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Sent via E-mail

Tara Ronimous
Missouri Department of Revenue
301 West High Street, Room 218
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Re: Formal Protest to RFPSDOR240116 | St. Charles License Office

Protesting Party:	ACM LLC 9748 Avondale Hills Ln Wentzville, MO 63385
Point of Contact:	Amy Fila 314.960.6188
Attorney:	Alexander C. Barrett Stinson LLP 230 W. McCarty Street Jefferson City, MO 65101 573.556.3601

Ms. Ronimous:

ACM LLC ("ACM") protests the Department of Revenue's ("DOR") award of the contract for Solicitation RFPSDOR240116 (the "RFP") to License Office Services LLC ("LOS") pursuant to 1 CSR 40-1.050(12) and Special Delegation of Authority 537 (SDA537). As this firm represents ACM, please arrange any contact with it regarding this protest through us.

DOR's award of the above-referenced contract to LOS was invalid. First, it appears DOR may have verified only 5 years of Motor Vehicle transaction processing history, rather than 10 years, as required by the RFP. Instead of listing "the last ten (10) years," as is the case for Driver License transactions, the evaluation summary states that DOR evaluated "the last five (5) years" when considering the number of Motor Vehicle transactions the proposed Contract License Office Manager ("CLOM") processed. The solicitation specified that DOR would review the last 10 years to determine the points awarded for both Driver License and Motor Vehicle transactions. DOR is bound by the RFP. *See* RFP at 50. If DOR in fact considered only 5 years of Motor Vehicle transactions, the error is fatal to the solicitation process.

Further, it appears that DOR improperly calculated the number of Driver License and Motor Vehicle transactions processed by ACM's proposed CLOM. Because ACM does not have access to DOR's data, it is unclear what DOR did. But, as explained below, the number of transactions DOR purported to "verify" in the evaluation summary do not match the number of transactions listed in the data DOR *has* made publicly available. Moreover, it appears DOR may have improperly reviewed transactions during the past ten *fiscal years* rather than calendar years. The RFP wording and DOR's own guidance indicated to vendors that DOR would consider transactions processed during the ten-year period immediately preceding the submission deadline (*i.e.*, November 22, 2013 to November 22, 2023). There is no hint in the RFP that DOR would review transactions based on fiscal year. If DOR intended to calculate transaction processing experience by fiscal year, it should have stated as much.

ACM lost the contract to LOS by 10 points. Had DOR properly calculated the number of transactions processed when determining CLOM experience, ACM would have secured enough points to be the winning bidder. ACM respectfully requests that DOR sustain its bid protest, rescind the award to LOS, and award the contract for operation of the St. Charles License Office to ACM. Alternatively, DOR should rescind the award, clarify the RFP, and re-bid.

Potentially Erroneous Time Period Considered for MV Transaction Verification

SDA537 requires DOR to solicit competitive proposals for license office contracts in compliance with § 34.042, RSMo. That statute requires contracts to "be let to the lowest and best offeror as determined by the evaluation criteria established in the request for proposal." § 34.042.3, RSMo. SDA537 similarly requires DOR to "evaluate proposals in accordance with established evaluation criteria identified in the solicitation document(s)." In short, § 34.042 and SDA5327 require DOR to adhere to the evaluation criteria established in the RFP.

Section B-6D of Exhibit A to the RFP offers up to 15 points based on the amount of experience a vendor's proposed CLOM has processing both Driver License (DL) and Motor Vehicle (MV) transactions during the last 10 years (30 points total). The RFP instructions say DOR will "award points based on the transaction ranges listed below." RFP at 50. They further say DOR will consider experience within "the last ten (10) years" for processing experience for both DL and MV Transactions. *Id.* The RFP Evaluation Summary, however, states that DOR verified MV transactions only if processed "[i]n the last five (5) years." RFP Eval. Summary at 4.

