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Via E-Mail

Craig W. Bulkley
Issuing Officer and Chief of Administration
Division of Administration
N.H. State Liquor Commission
P.O. Box 503
Concord, NH 03302-0503

Re: XTL-NH, Inc.'s Protest Pursuant to RFP Section 1.24

Dear Mr. Bulkley:

Pursuant to RFP Section 1.24, please be advised that XTL-NH, Inc. (hereinafter "XTL-NH") respectfully submits its protest of the New Hampshire State Liquor Commission (hereinafter the "NHSLC")'s award of the contract for Warehouse Services for Wine and Spirits and Related Products (hereinafter the "RFP") to Exel, Inc. (hereinafter "Exel") on November 20, 2012.

I. Introduction and Background

On March 28, 2012, the NHSLC issued the RFP to solicit competitive responses and Proposals from qualified Vendors to provide warehousing services for the State of New Hampshire for a twenty (20)-year term. The RFP was comprehensive and included numerous, specific requirements and provisions, for which a Vendor had to provide a complete written response and/or otherwise fully satisfy. On June 7, 2012, XTL-NH timely submitted its Proposals, including, but not limited to, all of its rate information and supporting documents, in response to this RFP. Four other bidders, Exel, Law Warehouses, Inc., Hat Trick Logistics, LLC, and Distributech, LLC, also submitted Proposals to the NHSLC on June 7, 2012.

From June 7, 2012 through November 16, 2012, upon information and belief, the NHSLC and its Evaluation Committee analyzed the bidders' Proposals, including the bidders' rate information, for both content and form pursuant to the RFP's requirements and provisions. During this evaluation period, XTL-NH was fully engaged with the NHSLC's Evaluation Committee, and provided complete and timely responses to all of the NHSLC's requests for additional information and clarification. In these exchanges, XTL-NH repeatedly advised the NHSLC that it understood and accepted, without any exceptions, the RFP's provisions and the contract's standard terms and conditions. XTL-NH also advised the NHSLC that it was fully capable of transitioning the warehouse services with minimal disruption and handling all of the NHSLC's day-to-day operations by the stated deadlines.

On July 31, 2012, the NHSLC's Evaluation Committee notified XTL-NH that it had been selected to participate in the Best and Final Offer (BAFO) phase of the RFP evaluation period. Upon information and belief, the NHSLC's Evaluation Committee notified the other four (4) bidders that they were also selected to participate in this BAFO phase. In early August 2012, XTL-NH timely submitted its BAFO to the NHSLC's Evaluation Committee. From August 2012 to November 2012, XTL-NH continued to provide timely and complete responses to the NHSLC's requests. XTL-NH also again confirmed to the NHSLC that it understood and accepted, without any exceptions, the RFP's provisions and the contract's standard terms and conditions and that it remained fully capable of performing warehouse services for the NHSLC by its deadlines, despite numerous extensions to the contract award date and amendments to the RFP's requirements. However, on November 14, 2012, the NHSLC's Evaluation Committee informed XTL-NH that it had entered into contract discussions with another bidder. On November 20, 2012, the NHSLC publicly announced that it had awarded the twenty (20)-year contract to Exel.

On December 12, 2012, after reviewing a portion of the NHSLC Evaluation Committee's scoring information, which the NHSLC had recently released, XTL-NH learned that it was the lowest qualified and responsive bidder to the RFP. To date, XTL-NH remains fully capable and ready to perform all warehousing services as promised to the NHSLC in its Proposals, for its BAFO prices.

II. XTL-NH's Grounds for Protest

Pursuant to RFP Section 1.24, and based on the limited information contained in the redacted materials that the NHSLC has publicly released thus far, XTL-NH's grounds for protesting the NHSLC's contract award to Exel are based on several material errors that occurred during the RFP competitive bidding process, which are described more fully below.

As only incomplete information regarding the bidders' Proposals and rate information, the correspondences among the NHSLC and the bidders, and the NHSLC's evaluation and scoring of the bidders' Proposals and rates have been released by the NHSLC to date, XTL-NH hereby reserves the right to amend its protest, including, but not limited to, the specific grounds for its protest, if and when the remainder of this information, including that which has been previously redacted, is released by the NHSLC. By submitting its protest by the NHSLC's January 28, 2013 deadline, without the benefit of full knowledge and consideration of all of the information regarding the RFP competitive bidding process, XTL-NH does not in any manner waive its right to amend this protest.

A. Because its Proposals failed to satisfy and comply with the minimum, mandatory requirements of the RFP, Exel should have been disqualified as a potential Vendor during the initial stages of the RFP evaluation period.

Under RFP Section 1.7.2, "all portions of this RFP shall be considered to be Mandatory." The RFP, under Section 1.0, defines "mandatory" as "the minimum that must be met by the Vendor." The RFP also provides under Section 4.2 that during its evaluation period, the NHSLC's Evaluation Committee will review each Proposal to determine whether the RFP's mandatory requirements have been satisfied by each of the potential Vendors, and that if any of these mandatory requirements have not been met, that bidder's entire Proposal may be disqualified from further consideration. The RFP, under Section 1.7.2, further provides that at its sole discretion, the NHSLC may waive mandatory requirements and accept alternatives deemed to be in the best interests of the NHSLC.

