contains a large number of basic, functional requirements that must be met in some fashion. There is, however, an opportunity for the Vendor to propose a solution that reaches the same result but takes a different path.

D. Alleged Deviations in the Contract as compared to the RFP

The basis for this section is without merit. The RFP was not a request for the cost of the proverbial “widget.” It was designed to solicit the best solution to the issues described within it. It is fruitless to complain that the eventual contract is not a mirror of the RFP. Moreover, the contract is tightly constructed to obtain reduced rates for the initial period, better service and technology, to secure the best partner for the NHSLC and to control risk.

1. Warehouse Capacity

Exel described its plan to expand the warehouse as needed over the 20-year term. See the answer to C.1.

2. Force Majeure

XTL’s claim that the contract expands the definition of *force majeure* is without merit or support.

This issue was addressed in Question 42:

Regarding Appendix C, VII, 13, page 46, what is the NHSLC’s definition of a Force Majeure event?

Answer: A *Force Majeure* event is an event beyond the reasonable control of the Vendor, for example, an earthquake.

XTL merely makes a bald statement that the definition has been “expanded.” It fails to identify any term in the definition that is within the reasonable control of Exel.

3. Consequential Damages

XTL takes the position that the contract can not contain any provisions other than those contained in the RFP. As previously stated and restated throughout this document, a Vendor was allowed to propose terms which the NHSLC was free to accept or reject.

The contract with the current Vendor contains the same term.

If the term was excluded, the NHSLC would be exposed to indirect or consequential damages. XTL has no explanation for how the contract would be more advantageous to the NHSLC if this term was left out and why XTL, given a great deal of discretion, did not propose the term.

4. Hours of Operation

XTL appears to assume that the two shifts described in Exhibit A are the only times that staff will be in the warehouse. If there is a conflict with Exhibit A, Exel has agreed to meet the requirements of the RFP as amended. In addition, the timing of the shifts is not described. The requirements of the May 1, 2012 clarification (which XTL does not reference) could easily be met by an 8-hour shift, a 2-hour break and then another 8-hour shift.

5. Operating Parameters

See answer to C.6.

6. Certificate of Vote

XTL states that this document was not posted online. It was attached to the hard copy and has been placed on the NHSLC website. A simple inquiry would have eliminated this issue.

7. Terms of Transition

Again, Vendors were allowed to take exceptions to the terms in RFP Exhibit C. In this case, the substance of paragraphs 3.3-3.3.1.4 were contained in RFP Exhibit C, paragraph 26. Paragraph 26 is contained in the contract.

8. Insurance

The Vendors were allowed to take exceptions.

Moreover, the answer to Question 33, May 1, 2012, states:

The NHSLC requires the maximum coverage from all perils to its product. It wants to be clear that the insurance required is not for the structure which is not owned by the NHSLC; rather it is for the Product. An "all risks" insurance policy does not necessarily cover all risks. **If the Vendor has an alternative solution, propose it.**

(Emphasis added).

In regard to insurance, Exel explained that its insurance policy was designed to pay Exel in the first instance and then pay the NHSLC. It complied with the RFP. There is no error.

9. Amount of Performance Bond

XTL claims that the contract is inconsistent with the RFP because the amount of the performance bond may be modified. It fails to cite any provision of the RFP. In section 1.9,

the RFP identified the amount of the bond as “to be determined.” It is difficult to understand how XTL can claim that “may be adjusted” is inconsistent with “to be determined.”

10. Contract Protest Process

The Vendors were allowed to take exceptions. While the NHSLC requested a particular process, Exel was not required to waive its rights.

11. Nine-Month Transition Period

RFP paragraph 26 called for a transition period of “up to 6 months.” The contract paragraph 26 has a transition period “up to 9 months.” The contract does not have to match the RFP. The extra 3 months will only come into play if the “new” Vendor (not Exel) is not ready and if the transition lasts longer than 6 months. Also, there is nothing in either paragraph 26 that prevents Exel from agreeing to more than the number of months identified.

Storage Fees

XTL takes issue with language that has been omitted that avoids duplicate storage fees during the future transition. A careful reading of paragraph 26 reveals that this provision will apply to Exel’s successor. Exel has already agreed to avoid duplicate fees in the current transition.

Overages and Shortages

This is an example of XTL’s misunderstanding of both the RFP and the contract. XTL boldly states that the “‘new’ warehouse” is Exel. It is most definitely not Exel. In this future transition, Exel is the ‘old’ warehouse.

E. False & Unreasonable Allegation

XTL claims that the EC was influenced by an internet record of a 1985 mail fraud conviction of a different XTL. It bases this claim on comments made by Attorney Judge, some in quotes and some evidently paraphrased. These comments were taken completely out of context.

Attorney Judge explained that, in a single conversation over the telephone, he was describing why Exhibit K to the EC memorandum had to be made public. The concern was that the inaccurate information on the web would become public, perhaps through another Vendor, and there would be no record of the EC finding, examining and discarding this inaccurate information. This definitely exposed the NHSLC to the potential for “bad press.”

The remarks described in Section E, put in context, were a description of the significance of the internet information if it proved to be true.

A conviction of a Vendor for mail fraud would certainly be a “huge concern.” A Vendor convicted of mail fraud would definitely be disqualified. A disqualified Vendor would never

advance to the BAFO phase, be scored, let alone finish second. XTL was not disqualified, did advance to the BAFO phase, was scored and finished second. It was treated fairly as were all the Vendors.

Moreover, in performing its due diligence in confirming the accuracy of the story, the EC, through counsel Attorney Judge, spoke privately with Anthony Cerone at the NHSLC on July 25 and received a full explanation of the matter. Contrary to the Protest, the information had no effect on how the EC initially evaluated XTL-NH. Consider that the EC ranked the Vendors on July 19 at the end of Phase I and the memo was not produced until August 7. XTL was ranked first.

V. CONCLUSION

The point has been made many times that in its Protest, XTL appears to have difficulty understanding the RFP. In any event, for the reasons stated above, the Protest is DENIED.

Cordially,



Richard D. Gerrish
Division Director
Sales, Marketing, Merchandising & Distribution