

STATE OF NORTH CAROLINA

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS

COUNTY OF WAKE

KEEFE COMMISSARY NETWORK, LLC)
d/b/a ACCESS SECUREPAK,)
Petitioner,)

v.)

NORTH CAROLINA DEPARTMENT OF)
PUBLIC SAFETY,)
Respondent.)

21 CPS 04633

and)

UNION SUPPLY GROUP, INC.)
Respondent-Intervenor.)

UNION SUPPLY GROUP, INC.,)
Petitioner,)

v.)

NORTH CAROLINA DEPARTMENT OF)
PUBLIC SAFETY,)
Respondent.)

21 CPS 04788

and)

KEEFE COMMISSARY NETWORK, LLC)
d/b/a ACCESS SECUREPAK,)
Respondent-Intervenor.)

FINAL DECISION

THIS MATTER PRESENTS under authority of the state Constitution, Art 3, Sec 11, accord, Art IV, Sec 3; G.S. § 7A-750; and G.S. § 150B (the “APA”); following hearing on the merits in Raleigh, 07-10 & 21-22 November 2022 before Jonathan S. Dills, Administrative Law Judge (“ALJ”) with the Office of Administrative Hearings (OAH”); for Final Decision.

In dispute is Respondent's award of a contract under Request for Proposal # 9-RFP-015255-KPL for North Carolina Correction Enterprises' Offender Packaging Program ("Hearing").

It is the function and mandate of the ALJ to determine the facts of a case, draw conclusions of law, and then "decide the case" within the bounds of law and therefore justice. GS § 150B-34(a).

APPEARANCES

For Petitioner and Respondent-Intervenor Keefe Commissary Network, LLC d/b/a Access Securepak ("Keefe"):

Matthew W. Wolfe

E. Bahati Mutisya

Baker Donelson Bearman Caldwell & Berkowitz, PC

Raleigh, North Carolina

For Petitioner and Respondent-Intervenor Union Supply Group, Inc. ("USG"):

Benjamin N. Thompson

Lee M. Whitman

Sophia V. Blair

Wyrick Robbins Yates & Ponton LLP

Raleigh, North Carolina

For Respondent North Carolina Department of Public Safety ("NCDPS"):

Bettina J. Roberts

Assistant Attorney General

North Carolina Department of Justice

Public Safety Section

Raleigh, North Carolina

ISSUES

I. Whether NCDPS deprived USG of property or substantially prejudiced USG's rights AND exceeded its authority, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, and/or failed to act as required by law or rule by:

(1) Failing to disqualify Keefe from award though Keefe did not make mandatory disclosures under Section 4.3 and 4.4 of the RFP;

(2) Failing to award the contract to USG pursuant to the only lawful and documented best value procurement in the record; and/or

(3) Failing to ensure that the appointed hearing officer deciding USG's protest had a complete and accurate record of the procurement.

II. Whether NCDPS deprived Keefe of property or substantially prejudiced Keefe's rights AND exceeded its authority, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, and/or failed to act as required by law or rule by:

- (1) Appointing NCDPS's interim general counsel as the hearing officer and thereby creating a conflict of interest and preventing an adequate record to be developed;
- (2) Allowing USG to submit an Amended Bid Protest Letter after the expiration of the deadline to submit a bid protest;
- (3) Granting USG's bid protest and cancelling the proper award of the contract to Keefe for the North Carolina Correction Enterprises Offender Package Program through a competitive procurement process purportedly based upon contentions in a protest letter submitted by USG and "information known to [NCDPS] through its investigation of USG's Initial Protest Letter;" and/or
- (4) Determining through the assigned hearing officer that the procurement process did not comply with unspecified procurement "best practices" without any record to support such a determination.

APPLICABLE STATUTES AND REGULATIONS

G.S. § 143-135.9

G.S. § 148-31

G.S. § 150B-23

G.S. § 150B-34

26 NCAC 03 .0127 ADMINISTRATIVE LAW JUDGE'S DECISION

01 NCAC 05A .0112 DEFINITIONS

01 NCAC 05B .0301 CONTRACTING REQUIREMENTS

01 NCAC 05B .0309 EVALUATION

01 NCAC 05B .1519 PROTEST PROCEDURES

01 NCAC 05B .1903(b)(2) FILES

EXHIBITS ADMITTED INTO EVIDENCE

By consent of all Parties: 1-9, 11, 13, 15, 18-19, 21, 23-27, 30, 34-35, 37-42, 47-52, 54 (judicial notice), 55-56, 58-60, 63, 66-67, 69, 71, 72 (judicial notice), 73, 75-76, 83-87, 89, 91-107, 109-113, 115, 116, 117, 118-119 (illustrative).

WITNESSES

1. LD Hay, Executive Vice President, USG
2. Bill Bosco, Group Vice President for the Southeast Region, Keefe
3. Martin Kish, Assistant Director of Business Development for North Carolina Correction Enterprises (“NCCE”), NCDPS
4. Dr. Anthony Vann, Chief Financial Officer, Department of Adult Corrections, NCDPS
5. Patricia Kinney, Procurement Specialist II, NCDPS
6. Billy Robbins, Assistant Director of Support Service for NCCE, NCDPS
7. Rhonda Miller, Human Resources Manager for NCCE, NCDPS
8. John Coleman, Director of NCCE, NCDPS
9. Andrew Kasper, former Interim General Counsel, NCDPS

BASED UPON careful consideration of the entire record; having weighed all the evidence and assessing the credibility of each witness by considering appropriate factors for judging credibility including, demeanor, interests, biases, and prejudices; the opportunity to see, hear, know, and remember; reasonableness; and consistency with all other believable evidence; the undersigned makes the following: ¹

FINDINGS²

The Parties

1. *Petitioner and Respondent-Intervenor USG is a supplier of commissary goods and services to State, Federal, and County correctional institutions nationwide, organized and existing under the laws of California with its principal place of business in Dallas, Texas.*
2. *Petitioner and Respondent-Intervenor Keefe provides automated commissary management services and technologies to city, county, and state correctional facilities.*
3. *Respondent NCDPS is the North Carolina State Agency responsible for overseeing North Carolina’s management of adult corrections and juvenile justice, with a principal place of business in Raleigh, North Carolina.*
4. *At all relevant times, NCCE was a Section of NCDPS’s Division of Adult Correction and Juvenile Justice responsible for providing marketable job skills and transitional opportunities for offenders while providing goods and services to customers, consistent with its mission to rehabilitate and reform offenders to re-enter society. Tr. 11/8/2022 180:25–181:3; Tr. 11/9/2022 244:4–6, 246:10–17; Tr. 11/10/2022 182:13–25.*

¹ A judge is not required to find all the facts shown by the evidence, but only sufficient material facts to support the decision. *Green v. Green*, 284 S.E.2d 171,174, 54 N.C. App. 571, 575 (1981); *In re Custody of Stancil*, 179 S.E.2d 844,847, 10 N.C. App. 545, 549 (1971).

² Uncontested facts stipulated to by the parties are italicized. *See*, Joint Statement of Uncontested Facts, 21 CPS 04633/21 CPS 04788.

5. *NCCE operates a direct package program that provides training and work opportunities for North Carolina offenders, who pack food and beverage, hygiene, crafts, clothing, footwear, electronics, and religious packages purchased for inmates in North Carolina prison facilities by their family and friends (the “Offender Packaging Program”).* Ex. 109.

6. *NCCE operates the Offender Packaging Program as a Prison Industry Enhancement (“PIE”) Program through a joint venture with an industry partner or vendor. PIE is federally legislated, and offenders working in a PIE certified program must be paid prevailing wages. Tr. 11/9/2022 243:11–25. This allows offenders to send money home to their families and have savings when they are released from prison, thereby reducing recidivism. Tr. 11/9/2022 244:7–19; see also G.S. § 148-131(9) (authorizing NCCE to properly establish and operate a federal PIE program).*

Procedural Background

7. *On December 2, 2020, NCDPS bid the contract for the Offender Packaging Program by issuing a Request for Proposal (“RFP”).* Ex. 5.

8. *On January 26, 2021, Keefe and USG submitted the only proposals in response to the RFP.* Exs. 110, 111.

9. *On July 1, 2021, NCDPS sent Keefe notice that it had been awarded the contract for the Offender Packaging Program.* Ex. 27.

10. *On July 2, 2021, USG sent a public records request to NCDPS via Procurement Specialist II Patricia Kinney, seeking documents relating to scoring of the proposals and other aspects of the procurement process.* Ex. 13.

11. *On July 8, 2021, Procurement Specialist II Patricia Kinney sent an email to USG representing that there were no scoring sheets and that all responsive documents at NCDPS had been provided.* Ex. 34.

12. *On July 16, 2021, USG submitted a request for protest meeting stating its grounds for protest to NCDPS (“Initial Protest Letter”).* Ex. 71.

13. *On August 19, 2021, Cassandra Hoekstra, the Interim Secretary of NCDPS, designated NCDPS’s Interim General Counsel, Andrew Kasper, as Hearing Officer. Mr. Kasper granted USG’s request for protest meeting.* Exs. 75, 89.

14. *On August 19, 2021, USG successfully moved for and a temporary restraining order to enjoin performance of Keefe’s contract in Wake County Superior Court (“Wake Litigation”).* Ex. 104.

15. *On September 8, 2021, USG submitted a second letter stating additional protest grounds (the “Amended Protest Letter”).* Ex. 73.

16. *On September 13, 2021, the Hearing Officer invited Keefe to participate in the bid protest meeting.* Ex. 90.

17. *On September 20, 2021, Keefe submitted a letter in opposition to USG’s protest.* Ex. 76.

18. *On September 21, 2021, Mr. Kasper held a bid protest meeting attended by representatives and counsel for USG and Keefe, and both parties were given the opportunity to be heard (the “Protest Meeting”).*

19. On September 29, 2021, Mr. Kasper issued his final decision on USG's protest in a letter addressed to counsel for Keefe and USG (the "Protest Decision Letter"). Ex. 66. The Hearing Officer cancelled the contract award to Keefe, determined that the contract for the Offender Packaging Program should be rebid, and provided USG and Keefe notice of their right to appeal. Ex. 66.

20. After the protest decision, NCDPS never issued a new RFP for the Offender Packaging Program. Tr. 11/8/2022 310:22–25.

21. Any rebidding of the contract for the Offender Packaging Program is on hold pending the results of the litigation in these contested cases, and in the event NCDPS does issue another RFP, it could take six months to rebid the contract from start to finish. Tr. 11/10/2022 57:25–58:9.

22. On October 12, 2021, NCDPS issued Request for Quote #: Q12192529 ("RFQ") to USG and Keefe. Ex. 109.

23. Keefe and USG submitted responses to the RFQ, and on October 19, 2021, NCCE awarded USG and Keefe each a portion of the contract. Ex. 109.

24. On October 28, 2021, Keefe timely filed a contested case action, Case No. 21 CPS 04633, challenging the Hearing Officer's decision to cancel the contract award to Keefe.

25. On November 8, 2021, USG timely filed a contested case action, Case No. 21 CPS 04788, challenging the Hearing Officer's decision to rebid the contract for the Offender Packaging Program instead of awarding it to USG.

26. On December 22, 2021, the two contested cases were consolidated. See Order of Consolidation, 21 CPS 04633/21 CPS 04788.

Purported Status Quo

27. NCDPS claims the RFQ was intended to preserve the *status quo*. It certainly fails to do so.

28. Under the RFQ, Keefe and USG each oversee the Offender Packaging Program in half of the State. Tr. 11/7/2022 179:3–7.

29. USG and Keefe package off-site and North Carolina inmates are not involved. Tr. 11/7/2022 179:7–12; Tr. 11/10/2022, 188:25–189:13. The inmates receive no work, training, or reentry opportunities. Tr. 11/7/2022 179:19–23; Tr. 11/8/2022 34:14–35:9.

30. NCCE receives a 35% commission from Keefe and USG under the RFQ. Tr. 11/7/2022 179:23–180:1; Ex. 35.

31. As a result of the RFQ, USG's net revenues and margins have significantly declined. Ex. 109. Such includes significant and expected litigation expenses. *Id.*

32. As a result of the RFQ, NCCE has lost significant funding. *Id.*

33. Most significantly, as a result of the RFQ, NCCE has and is failing to fulfill its purposes and mission. G.S. § 148-31(9); *see also*, prior paragraph no. 4.

34. A preponderance of the evidence indicates the RFQ was pretextual, more likely than not, intended to allow Keefe to get a toehold into NCCE operations, and perhaps to strongly signal either the agency's preference for Keefe, its displeasure with USG's challenges, or both.

NCCE failed in contrast, to reasonably justify its significant disruption of the state's PIE program.

35. It is obvious that the *status quo* could and only can be reasonably maintained by continuing the programs under USG, which had been the original plan as hereinafter is detailed.

The Offender Packaging Program

36. USG has been in business with the State of North Carolina continuously since 2010 and has been the incumbent vendor for NCCE's Offender Packaging Program since 2013. Tr. 11/7/2022 57:3-10; Ex. 109.

37. *On January 18, 2013, USG and NCCE executed the Professional Contract, pursuant to which USG would operate the Offender Packaging Program for NCCE.* Ex. 48.