However, despite the fact that the RFP states that the NHSLC has the discretion to waive requirements, statutory authority, common law, and case law

from New Hampshire, and similar authority from other jurisdictions, uniformly prohibit the waiver of a bidder's material deviations from an RFP's requirements, as strict compliance with mandatory or material requirements for bidding is required. Together, statutory authority, common law, and case law articulate the general principle, applicable in all cases of competitive bidding, that all bidders must stand on equal footing and that there must be conformity in material respects between the scope of work defined in the bid specifications, the bids, and the contracts that are ultimately entered into by the parties. Further, for a bidder to furnish its own specifications or terms for any material and/or mandatory part of the contract, or for a governmental agency to waive any such material deviation at its discretion, would destroy genuine and fair competition and the contractual standards of good faith and fair dealing, and would be subversive of the public interest. A bidder's furnishing of its own specifications in this manner would also nullify the purposes of competitive bidding, which are to invite competition, guard against favoritism, improvidence, extravagance, fraud and corruption, and secure the best work at the lowest price practicable.

For example, N.H. Rev. Stat. Ann. §§ 21-I:22-a, 22-b requires that the RFP contain "the standards upon which any awards will be based," and that "awards shall not be made on criteria that are unknown to the parties submitting bids or proposals." The legislative purposes behind N.H. Rev. Stat. Ann. §§ 21-I:22-a, 22-b are to remove any perception of favoritism in the awarding of state contracts, and to ensure that "qualified vendors will know the rules before they submit a price, and the award will be controlled by criteria known to all."

Pursuant to those statutes, it would be unlawful if a state agency overlooked a bidder's non-compliance with or unresponsiveness to an RFP's mandatory requirements, and waived those deficiencies so that bidder could continue in the process and win the contract based on that bidder's own specifications and not that of the RFP. This is because other legitimate bidders, who complied with all of the RFP's mandatory requirements, would then be placed on unequal footing, and would no longer be evaluated on the objective and specific factors set out in the RFP, but on the other bidder's own specifications unknown to those bidders.

Therefore, by applying the above-mentioned principles to this matter, the Sections of the RFP that allow the NHSLC to waive the RFP's mandatory requirements are invalid under New Hampshire law, and that of other jurisdictions

with similar statutory schemes. The NHSLC's waiver of numerous material deficiencies and significant unresponsiveness and non-compliance in Exel's Proposals is improper as it destroys the purpose of competitive bidding, in violation of N.H. Rev. Stat. Ann. § 21-I:18(b)¹, and allows favoritism, improvidence, and bias to become part of a now fundamentally flawed competitive bidding process and to place the other bidders on unequal footing. Such impropriety and violations of statutory law invalidate the contract between the NHSLC and Exel formed through a fundamentally flawed competitive bidding process, where strict compliance with the RFP's material requirements was not achieved.

A review of Exel's Proposals, including, but not limited to, the proposed rates, demonstrates numerous instances where Exel failed to completely or compliantly respond to all of the RFP's mandatory requirements and provisions. These instances include the following:

1. Exel deliberately failed to submit a Proposal for one of the two scenarios required under the RFP, a scenario that was eventually adopted in the NHSLC's contract with Exel. Under Section 1.1, the RFP required potential Vendors to submit Proposals for two separate scenarios: "(A) A Single Warehouse based on the combined volume of the 2 existing Warehouses; and (B) Two separate Warehouses based on the volume currently handled by a private Warehouse (LAW, Inc.) and the state's Warehouse." Similarly, the NHSLC stated that "the RFP requires that two proposals be submitted - one for a single warehouse and one for two separate warehouses. On the basis of these proposals, the NHSLC will determine the most beneficial solution." See the NHSLC's Answer to Question 18, April 18, 2012 Clarifications and Amendments to the RFP.

Despite stating that it "reviewed and understood" this requirement, Exel chose not to provide the NHSLC with any Proposal for (B), the two separate warehouses scenario. In violation of this mandatory requirement of the RFP, Exel only provided a Proposal for the one warehouse scenario, and admitted to its unresponsiveness in this manner by stating, "[w]e did review a two warehouse option. The one warehouse option was a lower cost and did not complete any

¹ N.H. Rev. Stat. Ann. § 21-I:18(b) requires the NHSLC to "uses competitive bidding when acquiring consumable supplies, materials, goods, and services that are necessary for, incidental to, or related to the operation of the liquor commission."

further work on a two warehouse option.” Further, in a July 8, 2012 e-mail correspondence to the NHSLC, Exel confirmed that it was only bidding on a one warehouse scenario, which was a non-compliant response to the RFP’s requirement.

Exel’s failure to submit any Proposal for the two warehouses scenario violates not only the RFP’s minimum, mandatory requirements, but also N.H. Rev. Stat. Ann. §§ 21-I:22-a, 22-b because Exel was able to bid on options that were unknown to the other bidders, i.e. on only one of the two required scenarios, and to furnish its own terms for a material part of the contract. This improperly altered the common and equal footing among the other bidders, including XTL-NH, and destroyed the genuine and fair competition purpose of the RFP process.

