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May 27, 2022

E. Wade Mullins, III, Esquire
Bruner, Powell, Wall & Mullins, LLC
PO Box 61110
Columbia, SC 29260-1110

RE: Protest Decision
RFP No. 21-2221, Food Service Management Company Contract

Dear Mr. Mullins:

This correspondence acknowledges receipt of the procurement protest you submitted on behalf of Southwest Food Service Excellence, LLC ("SFE"). SFE protests the Notice of Intent to Award this contract to Sodexo on two primary grounds. First, SFE argues that Sodexo's proposal is not responsive. Second, SFE challenges the evaluation panel's composition and scoring. In accordance with the Procurement Code, I have conducted an administrative review of the protest. For the reasons explained below, SFE's protest is denied.

1. Sodexo's Proposal Is Responsive to the RFP

After receipt and opening of the proposals, the District evaluated each of them to determine whether they were responsive to the requirements of the RFP. Sodexo's proposal was determined to be responsive. The proposal of SFE was found to be deficient in two areas regarding its responsiveness. The District allowed SFE an opportunity to correct its proposal to correct those deficiencies. Based on the review of Sodexo's proposal, there were no deficiencies.

SFE's protest alleges multiple areas of non-responsiveness on the part of Sodexo. For example, you assert that the proposal is non-responsive because it refers to possible price adjustments. The RFP, however, specifically contemplates that possibility, so this language does not render the proposal non-responsive. In fact, SFE should be familiar with this process because it has relied on it in prior years to request price adjustments.

You also claim that Sodexo imposed certain conditions and limitations on its proposal in multiple instances. However, having studied the entire RFP and the Sodexo proposal as a whole, I disagree with your characterization of the proposal as non-responsive. The specific language you refer to in the protest does not render the Sodexo proposal non-responsive. Sodexo's proposal reasonably met the requirements of the RFP and was found to be responsive. Accordingly, SFE's protest on the alleged non-responsiveness of the Sodexo proposal is denied.

2. Composition of Evaluation Committee

As part of its protest, SFE questions the composition and fairness of the evaluation panel. Pursuant to the RFP, the District established a diverse committee to evaluate and score the proposals. The RFP contained suggestions for the composition of the committee, but did not mandate exactly who would serve in this role. For this solicitation, the evaluation panel consisted of a finance manager, a Board member, a community member, two school principals, a bookkeeper, a school nurse, and Gary Black, Contract Administrator for the School Food Service Department. I conclude that the composition of this panel was appropriate and does not support SFE's protest of the award.

SFE also challenges Mr. Black's participation on this panel, alleging that he and other unnamed members of the committee were biased against SFE. Your protest states that Mr. Black does not speak with representatives of SFE. I have determined that your accusation is not correct. Mr. Black interacts and speaks with SFE personnel regularly. I have not seen any evidence of bias by any member of the evaluation panel.

You also suggest that Mr. Black may have been involved in the separate issue involving the over-reporting of meals served. However, Mr. Black did not have a password or access to the meal counts, so he could not have been the person who altered the daily meal counts. Therefore, your protest on this basis is denied.

3. The District and the Evaluation Panel Properly Considered the Proposals

SFE's protest also alleges that the evaluation process was flawed and improper. Having carefully considered the evaluation process as part of this administrative review, I conclude otherwise.

Each member of the committee independently evaluated and scored the proposals without discussing the scores among themselves. I have examined the scoring sheets and do not see any evidence of impropriety. Therefore, I deny the protest on this ground.

You also claim that the District failed to consider the fixed prices for breakfast and snacks in its cost/price evaluation. That assertion is mistaken. The RFP included a conversion formula for breakfast and snacks. The conversion formula confirms that the meal costs were calculated correctly.

You also complain about the District applying 5 of 20 points to evaluate the financial condition and stability of the offerors. The RFP did not specify how those 20 points were to be allocated, and did not prohibit this method of evaluation. This basis of your protest has no merit, and it is denied.

In summary, I conclude that this procurement was conducted in accordance with applicable laws and with open and free competition. I also conclude that the evaluation procedures were applied

properly, resulting in a Notice of Intent to Award to the highest ranked, qualified, and responsible offeror.

My decision on this protest is final and conclusive unless SFE requests in writing a further administrative review by the District Procurement Review Panel pursuant to Section 4410 of the District Procurement Code. Any such request must be submitted to me within 10 days of the posting of this decision, and must set forth the reasons for disagreement with this decision denying the protest.

Sincerely yours,

A handwritten signature in black ink that reads "Terri Smith". The signature is written in a cursive, flowing style.