38. *The term for the Professional Contract expired on February 28, 2016, and was renewable "on mutually agreeable terms."* Ex. 48.

39. *Tom Thomas, the CEO and President of USG, and Karen Brown, then Director of NCCE, signed the Professional Contract on behalf of each party.* Ex. 48.

40. *In late December 2015, pursuant to Section VI.e.A of the Professional Contract, NCCE and USG extended the term of the Professional Contract through February 28, 2021 ("First Amendment").* Ex. 49.

41. *Mr. Thomas and Ms. Brown executed the First Amendment on behalf of USG and NCCE, respectively.* Ex. 49.

42. *John Coleman became Director of NCCE on June 1, 2020.* Tr. 11/9/2022 221:21-23. Prior to becoming Director of NCCE, Director Coleman worked as a warden and in managerial roles with the Ohio Department of Corrections, during which time Director Coleman had occasion to work with both USG and Keefe. Tr. 11/10/2022 73:21-74:20.

43. Director Coleman is the top administrator within NCCE and is responsible for the overall direction of all 28 of NCCE's plants throughout North Carolina, which have various product lines including sewing, license plates, metal fabrication, and woodworking. Tr. 11/9/2022 221:10-19; Tr. 11/10/2022 183:12-14.

44. Director Coleman reports to Brandeshawn Harris. Tr. 11/9/2022 222:1-2. *Brandeshawn Harris was the Assistant Commissioner of Prisons at all relevant times herein.* Tr. 11/8/2022 251:25-252:3.

45. Shortly after arriving at NCCE, Director Coleman became aware that USG was the vendor for the Offender Packaging Program. Tr. 11/9/2022 222:16-223:1. Director Coleman met with representatives from USG, reviewed USG's Professional Contract and the First Amendment, investigated whether the Offender Packaging Program was running well, and decided to extend USG's contract. Tr. 11/9/2022 227:11-228:16.

46. The testimony elicited at the Hearing consistently showed that NCCE was satisfied with USG's oversight and performance of the Offender Packaging Program. Tr. 11/7/2022 86:25-87:21, 92:1-5; Tr. 11/8/2022 244:2-7; Tr. 11/9/2022 140:10-16, 265:3-7.

47. *On August 18, 2020, Director Coleman and USG signed an amendment to the Professional Contract ("Second Amendment").* Ex. 50. *The Second Amendment would extend the term of the Professional Contract through February 28, 2026, without otherwise modifying its terms.*

48. Mr. Coleman claims he did not speak to any superior or any individual to whom he reported, prior to signing the Second Amendment. Tr. 11/10/2022 78:18–22.

49. The Offender Packaging Program does not require any outlay of public dollars from NCDPS or NCCE to the vendor operating the program. Tr. 11/9/2022 224:12–16. Rather, the vendor operating the Offender Packaging Program pays a commission to NCCE based on sales, pays rent for use of an NCCE plant, and reimburses NCCE for offender labor and transportation. Tr. 11/9/2022 224:17–225:8.

50. Under the Professional Contract, USG originally paid NCCE a 15% commission. Tr. 11/9/2022 225:9–14. Under the First Amendment, USG increased the commission to 20%. Tr. 11/9/2022 226:14–23.

51. Director Coleman knew he could have negotiated for a commission higher than 20% under the terms of USG’s contract but did not. Tr. 11/9/2022 230:15–231:4, 265:13–20; Exs. 48–50.

52. After joining NCCE, Director Coleman was unaware of any budget deficits or claims within NCCE that USG’s historical service fees were too low, and he believed that a 20% commission enabled NCCE to satisfy its mission. Tr. 11/9/2022 231:5–11, 265:8–12.

The Request for Proposals

53. *On August 19, 2020, Director Coleman called and left a voicemail for Ashley Lear of USG and emailed USG stating: “[a]t the time I returned the signed addendum, I was unaware that I am not the final signing authority. The addendum must go through the e-procurement process. Some one [sic] will be in touch regarding how we move forward.”* Tr. 11/9/2022 235:4–23; Ex. 52.

54. In response to Director Coleman’s email of August 19, 2020, USG representative Ashley Lear asked USG’s general counsel to voluntarily delete the signed Second Amendment in his possession. Ex. 52.

55. *On August 24, 2020, Commissioner of Prisons Todd Ishee instructed Director Coleman to “[p]lease bid publicly.”* Ex. 18. *Commissioner Ishee further explained that the solicitation:*

Should encourage submissions of additional ideas for us to consider (ex staggered box ordering during a quarter, canteen delivery to cell for close custody and limited RH offering, maybe a type of non-food box—clothing, shoes, etc., micro markets at prisons for staff and anything else you can think of. They may have ideas too)[.] Maybe a plant that could support Southeast US Jails.

Ex. 18.

56. NCDPS issued the RFP on December 2, 2020. Ex. 5.

57. Patricia Kinney, a Procurement Specialist II in NCDPS’s purchasing department (“Purchasing”), put together the RFP from a template maintained by NCDPS combined with specifications supplied by NCCE. Tr. 11/9/2022 13:12–22 15:13–16 42:8–17. As the procurement specialist, Ms. Kinney acted as an intermediary between NCCE and the vendors and was the sole point of contact for the vendors for this procurement. Tr. 11/9/2022 41:10–18.

58. In Section 3.1, the RFP provides that “[a]ll qualified proposals will be evaluated,

and awards will be made to the Vendor(s) meeting the RFP requirements and achieving the highest and best final evaluation, based on the criteria described below.” Ex. 5.

59. In Section 2.9(p), the RFP defines a qualified proposal as “[a] responsive proposal submitted by a responsible Vendor.” Ex. 5.

60. A responsive proposal is “an offer that conforms to the requirements of the solicitation.” 01 NCAC 05A .0112(32).

61. A responsible Vendor is “a Vendor who demonstrates in its Offer that it has the capability to perform the requirements of the Solicitation.” *Id.* at .0112(31).

62. In Section 3.4, the RFP provides that “[a]ll qualified proposals will be evaluated, and award made based on considering the following criteria, to result in an award most advantageous to the State.” Ex. 5.

63. Director Coleman selected the evaluation criteria and set their order of importance in the RFP. Tr. 11/8/2022 20:17–24; Tr. 11/9/2022 42:23–43:8, 245:13–18.

64. In order of importance, the 9 criteria are: (1) Demonstration of Vendor’s experience providing services similar in size and scope as outlined in this RFP, (2) Demonstration of Vendor’s menu design and characteristics as outlined in this RFP, (3) Demonstration of Vendor’s organizational and operational plan to effectively manage the implementation of the project plan and warehouse planning/consultation, (4) Demonstration of Vendor’s organization and operational plan to accomplish tasks outlined in the Training and Consultation Section, (5) Vendor’s ability to provide the requested information outlined in the Administrative Section, (6) Demonstration of Vendor’s capabilities, organizational and operational plans for order processing and marketing material, (7) Demonstration of Vendor’s organization and operational plan to effectively manage the payment process and conduct customer service. Vendor must also describe the utilization and functionality of the provided management software, (8) Vendor’s ability to provide the requested information outlined in the Product Kits section, and (9) Pricing and Service Fee. Ex. 5 at § 3.4.

65. Director Coleman included price and service fee as one of the 9 evaluation criteria because commission from the Offender Packaging Program helps NCCE pay its bills and expand reentry services to its entire population of offenders. Tr. 11/9/2022 246:20–25, 247:23–24.

66. Director Coleman did not receive any direction from Commissioner Ishee in his email to publicly bid the contract for the Offender Packaging Program to seek or obtain a higher commission. Tr. 11/9/2022 242:7–11. If profit was the most important factor for NCCE in awarding the contract for the Offender Packaging Program, it could have made price and service fee the most important evaluation criteria. Tr. 11/8/2022 344:21–24; Tr. 11/9/2022 247:6–12.

67. However, Director Coleman made price and service fee the *least* important of the 9 criteria because he wanted to emphasize the reentry elements of the Offender Packaging Program and “[b]ecause the mission of Correction Enterprises is to train offenders, not make money.” Tr. 11/9/2022 246:5–17, 247:19–22.

68. The second most important evaluation criterion refers to Section 5.2, Subsection 1 of the RFP, which states among other things, that the “Vendor must ... [p]rovide training opportunities in various elements of supply chain management.” Ex. 5.

69. The fourth most important evaluation criterion refers to Section 5.2, Subsection 5 of the RFP, which provides in part that the “Vendor must provide ongoing offender training that supports the mission of NCCE to provide marketable job skills and transitional opportunities for

offenders.” Ex. 5.

70. Section 3.3 of the RFP provides that the procurement for the Offender Packaging Program was a best value procurement. Exs. 5; see also Ex. 21 (“This procurement was done in accordance with best value procurement practices[.]”).

71. In a best value procurement, “[t]he selection of a contractor [is] based on a determination of which proposal offers the best trade-off between price and performance, where quality is considered an integral performance factors.” G.S. § 143-135.9(a)(1). “The intent of Best Value procurement is to enable contractors to offer and the agency to select the most appropriate solution to meet the business objectives defined in the solicitation[.]” *Id.* at 143–135.9(b).

72. NCDPS publishes a manual containing policies and procedures for procurements conducted by NCDPS, including best value procurements (“NCDPS Procurement Manual”). Tr. 11/9/2022 46:18–47:5. The NCDPS Procurement Manual is intended to provide the reader with “basic laws, rules, policies and procedures that must be followed in carrying out the responsibilities of a Purchaser in the Department of Public Safety.” Ex. 105 at 5. The November 7, 2019, version of the NCDPS Procurement Manual was in effect at the time of the procurement at issue in these contested cases. Tr. 11/9/2022 47:22–48:3; Ex. 105.

73. The NCDPS Procurement Manual also refers the reader to “additional resources needed by the Purchaser to insure compliance with all purchasing requirements[.]” including an Agency Purchasing Manual published by the Division of Purchase and Contract of the Department of Administration (“NCDOA Procurement Manual”). Ex. 105 at 5; Ex. 106.

74. The NCDPS and NCDOA Procurement Manuals consistently describe the procedures that govern best value procurements. Exs. 105–106.

75. “An evaluation committee evaluates offers in accordance with the stated evaluation factors.... Relative strengths, deficiencies, weaknesses, and risks supporting the evaluation shall be documented in the contract file.” Ex. 105 at 35; Ex. 106 at 70; see also Tr. 11/9/2022 46:2–6.

76. “The evaluation committee shall determine a final ranking of all offers under consideration using only the criteria set forth in the solicitation document.” Ex. 105 at 35; Ex. 106 at 71; *see also*, Tr. 11/9/2022 46:7–11.

77. “All criteria to be used in the evaluation of offers shall be identified in the solicitation and then those identified must be used during the evaluation and in making or recommending the award.” Ex. 105 at 40.

78. “Award must be made to the responsive and responsible [vendor] whose offer is determined in writing to be the most advantageous to the state, using all evaluation factors set forth in the solicitation.” Ex. 105 at 36; Ex. 106 at 71; see also 01 NCAC 05B .0309(a) (“In determining the award of Contract, Responsive Offers shall be considered and evaluated as provided by statute and applicable rules.”).

79. Director Coleman knew of the existence of but did not consult the NCDPS Procurement Manual at the time of this procurement. Director Coleman was unfamiliar with the NCDOA Procurement Manual. Tr. 11/10/2022 43:5–44:2; Tr. 11/10/2022, 51:4–15.

The First Evaluation

80. In early January 2021, Director Coleman met with Martin Kish, the Assistant

Director of Business Development for NCCE, to advise that he would be appointing Mr. Kish as lead of the team to review, evaluate, and assess the competing proposals for the Offender Packaging Program, and which team would then recommend the proposal that should be accepted by NCDPS in the best interest of the State of North Carolina. Tr. 11/8/2022 107:25–108:12.

81. After meeting with Director Coleman, Mr. Kish familiarized himself with the RFP, including the Evaluation Criteria in Section 3.4. Tr. 11/8/2022 108:13–20, 110:10–13.

82. *On January 14, 2021, Director Coleman informed NCDPS employees Rhonda Miller, Billy Robbins, and Martin Kish via email that they had been “selected to evaluate” vendor proposals submitted in response to the RFP and to make a recommendation (“Evaluation Committee” or “Committee”).* Ex. 2.

83. Director Coleman asked the Evaluation Committee to recommend which vendor should be awarded the contract, noting: “[i]t is imperative that we select the best overall proposal based on the (9) nine elements listed on page 11 of 25 in section 3.4 ‘Evaluation Criteria.’” Ex. 2.

84. Director Coleman appointed Mr. Kish, Ms. Miller, and Mr. Robbins as the Evaluation Committee because he considered each of them experts in key aspects of NCCE’s mission. Tr. 11/9/2022 269:17–23; Ex. 2.

85. *Ms. Miller is a Human Resources Manager for NCCE and oversaw NCCE’s PIE Program.* Ms. Miller has been with NCDPS for seventeen years and trained and gained experience with requests for proposals and other procurement methods during that time. Tr. 11/9/2022 187:10–14. As NCCE’s former PIE Program Coordinator, Ms. Miller worked with offender educational programs, set up apprenticeships, and ensured that offenders received on-the-job hours through community college. Tr. 11/9/2022 183:23–184:12.

