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June 21, 2023

Via Email (Tara.Ronimous@dor.mo.gov) & Regular Mail

Ms. Tara Ronimous
Missouri Department of Revenue
301 West High Street
Jefferson City, MO 65101

Re:	Protest of Contract Award for Operation of Warrensburg Office Number RFPSDOR230078
Party:	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

Ms. Ronimous:

I am writing on behalf of License Office Services LLC to protest the award of a contract for a license fee office in Warrensburg, Missouri, Solicitation Number RFPSDOR230078. This protest letter is submitted within ten (10) business days of the award of the contract and is therefore timely.

A. Use of the "competitive proposal method."

Sometime in 2022, the Office of Administration and the Department of Revenue announced the following decision to utilize the "competitive proposal method" in awarding contracts for license offices:

> *It has been determined that the procurement of license office services by means of competitive bidding would be neither practicable nor advantageous to the State of Missouri. Therefore, the Department of Revenue has authority through*

> *SDA537, to utilize the competitive proposal method for the following reasons in accordance with Section 34.042, RSMo.*
>
> *The complex requirements of this solicitation justify the competitive proposal method as being more beneficial than the solicitation of competitive bids. The procurement through the use of competitive proposals will also maximize the state's potential to receive the most flexible and creative solutions from vendors and allow the State of Missouri to select the solution that will provide the optimal combination of price and quality.*

Section 34.042 RSMo is specifically limited to the procurement of "supplies":

> 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. (Emphasis added.)

License office services are not "supplies." The decision to utilize the "competitive proposal method" in awarding contracts for license offices is not supported by Section 34.042 RSMo.

B. Defective Rulemaking.

In the approximately 120 days preceding the scoring of the subject bid, DOR made significant changes to its scoring criteria, including without limitation two major shifts:

- Inventory control experience scoring was changed to use the vendor's overall experience instead of the office manager's experience.
- Transaction processing scoring was changed, significantly increasing the number of transactions required to earn maximum points.

A "rule" is an "agency statement of general applicability that implements, interprets, or prescribes law or policy, or that describes the organization, procedure, or practice requirements of any agency." Section 536.010(6), RSMo. A rule "has future effects and acts on unnamed and unspecified facts." *Dept. of Social Servs., Div. of Med. Servs. v. Little Hills Healthcare, LLC*, 236 S.W.3d 637, 642 (Mo. banc 2007). While not every generally applicable statement is a "rule,"

> Implicit in the concept of the word 'rule' is that the agency declaration has a potential, however slight, of impacting the substantive or procedural rights of some member of the public. Rulemaking, by its nature, involves an agency statement that affects the rights of individuals in the abstract.
> *Little Hills Healthcare*, 236 S.W.3d at 642.

"Rules" used in the bidding process are required to go through the Chapter 536 promulgation process, including being published in the Code of State Regulations in both draft and final form and being approved by JCAR. Sections 34.040.9, 536.021, 536.024 RSMo; *Degraffenreid v. State Board of Mediation*, 379 S.W.3d 171, 184 (Mo. App. W.D. 2012). Failure to go through this process makes the statement used by the agency "null and void." *Degraffenreid*, 379 S.W.3d at 184.

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. *See Little Hills Healthcare*, 236 S.W.3d at 642 (calculation that is applied to all Medicaid-participating providers is generally applicable even though some hospitals are not Medicaid participants); *Degraffenreid*, 379 S.W.3d at 185 ("if a state agency suddenly applies a new (but unpromulgated) generally applicable policy, even *within* a case-specific adjudication, the agency may be at fault for failure to promulgate the new policy"); *Young v. Children's Div., State Dept of Soc. Servs.*, 284 S.W.3d 553 (Mo. banc 2009) (changes in formula used to determine subsidies was a rule and should have been promulgated).

There is no statutory authorization for imposing new scoring criteria. Essentially, DOR "wakes up one morning and decides to change how bids are scored." There is a complete absence of the public input that is envisioned and guaranteed by Chapter 536 RSMo.

C. Arbitrary and Capricious Changes.

Putting aside for the moment the issue of whether recent changes in scoring criteria constitute defective rulemaking, several of the changes have no apparent rational basis.