Terri Smith
Executive Director of Auxiliary Services

BRUNER, POWELL, WALL & MULLINS, LLC

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AUTHOR'S E-MAIL: WMULLINS@BRUNERPOWELL.COM

May 16, 2022

VIA EMAIL- procurement@rhmail.org

AND US MAIL

Attn: Executive Director of Auxiliary Services

Rock Hill School District 3

386 East Black Street

Rock Hill, South Carolina 29730

**Re: Protest of Award of Contract for RFP No. 21-2221, Food Service
Management Company Contract
Rock Hill Schools (York County District 3)
Our File No.: 7-3473.100**

To Whom it May Concern:

As you know, this firm has been retained to represent the interests of Southwest Foodservice Excellence, LLC ("SFE") in connection with the above-referenced solicitation issued by Rock Hill Schools (York County District 3)(hereinafter referred to as the "District"). On behalf of SFE, we hereby submit this **Amended Protest** of the District's intent to award RFP No. 21-2221, Food Service Management Company to Sodexo and request a hearing or administrative review, which effectively amends the Initial Protest filed on May 9, 2022. The Intent to Award was posted on April 29, 2022. SFE was the incumbent and an offeror in the above-referenced solicitation. As an Offeror, and pursuant to Section 4210.1.2 of the District's Consolidated Procurement Code (the "Code"), SFE has standing to pursue this protest. SFE's protest is timely filed within 10 days of the posting of the Intent to Award and this Amended Protest is timely filed within 15 days of the Intent to Award.

SFE maintains that it would be in the best interest of the District to conduct a hearing to allow for the presentation of facts, evidence and arguments relating to the protest grounds set forth below. As set forth more fully below, the allegations in this protest involve claims that the District took very unusual and unique actions with regards to the evaluation of the proposals that were violative of the Code. Furthermore, the District erred in failing to deem Sodexo's Proposal non-responsive as Sodexo failed to comply with requirements of the RFP; took exception to essential terms of the RFP; and otherwise attempted to modify requirements of the RFP to limit its liability to the District and improperly pass certain costs onto the District. To the extent that the Executive

Director of Auxiliary Services (“Executive Director”) determines not to conduct a hearing or meeting with the interested parties, SFE requests that the Executive Director provide it with a copy of all additional information considered by the Executive Director as part of the administrative review upon receipt so that SFE would have an opportunity to review and provide any additional information in response in order to ensure that no due process rights are violated. Moreover, SFE would also request to be notified of any deadlines for the submission of any additional information prior to any decision rendered on the protest. SFE’s made a request for all of the documents relevant to this procurement Pursuant to SC FOIA; and the District has represented that it has provided SFE with all of the responsive documents. Should the District provide any additional documents relevant to this procurement, SFE reserves the right to supplement its protests with relevant information.

The protest is based upon the following factual and legal basis:

BACKGROUND

On February 18, 2022, the District issued RFP No. 21-2221. The solicitation sought proposals to establish a contract to provide food service maintenance contract services for the District’s nonprofit school food service program. Section Six of the RFP set forth the format and detail of the content of the proposal required of the vendors along with reference to attachments requiring various information, including but not limited to: (a) a Firm Price Cost Summary; (b) Nutritional Analysis of the 21-day menu cycle; (c) Product Description and portion sizes utilized with menu; (c) a 21-day cycle menu; (d) Marketing Plan; (e) Training Plan; (f) List of additional supplies of expendable and non-expendable equipment; (g) Personnel and Staffing profile; (h) List of School Lunch Programs managed in South Carolina and nationally and (i) a Balance Sheet or Annual Report of the vendor’s last fiscal year of operation.

After submission, each Offeror’s Proposal was to be, first, judged by the procurement officer (“PO”) for responsiveness and, after responsiveness was determined, evaluated and scored by an evaluation panel along with the pursuant to the published evaluation criteria in the RFP. The RFP contemplated that the Price/Cost Proposal (Attachment B) was to be, first, judged for responsiveness by the PO and, after responsiveness was determined, evaluated and scored by PO, using an objective formula that awards the lowest cost per meal equivalent all of the available points and the other offerors a pro rata portion of the points based on the percentage difference between the price proposals. The RFP also provided that the evaluation panel would not be provided the information on the price/cost proposals at the time they were conducting the evaluation of the proposal using the remaining award criteria.