Instead of rejecting Exel’s Proposals for non-compliance with and unresponsiveness to the RFP, as was authorized by the RFP and required by law, the NHSLC abused its discretion by improperly allowing Exel to continue in the RFP bidding process, despite these material deficiencies in its Proposals. However, pursuant to statutory, common law, and case law, the NHSLC could not legally waive Exel’s material deviation from the RFP’s requirements.

2. In its Proposals, Exel failed to provide the required rates and cost proposals through Appendices D and D-1 of the RFP. Under Sections 1.10.3, 1.17(h), 3.0.12, Appendix B-3, Appendix C, IX, and Appendix D-3, the RFP required potential Vendors to include in their Cost Proposals all rates that the Vendor would charge to both the NHSLC and the suppliers in operation of the warehouse for the initial thirty (30) months of the contract. To accomplish this, the RFP required each potential Vendor to submit these rates through worksheets under Appendices D (entitled “Rates for Suppliers”) and D-1 (entitled “Rates for the NHSLC”).

However, Exel violated these material and mandatory provisions of the RFP because it failed to complete both Appendices D and D-1 and submit rates to be charged to both the NHSLC and the suppliers. Exel chose to deviate from these requirements and to instead propose “an alternate commercial reimbursement model,” which was unresponsive to and non-compliant with the RFP. In its Proposals, Exel stated that underneath its alternate commercial reimbursement model, “the NHSLC sets the rates for suppliers, and keeps the difference,” which “eliminates the need for two pricing structures,” as required by the RFP. Further,

Exel admitted its non-compliance with the RFP by clearly stating, “we are not submitting D and D-1.”

Under Appendix B-3, the RFP provided that “a Proposal that fails to satisfy the minimum requirements in this section may be rejected without further consideration,” and specifically listed costing data in Appendices D and D-1 as minimum requirements. The RFP, in Appendix D-3, further stated that each potential Vendor must provide complete cost information in its primary Proposal, and that in order to properly evaluate each Proposal’s cost, all factors shall be addressed and completed as requested without deviations in the primary Proposal. The RFP, through Appendix D-3, also provided that a potential Vendor can only submit an alternate Proposal after it has submitted a primary Proposal. It is clear from its submissions that Exel either submitted its “commercial reimbursement model” as its primary Proposal, but not in compliance with Appendices D and D-1, or that it submitted its “commercial reimbursement model” as its alternate Proposal without first submitting a primary Proposal as required. In either case, Exel’s Proposals materially non-complied with multiple provisions of the RFP regarding rates and costs and as a result of its material non-compliance, Exel and its Proposals should have been rejected by the NHSLC without any further consideration.

Exel’s failure to provide the required rates and cost proposals through the RFP’s Appendices D and D-1 violates not only the RFP’s minimum, mandatory requirements, but also N.H. Rev. Stat. Ann. §§ 21-I:22-a, 22-b because Exel was able to bid on options that were unknown to the other bidders, i.e. by submitting incomplete rates and by failing to submit the required primary Proposals, and to furnish its own terms for a material part of the contract. This improperly altered the common and equal footing among the other bidders, including XTL-NH, and destroyed the genuine and fair competition purpose of the RFP process.

Instead of rejecting Exel’s Proposals for non-compliance with and unresponsiveness to the RFP, as was authorized by the RFP and required by law, the NHSLC abused its discretion by improperly allowing Exel to continue in the RFP bidding process, despite these material deficiencies in its Proposals. However, pursuant to statutory, common law, and case law, the NHSLC could not legally waive Exel’s material deviation from the RFP’s requirements.

3. In its Proposals, Exel also failed to comply with numerous other mandatory provisions and requirements of the RFP, which include the following:

a. Under Section 1.10.4, the RFP required that “any rate changes be negotiated at the end of each subsequent thirty (30) month period for the next thirty (30) month period by giving consideration to the Consumer Price Index (CPI), provided that any increase be limited to the CPI for the previous twelve (12) months and supported by appropriate documentation showing increases in expenses related to warehouse operations.”

In its Proposals, Exel admitted that it would not comply with this mandatory RFP provision under its “alternate commercial reimbursement model.” Further, in a July 8, 2012 e-mail correspondence to the NHSLC, Exel stated that it would not accept this requirement of the RFP.

b. Under Section 3.0.6 and Appendix C, II, the RFP required a potential Vendor to provide the layout of the proposed warehouse that is capable to handle the NHSLC’s needs, including growth in case volume, and a showing of the Vendor’s plan for receiving, processing, inventorying, storing, and loading product, over the twenty (20)-year term of the contract.

