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July 27, 2023

Vendor: License Office Services, LLC
400 Chesterfield Center, Suite 400 #S7
St. Louis, MO 63017

Point of Contact: Sarah Nicole Dent

Attorney: John D. Landwehr
Cook, Vetter, Doerhoff & Landwehr, P.C.
231 Madison Street
Jefferson City, MO 65101

Re: Warrensburg License Office, Protest of Award for RFPDOR230078

Dear Mr. Landwehr:

The Department of Revenue ("Department") received your protest letter dated June 21, 2023, on behalf of License Office Services, LLC, ("LOS") challenging the above-referenced award to RFPDOR230078. The Department has reviewed your protest pursuant to the authority granted the Department by the Special Delegation of Authority ("SDA537"), executed with the Office of Administration, Division of Purchasing (the "Division"), on December 1, 2021, as well as 1 CSR 40-1.050(12), and considered the information and arguments presented therein. After having done so, the Department denies LOS's protest. Pursuant to SDA537 and 1 CSR 40-1.050(12), the Department will take no further action.

Findings of Fact

- 1) On April 11, 2023, in accordance with SDA537, the Department issued RFPDOR230078 for the Warrensburg License Office ("WLO"), a request for proposal ("RFP") to provide license office services in and around Warrensburg, Missouri;
- 2) On April 24, 2023, the WLO RFP closed;
- 3) LOS and Paul J Wrabec Co., Inc. ("Wrabec") among others, submitted proposals for the WLO RFP;

- 4) On June 6, 2023, after evaluation, the WLO RFP was awarded to Wrabec with a total score of 178.19 points, and LOS came in second with a total score of 155.00 points;
- 5) On June 21, 2023, LOS filed a timely protest, alleging the following:

Point I: License office services are not “supplies.” The decision to utilize the “competitive proposal method” in awarding contracts for license office services is not supported by Section 34.042 RSMo.

Point II: Defective Rulemaking.

Point III: Arbitrary and Capricious Changes.

Analysis

Point I: License office services are not “supplies.” The decision to utilize the “competitive proposal method” in awarding contracts for license office services is not supported by Section 34.042, RSMo.

LOS first alleges that license office services are not “supplies” and that the utilization of the “competitive proposal method” in awarding contracts for license office services is not supported by § 34.042, RSMo.

Section 34.042.1, RSMo, states in part:

“When the commissioner of administration determines that the use of competitive bidding is either not practicable or not advantageous to the state, supplies may be procured by competitive proposals...”

However, § 34.010.6. RSMo, states:

“The term “supplies” used in this chapter shall be deemed to mean supplies, materials, equipment, contractual services and any and all articles or things, except for utility services regulated under chapter 393 or as in this chapter otherwise provided.” (Emphasis added.)

Section 34.042, RSMo allows for utilization of the competitive proposal method for contractual services, such as license office services, as such services are included in the definition of “supplies” under § 34.010.6, RSMo. *Lee's Summit License, LLC v. Off. of Admin.*, 486 S.W.3d 409, 421 (Mo. Ct. App. 2016).

Point I of LOS’s protest is denied.

Point II: Defective Rulemaking.

LOS next alleges that, “The use of new scoring criteria appears to be [a] ‘rule’ because it is generally applicable to all license office bidders, and it describes the procedural requirements for issuing a bid.”

This is inaccurate, because requests for proposals are invitations to submit proposals for a proposed contract, not a statement of general applicability. The RFP will at most apply to one contract that will bind one vendor, no more. Section 34.042.3, RSMo, which authorizes contracts to be awarded based on requests for proposals, states:

The contract shall be let to the lowest and best offeror as determined by the evaluation criteria established in the request for proposal and any subsequent negotiations conducted pursuant to this subsection. In determining the lowest and best offeror, as provided in the request for proposals and under rules promulgated by the commissioner of administration, negotiations may be conducted with responsible offerors who submit proposals selected by the commissioner of administration on the basis of reasonable criteria for the purpose of clarifying and assuring full understanding of and responsiveness to the solicitation requirements. . . .