Section 1530.5 of the Code requires the RFP to set forth the evaluation factors, including their relative importance, to be used in evaluating the proposals. Furthermore, the Code and the RFP provide that the evaluators must limit their review and evaluation to those factors set forth in the RFP. Neither the evaluation panel nor the PO may consider factors outside the RFP nor are they free to deviate from what is set forth in the RFP. The RFP set forth the following Evaluation

Criteria and the accompanying points that were allocated to each of the criteria that totaled 100 points:

Evaluation Criteria	Maximum Score
Price Per Meal Guarantee (see guidance notes/requirements-must be the heaviest weighted item)	40
Quality and variety of menus. Includes: <ul style="list-style-type: none">• Product specifications• Nutrient analysis	20
Capacity and experience of FSMC. Includes: <ul style="list-style-type: none">• Total business experience• Experience with similar size SFAs and schools• References• Financial condition/stability• Business Practices• Personnel management and professional standards plan	20
Experience of proposed onsite management team. Includes: <ul style="list-style-type: none">• Total business experience• Experience with similar size SFAs and schools	10
Promotion/marketing plan and involvement of students, staff, parents Presentation- Transition plan, long term vision, staffing retention plan.	10
Total	100

With regards to the Price/Cost Proposal, the RFP required the offerors to submit a Firm Price Cost Summary as set forth in Attachment B to the RFP. Attachment B required the following information to be included in the Firm Price Cost Summary:

Total Firm, Fixed Price Cost:	Fixed Price Per Meal
• Reimbursable Breakfasts	\$ _____
• Reimbursable Lunches	\$ _____
• Reimbursable Snacks	\$ _____

The RFP indicated that points for the price/cost section of the evaluation will be calculated by a District representative. The per meal equivalent guarantee was to be calculated using the lowest per meal equivalent guarantee submitted by any offeror divided by the per meal equivalent guarantee offered by the specific offeror being evaluated. That result should then be multiplied by the weighted amount to obtain the maximum points to be awarded. See RFP. p.114. Attachment B and Section 9 of the RFP clearly contemplated that the Offeror was to provide a separate fixed price per meal for Breakfast, Lunch and Snacks, which would be considered in the Cost/Price evaluation. However, the District for some inexplicable reason failed to consider the fixed prices per meal for Breakfast and Snacks in its Cost/Price evaluation. Moreover, the Fixed Firm Price Cost Summary also required the Offeror to provide its Surplus Guarantee. As reflected in the title of Attachment B, this pricing was to be firm fixed pricing for the life of the contract (1 base year with 4 renewable options for the District). The RFP provided that “[a]ny provision, including adjustments to payments that will be used for renewing contracts, must be stated in the RFP/contract, as applicable.” See RFP p. 8. There were no provisions contained in the RFP that provided for adjustments in pricing. In fact, the RFP specifically provided that “[t]he price is not subject to any adjustment on the basis of the FSMC’s cost experience in performing the contract.” See RFP p. 9. Furthermore, the District specifically required that the “Surplus Guarantee amount shall remain constant during each extended one-year contract period.” See RFP p. 39 As such, any efforts by the offerors to reserve rights to modify or adjust pricing in any way would be violative of the RFP.

On or about March 21, 2022, proposals were received. SFE was the incumbent vendor and submitted a proposal along with three other offerors – Sodexo, Chartwells and The Nutrition Group. SFE is not aware of whether the PO complied with the directive and submitted the Proposals to the evaluation committee without the Firm Fixed Price Cost Summary or not. If the evaluation panel was initially provided Price/Cost information that would be violative of the RFP. It does appear the PO performed the evaluation of the Price/Cost using the formula that was provided; however, that evaluation was limited to the Fixed Price Per Meal for Lunches and

ignored the price proposals for Breakfast and Snacks. Moreover, the Surplus Guarantee provided by the Offerors in the was not included in the evaluation of the Price/Cost at all as well. The RFP specifically cites and incorporates as applicable to the RFP the 2016 USDA Guidance Documents for Contracting with Food Service Management Companies. Indeed, the Executive Director Anthony J. Cox cited to these Guidance Documents as authority in the Protest Decision he issued in response to the protest that Sodexo filed during the last Food Service Management Contract procurement. These Guidance Documents provide that the **total cost of the bid/proposal for the breakfast, lunch, a la cart meal service and any other child nutrition program meal service that is operated by the SFA and included in the bid/proposal request, must be used in determining the lowest bid/proposal.** See USDA Guidance for School Food Authorities at p. 56.

According to the RFP, an evaluation panel would be composed of prescribed representatives of certain categories (See RFP p. 113) and the proposals would be submitted to the evaluation panel to independently score the proposals on all the award criteria with the exception of the Price/Cost evaluation criteria, which was to be scored by the PO. The structure of the evaluation panel as set forth in the RFP was to ensure that scoring was arrived at independently and the evaluation was not tainted by conflict of interest or bias. See RFP p. 113-114. The District failed to ensure that the evaluation panel was composed of members free from conflicts of interest and bias when it empaneled Gary Black and other members that possessed known bias and conflicts with SFE. The presence of potential bias and conflicts of interest amongst the evaluation panel irretrievably tainted the evaluation process.