In its Proposal, Exel only proposed a five (5)-year layout for its warehouse building and product flow, which fell significantly short of, and was thus unresponsive to, this mandatory requirement of the RFP.

c. Under Section 1.17 and Appendix-A:3.4, the RFP required a potential Vendor to submit with its Proposals a Warehouse License or an application for a Warehouse License. Exel not only failed to provide either a Warehouse License or an application for a Warehouse License, but also attempted to excuse this failure by falsely stating that it was impossible for anyone other than the winner of the contract to acquire such documents. However, XTL-NH fully complied with this requirement when it submitted its Proposals to the NHSLC on June 7, 2012.

d. Under Sections 1.25 and 3.0.11, the RFP required that as product is depleted or transferred from the “old” warehouse, product overs and shorts will be reconciled to determine a net financial obligation between the NHSLC, the old warehouse, and the new warehouse. However, Exel’s

response to this RFP requirement was materially non-compliant, in that Exel removed its liability as the “new warehouse” from this provision by changing this provision to state, “shortages will need to be resolved between the ‘old’ warehouse and the Product Vendor, or the NHSLC as Product is depleted or transferred from the ‘old’ warehouse.”

e. Under Section 3.0.4.1, the RFP required that the potential Vendor perform “a full annual physical inventory” in the warehouse. In its Proposals, Exel indicated its unwillingness to comply with this mandatory RFP requirement by stating, “Exel wishes to discuss the requirement for the annual physical inventory as this is not best practice in our experience. Typically, the requirement for an annual physical inventory can be replaced with a robust cycle count.”

f. Under Section 3.0.15, the RFP required the State of New Hampshire to be named as a loss payee on the potential Vendor’s insurance. In its Proposals, Exel refused to comply with this important RFP requirement, designed to limit the State of New Hampshire’s risk, and stated, “the state cannot be a loss payee. Our insurance company will pay us and we will pay the state.”

g. Under Appendix C, III, the RFP required the potential Vendor to provide the physical locations of its anticipated personnel, and the identities of the General Manager of the operation and the Project Manager for the transition. In its Proposals submitted on June 7, 2012, Exel failed to provide this information and satisfy these requirements.

h. Under Appendix C, VII, 8, the RFP required a potential Vendor to file a certified copy of the insurance policy with the NHSLC before entering into the contract, so that the NHSLC can approve the policy. In its Proposals, Exel stated that it would not comply with this requirement of the RFP.

i. Under Section 1.17, the RFP limited a potential Vendor’s Executive Summary to ten (10) pages. In its Proposals, Exel violated this requirement by including an Executive Summary that significantly exceeded this requirement by five (5) pages.

Exel's failure to comply with these other provisions of the RFP violates not only the RFP's minimum, mandatory requirements, but also N.H. Rev. Stat. Ann. §§ 21-I:22-a, 22-b because Exel was able to bid on options that were unknown to the other bidders, and to furnish its own terms for material parts of the contract. This improperly altered the common and equal footing among the other bidders, including XTL-NH, and destroyed the genuine and fair competition purpose of the RFP process.

Instead of rejecting Exel's Proposals for non-compliance with and unresponsiveness to the RFP, as was authorized by the RFP and required by law, the NHSLC abused its discretion by improperly allowing Exel to continue in the RFP bidding process, despite these material deficiencies in its Proposals. However, pursuant to statutory, common law, and case law, the NHSLC could not legally waive Exel's material deviations from the RFP's requirements.

B. By using Exel's Best and Final Offer (BAFO) price for the one warehouse scenario in its scoring and ranking process, despite awarding the contract for the two warehouses scenario, the NHSLC failed to objectively evaluate and impartially rank the potential Vendors' pricing and improperly denied XTL-NH the full benefit of its significantly lower bid.

Because it awarded the contract to a bidder based on the two warehouses scenario, in order to compare all of the bidders fairly and impartially, as required by the RFP under Section 4.1, the NHSLC should have scored and ranked all of the bidders based on their Best and Final Offer (BAFO) prices for the two warehouses scenario. See the NHSLC's November 20, 2012 news release and media fact sheet, both indicating that under the NHSLC's contract with Exel, the NHSLC's Concord warehouse facility would remain open and in use, in addition to Exel building and operating its own warehouse facility in Bow. This arrangement is the two warehouses scenario described by RFP Section 1.1. It is important to note that the NHSLC later stated in a January 16, 2013 internal memorandum regarding the NHSLC's Evaluation Committee's recommendation that the Concord warehouse will remain open for "limited purposes, but that the bulk of the product be handled exclusively through one warehouse," and described a third scenario that was different from either of the two scenarios specifically described in the RFP, and was not ever discussed with XTL-NH as a viable scenario, let alone one for which the contract would be awarded.