Section 34.010.2, RSMo, states:

“The term “lowest and best” in determining the lowest and best award, cost, and other factors are to be considered in the evaluation process. Factors may include, but are not limited to, value, performance, and quality of a product.”

Sections 34.042.3 and 34.010.2, RSMo, plainly combine to permit the consideration of any factors deemed relevant by the State in determining the “lowest and best” bidder, so long as those factors are identified as “evaluation criteria” in a request for proposal and are not otherwise expressly prohibited from consideration by statute. *Lee’s Summit License, LLC v. Off. of Admin.*, 486 S.W.3d 409, 421 (Mo. Ct. App. 2016).

Even if the criteria were properly characterized as a rule, the Commissioner of Administration “has discretion to determine when to make and adopt rules.” *LO Mgmt., LLC v. Off. of Admin.*, 658 S.W.3d 228, 238 (Mo. Ct. App. 2022). Section 34.050, RSMo, states:

The commissioner of administration shall make and adopt such rules and regulations, not contrary to the provisions of this chapter, for the purchase of supplies and prescribing the purchasing policy of the state as may be necessary. . .
(Emphasis added.)

The legislature's use of the phrase “as may be necessary” indicates that the Commissioner of Administration has discretion to determine when to make and adopt rules. *Id.*

The scoring criteria at issue are relevant to determining the “lowest and best” proposal, and are not expressly prohibited from consideration by statute, and are clearly identified within the solicitation documents. Under § 34.042, the promulgation of rules to this effect are unnecessary

(even inappropriate), because the criteria are fully set forth in the RFP and because RFP criteria are not statements of general applicability.

Point II of LOS's protest is denied.

Point III: Arbitrary and Capricious Changes.

LOS's third and final point of protest alleges several changes in the RFP "have no apparent rational basis" and are therefore "arbitrary and capricious". Specifically, LOS alleges the following four (4) changes to the RFP are "arbitrary and capricious":

- (1) Inventory Control Experience: Arbitrary favorable scoring for small offices.
- (2) Inventory Control Experience: Arbitrary negative weight given to losses.
- (3) Inventory Control Experience: Arbitrary assignment of responsibility.
- (4) Arbitrary transaction criteria for managers.

The Department may include any criteria in the best interest of the state in the evaluation of submitted proposals. Inventory management and control is an important duty assigned to the license offices and its evaluation is relevant to determining the lowest and best proposal. Pursuant to 1 CSR 40-1.050(10)(G), "In addition to cost, subjective and any other criteria deemed in the best interest of the state may be utilized in the evaluation of bids/proposals provided that the criteria are published in the solicitation document." Similarly, 1 CSR 40-1.050(16) provides "[f]or solicitations using weighted criteria evaluations, the evaluation criteria and point assessment assigned to each criterion, as well as the award process, will be specified in the solicitation documents."

The Department has determined that the vendor's prior inventory control experience and transaction volume for Contract License Office Managers are relevant criteria to determining which submitted proposal would best serve the interest of the state in the evaluation of proposals. All such criteria are published in the solicitation document as required by 1 CSR 40-1.050(10)(G). Further, the evaluation criteria and point assessment assigned to each criterion, as well as the award process, is clearly specified in the solicitation documents as required by 1 CSR 40-1.050(16).

No scoring criteria within the WLO RFP are "arbitrary and capricious" and all criteria are published and specified within the solicitation documents.

Point III of LOS's protest is denied.

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Conclusion

For the reasons set forth above, the Department finds LOS's protest fails to establish a basis for cancellation of the Division's award of RFPDOR230078 to Wrabec. Therefore, LOS's protest is denied. Pursuant to 1 CSR 40-1.050(12), the Department will take no further action on LOS's protest.

Sincerely,

A handwritten signature in black ink that reads "Ken Struempf". The signature is written in a cursive style with a long, sweeping tail on the "p".

Ken Struempf
Director
Motor Vehicle and Driver License Division