Despite the clear mandate that the District could not change the evaluation criteria, the PO and the evaluation panel modified the evaluation process. With regards to the third evaluation criteria designated as Capacity and Experience of FSMC, the PO and/or the evaluation panel inexplicable calculated 25% of the scoring for that evaluation criteria using the same formula for Price/Cost to evaluate financial condition/stability using cash/cash equivalent and equity. Not only was this method of evaluation a deviation from the RFP, it implemented an arbitrary and capricious method of scoring this evaluation criteria and resulted in scoring method that had no rational relation to the award criteria.

According to the documents obtained from the District, it would appear that the evaluation panel completed its scoring on April 22, 2022. The scoring composite appears to reflect that the scoring was conducted by an evaluation panel comprised of 8 members. After totaling the scores from the evaluators, the scoring was as follows: Sodexo – 738.12; Chartwells – 717.44; SFE – 662.48; and The Nutrition Group – 648.36. On April 29, 2022, the District issued a Notice of Intent to Award to Sodexo.

SFE contends the proposed award to Sodexo is improper and contrary to the RFP and the District Procurement Code. Sodexo's proposal was non-responsive on its face in that it took multiple exceptions to material requirements of the RFP and otherwise qualified its price proposal and improperly shifted liability to the District. As stated, the evaluation of the Fixed Price Cost Summary was arbitrary, capricious and in violation of the RFP and the Code. Moreover, the

scoring of the Capacity and Experience award criteria was performed in violation of the RFP. The advantage provided to Sodexo on the scoring of the Price Proposal was obtained through erroneous and incomplete calculation of the pricing and the remaining award criteria. Moreover, the District's composition of the evaluation panel was violative of the RFP and the Code. There is great disparity in scoring which reflects arbitrary and capricious scoring by the evaluators and reflects consideration of factors outside of the award criteria. SFE asserts that the evaluation process was irreparably tainted by the irregularities in the empaneling of the evaluators and the method of evaluation and the District has no option to ensure compliance with its Code and other applicable statutory and regulatory requirements but to overturn the award to Sodexo and issue a new solicitation.

ISSUES OF PROTEST

- I. Sodexo's proposal was non-responsive to material, essential and mandatory requirements of the RFP in ways that affected price, quality and quantity and performance of the contract and sought to limit its liability to the District; and, as such, Sodexo's proposal should have been rejected.**

Sodexo was non-responsive to the material, essential and mandatory requirements of the RFP and sought to limit its liability to the District as detailed below. These material deviations from the requirements of the RFP clearly affected price, quality and delivery of services at issue and required rejection of the Sodexo proposal. The District's failure to determine the Sodexo proposal as non-responsive was arbitrary, capricious and in violation of the applicable provisions of the Code and regulations.

- A. The RFP required Offerors to provide a FSMC Surplus Guarantee that was to remain constant during each extended one-year contract period. The Sodexo Proposal in multiple instances imposed conditions on the Surplus Guarantee that were not permitted or contemplated in the RFP and otherwise limited its liability to the District.**

Sodexo, in its Fixed Firm Price Cost Summary provided that it would guarantee an annual surplus of \$150,000 in the nonprofit school food service account. The RFP provided that if the accounting reflected that the FSMC (vendor) did not meet the surplus the FSMC would be required to issue payment to the District to meet the shortfall. The RFP was specific in how expenditures would be accounted for in determining whether the Surplus Guarantee had been met. **See RFP pp.38-39.** The Sodexo Fixed Firm Price Cost Summary set forth in Attachment B to the Proposal imposed multiple conditions that severely weakened the Guarantee and limited its obligations to comply with the Surplus Guarantee as represented. The impermissible modifications to the Surplus Guarantee are as follows:

1. Despite the RFP requirement that the Surplus Guarantee remain fixed and constant for the option years of the contract, Sodexo impermissibly limited its Surplus Guarantee to 1 year. *“The guaranteed surplus represents our performance guarantee for the first year of the new contract and is based on historical information from Rock Hill Schools. However, revenues and Sodexo expenditures may vary.”* **Sodexo Proposal, Attachment B, p.6 attached as Exhibit A.**

2. Sodexo improperly retained the ability to modify its Surplus Guarantee if the number of serving days fell below a certain number. Sodexo indicated that it was assuming 180 serving days for breakfast and lunch and that the “financial guarantee will be adjusted for serving days below these levels.” **Sodexo Proposal, Attachment B, p. 7.**

3. Sodexo improperly retained the ability to modify its Surplus Guarantee the attendance fell below a certain number. Sodexo mandated if “the [a]verage daily attendance on campus at levels below 95% of the enrollment identified in the RFP will result in an adjustment of the guarantee.” **Sodexo Proposal, Attachment B, p. 7.**

4. Despite the RFP specifically providing how the accounting would be performed for purposes of determining whether the Surplus Guarantee had been met, Sodexo imposed its own limitations that would reduce its liability on the Surplus Guarantee and impermissibly shifted the risk of increased expenditures to the District.