However, because Exel only submitted a Proposal and thus, a BAFO price, for the one warehouse scenario, one of the two required scenarios, the NHSLC erroneously used Exel's BAFO price to skew the scoring and ranking of the bidders for the category of Vendor pricing, denying XTL-NH the full benefit of its significantly lower BAFO price for the two warehouses scenario. According to Exhibit A of the Evaluation Process, a scoring worksheet recently released by the NHSLC, Exel's BAFO price for the first thirty (30) months of the contract was listed as \$27,000,000, which represented Exel's price for the one warehouse scenario, which Exel admitted was the only scenario that it chose to bid on. In comparison, Exhibit A listed XTL-NH's BAFO price for the one warehouse scenario for the first thirty (30) months of the contract as \$26,484,586. However, XTL-NH, unlike Exel, submitted a different, and much lower, price for its two warehouses scenario, which was \$21,678,875, approximately \$5.3 million dollars lower than Exel's BAFO price for the one warehouse scenario. This \$5.3 million dollar disparity is even greater when you compare XTL-NH's price for two warehouses scenario with what Exel's price for the two warehouses scenario would have been, as Exel stated in its Proposals, dated June 7, 2012, that its price for the two warehouses scenario was higher than its price for the one warehouse scenario, which was \$27,990,405 as of July 3, 2012. See Exhibit E of the Evaluation Process. Over the life of the contract, these savings add up to a total of over \$42 million.

If the NHSLC had acted properly and objectively in its scoring of the bidders' BAFO prices, XTL-NH still would have received the full 40 points, however, the bidder with the second highest score in the financial category, Exel, would have received much less than 39.24 points due to the more accurate difference of at least \$5.3 million between XTL-NH's and Exel's prices for the first thirty (30) months of the contract. Based on the ratios that appear to be implemented in the NHSLC's scoring table in Exhibit A, Exel should have received a score for Vendor pricing that was an estimated seven and a half (7.5) points lower. For example, another bidder, Law Warehouses, received 38.00 out of the total 40.00 points because its BAFO price for the one warehouse scenario was approximately \$1.4 million dollars more than XTL-NH's BAFO price. Therefore, it appears that for approximately every \$700,000 over the lowest BAFO price, that bidder loses one point. Thus, a difference of at least \$5.3 million dollars between XTL-NH's and Exel's BAFO prices for the two warehouses scenario translates to a point difference of approximately 9.02, which would adjust Exel's

score for Vendor pricing to about 30.98, for a total score of approximately 84.98, in comparison to XTL-NH's total score of 91.00.²

Of course, in accordance with the RFP's mandate for strict compliance regarding submission of Proposals for both scenarios, a strong argument could be made that Exel should have received zero points in the Vendor Pricing category due to its failure to submit a Proposal for the two warehouses scenario. In that case, Exel's total score would be 54.00, in comparison to XTL-NH's total score of 91.00.

As a result, if the scoring had been done properly using the correct values, XTL-NH would have received a higher total score than the other bidders, including Exel by about six (6) points, and would have been ranked first, thus earning the opportunity to enter into contract negotiation with the NHSLC and receive the contract. See RFP Section 4.1, stating that "the award of the contract shall be to the responsive and responsible Vendor who submits the Proposal that best meets the needs of the NHSLC," which logically would be the bidder with the highest rank. As XTL-NH took no exceptions to the RFP and to the standard terms and conditions of the contract, and had a significantly lower price than the other bidders, a contract between the NHSLC and XTL-NH would have better served the interests of both the NHSLC and the State of New Hampshire, and would have resulted in greater savings and revenue for the State.

C. The NHSLC improperly entered into an "open-ended" contract with Exel that not only violated the RFP's mandatory requirements and provisions and prejudiced XTL-NH, but also gave away the State of New Hampshire's protection from risk, placing the NHSLC and the State at significant risk of losing millions of dollars once the initial thirty (30) month period passes.

The NHSLC's contract with Exel improperly included a significant number of Exel's non-compliant and divergent Proposals in its terms and conditions, which were not prescribed by the RFP, particularly regarding rates. This is in direct violation of the contract's mandate that "in the event that any provision of the RFP or Proposal shall conflict or be inconsistent with any provision of Exhibits A, B, or

² $\$27,990,405 - \$21,678,875 = \$6,311,530 / \$700,000 = 9.02$ point deduction from the full 40.00 points.

F of this Agreement, the RFP shall govern,” and the State’s traditional, established practice regarding contracts and the contractual standards of good faith and fair dealing.

As a result, the NHSLC has entered into an “open-ended” contract with Exel, in that the terms regarding rates, charges, and costs are not fully defined or limited in advance. This “open-ended” contract wrongfully provides Exel ample opportunities after the initial thirty (30) month period to increase its rates beyond the Consumer Price Index (CPI), to receive additional payments, and to add premiums to its warehouse services charges.

Under this contract, the NHSLC has improperly afforded Exel the ability to raise its rates after the initial thirty (30) month period under the following provisions that were not included in the RFP:

1. Under Exhibit A, paragraph 4, the contract states that “if at any point during the Agreement after the initial thirty (30) month period, the on-hand inventory exceeds the agreed adequate Warehouse capacity, the Contractor has the right to request a rate increase from the NHSLC to be charged to the industry to cover incremental costs incurred to restore Warehouse capacity. These higher rates will remain in effect until the Warehouse capacity is restored.” This provision does not appear in the RFP, which specifically stated in both Section 3.0.6 and Appendix C, I that the NHSLC “does not guarantee future volume.” It is unknown how, if there is no guarantee of volume, the NHSLC agreed that Exel has the ability to increase its rates for not only going over its “warehouse capacity,” but for somehow having insufficient capacity in the first instance.