86. Director Coleman appointed Ms. Miller to the Evaluation Committee because of her experience to include directly working with USG on the existing Offender Packaging Program. Tr. 11/9/2022 271:10–15.

87. *Mr. Robbins is the Assistant Director of Administrative Services for NCCE.* Mr. Robbins has worked for NCDPS and the Department of Corrections for over twenty-six years. Tr. 11/9/2022 137:25–138:10.

88. Mr. Robbins also served as NCCE’s PIE Program Coordinator for a time. Tr. 11/9/2022, 121:1–10, 164:16–20. As Coordinator, Mr. Robbins’ principal job was to ensure agency and vendor compliance with the PIE program. Tr. 11/9/2022 139:9–17.

89. Mr. Robbins has experience with over 100 procurements for government contracts, five to ten of which were RFPs like the procurement at issue here. Tr. 11/9/2022 140:17–141:22.

90. Director Coleman appointed Mr. Robbins to the Evaluation Committee because he had over twenty years’ experience managing NCCE’s plants. Tr. 11/9/2022 271:16–18.

91. Director Coleman appointed Mr. Kish to the Evaluation because he leads NCCE’s business development sales and marketing. Tr. 11/9/2022 271:6–8.

92. *On January 26, 2021, USG and Keefe submitted proposals in response to the RFP.* Exs. 110, 111. *No other vendors submitted proposals.*

93. Mr. Kish coordinated the evaluation of the proposals submitted by Keefe and USG and scheduled several meetings with Ms. Miller and Mr. Robbins to evaluate the proposals. Tr. 11/8/2022 114:22–115:5.

94. Before meeting with the rest of the Evaluation Committee, Mr. Kish and Mr. Robbins individually reviewed the proposals submitted by Keefe and USG. Tr. 11/8/2022 115:6–20; Tr. 11/9/2022 128:4–10. Mr. Robbins reviewed the proposals individually for a total of 4 hours. Tr. 11/9/2022 146:4–10.

95. *The Evaluation Committee then met over several hours on multiple occasions to evaluate the proposals and make a recommendation regarding which vendor should be awarded the contract for the Offender Packaging Program.* Tr. 11/8/2022 115:25–116:5, 120:14–121:4; Tr. 11/9/2022 191:22–192:2; Exs. 3–4.

96. During its first meeting, the Evaluation Committee discussed the nine evaluation criteria in Section 3.4 of the RFP, which served as lodestars for the Committee’s evaluation of the proposals. Tr. 11/8/2022 116:6–17, 192:14–16, 22–24.

97. Mr. Kish instructed Ms. Miller and Mr. Robbins that after evaluating the proposals, the Evaluation Committee would need to make a recommendation regarding which vendor should be awarded the contract in the best interest of the State. Tr. 11/8/2022 116:18–24. Mr. Kish advised that the proposals were to be evaluated against the 9 criteria in the RFP in descending order of importance. Tr. 11/8/2022 111:23–112:3.

98. After the first meeting of the Evaluation Committee, Ms. Miller began to review each proposal individually. Tr. 11/9/2022 170:9–12. Over several days, Ms. Miller spent about 10 to 12 hours in total reviewing the proposals. Tr. 11/9/2022 170:13–19. Ms. Miller read the proposals cover-to-cover, word-for-word. Tr. 11/9/2022 170:20–23.

99. The Evaluation Committee then proceeded to evaluate each of the proposals against the 9 evaluation criteria in Section 3.4 of the RFP in order of importance and had a collaborative discussion regarding which vendor was superior to the other with respect to each of the nine evaluation criteria. Tr. 11/8/2022 116:25–117:12, 191:15–17; Tr. 11/9/2022 129:13–18, 144:3–11, 191:9–18.

100. The Evaluation Committee concluded that USG’s proposal was superior to Keefe’s with respect to the eight most important evaluation criteria. Tr. 11/8/2022 117:13–17; Tr. 11/9/2022 131:5–9, 193:12–14. They then unanimously recommended that the contract for the Offender Packaging Program be awarded to USG. Tr. 11/8/2022 124:5–12; Tr. 11/9/2022 130:24–131:2.

101. The only criterion on which the Evaluation Committee determined Keefe was superior was the least important criterion of pricing and service fee. Tr. 11/8/2022 125:12–20. *USG proposed a 27.5% service fee, whereas Keefe proposed a 45.25% service fee.* Exs. 110, 111.

102. At the time the Evaluation Committee unanimously recommended USG be awarded the contract, all 3 members were aware of the significant difference between USG and Keefe’s proposed service fees. Tr. 11/8/2022 125:24–126:24. The Committee had significant discussion about the disparity in revenue before recommending USG for award. Tr. 11/8/2022 191:3–6.

103. At the end of their evaluation of the proposals, there was no dissension or disagreement amongst the Evaluation Committee members that USG’s proposal was in the State’s best interest and that it would be most advantageous to award the contract to USG. Tr. 11/8/2022 124:24–5; Tr. 11/9/2022 147:22–148:2, 148:16–25.

104. On February 2, 2021, after the Evaluation Committee concluded the evaluation process. Mr. Kish drafted a memorandum on behalf of the Committee addressed to Director

Coleman which stated that the Committee unanimously recommended the contract be awarded to USG and providing the rationale for that recommendation (the “Unanimous Award Recommendation”). Tr. 11/8/2022 127:6–24, 132:2–8; Ex. 4.

105. The Unanimous Award Recommendation stated that the Evaluation Committee met multiple times during the weeks of January 25th and February 1st, 2021, at Director Coleman’s instruction to review USG and Keefe’s proposals. Ex. 4.

106. According to the Unanimous Award Recommendation, the Evaluation Committee “compared each bidder’s submission based on the nine criteria ranked in order of importance included in RFP section 3.4, ‘Evaluation Criteria.’” Ex. 4.

107. The Evaluation Committee concluded that based on its comparison, USG should be awarded the contract. The Committee explained that USG’s proposal was superior to Keefe’s with respect to evaluation criteria 1–8 of the RFP, without limitation, because USG proposed: “[u]nique training opportunities for offenders[,]” “[m]ultiple kit production possibilities for offenders[,]” “post-release employment opportunities for offenders[,]” a “[h]igh-value product line[,]” and demonstrated “experience providing services similar in size and scope.” Ex. 4; Tr. 11/8/2022 129:22–130:2, 130:20–131:4.

108. The first and most important evaluation criterion was demonstration of a vendor’s experience providing services similar in size and scope. Ex. 5. USG was the incumbent vendor for the Offender Packaging Program and had been operating the program since 2013. Tr. 11/8/2022 111:7–18.

109. The Evaluation Committee further explained that USG’s “bid package quality was exceptional” with respect to: “[c]reativity and future strategic vision[,]” “[q]uality and quantity of samples provided[,]” “[o]rganization, detailed depth, and communication clarity[,]” and “[t]otal long-term profitable revenue potential.” Ex. 4.

110. The Evaluation Committee concluded that Keefe’s proposal “exceeded the fulfilment of the lowest-ranked criterion No. 9, ‘Pricing and Service Fee.’” Ex. 4.

111. Mr. Robbins reviewed the Unanimous Recommendation of Award before Mr. Kish sent it to Director Coleman, Tr. 11/9/2022 131:25–132:2, and Mr. Kish then emailed the Unanimous Recommendation of Award to Director Coleman on February 2, 2021. Ex. 55; Tr. 11/8/2022 133:11–17.

112. Mr. Robbins testified that the Evaluation Committee was tasked with deciding which vendor would be awarded the contract and did not believe that the evaluation would continue past the point of the Unanimous Recommendation of Award. Tr. 11/9/2022 132:8–16. Mr. Robbins further testified that the process that the Committee employed in making a recommendation of award to Director Coleman was consistent with Mr. Robbins’ past procurement experience. Tr. 11/9/2022 151:4–9.

113. *At 3:04 PM on February 2, 2021, Director Coleman sent an email to his assistant, Amy Moore, copying the Evaluation Committee, Dr. Anthony Vann, and Brandeshawn Harris, stating: “I accept the recommendation as stated. Please prepare the letter for submission to purchasing.”* Ex. 55. Dr. Vann was the Deputy Director of NCCE during this procurement. Tr. 11/8/2022 243:11–13.

114. Director Coleman instructed Ms. Moore to draft a letter to Purchasing because Purchasing issues the contract award to the winning vendor and Director Coleman intended the contract for the Offender Packaging Program to be awarded to USG. Tr. 11/9/2022 279:3–10.

115. Ms. Moore then prepared, and Director Coleman approved and signed a letter addressed to NCDPS's purchasing department dated February 2, 2021, recommending that the contract for the Offender Packaging Program be awarded to USG (the "Recommendation of Award to USG"). Ex. 56.

116. In the Recommendation of Award to USG, which was addressed to Ms. Kinney as the procurement specialist for this RFP, Director Coleman explained that Keefe and USG's proposals "were reviewed by a team of three (3) subject matter experts and the recommendation was formed by the consensus of the team." Ex. 56.

117. Director Coleman further stated that the Evaluation Committee "compared each bidder's submission on the nine criteria ranked in order of importance included in RFP section 3.4, 'Evaluation Criteria.'" Ex. 56.

118. Director Coleman then restated the Evaluation Committee's bases for recommending that the contract be awarded to USG as set forth in the Unanimous Award Recommendation. Exs. 4, 56.

119. At 4:14 PM on February 2, 2021, Ms. Moore emailed the Recommendation of Award to USG to Purchasing, copying Director Coleman and Dr. Vann. Ex. 47.

120. At the time Ms. Moore sent the Recommendation of Award to USG, Director Coleman understood NCCE's role in the procurement to be over. Tr. 11/9/2022 283:11-16.

121. The preponderance of the evidence shows that the Evaluation Committee appointed by Director Coleman and comprised of subject-matter experts in procurements, elements of the RFP, and NCCE's mission, carefully and thoughtfully evaluated Keefe's and USG's proposals against the 9 evaluation criteria in the RFP in their stated order of importance, reached a consensus, unanimously recommended that the contract for the Offender Packaging Program be awarded to USG, and sent Director Coleman a reasoned and written explanation of their recommendation.

122. The preponderance of the evidence further shows that Director Coleman accepted the Evaluation Committee's Unanimous Recommendation of Award and sent the Recommendation of Award to USG to Purchasing with the understanding that the contract would be awarded to USG. Ex. 56; Tr. 11/9/2022 279:3-10.

The Re-Evaluation

123. At 7:47 AM on February 3, 2021, Mr. Kish emailed Director Coleman the following message: "John, before sending the bid letter to purchasing, I would like to talk to you about an important issue..." Ex. 8. The "important issue" that Mr. Kish wanted to discuss with Director Coleman was the discrepancy in USG and Keefe's service fees. Tr. 11/8/2022 146:12-17.

124. At the time Mr. Kish sent and Director Coleman received this email, Ms. Moore had already sent the Unanimous Recommendation of Award to USG to Purchasing. Tr. 11/9/2022 286:3-5.

125. Shortly after receiving Mr. Kish's email, Director Coleman spoke with Mr. Kish. During that conversation, Mr. Kish explained or rather underscored that Keefe's proposed commission was substantially higher than USG's proposed or existing commission. Ex 8.

126. Mr. Kish oddly testified that his conversation was "a general ... postmortem discussion[.]" Tr. 11/8/2022 147:9-16.

127. Both Messrs. Kish and Coleman were less than forthright regarding the details of the subject conversation. The undersigned believes more was said than was relayed in testimony.

128. Director Coleman says he was “frustrated” and “agitated” because he had already acted in response to the Evaluation Committee’s Unanimous Recommendation of the Award by authoring and sending a letter to Purchasing instructing them to award the contract to USG. Tr. 11/9/2022 290:11–291:14.

129. Before this conversation with Mr. Kish, Director Coleman was not aware of the vendors’ proposed service fees and had not seen the vendors’ proposals. Tr. 11/9/2022 287:19–22, 288:15–17 289:4–7.

130. *At 8:52 AM on February 3, 2021, Director Coleman emailed Purchasing and Ms. Moore with Dr. Vann copied, and asked Purchasing to “hold” the Recommendation of Award to USG because he needed “to ask a couple more questions.”* Ex. 7; Tr. 11/9/2022 295:18–21.

131. Ms. Kinney testified that but for Director Coleman telling her to “hold off,” upon receiving the Recommendation of Award to USG from Director Coleman, she would have proceeded to send notice to USG that it had been awarded the contract, and the procurement would have been over. Tr. 11/9/2022 64:7–20, 68:24–69:2, 72:13–24, 91:13–23.

132. *Director Coleman spoke with Commissioner Ishee about the substantial difference between USG and Keefe’s proposed service fees and sent questions to Keefe through Purchasing concerning several aspects of its proposal.*

133. *On or around February 12, 2021, Director Coleman decided that NCCE would ask the vendors to give presentations on their proposals and request best and final offers (“BAFOs”).* Ex. 7; Tr. 11/9/2022 310:7–11.

134. The Evaluation Committee did not request oral presentations because it did not feel it needed clarification from either vendor to determine which proposal presented the best value to the state. Tr. 11/8/2022 118:7–22; Tr. 11/9/2022 151:10–15; see also Ex. 5 at § 3.3.