To meet basic standards of due process and to avoid being arbitrary, unreasonable, or capricious, an agency's decision must be made using some kind of objective data rather than mere surmise, guesswork, or "gut feeling." *Mo. Nat'l. Educ. Ass'n. v. Mo. State Bd. of Educ.*, 34 S.W.3d 266, 281 (Mo.App. W.D. 2000) (citation omitted). "Moreover, an agency which completely fails to consider an important aspect or factor of the issue before it may also be found to have acted arbitrarily and capriciously." *Barry Serv. Agency Co. v. Manning,* 891 S.W.2d 882, 892 (Mo.App. W.D. 1995) (citation omitted).

Under Missouri law, proposed vendors "shall be accorded fair and equal treatment with respect to any opportunity for negotiation . . ." Section 34.044, RSMo. In fact, a contract issued pursuant to an RFP must be *cancelled* if a material provision "gives a bidder a substantial advantage or benefit not enjoyed by other bidders." *State ex. rel. Stricker v. Hanson,* 858 S.W.2d 771, 776 (Mo.App. W.D. 1993). "This test . . . reflects a belief that ***every element which enters into the competitive scheme should be required equally for all and should not be left to the volition of the individual aspirant*** to follow or to disregard and thus to estimate his bid on a basis

different from that afforded the other contenders." *Id.* (emphasis in original; internal citations omitted).

(1) Inventory Control Experience: Arbitrary favorable scoring for small offices.

One of the changes to the scoring criteria calculates lost inventory on a company-wide basis, using losses experienced by the vendor in all of its offices and applying the $175.00 threshold. This change is arbitrary, capricious, and unreasonable in that a bidder with one small office may have losses constituting a significant percentage of its overall volume; as compared with a large vendor with multiple offices having more collective losses company-wide, but a much lower percentage of losses when compared with its overall volume, or when separate locations are compared. This is a thinly veiled effort to favor small offices and single office bidders.

(2) Inventory Control Experience: Arbitrary negative weight given to losses.

The latest changes minimize the reduction in points for suspensions or contract cancellations as compared with inventory losses. According to RFP Section 4.6.4, a bidder who (prior to August 1, 2022) displayed perhaps the most irresponsible level of performance by unilaterally cancelling a contract mid-term, would not be penalized at all! However, a bidder who lost $176.00 of inventory in the past two years would lose eight points. Indeed, a contract cancellation after August 1, 2022, would one year later only result in the loss of seven points. This is an absurd allocation of points and penalties without regard to the seriousness of the activities or impact to the state and the general public.

(3) Inventory Control Experience: Arbitrary assignment of responsibility.

A related change also penalizes large offices. Under the new (unpromulgated) "rules," inventory control experience is the *only* experience category that is now scored based on the vendor and not the office manager. Other similar matters are scored at the manager level:

- Experience in the office
- Presence in the office
- Customer service experience
- Transaction processing
- Other computer experience.

There is no rational basis for singling out inventory control in this manner, and it is unfairly prejudicial to bidders with multiple offices.

(4) Arbitrary transaction criteria for managers.

Prior to the recent changes, a bidder could receive maximum points if the manager had at least 1,000 motor vehicle transactions in the preceding five years. That number was increased to

15,000 (over ten years) for no apparent reason. Similarly, the number for driver's license transactions was increased from 1,000 to 5,000 (over ten years). Once a level of competency is reached (arguably after 1,000 transactions) how is the bid enhanced by the manager having 14,000 more transactions?

More importantly, the new rule unfairly prejudices bidders with larger offices because in large offices, managers for the most part do not perform actual transactions. They supervise subordinates. These highly skilled managers are not given due credit under the new arbitrary criteria which favor small offices where managers typically perform many transactions in addition to their supervisory work.

Based on the foregoing fundamental defects in the scoring processes and the lack of statutory support for the department's actions without formal rulemaking, we request that no transition of the contract for the Warrensburg office be implemented until the foregoing matters are investigated and resolved.

John D. Landwehr

JDL/db