2. Under Exhibit A, paragraph 10, the contract states that “the NHSLC reserves the right to order the Contractor to add a premium to the Warehouse Service Charges in order to comply with statutory, financial, or other requirements. Such premium shall be charged by the Contractor and returned to the NHSLC with no charge to the NHSLC.” This provision is not included in the RFP.

3. Under Exhibit B, paragraph 1(a) of the contract, the Warehouse Services Charges listed in Exhibit F are valid only for the initial thirty (30) months of the contract, from November 1, 2013 until April 30, 2016. Thereafter, Contractor and the NHSLC may renegotiate rates as provided in Exhibit C. This provision is substantially different than Exhibit C, paragraph 5.2 of the RFP, which

stated, “[e]xcept as otherwise provided herein or as otherwise agreed by the NHSLC, rates shall not change until the Completion Date.” In addition, during the evaluation process, the NHSLC repeatedly requested that XTL-NH confirm its rates and prices for the full twenty (20)-years of the contract, and XTL-NH complied.

4. Exhibit C, paragraph 5.2(b) the contract provides that rate changes are not restricted to increases based on Consumer Price Index (CPI). This provision is substantially different than Section 1.10.4 of the RFP, which specifically limited increases in rate changes to the Consumer Price Index (CPI).

5. Exhibit C, paragraph 5.2(c) of the contract permits Exel to make additional rate adjustments. This provision does not appear in the RFP, which under Section 1.10.4, only provided for rate increases to be made pursuant to the Consumer Price Index (CPI).

6. Exhibit A, paragraph 12 of the contract describes Key Performance Indicators (KPIs), which are used to evaluate Exel’s performance of the warehousing services, and are the bases for Exel to receive “efficiency payments.” These KPIs and efficiency payments do not appear in the RFP; however, they were included in Exel’s Cost Proposal as part of its “alternate commercial reimbursement model.” In its Proposal, Exel stated that “we propose that in order to be eligible for any efficiency payment, Exel must achieve service KPIs. Examples of service KPIs that are normally part of our agreements include inventory accuracy, fill-rate, order accuracy, and on-time.” Exel described an efficiency payment as when Exel and the NHSLC split variances in actual costs incurred versus the budgeted costs (determined yearly) after adjustment for changes in volume and operating profile.

As evidenced by the above-listed provisions, this “open-ended” contractual structure regarding rates not only violates the RFP’s mandatory requirements and provisions, but also statutory authority, common law, and case law from New Hampshire and from other jurisdictions because the contract award to Exel was based on criteria unknown to the other bidders and on terms that were not actually contained in the RFP. Further, because of the manner in which this contract between the NHSLC and Exel was entered into, XTL-NH was unfairly prejudiced because it would have reduced its prices even further had it known that the RFP’s specifications and the terms of the contract, especially those relating to rate

changes, could be relaxed in the same manner as for Exel, but was wrongfully deprived of the opportunity to do so.

In addition, the NHSLC's "open-ended" contract with Exel, which was not the lowest qualified and responsive bidder, is also not in the best interests of the State of New Hampshire and its customers because in entering into this contract, the NHSLC has improperly given away the State's protection from risk, a protection that is traditionally contained in the contract's standard terms and conditions, and control over its profits and costs through rates, as presented in the RFP. This significantly increases the State's risks and vulnerability over the life of the twenty (20)-year contract, and jeopardizes the NHSLC's ability to cut costs and to maximize revenue for the State, as required under N.H. Rev. Stat. Ann. § 176:3³.

D. The NHSLC also improperly incorporated several of Exel's other significant deviations from the RFP's requirements into the terms and conditions of the signed contract, to the point that there is little conformity between the RFP's specifications and the contract, as required by law.

The NHSLC's remaining material changes to the terms and conditions of the contract pertain to several other issues, which include the following:

1. Under Exhibit A, paragraph 4, the contract provides that the Contractor only has to maintain adequate warehouse storage capacity of product for the initial thirty (30) months of the contract. In comparison, under Section 3.0.6, the RFP required potential Vendors to specify how they intend to receive, process, inventory, store, and load volumes of product over the entire twenty (20)-year term of the contract, and describe how it will handle projected increase(s) in case volume.

2. Exhibit A, paragraph 5 of the contract expands the definition of "force majeure" to include, but not be limited to, "acts of God, riots, acts of war, epidemics, acts of government, fire, power failures, nuclear accidents, earthquakes, unusually severe weather, or other disasters." This expanded definition of force majeure is not provided for under Appendix C, VII, 13 of the RFP.

³ N.H. Rev. Stat. Ann. § 176:3 states that the primary duties of the NHSLC are to optimize profitability, to maintain proper controls, to assume responsibility for its effective and efficient operation, and to provide service to its customers.

3. Exhibit A, paragraph 6 of the contract states that “[N]either party shall be liable to the other for any indirect or consequential damages. This provision is not provided by the RFP.