135. A BAFO is an offer “submitted by a Vendor to alter its initial offer, made in response to a request by the issuing agency.” Ex. 5 at 2.9(a). Under Section 3.3 of the RFP:

The State reserves the right to negotiate with one or more vendors, or to reject all original offers and negotiate with one or more sources of supply that may be capable of satisfying the requirement and submit a best and final offer (BAFO), based on discussions and negotiations with the State, if the initial responses to the RFP have been evaluated and determined to be unsatisfactory.

Ex. 5.

136. Before the vendor presentations, Tr. 11/9/2022 336:22–25, *Director Coleman also decided that he would evaluate the proposals himself, and completed handwritten ratings of each vendor’s proposal, using a rating scale of “E” for “Exceeds,” “M” for “Meets,” and “DNM” for “Does Not Meet.”* Exs. 39, 41; Tr. 11/9/2022 310:4–6.

137. By his own testimony, Director Coleman did not consider himself an evaluator for this procurement; instead, he described himself as a “recommender” or “approver.” Tr. 11/9/2022 272:9–13. Director Coleman did not consider himself to be a subject matter expert with regard to how to conduct or document procurements for publicly bid government contracts and had never before served as an evaluator for any competitive procurements. Tr. 11/10/2022 50:12–23.

138. Director Coleman evaluated USG's proposal first. Tr. 11/9/2022 333:12–15. *Director Coleman rated USG's proposal "E" for "Exceeds" on criteria 1–8, and "M" for "Meets" on criterion 9, pricing and service fee.* Ex. 40.

139. *Director Coleman rated Keefe's proposal "E" for "Exceeds" on criteria 1–7 and 9, and "M" for "Meets" on criterion 8.* Ex. 42.

140. There are no scratch-outs or write-overs on Director Coleman's handwritten evaluation of USG's proposal. Ex. 40.

141. There are scratch-outs or write-overs on criteria 2, 3, 6, and 8 of Director Coleman's handwritten evaluation of Keefe's proposal. Ex. 42; Tr. 11/10/2022 12:25–13:12. Director Coleman testified that he did not alter his handwritten evaluation of Keefe's proposal after Keefe was awarded the contract. Tr. 11/10/2022 120:24–121:3.

142. Director Coleman instructed his assistant, Ms. Moore, to electronically transcribe his handwritten evaluations after USG protested the award to Keefe. Tr. 11/9/2022 338:1–7. *In the typed evaluations, Director Coleman rated USG's proposal "E" for "Exceeds" on evaluation criteria 1–8 and left evaluation criterion 9, pricing and service fee, blank.* Ex. 39; Tr. 11/9/2022 334:9–15. *Director Coleman rated Keefe's proposal "E" for "Exceeds" on evaluation criteria 1–7, "M" for "Meets" on criterion 8, and left criterion 9 blank.* Ex. 41.

143. The scratch-outs and write-overs on Director Coleman's handwritten evaluation of Keefe's proposal are not apparent in the typed version. Tr. 11/10/2022 14:11–21; *compare* Ex. 42 *with* Ex. 41.

144. Director Coleman scheduled the vendor presentations for April 20, 2021 and through his assistant, Ms. Moore, asked the Evaluation Committee, Dr. Vann, Lakeisha Jones, and Sophia Feaster-Lawrence to attend. Tr. 11/10/2022 18:6–9, 18:17–24; Ex. 11.

145. Director Coleman invited Ms. Jones and Ms. Feaster-Lawrence because he wanted a fresh set of eyes from the perspective of reentry, which is a core component of NCCE's mission. Tr. 11/10/2022 19:15–23.

146. *On April 20, 2020, USG and Keefe each presented on their proposals during their scheduled vendor presentation.*

147. On April 21, 2021, Ms. Feaster-Lawrence sent Ms. Moore and Director Coleman written feedback on the vendor presentations. Ex. 1. Ms. Feaster-Lawrence is an Education Program Consultant II for NCDPS. Ex. 1.

148. In her feedback email, Ms. Feaster-Lawrence stated that USG "would provide support and structure for this proposal and the idea of having training such as forklift/HRD to support offenders (justice involved individuals) preparing them for release would be great[,] and USG's "accommodations for deaf/hard of hearing offenders is very important as it related to the American Disabilities Act. By having accommodations for this population, [it] would help to provide training for them[,] and Anson is currently part of the 'pilot program' for the tablets that w[ere] mentioned during yesterday's presentation." Ex. 1.

149. Ms. Feaster-Lawrence stated that Keefe "seems as though they would not provide on-site support which is needed on all levels[,] especially since they are new to this state and are not familiar with policies and procedures of NCDPS.... [Given] ... the fact that this is a correctional environment, having someone represent their company would be beneficial as opposed to having to call someone." Ex. 1.

150. *On April 28, 2021, NCDPS sent the vendors requests for BAFOs asking for the vendors' best and final offers with respect to the price and service fee under criterion 9. Ex. 30; Tr. 11/10/2022 24:17–19. The BAFOs did not request any information regarding evaluation criteria 1–8 or offender training and re-entry programs. Tr. 11/10/2022 25:4–11.*

151. *On May 7, 2021, Keefe responded to the request for BAFO with a proposed service fee of 45.25%. Ex. 26.*

152. *On May 19, 2021, USG responded to the request for BAFO with a proposed service fee of 35%. Ex. 25.*

153. Only USG increased the competitiveness of its proposal through its BAFO response. Tr. 11/8/2022 162:22–163:9.

154. *On May 24, 2021 at 9:37 AM, Director Coleman sent a survey via Outlook to Mr. Kish, Ms. Miller, Mr. Robbins, Dr. Vann, and himself, asking the recipients to vote on which vendor should be awarded the contract (“Outlook Survey”). Ex. 60.*

155. Through February 3, 2021, Director Coleman did not consider himself or Dr. Vann to be evaluators for this procurement, and Director Coleman did not ask Ms. Feaster-Lawrence or Ms. Jones to vote. Tr. 11/10/2022 28:10–21.

156. The Outlook Survey does not specifically instruct the recipients that they should evaluate the proposals pursuant to the 9 evaluation criteria in the RFP prior to casting a vote. Tr. 11/10/2022 41:13–20.

157. The only attachments to the Outlook Survey were the vendors' responses to the requests for BAFOs. Ex. 60. Director Coleman did not attach any section of the RFP, any portion of the vendors' proposals, the Unanimous Recommendation of Award, any of Director Coleman's notes or rating sheets, or Ms. Feaster-Lawrence's email with feedback on the vendor presentations. Tr. 11/10/2022 29:5–24, 31:7–9.

158. *All recipients responded to the Outlook Survey on May 24, 2021. Director Coleman voted for Keefe at 9:39 AM. Mr. Kish voted for Keefe at 9:58 AM. Ms. Miller voted for USG at 12:26 PM. Mr. Robbins voted for USG at 1:03 PM, and Dr. Vann voted for Keefe at 1:35 PM. Ex. 60. Therefore, the result of the vote was 3:2 in favor of Keefe.*

159. Ms. Miller voted for USG. Tr. 11/9/2022 178:1–3. Ms. Miller testified that she voted for USG from the perspective of NCCE's former PIE Program Coordinator, NCCE's mission, and what was going to be beneficial for the offenders in terms of what each vendor could offer them. Tr. 11/9/2022 178:6–14. Ms. Miller noted that Keefe's proposal more concentrated on commissary services rather than the Offender Packaging Program, the latter of which was the focus of the RFP. Tr. 11/9/2022 178:22–24, 206:14–207:3. Unlike under the Offender Packaging Program, commissary services provide fewer opportunities for offenders to participate and make prevailing wages. Tr. 11/9/2022 206:18–207:3.

160. Dr. Vann voted for Keefe. Ex. 60.

161. Dr. Vann was not on the Evaluation Committee. Tr. 11/8/2022 156:12–14, 259:8–12; Tr. 11/9/2022 272:18–20. Dr. Vann did not attend or participate in or attend any of the meetings held by the Evaluation Committee to evaluate the proposals. Tr. 11/8/2022 259:13–16. At no point including after February 2, 2021, did Director Coleman ever inform Dr. Vann that he was an official evaluator for this procurement. Tr. 11/8/2022 270:3–8. Furthermore, Dr. Vann never considered himself to be an evaluator for this procurement. Tr. 11/8/2022 270:9–12.

162. Director Coleman did not put Dr. Vann on the Evaluation Committee due to concern that he could be perceived as biased towards Keefe because he had ideas about expansion based on other business Keefe was doing in North Carolina. Tr. 11/9/2022 300:19–23, 301:3–12; *see also*, Tr. 11/8/2022 8:12–9:6. Dr. Vann first became familiar with Keefe in 2009 because Keefe ran several commissaries and canteens in North Carolina prisons. Tr. 11/8/2022 287:24–288:6. Dr. Vann came to know Bill Bosco in particular. Tr. 11/8/2022 288:7–9.

163. Mr. Bosco, Keefe’s Group Vice President for the Southeast Region, wrote several sections of Keefe’s proposal in response to the RFP, reviewed it, and signed it. Tr. 11/8/2022 20:3–5; Ex. 110.

164. Prior to the issuance of the RFP, Dr. Vann and Mr. Bosco had conversations about what Keefe could do for NCCE if it were to contract with Keefe for the Offender Packaging Program. Tr. 11/8/2022 292:22–294:16.

165. Prior to the issuance of the RFP and during the term of USG’s contract for the Offender Packaging Program, Mr. Bosco had conversations with Dr. Vann about Keefe taking over the Offender Packaging Program from USG, and informed Dr. Vann that if NCCE re-procured the contract through a competitive bid process, NCCE would get a higher commission than what was being paid by USG at the time. Tr. 11/8/2022 64:10–20; 70:11–17.

166. Dr. Vann testified that he did not believe he had any ethical or other conflict that would have prevented him from being able to objectively review the proposals and make a recommendation as to the award of the offender packaging program. Tr. 11/8/2022 314:4–10.

167. According to the NCDPS Procurement Manual:

Fairness and impartiality in all phases of the process by requestors and purchasing personnel is an essential ingredient in public procurement. Dealings with vendors must be open, honest, and objective.... Integrity is a principal stock in trade for the public procurement professional. Integrity is manifested by fairness, openness, and impartiality and can be tarnished by even the slightest appearance of impropriety. Once this occurs, it is very difficult to regain.

Ex. 105 at § C.

168. According to his own testimony, the primary factor that drove Dr. Vann’s decision to vote for Keefe was that Keefe proposed a higher service fee. Tr. 11/8/2022 280:18–22, 335:3–6, 336:7–8, 340:3–8, 342:18–25. Dr. Vann was neither asked for an explanation as to why he voted for Keefe, nor requested to document the basis for his decision. Tr. 11/8/2022 280:23–281:4.

169. During Dr. Vann’s eight years at NCCE, this was his first procurement in which competing proposals were received and NCCE had to assess, compare, evaluate, and select a vendor. Tr. 11/8/2022 281:23–282:8.

170. Dr. Vann has never been on an evaluation committee for a publicly bid government contract. Tr. 11/8/2022 282:17–19.

171. Dr. Vann never formally evaluated the proposals according to the nine criteria in the RFP. Tr. 11/8/2022 270:13–17, 22–25, 342:12–17. Dr. Vann merely read the proposals so that he would be prepared to ask questions during the vendor presentations. Tr. 11/8/2022 269:19–24. Dr. Vann did not take any notes indicating his thought process as he was reading through the proposals. Tr. 11/8/2022 271:1–5.

172. At the time Dr. Vann reviewed the proposals in preparation for the Vendor

Presentations, he was not aware that he would be asked by Director Coleman to vote on which vendor should ultimately be awarded the contract. Tr. 11/8/2022 272:10–15.

173. Indeed, Dr. Vann disagreed with the bid process generally, thinking that Keefe should just have been awarded the contract regardless of any detailed evaluation methodology. He indicated that the agency had authority to contract with either vendor it chose, and that the process employed was likely to lead to problems like the contested cases here in issue. Tr. 11/8/2022 248:16-24; 306:11-16.

174. Director Coleman never asked Dr. Vann whether he had evaluated the proposals against the nine evaluation criteria before casting his vote. Tr. 11/10/2022 41:24–42:4.

175. Mr. Kish changed his vote to award the contract to Keefe in response to the Outlook Survey. Ex. 60.

176. Before voting in response to the survey, Mr. Kish did not go back and review the proposals in their entirety again. Tr. 11/8/2022 165:13–17. Mr. Kish concluded after his earlier evaluation of the proposals that USG’s proposal was vastly superior to Keefe’s. Tr. 11/8/2022 171:7–13. Mr. Kish did not hear anything during the vendor presentations that altered his recommendation that the contract should be awarded to USG. Tr. 11/8/2022 164:5–9.

177. Mr. Kish testified that he did not feel bound or limited by the order of the evaluation criteria at the time he voted in response to the Outlook Survey because he “felt like it was a whole new situation[.]” Tr. 11/8/2022 193:1–10.

178. Mr. Kish testified that, having been given the opportunity to revote, he disregarded the fact that USG’s proposal was superior to Keefe’s with respect to the eight most important criteria. Tr. 11/8/2022 172:20–24. Rather, he “chose to vote with the revenue stream.” Tr. 11/8/2022 172:13–14, 173:15–19.