***Finance Guarantee** – If at the end of the [2022-2023] school year, the Rock Hill Schools child nutrition program does not meet or exceed the agreed-upon guaranteed surplus of \$150,000, Sodexo will guarantee any shortfalls. For purposes of calculating the District foodservice surplus for the Financial Guarantee, the District Labor and District Other Costs shall be no greater than the amounts set forth below.*

.....
***District Costs** – District Labor projected at zero as identified by Rock Hill Schools. District Other Costs are projected at \$390,557 as identified by Rock Hill Schools. Any additional District Labor costs or additional District Other Costs would cause a corresponding adjustment in the guarantee.*

See Sodexo Proposal, Attachment B, p. 8

5. Sodexo conditions its Proposal by dictating that the financial arrangement will be adjusted to reflect additional costs incurred by Sodexo so that they are passed on to the District. Such costs included those incurred in connection with (i) implementation of legislation or other legal requirements, including but not limited to the Affordable Care Act or other health care rules or (ii) increases in benefit costs paid by Sodexo on behalf of covered employees. The adjustment to the financial arrangement will be effective from the date of the event. **Sodexo Proposal, Attachment B, p. 9.**

6. Sodexo impermissibly imposed its own calculation formula for determining the Surplus Guarantee in direct contradiction to the provisions of the **RFP. Sodexo Proposal, Attachment B, p. 9.**

B. The RFP clearly required the Offeror to provide a firm fixed price for Breakfasts, Lunches and Snacks with the firm fixed price remaining firm and fixed for the life of the contract. The Sodexo Proposal in multiple instances imposed conditions on the firm fixed price that attempted to protect itself against future changes in conditions, such as increased costs, that were not permitted by the Code or applicable regulations or contemplated in the RFP and otherwise limited its liability to the District.

1. Despite the fact that there is no mechanism contained in the RFP to provide for a price increased to the fixed price per meal, qualifies its price by providing that it can be increased on an annual basis pursuant to a price index. *“Our fixed price per meal may be increased on an annual basis by the yearly percentage change in the Consumer Price Index for all urban customers, as published by the United States Department of Labor, Bureau of Labor Statistics, Food Eaten Away from Home, South-Size Class B/C.”* **RFP. Sodexo Proposal, Attachment B, p. 8.**

2. Sodexo, in its Proposal, attempts to protect itself against future changes in conditions that would increase its costs by directly passing along those costs to the District such that the total cost to the District cannot be determined.

***Legislative Changes** – In the event of an increase in the city, state or federal minimum wage, **the fixed-price per meal shall be increased** from the legislated dated of such increase by an amount equal to the resultant increase in cost to our company from an increase in wages paid to employees necessary to match similar increases paid locally because of the increase in the minimum wage. In the event of an increase in wages or benefits payable because of unionization or because of the renegotiation and ratification of an existing collective bargaining agreement, **the fixed-price per meal shall, from the date of increase in wages or benefits, increase** by the percentage increase in wage rates and/or benefit.*

See **RFP. Sodexo Proposal, Attachment B, p. 9.**

C. The Sodexo Proposal effectively limits the rights of the District to pursue contract claims that are otherwise permissible and effective in violation of the Code and applicable regulations.

Any proposal that seeks to limit the contract rights of the District must be deemed non-responsive and rejected. The District is well aware of the impermissible nature of such attempts as it requested that another Offeror, The Nutrition Group, remove objectionable

contract stipulations in order for its proposal to be deemed responsive and considered for award. See Emails between PO and The Nutrition Group attached as **Exhibit B**. No efforts were made to remove the Sodexo exceptions and modifications and, as such, the PO's failure to determine Sodexo as non-responsive was arbitrary and capricious and violative of the Code and applicable statutes and regulations. The objectionable exceptions are as follows:

***Waiver of Recovery.** Notwithstanding anything to the contrary set forth in this agreement, with respect to property damage, for which the parties maintain a system of coverage on their respective property, each part hereto waives its rights, and the rights of its subsidiaries and affiliates, to recover from the other party hereto and its subsidiaries and affiliates for loss or damage to such party's building, equipment, improvements and other property of every kind and description resulting from fire, explosion or other cause normally covered in special causes of loss form and builders risk property insurance policies. This clause shall survive termination of this agreement.*

***Consequential Damages.** In no event shall either party be liable for consequential, indirect or incidental damages (including punitive damages and lost profits), even if such party has been advised of the possibility of such damages in advance.*

Sodexo Proposal, Attachment B, p. 9.