4. Under Exhibit A, described as Operating Parameters, the contract lists that Exel’s hours of operation are five (5) days a week, with two eight (8) hour shifts per day. This contradicts Section 3.0.8 of the RFP, which required the potential Vendor to have the product loaded on a truck and ready for delivery to NHSLC stores within eight (8) hours of receipt of the picking information. This provision of the RFP, along with other technical requirements in the RFP, required many more hours of operation than what is included in the contract.

5. Several other Operating Parameters listed under Exhibit A, such as Stock-Keeping Unit (SKU) Growth, Annual Unit Picks for Years 1 and 20, and the percentages of inbound cases on pallets, slip sheets, and floor loaded, are either not included in the RFP, or are significantly different values than those listed in the RFP.

6. Exhibit C, paragraph 1 of the contract requires Exel’s Certificate of Vote to accompany the contract, which it did not in the publicly released version.

7. Exhibit C, paragraph 3 of the signed contract omits Exhibit C, paragraphs 3.3, 3.3.1.1, 3.3.1.2, 3.3.1.3, and 3.3.1.4, which were included in the RFP to describe the particulars of the transition period.

8. Exhibit C, paragraph 14.1.3 of the contract provides that in the event of a claim payment, insurer or Contractor agrees to make payment directly to the NHSLC. This contradicts Exhibit C, paragraph 14.1.3 of the RFP, which required the NHSLC to be named as a loss payee.

9. Exhibit C, paragraph 14.1.4 of the contract provides that at the end of the first thirty (30) month period and at any point thereafter upon mutual agreement, the amount of the Performance Bond may be adjusted. This provision is not included in the RFP.

10. Exhibit C, paragraph 25 of the contract, which describes the contract protest process, provides for the use of a Mediator if the Parties are unable to reach agreement after good faith negotiation. This provision is substantially different

from RFP Exhibit C, paragraph 25, which described the typical contract protest process as including two levels of management involvement and a schedule table.

11. Exhibit C, paragraph 26 of the contract states that if this contract expires or is terminated before a Vendor is selected and prepared to provide warehouse services to the NHSLC, the Contractor agrees to continue the services described under the current contract for up to nine (9) months at prices to be negotiated by the parties. In comparison, the same provision of the RFP in Exhibit C, paragraph 26 stated that the continuation of services shall be for up to six (6) months.

Exhibit C, paragraph 26 of the contract also differs from similar provisions in the RFP in two other ways. First, under the signed contract, “all costs associated with the transfer of Product and control from the existing Warehouse(s) (“old”) to the Warehouse of the successful Vendor (“new”), including, but not limited to, shipping, handling and transportation, shall be borne by the NHSLC or the defaulted Contractor.” However, the same provision under the RFP also included the words, “[i]n an effort to avoid charging the NHSLC or Suppliers duplicate storage fees, storage charges for transferred Product shall not accrue until the first day of the month following the transfer.”

Second, the contract provides that as Product is depleted or transferred from the “old” Warehouse, Product overages and shortages shall be reconciled to determine a net financial obligation between the NHSLC, the “old” Warehouse and the Product Vendor. However, the RFP required that the “‘new’ Warehouse,” which is Exel, share in this net financial obligation instead of the “Product Vendor.”

As evidenced by the above-listed provisions, this “open-ended” contractual structure not only violates the RFP’s mandatory requirements and provisions, but also statutory authority, common law, and case law from New Hampshire and from other jurisdictions because the contract award to Exel was based on criteria unknown to the other bidders and on terms that were not actually contained in the RFP.

In addition, the NHSLC’s “open-ended” contract with Exel, which was not the lowest qualified and responsive bidder, is also not in the best interests of the State of New Hampshire and its customers because in entering into this contract,

the NHSLC has improperly given away the State's protection from risk, a protection that is traditionally contained in the contract's standard terms and conditions, and has provided Exel with more latitude solely in its best interests in numerous manners not prescribed by the RFP. This significantly increases the State's risks and vulnerability over the life of the twenty (20)-year contract, and jeopardizes the NHSLC's ability to cut costs and to maximize revenue for the State.

E. The NHSLC abused its discretion by unfairly and improperly evaluating and scoring XTL-NH's responses to the RFP and overall bid based on a false and unreasonable allegation that XTL-NH was involved in a mail fraud conviction approximately thirty (30) years ago.

The NHSLC recently released an exhibit, entitled "Exhibit K," on its website with a number of other exhibits as part of a the "Evaluation Committee Recommendation" and a collection of documents entitled "Evaluation Process." Exhibit K contains an August 7, 2012 e-mail correspondence from Attorney Stephen Judge, legal counsel to the NHSLC's Evaluation Committee, to some members of this Evaluation Committee regarding an allegation of "XTL, Inc.'s mail fraud conviction" in the 1980s.

In this e-mail correspondence, Attorney Judge describes an allegation made on the Internet that "Xpress Truck Lines, Inc. (XTL)" pled guilty to mail fraud. Attorney Judge stated that in his mind "guilty is guilty," but conceded that there is also an explanation of this allegation. In fact, the entity involved in the allegation at issue in Attorney Judge's e-mail correspondence, the mail fraud incident, was Xpress Truck Lines, which is a different entity than XTL-NH, the entity that responded to this RFP and bid on the warehousing contract. Further, XTL-NH and its parent corporation, XTL, Inc., the potential Vendors for this contract, were not in existence during the time of the incident, approximately 1983.

