

IN THE CIRCUIT COURT OF COLE COUNTY, MISSOURI

WORLD WIDE TECHNOLOGY, INC.)

Plaintiff,)

v.)

Case No. _____

OFFICE OF ADMINISTRATION,)

State of Missouri,)

Serve: Sarah Steelman)

Commissioner of Administration)

Capitol Building, Room 125)

Jefferson City, MO 65101.)

and)

DIVISION OF PURCHASING AND)

MATERIALS MANAGEMENT,)

Office of Administration, State of Missouri,)

Serve: Karen Boeger)

Director)

Harry S Truman State Office Bldg.)

301 West High Street, Room 630)

Jefferson City, MO 65101,)

Defendants.)

PETITION FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

World Wide Technology, Inc. (“World Wide”) seeks an order voiding an unlawful procurement for state services and preliminarily and permanently enjoining the Office of Administration from entering into any contract resulting from the unlawful procurement. The state engaged in unlawful practices during the procurement of an expensive and important service. The state’s unlawful practices included failing to follow a lawful process in determining the best price for the product, failing to follow a lawful process in determining minority participation and failing to award legally required bonus points to a successful Missouri

company that employs thousands of Missourians and provides significant contributions to Missouri's economy. For its cause of action, World Wide states as follows:

1. World Wide is a Missouri Corporation with its headquarters in St. Louis, Missouri.

2. The Office of Administration ("OA") is a state agency authorized to procure services for the State of Missouri and its various departments. The Division of Purchasing and Materials Management is the division of OA responsible for procuring supplies, equipment and services for the State of Missouri.

3. All Defendants reside in Cole County, Missouri.

4. Venue is proper in this Court pursuant to Section 508.010, RSMo.

5. This Court has jurisdiction pursuant to Section 536.150,¹ Chapter 526, and Chapter 527 of the Revised Statutes of Missouri, and Missouri Rules 87 and 92.

6. World Wide has a contract with OA to provide PC Prime Vendor Services. The PC Prime Vendor Services contract allows state agencies to purchase from World Wide computer hardware, software, software maintenance, and value-added services (e.g., installation, service plans) on an as needed basis. The contract is set to expire on March 31, 2018.

7. On June 28, 2016, Defendants issued a request for proposals to award a PC Prime Vendor Services contract replacing World Wide's existing contract, identified as RFPT30034901600910 (the "RFP").

8. Defendants issued six addendums to the RFP. An accurate copy of Addendum No. 6, which contains the original RFP and all addendums, is attached as Exhibit 1.

9. The RFP specified the manner in which proposals would be evaluated. Per the

¹ All references are to the 2016 edition of the Revised Statutes of Missouri, as amended.

evaluation criteria in the RFP, an offeror could earn a maximum of 100 points. (See Exhibit 1 ¶ 4.2.1). The points were broken down as follows:

Evaluation Criteria Scoring Category	Maximum Points
Cost Product Type: Desktop Computers.....20 Points Product Type: Portable Computers.....15 Points Product Type: Servers.....8 Points Product Type: Printers.....8 Points Product Type: Peripherals.....8 Points Product Type: Microsoft Software.....15 Points Product Type: All Other Software.....10 Points Product Type: Manufacturer-Provided Value-Added Services.....5 Points Product Type: Contractor-Provided Value-Added Services.....3 Points State of Missouri Purchasing Card (P-Card) Usage Fee.....8 Points	100
Experience of Organization	40
Method of Performance	50
MBE/WBE Participation Commitment	10
TOTAL	200

(Exhibit 1 ¶ 4.2.1).

10. World Wide responded to the RFP. An accurate copy of World Wide’s response to the RFP is attached as Exhibit 2.

11. Two other offerors responded to the RFP: SHI International Corp. (“SHI”) and Technology Group Solutions, LLC (“TGS”). SHI is located in New Jersey. TGS is located in Kansas.