The South Carolina Procurement Review Panel has stated:

The Procurement Code define a "responsive offeror" as one who has one who has submitted a[n] ... offer which conforms to all material aspects to the ... request for proposals." S.C. Code Ann. § 11-35-1410(7)(2011). Under the provisions governing RFPs, a proposal must be responsive in order to be evaluated, ranked, and considered for award. S.C. Code Ann. § 11-35-1530(7)(2011). Generally speaking, responsiveness is determined at the time an offer is opened and, unless discussions are conducted under section 11-35-1530(6), is based on the information included in the offeror's proposal.

Appeal by Excent Corporation, Panel Case 2013-2; *Appeal by Heritage Community Service*, Panel Case 2013-1 (May 6, 2013, Order on Reconsideration); See also, *Appeal by Blue Cross and Blue Shield*, Panel Case 2019-2.¹

The only thing that can be discerned from Sodexo's Firm Fixed Price Cost Summary is that the price it is offering the District is neither firm nor fixed. The qualifications and exceptions that its proposal imposes upon the District on its Surplus Guarantee and Fixed Price Meal fee

¹ The RFP incorporates and expressly provides that the S.C. Consolidated Procurement Code is applicable to the procurement. Moreover, the District Code is designed with identical provisions to the State Code with the exception that the District Code does not contain the most recent revisions to the State Code.

effectively prohibits a meaningful evaluation of the true cost to the District. Moreover, Sodexo severely limited the rights of the District when it unilaterally imposed that the District must waive any property damage claims against Sodexo and waive consequential damages and punitive damages it may have against Sodexo. Under any applicable procurement theory, this must result in a determination of non-responsiveness and rejection of Sodexo's proposal. The District was aware of the fatal impacts of qualifying provision contained in proposals and sought assistance from the SC Department of Education. See email from PO to SCDE attached as **Exhibit C**. As stated, the PO notified The Nutrition Group, that its Proposal imposed stipulations that rendered it non-responsive and subject to rejection and gave The Nutrition Group the option to remove the problematic terms which were similar to those deviations in Sodexo's Proposal identified above. See **Exhibit B**. The PO never addressed the non-responsive conditions in Sodexo's Proposal. This arbitrary and capricious failure to take action on an obviously non-responsive Proposal resulted in an award in violation of law. Imposing the ability to modify its surplus guarantee, increase its fixed pricing and limit its liability to the District created an improper advantage to Sodexo and was prejudicial to SFE and the other Offerors. It is impossible to conclude that the award to Sodexo was the result of an open and fair competitive procurement and the award must be overturned.

II. The means and methods by which the evaluation process was conducted, and award determination made was arbitrary and capricious and in violation of the District Procurement Code.

The defects in Sodexo Proposal fully warrants the relief requested herein. However, SFE is compelled to raise the errors in the evaluation process that prevented the fair and open competition that is the objective of the District and the RFP and required by the applicable federal and State statutory and regulatory provisions. Whether the errors were inadvertent or intentional is irrelevant. The effect of this attempted award is to expose the District to potentially significant more costs and performance shortfalls that would have been avoided through award to other vendors.

A. The scoring of the Price Proposals was arbitrary, capricious and lacked any rational or reasonable approach and was otherwise conducted in violation of the Code.

To the maximum extent practicable, the prices evaluated in a competitive procurement must reflect the total cost of ownership. Even if it is not practical to require offerors to propose a total cost of ownership, the evaluation must treat all elements of the cost to the District. It cannot consider the price for one part of the services or supplies while ignoring the other. This principal is expressed in the regulations promulgated under the State Code and which are incorporated and applicable to this procurement. The specifications – must “tak[e] into account, to the extent practicable, the cost of ownership and operation....” S.C. Reg. 19-445.2140B. Moreover, the USDA Guidance referenced above specifically provides the cost for Breakfast and Snacks must be considered in determining the lowest price. Price evaluation must have a reasonable relationship to the actual costs of the service and should reflect which firm's proposal will in fact result in the lowest cost to the District. That did not happen here.