While Attorney Judge concluded in this e-mail correspondence that XTL was not charged, convicted, or even involved in the incident, and recommended that "XTL's bid rise and fall on its merits," XTL-NH recently learned from Attorney Judge that this allegation was a "huge concern" for the NHSLC's Evaluation Committee, and that it had a negative effect on how the Evaluation Committee initially evaluated XTL-NH as a potential Vendor because the NHSLC

was very concerned about the “bad press” that would occur if XTL-NH was selected to receive the warehousing contract.

XTL-NH also recently learned from Attorney Judge that but for his August 7, 2012 e-mail correspondence, the NHSLC Evaluation Committee would have disqualified XTL-NH from continuing in the evaluation process, instead of allowing XTL-NH to advance to the Best and Final Offer (BAFO) phase of that process. Attorney Judge also remarked that without his August 7, 2012 e-mail correspondence, XTL-NH would not have even come in second in the NHSLC’s scoring.

While Attorney Judge has stated that “the substance [of Exhibit K] had no effect on the decision,” XTL-NH was placed on unequal footing with the other bidders due to the nature of this allegation and the fact that it had an admitted effect on the NHSLC’s subjective opinion and evaluation of XTL-NH during the evaluation process. In addition, this information potentially injected an improper consideration that may have biased the NHSLC Evaluation Committee against XTL-NH, in violation of RFP Section 4.1, which requires a fair and impartial review and evaluation of XTL-NH’s Proposals. The information contained in Exhibit K appears to be one real reason why XTL-NH, despite being the lowest qualified and responsive bidder, was scored just below Exel, so that Exel could be granted the contract despite its significantly non-responsive and non-compliant responses to the RFP and overall bid. Accordingly, it appears that the NHSLC abused its discretion in unreasonably evaluating XTL-NH’s background based on an untrue and invalid allegation of mail fraud, and through favoritism and bias, in allowing this allegation to affect XTL-NH’s standing in the competitive bidding process for the RFP and the warehouse contract.

III. Conclusion

In conclusion, the NHSLC erroneously awarded this contract to Exel, a bidder that should have been rejected by the NHSLC during the evaluation period because it submitted materially unresponsive and non-compliant Proposals in response to the RFP. In awarding the contract to Exel, which was not the lowest qualified and responsive bidder, the NHSLC acted improperly by:

1. Abusing its discretion by waiving Exel's substantial deviations from the minimum and mandatory requirements of RFP and by affording an unfair advantage to Exel to the detriment of the other bidders;
2. Incorporating these deviations into the contract's terms and conditions and unreasonably bartering away the State of New Hampshire's traditional protection from risk;
3. Entering into an "open-ended" contract with Exel, not prescribed by the RFP, and affording Exel an unfair opportunity to significantly and arbitrarily increase its rates after the first thirty (30) month period;
4. Awarding the contract for a two warehouses scenario to a bidder who intentionally failed to submit a Proposal and bid for that scenario;
5. Improperly and unfairly evaluating and scoring XTL-NH's Vendor pricing; and
6. Unfairly evaluating XTL-NH's responses to the RFP and overall bid based on a false and unreasonable allegation of mail fraud.

For the foregoing reasons, XTL-NH respectfully requests the following relief:

1. That the NHSLC hold a hearing on the issues included herein;
2. That the NHSLC provide a detailed response to the issues included herein;
3. That the NHSLC suspend Exel's performance of the contract pending full resolution of this protest, and any subsequent legal action(s);
4. That the NHSLC, through the RFP protest process pursuant to RFP Section 1.24, and pursuant to N.H. Rev. Stat. Ann. §§ 21-I:22(a)-(b), reconsider and reverse its decision to award the contract for Warehouse Services for Wine and Spirits and Related Products (RFP 2012-14) to Exel; and

Craig Bulkley, Issuing Officer and Chief of Administration

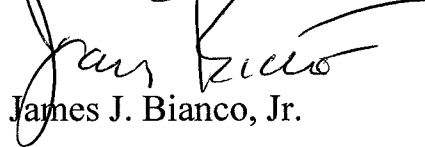
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5. That the NHSLC award the contract for Warehouse Services for Wine and Spirits and Related Products (RFP 2012-14) to the lowest responsive and qualified bidder, XTL-NH, pursuant to statutory authority, common law, case law, and traditional New Hampshire practice regarding competitive bidding.

Thank you for your consideration of this matter. We look forward to meeting with the NHSLC through this RFP protest process in good faith, and working together to fairly and appropriately resolve this dispute.

Sincerely yours,

A handwritten signature in black ink, appearing to read "James J. Bianco, Jr.", written in a cursive style.

James J. Bianco, Jr.

JJB/caf

cc: Anthony Cerone
Louis Cerone, Ph.D.