12. After the offerors submitted their proposals, Defendants entered into Best and Final Offer (“BAFO”) negotiations with the offerors.

13. Defendants issued the following BAFO requests: BAFO 1, revised BAFO 1, BAFO 2, revised BAFO 2, BAFO 3, revised BAFO 3, BAFO 4, and revised BAFO 4.

14. After completing BAFO negotiations, Defendants evaluated the proposals and awarded the contract to SHI. An accurate copy of the Evaluation Report is attached as Exhibit 3. Defendants issued the Notice of Award on February 9, 2018.

15. Defendants awarded SHI 197.620 points, World Wide 188.572 points, and TGS 126.960 points. (Exhibit 3 at 5).

16. World Wide submitted a timely bid protest letter to Defendants on February 26, 2018. An accurate copy of the Bid Protest Letter is attached as Exhibit 4.

17. As of the filing of this petition, Defendants have not determined the outcome of World Wide's bid protest.

18. Section 34.042, RSMo, describes the statutory competitive proposal process for contracting in the State of Missouri.

19. The contract "shall be let to the lowest and best offeror." § 34.042.3. The lowest and best offeror shall be determined "as provided in the request for proposals and under rules promulgated by the commissioner of administration." *Id.*

20. "[C]ompetitive bidding procedures for public contracts should ensure that all who may wish to bid shall have a fair opportunity to compete in a field where no favoritism is shown or may be shown to other contestants." *State ex rel. Stricker v. Hanson*, 858 S.W.2d 771, 778 (Mo. Ct. App. 1993).

21. Section 536.150, RSMo, authorizes judicial review of OA's procurement decisions. *See Pub. Comm'ns Servs., Inc. v. Simmons*, 409 S.W.3d 538, 545 (Mo. Ct. App. 2013). Such a review is *de novo*, with the circuit court determining whether the agency's

decision was “unlawful, unreasonable, arbitrary, or capricious or involve[d] an abuse of discretion.” *Id.*

22. The awarding of a contract in violation of the law renders the contract “void and of no effect.” § 34.150, RSMo.

COUNT I
Defendants violated the procurement requirements established in law by
applying unpromulgated rules in awarding the contract.

23. World Wide incorporates the preceding paragraphs of this petition as if fully set forth herein.

24. Per the RFP, offerors could earn a maximum of 100 points in the “Cost” category of the evaluation.

25. The Cost category was further broken down into 10 sub-categories based on “product type.” For example, an offeror could earn a maximum of 20 points for “desktop computers.”

26. The RFP specified a maximum amount of points for each product type, ranging from 3 to 20 points.

27. For each product type, Defendants used the following formula to calculate points:

$\frac{\text{Lowest Responsive Vendor's Price}}{\text{Compared Vendor's Price}}$	x	Maximum Cost Points	=	Cost Evaluation Points
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28. Defendants use the formula described in Paragraph 27 in all procurements that involve cost evaluation. There is an OA template for RFPs that contains this cost formula. When OA trains its employees, it instructs them that this cost formula is used to calculate cost points in all procurements.

29. This cost formula is not required by any statute, nor has it ever been published in the Missouri Register.

30. The RFP allowed a “Maximum 10 points” for “MBE/WBE Participation Commitment.” (Exhibit 1 ¶ 4.2.1). “MBE” stands for Minority Business Enterprise. “WBE” stands for Women Business Enterprise.

31. To calculate and award MBE/WBE participation points, the RFP provided the following standards: If the offeror meets or exceeds the state’s target percentage of participation (10% for MBE; 5% for WBE),² the offeror shall be assigned the maximum points. (Exhibit 1 ¶ 4.6.2(a), (b)). If the offeror’s proposed percentages are lower than the targets, the offeror is assigned “a proportionately lower number” of the maximum evaluation points. (Exhibit 1 ¶ 4.6.2(c)).