179. Mr. Kish further testified that if he had felt bound by the 9 evaluation criteria in the RFP at the time he voted in response to the Outlook Survey, he would not and could not have voted for Keefe. Tr. 11/8/2022 233:18–22.

180. *On June 25, 2021, Director Coleman signed a memorandum, recommending to Purchasing that the contract for the Offender Packaging Program be awarded to Keefe (the “Recommendation of Award to Keefe”).* Ex. 21.

181. From the time that Director Coleman accepted the Evaluation Committee’s unanimous recommendation that USG be awarded the contract to the Recommendation of Award to Keefe, the only difference in the proposals was that USG increased its proposed service fee from 27.5% to 35%. Tr. 11/8/2022 279:7–21.

182. In the Recommendation of Award to Keefe, Director Coleman stated that it was: “Correction Enterprises’ recommendation to award a Statewide Term Contract to Keefe Group for (1) year with the option to renew for up to a total of two (2) additional one-year terms.” Ex. 21.

183. The Recommendation of Award to Keefe is void of any explanation, basis, or rationale for the decision to award to Keefe and does not mention USG at all. Ex. 21; Tr. 11/9/2022 72:9–12; Tr. 11/10/2022 47:9–48:2.

184. The Recommendation of Award to Keefe states: “The evaluation was done in accordance with Best Value procurement practices as defined by GS §143-135.9, 9 NCAC 6A (2) *sic*, and 9 NCAC 6B .0302.” Ex. 21. It obviously was not.

185. Director Coleman did not personally review, analyze, or consider any of the statutes or code provisions cited in the Recommendation of Award to Keefe to ensure that the procurement was in fact done in accordance with best value procurement practices. Tr. 11/10/2022 48:19–25, 49:7–15. Nonetheless, it would have been obvious to him that it was not.

186. *On July 1, 2021, NCDPS sent USG a notice informing USG that the contract had been awarded to another vendor and Keefe a notice of award informing Keefe that it had been awarded the contract.* Exs. 27, 107.

187. Prior to sending a notice of award to Keefe informing Keefe that it had been awarded the contract for the Offender Packaging Program, Ms. Kinney did not make any efforts to determine whether the procurement process or the Recommendation of Award to Keefe complied with applicable requirements. Tr. 11/9/2022 35:9–13, 71:21–72:2.

188. Moreover, when Ms. Kinney received the February 2, 2021 email with the Recommendation of Award to USG attached, she did not open the attachment because she received the email from Director Coleman the next day instructing her to “hold off.” Tr. 11/9/2022 35:25–36:4, 36:11–19. Therefore, at the time that Ms. Kinney received the Recommendation of Award to Keefe and sent notice of the contract award to Keefe, she was not aware that Director Coleman had previously recommended that the contract be awarded to USG. Tr. 11/9/2022 35:25–36:4, 36:11–19.

USG’s Bid Protest

189. On July 16, 2021, USG submitted the Initial Protest Letter to NCDPS challenging the award to Keefe (the “Initial Protest Letter”). Ex. 71.

190. *USG argued that the award to Keefe should be reversed and the contract should be awarded to USG because: (1) Keefe’s proposal should have been rejected as non-responsive for failure to respond to mandatory requirements of the RFP; (2) there was no scoring or evaluation record supporting the award to Keefe; (3) USG’s proposal was technically superior to Keefe’s; and (4) NCDPS awarded the contract to Keefe merely because it proposed a higher commission to NCCE in contravention of the evaluation criteria and even though that commission was unrealistic and would result in additional costs to the State, offenders, and their friends and families.* Ex. 71.

191. *USG also requested that performance of the contract awarded to Keefe be stayed during the protest proceedings.* Ex. 71. In its Initial Protest Letter, USG proposed that it be allowed to continue operating the Offender Packaging Program during the pendency of its bid protest as the incumbent vendor “to avoid disruption of services to vendors and their friends and families.” Ex. 71.

192. *On August 5, 2021, NCDPS denied USG’s request for voluntary stay of the contract awarded to Keefe.* Ex. 73.

193. *On August 13, 2021, USG filed a Verified Complaint and Motions for Temporary Restraining Order and Preliminary Injunction in Wake County Superior Court, Union Supply Group, Inc. v. N.C. Dep’t of Public Safety, 21 CVS 010880, alleging against NCDPS, in part, breach of the Second Amendment and related duty of good faith and fair dealing, and requested a declaratory judgment that Director Coleman had authority to execute the Second Amendment, the Second Amendment was a valid and enforceable agreement, and the RFP and resultant contract award to Keefe were null and void.* Ex. 73.

194. USG filed the Wake Litigation because NCDPS refused USG's request to stay performance of the contract with Keefe. Tr. 11/7/2022 143:5–17.

195. *On August 19, 2021, Judge A. Graham Shirley, II granted USG's Motion for Temporary Restraining Order from the bench. Ex. 73. On August 20, 2021, Judge Shirley issued a Temporary Restraining Order. Ex. 104.*

196. After the grant of USG's Motion for Temporary Restraining Order, NCDPS agreed to stay performance of the contract during the duration of USG's protest. Tr. 11/7/2022 150:6–13.

197. On August 19, 2021, Ms. Hoekstra appointed Mr. Kasper as NCDPS's Hearing Officer, and Mr. Kasper notified USG that its request for a protest meeting was granted. Exs. 75, 89; Tr. 11/21/2022 7:25–8:10, 8:23–9:7. In the August 19, 2021 letter, Mr. Kasper characterized the Bid Protest Meeting as “an informal, non-adversarial opportunity for [USG] to explain what it believes are the deficiencies in the State's bid evaluation or other conduct beyond what you previously submitted in writing.” Ex. 75.

198. The Hearing Officer was not given any instruction regarding his role or responsibilities as Hearing Officer. Tr. 11/21/2022 13:24–14:17.

199. The Hearing Officer testified that he employed a “best-interest-of-the-state” standard and that he endeavored to act as an impartial arbiter in ruling on the protest. Tr. 11/21/2022 15:3–19; Tr. 11/21/2022 16:23–25.

200. After USG submitted its Initial Protest Letter, counsel for USG met with the Hearing Officer. Tr. 11/21/2022 24:3–9. During that meeting, counsel for USG presented the Hearing Officer with additional materials in support of USG's bid protest, including information that Keefe had failed to disclose certain litigation in response to mandatory RFP requirements. Tr. 11/21/2022 24:24–25:9. The Hearing Officer told counsel for USG that handing him the information would not be adequate to make it part of the record for the protest meeting, and to the extent USG wanted to submit additional information, USG should consider submitting an amended protest letter. Tr. 11/21/2022 26:10–25.

201. On September 8, 2021, USG submitted its Amended Protest Letter, which argued in part that Keefe's proposal failed to meet requirements in Sections 4.3(iii) and 4.4(e) of the RFP because Keefe did not disclose required litigation filed by the State of Mississippi against Keefe on February 8, 2017 (the “Mississippi Litigation”), rendering Keefe's proposal unqualified and ineligible for award. Exs. 73, 86.

202. Under Section 4.3(iii) of the RFP, the “Vendor **must** ... [i]dentify all current and past litigation in the past five (5) years arising out of or relating to contracts or services of the type requested in the RFP.” Ex. 5. (emphasis added). However, Section 4.3(iii) also states: “Failure to provide this information **may** be grounds to disqualify the vendor.” Ex. 5. (emphasis added).

203. Section 4.4 of the RFP says:

Vendor and its personnel are required to provide or undergo background checks at Vendor's expense prior to beginning work with the State. As part of Vendor background the details below **must** be provided to the State:

... (e) any civil litigation, arbitration, proceeding, or judgments rendered against Vendor during the three (3) years preceding submission of its proposal or a statement herein that there are none.

Vendor's responses to these requests shall be considered continuing representations, and Vendor's failure to notify the State within thirty (30) days of any criminal litigation, investigation or proceeding involving Vendor or its then current officers, directors or persons providing Services under this contract during its term **shall constitute a material breach** of this contract.

Ex. 5 (emphasis added).

204. Section 4.0 of the RFP is titled "Requirements" provides relative to Sections 4.1-4.5: "This Section lists the requirements related to the RFP. By submitting a proposal, the Vendor agrees to meet all stated requirements in this Section as well as any other specifications, requirements and terms and conditions stated in this RFP." Ex. 5.

205. Under Section 2.9(t) of the RFP, "SHALL or MUST: Denotes that which is a mandatory requirement. Failure to meet a mandatory requirement will result in rejection of the proposal." Ex. 5.

206. In contrast, Section 3.6 of the RFP provides: "Except as specifically stated in the Request for Proposal, no one requirement shall automatically disqualify a Vendor from consideration. However, failure to comply with any single requirement may result in the Department exercising its discretion to reject a proposal in its entirety." Ex. 5.

207. In the Amended Protest Letter, USG highlighted allegations from the Complaint filed by Mississippi's Attorney General that Keefe "paid millions of dollars in so-called 'consulting fees' to Defendant Cecil McCrory, and through McCrory these fees were used to pay bribes and kickbacks to then MDOC Commissioner Christopher B. Epps." Ex. 86. "Because of these bribes and kickbacks, Commissioner Epps awarded, directed and/or extended public contracts to Keefe." Ex. 86.

208. In 2007, Keefe was assigned a contract to provide commissary services to the Mississippi Department of Corrections when it purchased GE Enterprises, which was owned by Mr. McCrory. Tr. 11/8/2022 84:21-85:2, 85:5-12, 87:14-18. At that time, Mr. McCrory became a consultant for Keefe and was tasked with encouraging Secretary Epps to continue extending Keefe's contract for commissary services instead of publicly bidding the contract. Tr. 11/8/2022 88:6-14.

209. The Attorney General of Mississippi alleged claims against Keefe for: (1) violation of the Racketeer Influenced and Corruption Act, (2) violation of the Mississippi Antitrust Act, (3) Violation of Miss. Code § 31-7-13, which sets forth mandatory bidding requirements for State purchases of \$50,000 or more, (4) Aiding and abetting breach of fiduciary duty; (4) common law fraud; (5) civil conspiracy; and (6) unjust enrichment. Ex. 86.

210. Keefe's Co-Defendants, Cecil McCrory and Christopher B. Epps were each indicted and pleaded guilty to federal charges for participating in the conspiracy described in the Mississippi Litigation. Ex. 86.

211. On or around March 6, 2018, Keefe settled the Mississippi Litigation in question by paying \$3.1 million to the State of Mississippi. Ex. 87. Therefore, the Mississippi Litigation was active within 3 years of the date Keefe submitted its proposal for the Offender Packaging Program. See Exs. 87, 110.

212. Keefe neither disclosed the Mississippi Litigation in its proposal in response to the RFP, nor during the vendor background check after receiving the contract award. Ex. 110; Tr. 11/8/2022 98:8-16; Tr. 11/8/2022 100:17-101:3.

213. As Keefe's Group Vice President for the Southeast Region since 2010, Mississippi contracts were within Mr. Bosco's area of responsibility. Tr. 11/8/2022 38:13–19, 83:1–12.

214. Mr. Bosco and senior leadership at Keefe were aware of the Complaint filed in the Mississippi Litigation and familiar with the settlement agreement Keefe executed to resolve that litigation. Tr. 11/8/2022 94:21–95:8.

215. NCDPS was unaware of the Mississippi Litigation at the time it evaluated Keefe's proposal; that information only became known after the award, through USG's protest. Tr. 11/10/2022 62:20–23.

216. If Keefe had disclosed the Mississippi Litigation in its proposal, the Evaluation Committee would have taken it under consideration. Tr. 11/10/2022 194:25–195:6; *see also*, Tr. 11/9/2022 200:15–21. NCDPS would have also had the discretion to decide whether to disqualify Keefe based on the disclosure.

217. NCDPS admits that Keefe's proposal was not fully responsive to the RFP. Ex. 19 at RFA 6.

218. Director Coleman testified incredibly, that while he believed the allegations of the Mississippi Litigation were "egregious," Keefe's failure to disclose the Mississippi Litigation to NCDPS was a minor informality or technicality. Tr. 11/10/2022 64:14–18.

219. Under Section 3.1 of the RFP, "[t]he State reserves the right to waive any minor informality or technicality in proposals received." Ex. 5.

220. Director Coleman testified and agreed that, since Keefe settled the Mississippi Litigation in March 2018, Keefe should have disclosed the litigation under Section 4.4(e) of the RFP. However, he noted that the Mississippi Litigation was only a few months from being outside of the disclosure window. Tr. 11/10/2022 64:19–65:2. Director Coleman referenced Keefe as a large corporation and stated that he did not believe the failure to disclose was purposeful. He did acknowledge that Mississippi was within Mr. Bosco's area of responsibility. Tr. 11/10/2022 65:9–17, 66:3–7.

221. After USG timely submitted its Initial Protest Letter and more than 30 days after the date of contract award, the Hearing Officer sent USG a letter on August 9, 2021, inviting USG "to explain [at the protest meeting] what it believes are the deficiencies in the State's bid evaluation or other conduct beyond what you previously submitted in writing." Ex. 75. After receiving the Hearing Officer's letter, USG submitted its Amended Protest Letter and argued the protest grounds in its Initial and Amended Protest Letters at the Protest Meeting. Ex. 73; Tr. 11/7/2022 175:22–176:5.