Because ACM does not have access to DOR's data and does not know what time period DOR actually looked at, ACM is unclear whether DOR looked only at 5 years of MV transactions (as the evaluation summary says) or 10 years of such transactions (as the RFP requires). It is possible this is simply a typo in the evaluation report that did not impact scoring. However, if it is not, DOR must rescind the solicitation and re-bid. As explained above, DOR is required to award contracts based on the evaluation criteria in the RFP. Here, the criterion was 10 years of MV processing, not 5 years. ACM and every other vendor prepared their proposals based on DOR's representation that it would consider 10 years of MV transaction processing. Application of an illegal criterion, even to

all vendors, renders an award unfair and void. *See Lee's Summit License, LLC v. Office of Admin.*, 486 S.W.3d 409, 417 (Mo. App. 2016)

Unclear and Improper Calculation of
Proposed CLOM's Transaction Processing Experience

Section B-6D of the RFP also says DOR will "verify" the proposed CLOM's experience processing DL and MV Transactions and score each bidder accordingly. RFP at 50. The RFP does not further explain how DOR will "verify" this experience and DOR's evaluation summary does not provide any information about how DOR reached the transaction numbers it purported to "verify" for each vendor. DOR's verification process is arbitrary and capricious and, as discussed below, the transaction numbers in DOR's evaluation summary for ACM's proposed CLOM appear to be facially erroneous based on available data.

DOR's practice of "verifying" information based on its records is arbitrary and capricious, rendering this bidding process patently unfair. "To meet basic standards of due process and 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.'" *Pub. Comms. Servs., Inc. v. Simmons*, 409 S.W.3d 538, 551 (Mo. App. 2013) (quoting *Mo. Nat'l Educ. Ass'n v. Mo. State Bd. of Educ.*, 34 S.W.3d 266, 281 (Mo. App. 2000)). The information on which DOR purportedly relies to make its decision is not publicly available and vendors have no way to review the data to confirm whether DOR has correctly calculated scores. The arbitrariness is exacerbated by DOR's failure to include a worksheet with the evaluation report explaining how it reached its calculations concerning CLOM experience for each vendor, or what time period it considered. We are unaware of any other procurement where the State purports to award evaluation points based on its own data—rather than the contents of a bid/proposal—and does not provide that data to vendors and the public so they can determine whether the evaluation was performed correctly.

Here, DOR awarded ACM 2 evaluation points for DL transactions (1-999 transactions) and 10 points for MV transactions (10,000-14,999 transactions) completed by its proposed CLOM, Arin Farabee (née Fila). *See* RFP Eval. Summary at 3-4. Again, it is unclear how DOR made this determination, as the evaluation summary does not identify how it calculated the transactions she processed. It is impossible for ACM, or anyone else, to verify DOR's calculations. DOR's publicly available transaction processing data apparently were last updated on August 31, 2023.[1] As explained below, the data appear to be organized by fiscal year, even though the RFP is properly read to require consideration of transactions processed in the ten-year period immediately preceding the proposal submission deadline.

Nonetheless, even taking DOR's publicly available data at face value, DOR miscalculated the number of points ACM should have received in Section B-6D. Those data reflect that Ms. Farabee processed 1,092 DL Transactions and 15,528 MV Transactions.[2] Thus, even according to

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[1] License Office RFP Schedule (mo.gov)

[2] FY13–FY22-Transaction-Information.xlsx (live.com)

its own data, DOR wrongly scored this portion of the RFP for ACM. Based on the above-referenced data, DOR should have awarded ACM 5 points for Ms. Fila's 1,092 DL Transactions and 15 points for her 15,528 MV Transactions.

This is not the end of the problems with DOR's evaluation of transaction processing history, however. As noted, DOR's publicly available data appear to be organized by fiscal year.[3] Even that is unclear, though, because the data is preceded by a disclaimer stating: "For informational purposes only, **last updated on 08/31/2023**."[4] Given that the State's fiscal year ends on June 30, we are unclear why "fiscal year" data would be updated on August 31. Regardless, if DOR reached its calculations concerning Ms. Farabee's transaction processing experience by considering transactions she processed during the last ten *fiscal years* rather than counting backward ten years from the submission date, that would likewise render the evaluation and award invalid.

Neither Section B-6D nor the remainder of the RFP define "years" for purposes of calculating transaction processing history. But the RFP references "calendar year(s)" multiple times. In Part 4.6.4 – Evaluation of Vendor Status: Prior History, DOR specifically relies on the calendar year to determine when "[a] vendor will receive evaluation point deductions for prior poor performance on a state license office contract[.]" And, again, in Part 4.8.2 – Motor Vehicle Registration and Tax Clearance Authorization and Release, DOR relies on the calendar year with respect to providing proof of paid personal property tax receipts, requiring vendors to provide proof that "personal property taxes have been paid or were not assessed for the previous three (3) calendar years (*based on the RFP proposal end date*)[.]" RFP at 36 (emphasis added). Like Section B-6D, these sections of the RFP concern vendor/owner history. Thus, it is clear that DOR relies on the calendar year for computing time and the proposal submission deadline as a reference point from which to count back. That is how DOR should have calculated transaction processing history, as this is how vendors would most naturally understand Section B-6D, given the above-referenced provisions and the wording of Section B-6D itself.