The RFP clearly required the Offerors to provide firm fixed pricing for three separate categories – Breakfast, Lunch and Snacks as well as the Surplus Guarantee. In scoring the Fixed Price Cost Proposal, the District failed to take into account the pricing for Breakfast and Snacks and failed to score the Surplus Guarantee, instead basing the entirety of the 40 point scoring for Price on the Per Meal Lunch fixed price. SFE offered the lowest Lunch price and received all 40 points. Sodexo offered a Lunch price that was close to the SFE price and, as such, received 39.7 points. Chartwells offered a higher Lunch price and received 35.1 points. Because the District did not take into account Breakfast and Snack pricing, the allocation of points for Price failed to recognize that both SFE and Chartwells offered pricing to the District lower than Sodexo for Breakfasts and Snacks. Taking into account the pricing for Breakfast and Snacks as required by the State regulations and the USDA Guidance a material impact on the scoring and created an apple to oranges comparison. The District’s inexplicable decision to require pricing for Breakfast and Snacks and then to ignore the pricing differential in the application of its formula for points allocation was arbitrary and lacked a rational basis. In Re: *Appeal by GPS Insight, LLC*, Panel Case 2021-1; See also, In Re: *Protest of Value Options*, Panel Case No. 2001-7 (equating “arbitrary and capricious” with “a lack of reasonable or rational basis”). For this reason as well, the award to Sodexo must be overturned.

B. The Evaluation Panel that was composed by the District did not comport with the requirements of the RFP to ensure an objective and variety of expertise was represented and to ensure that the evaluation was completed without risk of bias.

The RFP provides the evaluation committee at a minimum should be composed of representatives from 6 categories relevant to the food service contract. This would ensure that there sufficient variety of expertise and objectivity in the evaluation process. It would also protect against any potential bias. Upon information and belief, the evaluation panel in this procurement failed to include representatives from 3 of the 6 categories, including the SC Department of Education, Teacher or other school level personnel and a child nutrition expert. Rather, the Panel seemed to be composed of mostly or finance related and/or administrative and Board representatives. The failure to comply with the RFP in terms of the makeup of the evaluation panel contributed to the arbitrary and capricious scoring conducted by the panel.

C. Upon information and belief, the scoring of the Evaluation Panel was flawed in that the scoring was not determined using independent scoring from the evaluators and was tainted by bias and conflict of interest.

On September 3, 2021, the District’s Chief of Business Services, Terri Smith, alleged that SFE overbilled the District by 315,278 meals, an amount equal to \$847,124.46. SFE underwent a 4-month investigation to determine what could have resulted in said alleged overbilling as SFE managerial employees denied all such wrongdoing. The result of said investigation determined, among other things, that: (i) District employees Gary Black and Tilena Taylor were providing incorrect instruction to both SFE kitchen managers and District employees and administrators as to the proper way to count meals; and (ii) the Google spreadsheet in which SFE employees

entered the meal counts for billing was tampered with, almost every single day, in a way that would increase meal counts. When SFE investigated the Google spreadsheet, there was another person, in the same office suite as the SFE employees (by the basis of the IP address) who was logged using a District employees computer. All SFE employees signed sworn affidavits that they did not engage in changing numbers in the Google spreadsheet. The results of the investigation which was reported to the District was that the computer that was used to modify the Google spreadsheet was under the control of Gary Black and/or Tilena Taylor. Since the submission of SFE's report to the District, both Gary Black and Tilena Taylor will not speak directly with SFE employees, despite working in the same office suite on a daily basis.

SFE submitted this response to the allegations months ago. To date, there has been no response by the District. Rather, the District chose to engage in the competitive procurement process for the current contract by empaneling Gary Black as an evaluator. SFE contends that Mr. Black has exhibited evidence of actual bias against SFE. At best, however, there is an undeniable appearance that Mr. Black possesses a conflict and bias against SFE that would taint any effort to produce an objective independent fair evaluation. Despite this appearance, the District not only empaneled Mr. Black as an evaluator but essentially allowed him to control most aspects of the procurement, further subjecting the outcome to his influence. See email from Gary Black suggesting questions for references of Offerors including SFE to include questions relating to subject matter of the ongoing allegations between the District and SFE attached as **Exhibit D**.

The scoring of SFE's proposal reflects the impact of the existence of the bias. Mr. Black assigned significantly low points to SFE. Moreover, SFE contends that other evaluation panel members who's District positions would have exposed him/her to the bias related to the unresolved issue of overcounting meals impacted the subjective scoring of the proposals. The failure to compose an evaluation panel that was free from the appearance of bias or conflict of interest renders the evaluation and award irretrievably tainted and requires re-solicitation. SFE raises this issue to emphasize the importance of ensuring sanctity of the evaluation process and open and fair competition by selecting unbiased and impartial panel members.

D. The scoring of the Proposals for the Capacity and Experience award criteria was arbitrary, capricious and lacked any rational or reasonable approach and was otherwise conducted in violation of the Code.