222. After USG submitted its Amended Protest letter, on September 14, 2021, the Hearing Officer reached out to counsel for Keefe to invite participation in the Bid Protest Meeting. Tr. 11/21/2022 32:2–33:4; Ex. 90. On September 20, 2021, Keefe submitted a letter in opposition to USG's protest. Ex. 76.

223. *On September 21, 2021, Mr. Kasper held the Protest Meeting attended by representatives and counsel for USG and Keefe, and both parties were given the opportunity to be heard.*

224. During the Protest Meeting, USG presented information contained in its Original Protest Letter and Amended Bid Protest Letter. Tr. 11/7/2022 175:22–176:5.

225. On September 29, 2021, Mr. Kasper issued the Protest Decision Letter. Ex. 66.

226. In the Protest Decision Letter, the Hearing Officer expressly stated that he did not consider “any of the bases or allegations included in Union Supply’s Amended Protest Letter that were not included in the Initial Protest Letter[,]” and concluded, “based on the allegations set forth in Union Supply’s Initial Protest Letter as well as information known to the Department through its investigation of Union Supply’s Initial Protest Letter,” Keefe’s contract should be cancelled, and it was “in the best interest of the State for the contract to be rebid.” Ex. 66.

227. The Hearing Officer did not consider the new allegations in the Amended Bid Protest Letter because there was adequate information in the Initial Protest Letter to grant USG’s protest and he was uncertain as to whether it would be proper to consider because 01 NCAC 05B .1519 contemplates that a protest must be filed within 30 days of award, and USG submitted the Amended Protest Letter more than 30 days after the date of the contract award to Keefe. Tr. 11/21/2022 166:19–25, 167:3–7.

228. Though the Tribunal was attuned to Keefe’s challenge regarding the interim general counsel for NCDPS serving as the Hearing Officer, the Tribunal found his testimony credible. The totality of evidence indicates the refusal to consider the Amended Protest Letter was not influenced with *mala fides*, but rather, it was effort to conclude his responsibility as quickly and defensibly as possible.

229. The Hearing Officer granted USG’s bid protest based on the allegations in the Initial Protest Letter and the information known to NCDPS through its investigation of that letter. Tr. 11/21/2022 47:9–17.

230. The Hearing Officer testified that he was concerned about the process used for scoring and that, while the RFP had nine criteria that were supposed to be reviewed in “rank order,” the ninth and lowest ranked criteria was given dispositive weight in the process because it was the “decisive consideration,” and the other eight criteria were “not treated as significant.” Tr. 11/21/2022 48:4–49:1, 208:24–209:3. The Hearing Officer also testified that “continuity of services” was very significant in the decision to award the contract to Keefe but did not appear to be within the specified evaluation criteria. Tr. 11/21/2022 49:2–8, 55:19–23; Ex. 38. The Hearing Officer concluded that the scoring process did not support allowing the contract to Keefe to remain in place. Tr. 11/21/2022 51:12–14.

231. In making his decision, Mr. Kasper relied on the “best interest of the State” standard. Tr. 11/21/2022 138:14–18. Mr. Kasper did not independently score the proposals against the nine criteria, Tr. 11/21/2022 131:10–25, 132:1–11, or decide whether Keefe’s proposal should have been rejected as nonresponsive for failure to address the RFP requirements, Tr. 11/21/2022 132:12–25, 133:1–25, 134:1–9.

232. After learning of the Hearing Officer’s decision, Director Coleman agreed that the contract award to Keefe was properly cancelled for insufficient documentation. Tr. 11/10/2022 56:9–14; 176:17–177:4.

233. The Hearing Officer determined that it was in the best interest of the State to rebid the contract because he did not consider himself able to determine which vendor proposed the best value to the State, and, based on his investigation of USG’s Initial Protest Letter, he knew that there was a “preliminary determination” that USG’s proposal was superior and a subsequent determination that Keefe’s bid was superior. Tr. 11/21/2022 61:25–62:15.

234. The Hearing Officer also decided to rebid the contract instead of awarding it to USG because Keefe proposed a higher service fee and that was a “relevant consideration ... both in terms of the cost to the families of the offenders who’ll be using the program and also in terms

of how much money the State receives under the program.” Tr. 11/21/2022 89:16–21.

235. The Hearing Officer testified that he believed it was within his power to award the contract to USG and that if the record were clear that one bid was superior and the bid was awarded to the other bidder for improper purposes like criteria not referenced in the RFP, it would be appropriate to award the contract to the superior bidder. Tr. 11/10/2022 213:1–11. However, the Hearing Officer did not believe that the evidence he had at the time he decided USG’s bid protest supported such a determination. Tr. 11/10/2022 213:11–12.

Production of the Procurement Record to USG, Keefe, and the Hearing Officer

236. On July 2, 2021, the day after NCDPS awarded the contract to Keefe, USG requested public records from NCDPS concerning the procurement for the Offender Packaging Program (the “Public Records Request”). Ex. 13.

237. USG requested, among other things: “[a]ll documents related to the evaluation of and/or scoring of proposals submitted in response to the RFP[,]” “[a]ll evaluation scoring sheets, and other documents or materials, used to determine the ranking or assessment of the proposals submitted in response to the RFP[,]” [a]ny internal notes, evaluation committe[e] commentary and/or emails related to the RFP[,]” and “[a]ll internal communications of North Carolina Correction Enterprises related to the RFP.” Ex. 13.

238. On July 6, 2021, Ms. Kinney sent USG: (1) the Recommendation of Award to Keefe, (2) the notice of award to Keefe, (3) Keefe’s BAFO response, and (4) a redacted copy of Keefe’s proposal. Ms. Kinney also sent USG a handful of emails between Keefe and Purchasing exchanged during the procurement process concerning logistical matters such as scheduling vendor presentations. Ex. 34.

239. *On July 7, 2021, USG emailed NCDPS to confirm whether all records had been produced, commenting:*

It looks like some of the records we requested have not been produced. It may be that they don’t exist. Attached is a copy of our original public records request for your reference.... Also, please confirm whether your responses include records that are in the possession of North Carolina Correction Enterprises (NCCE) or whether we need to issue a separate public records request directly to NCCE.

Ex. 34.

240. On July 8, 2021, Ms. Kinney responded with a bullet-point list in red font, stating: “DPS made no recordings of the [Vendor] presentation[s,]” “There were only two (2) Vendors to respond – Union Supply and Keefe[,]” “The proposal from Keefe as well as BAFO has been sent to you[,]” “Recommendation with Evaluation criteria stated has been sent[,]” “No scoring sheets exist[,]” “No internal notes exist[,]” “Internal communications have been sent[,]” and “Correction Enterprises did not have any communication directly with Keefe, all communications went through Purchasing.” Ex. 34.

241. On August 6, 2021, NCDPS made a supplemental production of 4 documents in response to USG’s Public Records Request. NCDPS included typewritten evaluation sheets of Keefe’s and USG’s proposals, Exs. 39, 41, which were based on the handwritten originals that were not produced to USG until a later date, Exs. 40, 42.

242. Director Coleman had instructed his assistant, Ms. Moore, to electronically transcribe his handwritten evaluations of USG and Keefe’s proposals to produce in response to USG’s Public Records Request. Tr. 11/10/2022 8:2–15. However, Director Coleman’s handwritten evaluations were not produced to USG until receiving expedited discovery from NCDPS in the Wake Litigation. Tr. 11/10/2022 14:24–15:4.

243. On August 19, 2021, during the hearing on USG’s Motion for Temporary Restraining Order in the Wake Litigation (“TRO Hearing”), counsel for NCDPS represented: “[T]he fact that Mr. Coleman had his notes typed up as opposed to submitting the handwritten notes, that is an issue that we recognize. Unfortunately, we’re behind the 8-ball on that one, so we will contend that [NCDPS] should have turned over those handwritten notes initially.” Ex. 23.

244. *In opposition to USG’s Motion for Temporary Restraining Order, NCDPS filed an affidavit prepared by Director Coleman with Director Coleman’s handwritten evaluation notes, vendor reference materials, and the February 3, 2021 emails between Director Coleman, Mr. Kish, and Purchasing attached.* Ex. 38; Tr. 11/10/2022 68:18–69:2.

245. Director Coleman’s Affidavit stated that “he personally reviewed and analyzed the proposals of USG and Keefe,” that he determined “as a result of [his] careful analysis ... that both vendors were essentially equal in non-monetary considerations,” and that “the decision of which to choose came down to the monetary considerations.” Ex. 38.

246. Director Coleman further stated that he chose Keefe as the new vendor for the Offender Packaging Program and told no one of his decision except Ms. Kinney and Ms. Moore. Ex. 38.

247. However, during the TRO Hearing, counsel for NCDPS stated on the record:

[T]he contract was awarded after their fair bidding process. And if the Court were to read through [Director Coleman’s] Affidavit, you would see that there was a committee who made a decision. It was 2:2.... There was a committee [Inaudible] [Audio distortion] were deadlocked 2:2. Two people thought it should go to USG, two people thought it should go to Keefe.... Mr. Coleman then [Inaudible] [Audio distortion] evaluated the entire process on his own [Inaudible].

Ex. 23.

248. Director Coleman’s Affidavit does not mention any 2:2 deadlock or suggest that Director Coleman evaluated the proposals on his own to resolve a 2:2 deadlock. Nor does Director Coleman’s Affidavit reference or attach the Evaluation Committee’s Unanimous Recommendation of Award to USG or Director Coleman’s Recommendation of Award to USG, which he sent to Purchasing on February 2, 2021. Ex. 38; Tr. 11/10/2022 69:25–71:9.

249. After receiving USG’s Initial Protest Letter on July 16, 2022, Mr. Kasper directed other counsel for NCDPS to conduct an internal investigation of the procurement for the Offender Packaging Program contract. Tr. 11/21/2022 44:14–45:2.

250. NCDPS’s internal investigation revealed that there were additional handwritten and typed documents relating to the procurement and evaluation of the proposals that were not produced in response to USG’s Public Records Request. Tr. 11/21/2022 46:25–47:3, 53:2–8. These documents were produced as attachments to Director Coleman’s Affidavit in expedited discovery in the Wake Litigation. Tr. 11/21/2022 53:9–15; Ex. 38.

251. The record tends to show that the Hearing Officer’s primary sources of information

regarding this procurement were assistant attorneys general to whom he delegated responsibility for investigating the allegations of USG's Protest Letter, Tr. 11/21/2022 73:13–17, Director Coleman, and possibly Dr. Vann, Tr. 11/21/2022 87:18–88:9.

252. Director Coleman testified that he turned over all the information he had regarding the procurement to NCDPS or the North Carolina Department of Justice. Tr. 11/10/2022 56:22–57:7.

253. The Hearing Officer did not create or maintain a file of the documents he received in connection with his investigation of USG's bid protest. Tr. 11/21/2022 87:12–17, 130:16–23.

254. At the Hearing, the Hearing Officer specifically recalled that he reviewed the Initial Protest Letter and attached documentation, the RFP, and Keefe's and USG's proposals. Tr. 11/21/2022 64:19–24, 65:7–9, 130:24–131:9. The Hearing Officer also generally recalled reviewing documents initially produced in response to USG's Public Records Request, identified by NCDPS during the course of its internal investigation and produced in supplemental responses to USG's Public Records Request and the Wake Litigation. Tr. 11/21/2022 64:25–65:6, 65:21–66:1.

255. Additionally, the Hearing Officer had no present sense recollection as to whether he reviewed: (1) the January 14, 2021 email in which Director Coleman appointed the Evaluation Committee, Ex. 2; (2) the Unanimous Recommendation of Award, Ex. 4; (3) the February 2, 2021 email in which Director Coleman accepted the Unanimous Recommendation of Award, Ex. 55; (4) the Recommendation of Award to USG, Ex. 56; and (5) the February 2, 2021 email from Amy Moore to Ms. Kinney sending the Recommendation of Award to USG, Ex. 47. Tr. 11/21/2022 68:7–22, 70:18–22, 75:5–9, 76:12–16, 80:20–25. These documents were not produced to USG and Keefe until late July 2022 to August 29, 2022. Tr. 11/21/2022 68:4–7, 70:3–8, 75:10–13, 76:7–11.

256. Hearing Officer Kasper testified that he was aware that there was a "preliminary determination" that USG should be awarded the contract and that there was a committee, but he could not recall whether he ever knew the committee-members' names. Tr. 11/21/2022 69:13–19.

257. The Hearing Officer had no specific recollection of knowing Ms. Kinney, Ms. Miller, Mr. Kish, or Mr. Robbins. Tr. 11/21/2022 77:1–7; Tr. 11/21/2022, 84:9–85:6.

258. The Hearing Officer did not ask Ms. Kinney any questions about her role in the procurement. Tr. 11/9/2022 109:7–10.

259. Mr. Kasper did not ask Mr. Robbins any questions about his involvement in the evaluation. Tr. 11/9/2022 136:24–137:6.

260. The Hearing Officer was not aware of the Evaluation Committee's reasoning for unanimously recommending USG for award. Tr. 11/21/2022 83:14–23.

261. The Hearing Officer had no specific recollection of the fact that Director Coleman accepted the Unanimous Recommendation of Award to USG. Tr. 11/21/2022 75:20–22.