By contrast, the RFP mentions "fiscal year" only three times, twice in Part 3.5.1 – Insurance and again in Terms and Conditions – Request for Proposal, 16. Cancellation of Contract. Neither provision relates to how the vendor will be awarded points in its RFP submission.

Consistent with this reading, DOR provides potential bidders with resources about the procurement process.[5] On its webpage, DOR provides links to inform potential bidders of the proposal submission process. One of the links connects potential bidders to "FY13 – FY22 Transaction Information" with an important disclaimer stating: "For informational purposes only, last updated on 08/31/2023. Final RFP evaluations will be based on internal Department data, **which is updated daily**." Through this disclaimer, DOR has advised potential bidders that the

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3 [FY13–FY22-Transaction-Information.xlsx (live.com)](live.com)
4 [License Office RFP Schedule (mo.gov)](mo.gov)
5[License Office RFP Schedule (mo.gov)](mo.gov)

experience of a CLOM will be calculated based on data that is updated daily. Using data that is updated daily is consistent with calculating transaction processing history using the ten-year period running backward from the proposal submission date. After all, if DOR were not considering transaction processing data up until the submission deadline, it would not matter if the data were "updated daily."

Thus, the instructions in Section B-6D are most naturally interpreted to require consideration of transaction processing data from the ten-year period immediately preceding the submission date of the bids. Applying this interpretation, DOR would have needed to verify the number of transactions Ms. Farabee processed from November 22, 2013 through November 22, 2023. This is important because ACM specifically took steps to ensure that Ms. Farabee maximized the number of DL transactions she was processing in the months leading up to the submission deadline in order to maximize the number of points it would earn in Section B-6D, based on the provided instructions. However, based on the number of points received by ACM, it appears DOR instead calculated transactions based on fiscal year. (Again, this is unclear as we do not have a way to access DOR's data.) Calculating transaction history that way is inconsistent with the RFP and DOR's bidding process guidance.

Evaluating transaction processing experience based on the ten-year period immediately preceding the submission deadline is also the only evaluation method that makes logical sense. If DOR cuts off experience tracking at the end of the fiscal year, it excludes a significant amount of otherwise relevant CLOM experience for a contract that will go into effect only *after* the date of submission. This would exclude months of relevant experience without notifying or appropriately apprising bidders of the time period to be considered. The evaluation time period, of course, materially affected how ACM responded to the RFP. As explained above, ACM took steps to ensure that Ms. Farabee got additional DL processing experience in the months leading up to the submission deadline. If DOR had made clear such experience would not be considered, ACM would have structured its proposal differently (*i.e.*, proposing a different CLOM). The bidding process must be structured in a manner so that all bidders have the same opportunity to succeed. "[B]id documents which require bidders to strategically structure bids or offers to receive scores in several categories do not present a 'fair opportunity' to all bidders" if one of those categories is invalid. *Lee's Summit License*, 486 S.W.3d at 417.

Here, the RFP is most naturally read to require DOR to consider transactions processed by Ms. Farabee between November 22, 2013 and November 22, 2023. While we do not have access to DOR's data, we believe that if DOR were to have considered transaction processing from that time period, Ms. Farabee's numbers would have resulted in ACM receiving at least 10 points for DL transactions and 15 points for MV transactions. That would have resulted in an additional 13 evaluation points than ACM actually received in Section B-6D. *See* RFP Eval. Summary at 3-4. Because ACM received a total score that was only 10 points lower than LOS's score, this 13-point increase would have resulted in ACM being awarded the contract.

Because DOR does not appear to have calculated transaction processing history in the manner required by the RFP—and, at a minimum, did not clearly instruct bidders on how transaction processing experience would be calculated—this contract award is invalid.

* * *

For all these reasons, DOR's award of the contract for the St. Charles License Office to LOS was erroneous. DOR should rescind the award and award the contract to ACM. In the alternative, DOR should rescind the award and re-bid the contract. ACM has submitted a sunshine request to DOR seeking additional information concerning the manner in which DOR actually measured/verified transaction processing history. ACM reserves the right to supplement this bid protest after receiving that information.

Sincerely,

Stinson LLP

Alexander Barrett