Capacity and Experience of the FSMC was identified as an award criteria totaling 20 points which was to be scored by the evaluation panel. There were several subcategories that were factors the Panel would consider in assigning the subjective evaluation. Despite the clear mandate that the District could not change the evaluation criteria, the PO and the evaluation panel modified the evaluation process. With regards to the Capacity and Experience of FSMC award criteria, the PO inexplicably calculated 25% of the scoring for that evaluation criteria using the same formula for Price/Cost to evaluate financial condition/stability using cash/cash equivalent and equity. Not only was this method of evaluation a deviation from the RFP, it implemented an arbitrary and capricious

method of scoring this evaluation criteria and resulted in scoring method that had no rational relation to the award criteria.

The RFP required the offeror to submit a balance sheet of annual report of the offeror's last fiscal year of operation as Attachment M of the proposal. The RFP further provided that this should be evaluated by the District to determine if the information had a material effect on the Offeror's ability to successfully manage the Contract. See RFP p. 80. The requirement that financial information be submitted in response to an RFP is not unusual. In most cases, the information is used by the PO to make a responsibility determination. In some cases, financial stability can be evaluated as a subjective award criteria. However, the only rational method for subjective evaluation is to deduct potential points if an evaluator has concerns that the Offeror's financial condition may impact its ability to successfully manage the Contract. If an evaluator has no concerns, then the full amount of points should be awarded.

In this case, the PO created a new order of the award criteria by assigning dedicated 5 points for Financial Condition/Stability. See Email from PO attached as **Exhibit E**. The PO took this award criteria away from the evaluation panel and calculated the points using the formula historically only used to score Price. The PO summarized her efforts to score this criteria as follows: "[t]he financial stability and condition was weighted at 5 points of the 20 points set aside for 'capacity and experience of the FSMC'. The calculation was based on the each company's equity and cash/ cash equivalent (each section was weighted as 2.5 for a total of 5.'" See the Financial Tally portion of PO Evaluation Summary attached as **Exhibit F**.

The PO's scoring as set forth above was in violation of the RFP, the District Code and arbitrary and capricious for several reasons. First, it created a new separately scored category that deviated from the award criteria set forth in the RFP. Second, it resulted in a modification to the order of importance of the identified award criteria in violation of the Code. Third, even if it was proper to create a new category worth 5 points, the method of scoring this category contravened the stated purpose for evaluating the financial information (that is to determine whether the financial condition/stability had any material effect on offeror ability to perform the contract) and resulted in an assignment of points based on who had the most cash on hand and equity. Furthermore, there is absolutely no rational basis for assignment points based on the formula reserved for pricing. Awarding points for cash on hand measures nothing and could reward vendors for accumulating large amounts of debt in order to hoard cash. Awarding points based on equity rewards gives more points to larger companies for simply being large. The impact of this arbitrary and capricious and irrational method of scoring restricts competition and does not reflect a procurement that fosters an open and fair competitive procurement. The SCDE seemed to recognize the arbitrary nature in which this scoring occurred. See email from SCDE attached as **Exhibit G**. Nevertheless, the method of scoring was maintained which had a material effect on the scoring and the District's ultimate determination of which Offeror's proposal was most advantageous to the District and became the basis for the proposed award to Sodexo.

CONCLUSION

For the foregoing reasons, the notice of award to Sodexo should be cancelled. SFE contends that the Sodexo's Proposal was non-responsive in multiple ways and the evaluation process was egregiously flawed and resulted in an award that was made in violation of the Code. The SCDE warned the District to ensure that the proposed awardee had not qualified its proposal and to ensure that its evaluation process was conducted in a complaint way. See Email from SCDE attached as **Exhibit H**. Unfortunately, the District failed to heed such warning. As such, SFE is requesting the Executive Director of Auxiliary Services issue a decision to mandate re-solicitation under the governing authority set forth in the Code and in accordance with the *Carter-Goble* precedent governing proper remedies for successful protests of competitive sealed proposals.

SFE will rely on these arguments and such additional information as may become available. We are requesting an administrative review and believe that, under these circumstances, a hearing of this protest is in the best interests of the District. To the extent that the Executive Director of Auxiliary Services determines he or she will not hold a hearing, we are requesting copies of all materials provided to you and an opportunity to review and provide comment on such submissions. Furthermore, to ensure due process, we would request that the Executive Director of Auxiliary Services provide all interested parties a deadline by which to produce evidence for the Executive Director of Auxiliary Services to consider in reaching a decision, and the date on which the Executive Director of Auxiliary Services' review will be completed.

Sincerely,



E. Wade Mullins III

EWM/les

cc: Alan D. Smith, Esq.