262. The Hearing Officer also had no specific recollection of a five-person vote. Tr. 11/21/2022 150:9–10.

263. As such, the credible testimony and preponderance of the evidence leads the Tribunal to conclude that the Hearing Officer was not in possession of material documents and information at the time he decided USG's bid protest, and particularly, he was not in possession of documents and information that supported a contract award to USG.

Miscellaneous

264. At issue in this case is the integrity of the state's contracting process.

265. Commissioner Ishee was invited by and through counsel for Respondent to appear and provide perspective. G.S. § 150B-33(b)(4) (authority to regulate the course of hearings). Nevertheless, Commissioner Ishee is commended for his directive to publicly bid this contract.

266. As this case indicates, NCDPS and our prison populace are best served when NCDPS follows proper guidance and appropriate criteria in contracting. It did so up and until Messrs. Kish and Coleman met on February 3, 2021. Thereafter Director Coleman, wholly focusing on funding, subverted that process. Such directly controverted Commissioner Ishee's mandate, a Best Value approach to the RFP, the criteria in order of importance, the best interest of the inmates, and the best interest of the State.

267. Following the meeting of February 3, 2021, further evaluation and the second vote were pretextual. Director Coleman improperly stacked the deck, setting himself up to be the tie breaker. Such contravened the RFP, the law, Commissioner Ishee's instruction, and propriety.

268. By every indication, and by a clear preponderance of the credible evidence, USG should have prevailed on the RFP.

269. The one action the Tribunal does not find improper following the conference of Messrs. Kish and Coleman on February 3, 2021, is the agency's request for BAFO. Executives, to include Director Coleman, are stewards of the state's resources, which stewardship includes funding as much as it includes expenditure. It certainly conforms to Ishee's instruction, a Best Value approach to the RFP, the established criteria, the best interests of the inmates, and the best interests of the state.

270. It is true that under Section 3.3 of the RFP, the request for any BAFO indicates requisite that "initial responses to the RFP have been evaluated and determined to be unsatisfactory." As the contract never actually issued prior to the request for BAFO, the Tribunal finds that at least as to USG's commission in comparison to Keefe's, it was appropriately determined as unsatisfactory.

271. Director Coleman often appeared agitated at the hearing on the merits, particularly when questioned by counsel for USG. He seemed especially perturbed when questioned on issues regarding his role in deviation from best practices in general procurement and/or a Best Value analysis of the subject RFP. On occasion he appeared to seethe. On occasion, he appeared to favor Keefe. His conduct insinuated at least bias.

272. The Tribunal is reasonably concerned regarding potential retaliation against USG.

273. Though the Mississippi Litigation was discussed in some detail at the hearing on the merits, to include allegations by the Mississippi Attorney General that Keefe had previously engaged in *inter alia* bribery, racketeering, and other felonious crimes, there was zero evidence that such was the case in North Carolina. The Tribunal only considered such litigation matters in reference to issues of mandatory disclosure under the subject RFP, as hereinafter detailed.

CONCLUSIONS

General Principles and Applicable Law

1. To the extent that the Findings contain Conclusions, or Conclusions are Findings, they should be so considered regardless of labeling. Charlotte v. Heath, 226 N.C. 750, 755, 440 S.E.2d 600, 604 (1946); Peters v. Pennington, 210 N.C. App. 1, 15, 707 S.E.2d 724, 735 (2011).

2. All parties have been correctly designated and there is no question as to joinder.

3. The Office of Administrative Hearings has personal and subject matter jurisdiction over these consolidated and contested cases.

4. The Bid Protest Decision Letter constitutes a Final Agency Decision, and Keefe and USG are potentially, equivalent “person[s] aggrieved” by the Final Decision under G.S. § 150B-2(6).

5. The parties received proper notice of the hearing in this matter as required by G.S. § 150B-23.

6. “An administrative law judge’s final decision shall fully dispose of all issues required to resolve the case[.]” 26 NCAC 03 .0127.

7. *Due* regard is given to the demonstrated knowledge and expertise of the agency with respect to facts and inferences within the specialized knowledge of the agency. G.S. § 150B-34(a).

8. Pursuant to G.S. § 150B-23(a), the burden of proof is on Petitioners to show, by a preponderance of the evidence, that Respondent exceeded its authority or jurisdiction; acted erroneously; failed to use proper procedure; acted arbitrarily or capriciously or failed to act as required by rule or law; and that Petitioners were thereby deprived of a property right or substantially prejudiced.

9. A contract is a property right protected under the United States and North Carolina Constitutions. U.S. Const., Art. I, § 10; N.C. Const., art. I, § 19.

10. Within the context of public procurements, a Petitioner is substantially prejudiced if, but for the acts or omissions of the respondent, “there was a substantial chance ... [Petitioner] would have received the contract award.” Eds Info. Servs., LLC v. Office of Information Tech. Servs., 04 DHR 1066, 2005 WL 1413576 (N.C. OAH, Jan. 11, 2015) (citing Alfa Laval Separation, Inc. v. United States, 175 F.3d 1365, 1367 (Fed. Cir. 1999), and Prof'l Food Servs. Mgmt., Inc. v. N.C. Dep't of Admin., 109 N.C. App. 265, 270, 426 S.E.2d 447, 451 (1993)).

11. “An administrative law judge may ... [o]rder the assessment of reasonable attorneys’ fees and witnesses’ fees against the State agency involved in contested cases decided under this Article where the administrative law judge finds that the State agency named as respondent has substantially prejudiced the petitioner’s rights and has acted arbitrarily or capriciously[.]” G.S. § 150B-33(b)(11).

12. The Tribunal acknowledges:

[T]he “arbitrary or capricious” standard is a difficult one to meet. Administrative agency

decisions may be reversed as arbitrary or capricious if they are “patently in bad faith,” or “whimsical” in the sense that “they indicate a lack of fair and careful consideration” or “fail to indicate ‘any course of reasoning and the exercise of judgment’” *Comm'r of Ins. v. Rate Bureau*, 300 NC [381] at 420, 269 SE2d [547] at 573 [(1980)] (citations omitted).

ACT–UP Triangle v. Commission for Health Servs., 345 NC 699, 707, 483 SE2d 388, 393 (reciting *Lewis v. N.C. Dep't of Human Resources*, 92 NC App 737, 740, 375 SE2d 712, 714 (1989) (citation omitted)).

Keefe’s Failure to Disclose the Mississippi Litigation

13. USG complied with 01 NCAC 05B .1519(a)(1) by timely submitting a request for protest containing reasons why USG was concerned with the award. Ex. 71.

14. The Hearing Officer wrongly failed to consider USG’s Amended Protest Letter. Even as the designee of NCDPS, he needed only to look ahead at the OAH for guidance on how best to proceed in this regard.

15. Unless conflicted, the Rules of Civil Procedure apply to administrative hearings. 26 N.C.A.C. 03.0101. As in the General Courts, leave to amend is freely and generally allowed. *Cf.*, Rule 15 (amendment allowed by right, consent, or leave “freely given”); *Mauney v. Morris*, 316 N.C. 67, 340 S.E.2d 397 (1986) (amendment “freely given” absent material prejudice).

16. Like here, material facts and/or documentation in a dispute are often possessed or controlled by the entity pursued, and diligence and discovery are required to ferret such out; it is a significant reason we allow discovery. Our rules by design, generally support the diligent, and not the obfuscator, regardless of whether obfuscation is with purpose or negligence. As an axiomatic principle, the law prefers matters decided on the merits. *Mangum v. Surles*, 281 N.C. 91, 99, 187 S.E.2d 697, 702 (“it is the essence of the Rules of Civil Procedure that decisions be had on the merits and not avoided on the basis of mere technicalities.”)

17. Perhaps anecdotally, in *Corvel v. N.C. Dept. of Admin.*, 19 DOA 05891, 2021 WL 1087852 (N.C.O.A.H. 2021), the respondent agency considered an amended bid protest submitted more than 30 days after the date of contract award.

18. Nonetheless, a judge generally is afforded broad discretion regarding amendment of pleadings. Such is interlocutory and cannot be disturbed absent abuse of discretion; yet even this broad discretion is not unfettered. An outright refusal to grant a proposed amendment without any reasonable explanation in the record constitutes abuse rather than an exercise in discretion. *Henry v. Deen*, 61 N.C.App. 189, 193-4, 300 S.E.2d 707, 710 (1983).

19. Here though, broad discretion is not subscribed to an intra-agency hearing officer. He is not a judge actually or practically speaking. This is especially relevant when he is appointed by the defending agency and/or serving as interim general counsel.

20. To any extent it matters, the Hearing Officer abused his discretion, committed error, failed to act as required by law, and was arbitrary or capricious in failing to consider the issues contained in the Amended Protest Letter and argued at the protest hearing.

21. Regardless of the propriety of the Hearing Officer’s conduct on this matter, it ultimately falls to this Tribunal to fully consider and decide this case. G.S. § 150B-34 (OAH has final decision-making authority).

22. For all the preceding reasons and authority, the undersigned certainly considers the

matters presented, to include disqualification of Keefe.

23. Clearly the Mississippi Litigation is responsive to Sections 4.3 and 4.4 of the RFP. However, at issue is whether NCDPS was required thereby to disqualify Keefe. *See*, Findings, paragraphs 201-206.

24. USG argues that, under Section 2.9(t) the words ‘shall’ or ‘must’ generally denote a mandatory requirement, and the failure to meet it relative to the Mississippi Litigation necessitates disqualification.

25. In contrast, Section 3.6 of the RFP generally provides a savings clause indicating that no one requirement “shall automatically disqualify a Vendor from consideration.”

26. “When general terms and specific statements are included in the same contract and there is a conflict, the general terms should give way to the specifics.” *Dev. Enterprises of Raleigh v. Ortiz*, 86 N.C. App. 191, 194, 356 S.E.2d 922, 924–25 (1987) (citing *Wood-Hopkins Contracting Co. v. N.C. State Ports Auth.*, 284 N.C. 732, 202 S.E.2d 473 (1974)). Therefore, Sections 4.3 and 4.4 individually control, independent of Sections 2.9 and 3.6.

27. As to Section 4.3, it is debatable how much knowledge or expertise the agency has demonstrated, and therefore how much “due regard” they should be allowed per G.S. § 150B-34(a). Given the incredibility of the testimony of Messrs. Kish and Coleman, perhaps not much. However, the undersigned is mindful that North Carolina affords deference to an administrative agency’s interpretation of a statute it administers. *Frye Reg’l Med. Ctr., Inc v. Hunt*, 350 N.C. 39, 45, 510 S.E.2d 159, 163 (1999) (“The interpretation of a statute given by the agency charged with carrying it out is entitled to great weight.”) (citation omitted); *Carpenter v. N.C. Dep’t of Hum. Res.*, 107 N.C. App. 278, 279-80, 419 S.E.2d 582, 584 (1992) (requiring deference “so long as the agency’s interpretation is reasonable and based on a permissible construction”), *disc rev. improvidently granted*, 333 N.C. 533, 427 S.E.3d 874 (1993). In sum, the Tribunal cannot conclude that the agency’s interpretation here is unreasonable or not based on permissible construction.

28. As to Section 4.4, it is clearer. Material breach is not the same as disqualifying; rather, it is disqualifiable. “Judicial decisions and text books on the law of contract are in agreement that where there is a material breach of the contract going to the very heart of the instrument, the other party to the contract may elect to rescind and is not bound to seek relief...” *Wilson v. Wilson*, 261 N.C. 40, 43, 134 S.E.2d 240, 242 (1964).

29. While the allegations contained in the Mississippi Litigation are troubling, and Director Coleman’s testimony that he considered Keefe’s failure to disclose the Mississippi Litigation to be a minor technicality is suspect, the Tribunal will not substitute its judgment in place of the agency’s. *Craven Reg’l Med. Auth. v. N.C. Dep’t of Health & Human Sers.*, 176 N.C. App. 46, 59, 625 S.E.2d 837, 845 (2006).

30. Therefore, the Tribunal cannot reasonably conclude that NCDPS erred in failing to disqualify Keefe from the RFP process.

The Award and Cancellation of the Contract to Keefe

31. The subject contract qualifies as a zero-dollar contract in that it did not require the expenditure of government funds. *See*, 01 NCAC 05B .0301. Rather, NCCE receives commissions from vendor sales, rent, and reimbursement. *See*, Findings, para 49.

32. As a zero-dollar contract that falls below the small-purchase benchmark, there was

no legal requirement that this contract be competitively procured, including through an RFP. *Id.* (requiring informal bidding procedures for expenditures of public funds exceeding the Small Purchases Benchmark of \$25,000 and formal bidding procedures for expenditures of public funds exceeding the Bid Value Benchmark or General Delegation established by the State Purchasing Officer); *see also*, Ex. 105 at 21 (stating that competition is not required for commodity and service purchases below \$5,000).

33. Furthermore, the NCDPS Procurement Manual “applies to the acquisition of all equipment, materials, supplies, printing, and services, through outright purchase, rental, lease, lease-purchase, or installment purchase[.]” Ex. 105 at 5. A no-cost contract obviously does not constitute an outright purchase, rental, lease, or lease-purchase.

34. However, NCDPS chose to conduct a competitive procurement utilizing an RFP, thereby representing to prospective bidders that NCDPS would observe the rules, regulations, and policies attendant to formal, competitive, best value procurements. The RFP is replete with references to Title 01, Chapter 05 of the North Carolina Administrative Code and Article 3 of Chapter 143 of the North Carolina General Statutes. *See, e.g.*, Ex. 5 at §§ 3.1, 3.3, Attachment B, Attachment C; *see also*, Ex. 21 (claiming that “[t]he evaluation was done in accordance with Best Value procurement practices as defined by GS §143-135.9[.]”).

35. Pursuant to principles of “policy, fairness and common sense” the Tribunal reasonably concludes that Title 01, Chapter 05 of the North Carolina Administrative Code, Article 3 of Chapter 143 of the North Carolina General Statutes, and the NCDPS and NCDOA Procurement Manuals, which interpret the foregoing statutes and regulations, govern this procurement. *Peace v. Employment Sec. Comm’n of N. Carolina*, 349 N.C. 315, 328, 507 S.E.2d 272, 281 (1998) (in absence of mandate, we apply principles of “policy, fairness and common sense”).

36. In essence, NCDPS publicized its intention to award the subject contract with “[f]airness and impartiality in all phases of the process[.]” to deal with vendors in an “open, honest and objective” manner, to have integrity as “a principle stock[.]” and to have such integrity untarnished “by even the slightest appearance of impropriety.”

Ex. 105 at § C.

37. Other than the questionable RFQ, NCDPS has yet to abandon its resolve to award the contract pursuant to the subject RFP. In fact, the Tribunal concludes it is in fact too late for the NCDPS to alter course at this juncture, as a matter of law.

38. In allowing this matter to reach the OAH, the Tribunal has acquired legal authority and mandate to meaningfully determine the cause(s). G.S. § 150B-34(a). “An administrative law judge's final decision shall fully dispose of all issues required to resolve the case. . . .” 26 NCAC 03 .0127(c). It would be an utter waste of significant resources were it otherwise. *Peace, supra* (“policy, fairness and common sense”).

39. Petitioners credibly indicate that an extreme amount of effort and expense has gone into this dispute, and they will be given the finality the APA offers and provides. *Id.*

40. The Tribunal likewise concludes that NCDPS is bound by the terms of its own RFP. While the RFP permitted NCDPS to negotiate with vendors, make separate awards to different Vendors for one or more line items, to not award one or more line items, or to cancel the RFP in its entirety without awarding a contract if considered advantageous to the State to do so, neither the RFP nor any other authority permit NCDPS to depart from the stated contract award

methodology, the evaluation criteria or their order of importance once the RFP is published. Ex. 5 at § 3.1.

41. Similarly, NCDPS was and is obligated to award the contract according to the applicable statutes, regulations, and procedures.

42. Section 3.3 of the RFP provides that the procurement for the Offender Packaging Program was a best value procurement. Ex. 5.

43. In a best value procurement, “[a]n evaluation committee evaluates offers in accordance with the stated evaluation factors.... Relative strengths, deficiencies, weaknesses, and risks supporting the evaluation shall be documented in the contract file.” Ex. 105 at 35; Ex. 106 at 70; see also Tr. 11/9/2022 46:2–6.

44. In Section 3.1, the RFP provides that “[a]ll qualified proposals will be evaluated, and awards will be made to the Vendor(s) meeting the RFP requirements and achieving the highest and best final evaluation, based on the criteria described below.” Ex. 5. The RFP defines a qualified proposal as “[a] responsive proposal submitted by a responsible Vendor.” Ex. 5 at § 2.9(p). A responsive proposal is “an offer that conforms to the requirements of the solicitation.” 01 NCAC 05A .0112(32). A responsible Vendor is “a Vendor who demonstrates in its Offer that it has the capability to perform the requirements of the Solicitation.” *Id.* at .0112(31).

45. “All criteria to be used in the evaluation of offers shall be identified in the solicitation and then those identified must be used during the evaluation and in making or recommending the award.” Ex. 105 at 40; *see also*, 01 NCAC 05B .0309(a) (“The evaluation criteria to be used in determining the award of Contract shall be identified in the Solicitation document.”).

46. Section 3.4 of the RFP contains 9 evaluation criteria listed in order of importance. Ex. 5.

47. “The evaluation committee shall determine a final ranking of all offers under consideration using only the criteria set forth in the solicitation document.” Ex. 105 at 35; Ex. 106 at 71; see also Tr. 11/9/2022 46:7–11.

48. “Award must be made to the responsive and responsible [vendor] whose offer is determined in writing to be the most advantageous to the state, using all evaluation factors set forth in the solicitation.” Ex. 105 at 36; Ex. 106 at 71; *see also*, 01 NCAC 05B .0309(a) (“In determining the award of Contract, Responsive Offers shall be considered and evaluated as provided by statute and applicable rules”).

49. The RFP provides that an award to the Vendor with the highest and best final evaluation based on the evaluation criteria results in an award most advantageous to the State. Ex. 5 at §§ 3.1, 3.4.

50. “Once evaluation and negotiations have been completed with the selected vendor(s), the agency must prepare a written narrative summarizing the rationale for the selected offer as well as the reasons for non-selection of offers. The summary shall address the merits of the offer relative to the solicitation document and address positive or negative attributes as well as weak or non-supportive factors.” Ex. 106 at 72.

51. “Evaluation scoring sheets, and other materials utilized to determine the ranking or assessment of the Responsive Offers shall be retained in the Agency Procurement File.” 01 NCAC 05B .0309(c); *see also*, *Id.* at .1903.

52. There were two separate and distinct evaluations in this procurement, the first of which resulted in the Recommendation of Award to USG on February 2, 2021, and the second of which resulted in the Recommendation of Award to Keefe on June 25, 2021.

53. The credible testimony and preponderance of the evidence establish that only the evaluation that resulted in the Recommendation of Award to USG substantially complied with the requirements for best value procurements stated above. The Evaluation Committee comprised of Mr. Kish, Mr. Robbins, and Ms. Miller evaluated Keefe's and USG's proposals against the 9 evaluation criteria in the RFP in order of importance, reached a consensus, unanimously recommended that the contract for the Offender Packaging Program be awarded to USG, and sent Director Coleman a reasoned, written explanation of their recommendation. Director Coleman accepted the Evaluation Committee's Unanimous Recommendation of Award and sent the Recommendation of Award to USG to Purchasing with the understanding that the contract would be awarded to USG.

54. While the First Evaluation stopped short of an award letter to USG, the procurement process after February 2, 2021, departed from the requirements for best value procurements stated above. Though it was appropriate for Director Coleman to request vendor presentations and issue requests for BAFOs under Section 3.3 of the RFP, neither Dr. Vann nor Director Coleman were on the Evaluation Committee, and the Evaluation Committee had already completed evaluation. BAFO could only reiterate what was already realized.

55. Moreover, the record reflects that Dr. Vann did not evaluate the proposals against the 9 evaluation criteria in order of importance and that, when voting for Keefe in response to the Outlook Survey, Mr. Kish relied solely on the BAFOs instead of taking all 9 criteria into consideration.

56. The Recommendation of Award to Keefe did not include any rationale for recommending that the contract be awarded to Keefe, nor is there any such contemporaneous written rationale in the record.

57. While the Tribunal concludes that NCDPS never consummated a contract with USG on or about February 2, 2021, because NCDPS did not send USG notice that it had been awarded the contract triggering Keefe's protest rights, the record demonstrates that the best value evaluation resulting in a recommendation of award to USG was complete, and that but for Director Coleman's non-compliance with applicable law and procedure after February 2, 2021, the only remaining step was completing BAFO and the ministerial task of sending USG a notice of award.

58. In sum, NCDPS did not err by cancelling the contract award to Keefe. Rather, NCDPS failed to use proper procedure, failed to act as required by rule and law, and acted in an arbitrary and capricious manner in failing to conduct the evaluation of the proposals after February 2, 2021, in accordance with the stated terms of the RFP, and deprived USG of a property right and substantially prejudiced USG by awarding the contract to Keefe instead of USG.

The Decision to Rebid the Contract

59. The preponderance of the evidence establishes that NCDPS failed to provide its Hearing Officer with the documents that establish that but for NCDPS's departure from applicable law and procedure after February 2, 2021, NCDPS would have awarded the contract to USG. *See*, Exs. 2, 4, 47, 55–56. NCDPS likewise deprived USG of the ability to incorporate these key documents in its bid protest and effectively raise them with the Hearing Officer because NCDPS did not produce them to USG in these contested cases until July to August 2022, notwithstanding

USG's diligence. *See*, Ex. 13.

60. Therefore, the Hearing Officer's decision to rebid the contract was arbitrary and capricious because it was not based on fair and careful consideration of the material facts of this procurement, which were in the possession, custody, and control of NCDPS but had not been delivered or made available to the Hearing Officer. *See*, ACT-UP Triangle, *supra*.

61. This Tribunal makes no finding as to whether this obfuscation or failure to produce all relevant materials to the Hearing Officer was in bad faith. Moreover, the Tribunal has considered Keefe's argument that Mr. Kasper had a practical conflict of interest given his dual role and finds that the record is devoid of any evidence that Mr. Kasper's status as Interim General Counsel colored his determination of USG's bid Protest as the designated Hearing Officer.

62. NCDPS's failure to provide its Hearing Officer with a complete procurement record deprived USG of a property right and substantially prejudiced USG because USG has been deprived of the benefit of the full contract for the Offender Packaging Program since September 29, 2021—the date of the Bid Protest Decision Letter—because USG has been forced to split the contract with Keefe under the RFQ, thereby decreasing USG's net revenues and percentage net margins. *See* Ex. 109.

63. The Tribunal further finds that NCDPS acted arbitrarily and capriciously and substantially prejudiced USG's rights as contemplated by G.S. § 150B-33(b)(11) by departing from best value procurement practices, failing to adequately and timely respond to USG's Public Records Request, and failing to ensure the Hearing Officer had a complete and accurate record of the procurement as set forth in the Findings of Fact stated above.

FINAL DECISION

WHEREFORE, based on the uncontested and stipulated facts, Findings of Fact, and Conclusions of Law set forth herein, the undersigned finds that Petitioner USG has met its burden of demonstrating by a preponderance of the evidence that Respondent exceeded its authority or jurisdiction; acted erroneously; failed to use proper procedure; acted arbitrarily or capriciously, or failed to act as required by rule or law; and that Petitioner USG has thereby been deprived of a property right or substantially prejudiced.

Based on the Stipulated Facts, Findings of Fact, and Conclusions of Law set forth herein, the undersigned finds that Petitioner Keefe has not met its burden of demonstrating by a preponderance of the evidence that Respondent exceeded its authority or jurisdiction; acted erroneously; failed to use proper procedure; acted arbitrarily or capriciously, or failed to act as required by rule or law in terminating Keefe's contract or otherwise; and/or that Petitioner Keefe has thereby been deprived of a property right or substantially prejudiced.

The undersigned hereby awards the contract for the Offender Packaging Program to USG as modified by USG's BAFO response and instructs NCDPS to take action consistent with and in furtherance of this ORDER.

Specifically, Respondent will immediately terminate the RFQ arrangement with Keefe and USG, and reinstitute the PIE program *in toto* at least to the pre-RFQ status. Respondent, and specifically NCCE, will in every reasonable way, return to its purpose and mission.

If for any reason this ruling is materially upset, the Tribunal rules alternatively that the RFP is appropriately, lawfully, and diligently rebid.

The parties are reminded of G.S. §§ 150B-22 and 33(b)(11).

NOTICE OF APPEAL

This is a Final Decision issued under the authority of G.S. § 150B-34.

Under the provisions of North Carolina General Statute § 150B-45, any party wishing to appeal the final decision of the Administrative Law Judge must file a Petition for Judicial Review in the Superior Court of the county where the person aggrieved by the administrative decision resides, or in the case of a person residing outside the State, the county where the contested case which resulted in the final decision was filed. **The appealing party must file the petition within 30 days after being served with a written copy of the Administrative Law Judge's Final Decision.** In conformity with the Office of Administrative Hearings' rule, 26 N.C. Admin. Code 03.0102, and the Rules of Civil Procedure, N.C. General Statute 1A-1, Article 2, **this Final Decision was served on the parties as indicated by the Certificate of Service attached to this Final Decision.** G.S. § 150B-46 describes the contents of the Petition and requires service of the Petition on all parties. Under G.S. § 150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of Superior Court within 30 days of receipt of the Petition for Judicial Review. Consequently, a copy of the Petition for Judicial Review must be sent to the Office of Administrative Hearings at the time the appeal is initiated in order to ensure the timely filing of the record.

This the 13th day of March, 2023.



Jonathan S. Dills
Administrative Law Judge

CERTIFICATE OF SERVICE

The undersigned certifies that, on the date shown below, the Office of Administrative Hearings sent the foregoing document to the persons named below at the addresses shown below, by electronic service as defined in 26 NCAC 03 .0501(4), or by placing a copy thereof, enclosed in a wrapper addressed to the person to be served, into the custody of the North Carolina Mail Service Center who subsequently will place the foregoing document into an official depository of the United States Postal Service.

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This the 13th day of March, 2023.



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