32. To assign this “proportionately lower number” of points, the RFP contains a formula:

$\frac{\text{Vendor's Proposed MBE \%} \leq 10\% + \text{WBE \%} \leq 5\%}{\text{State's Target MBE \% (10) + WBE \% (5)}}$	x	Maximum MBE/WBE Participation Evaluation points (10)	=	Assigned MBE/WBE Participation points
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33. Upon information and belief, Defendants use the standards described in Paragraph 31 and the formula described in Paragraph 32 in all procurements that evaluate MBE/WBE participation and assign MBE/WBE participation points.

34. The standards and formula that Defendants use to evaluate MBE/WBE participation and assign points are not required by any statute, nor have they ever been published in the Missouri Register.

35. The commissioner of administration shall make and adopt rules and regulations prescribing the purchasing policy of the state as necessary. § 34.050, RSMo.

² As described in Count II, the RFP incorrectly describes the state’s WBE target percentage of participation as 5%. The target is actually 10%. See 1 CSR 40-1.050(20)(A); Executive Order 15-06.

36. 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.” § 536.010(6), RSMo.

37. “An agency standard is a ‘rule’ if it announces an agency statement of policy or interpretation of law of future effect which acts on unnamed an unspecified facts.” *NME Hosps., Inc. v. Dep’t of Soc. Servs.*, 850 S.W.2d 71, 74 (Mo. banc 1993).

38. The formulas and standards Defendants used to calculate points for cost and MBE/WBE participation were rules.

39. A rule must be validly promulgated to have effect. § 34.050.

40. The rules Defendants used to calculate points for cost and MBE/WBE participation were not validly promulgated.

41. Defendants had previously been advised by this very court that the formula used to calculate costs needed to be promulgated as a rule to be effective, yet they failed to do so.

42. Defendants used these unpromulgated rules in evaluating this RFP, calculating points for all offerors, and awarding the contract to SHI.

43. Defendants’ use of these unpromulgated rules in their evaluation and award violated Section 34.050 and rendered the resulting award of contract void and of no effect. *See* § 34.150; *NME Hosps., Inc.*, 850 S.W.2d at 74.

WHEREFORE, World Wide respectfully requests this Court enter an order declaring that Defendants violated Section 34.050 by applying unpromulgated rules in awarding the contract; declaring that as a result of Defendants’ unlawful award of the contract, the resulting contract is void and of no effect; preliminarily and permanently enjoining Defendants from entering into any contract resulting from the RFP; and providing any other relief that the Court

deems just and proper.

COUNT II

Defendants violated the procurement requirements established in law by calculating MBE/WBE participation points in violation of 1 CSR 40-1.050(20)(A) and Executive Order 15-06.

44. World Wide incorporates the preceding paragraphs of this petition as if fully set forth herein.

45. In conducting the procurement process, Defendants must “avoid being arbitrary, unreasonable, or capricious.” *See Simmons*, 409 S.W.3d at 551. An agency acts arbitrarily, unreasonably, and capriciously if it fails to consider an important aspect or factor of the issue before it. *Id.*

46. The RFP required Defendants award points for MBE/WBE participation based on the state’s target percentages of participation. (Exhibit 1 ¶ 4.6.1).

47. If an offeror committed to meeting the state’s targets, the offeror received maximum points for MBE/WBE participation. (Exhibit 1 ¶ 4.6.2(a), (b)). If an offeror did not meet the state’s targets, the offeror received a proportionately lower number of points for MBE/WBE participation. (Exhibit 1 ¶ 4.6.2(c)).

48. The RFP stated that the state’s target percentage for WBE participation was 5% and the state’s target percentage for MBE participation was 10%. (Exhibit 1 ¶ 4.6.1). The RFP cited Executive Order 05-30 for these percentages. (Exhibit 1 ¶ 4.6.1).

49. The state’s target percentage for WBE participation is 10%, not 5%. In 2015, the governor issued Executive Order 15-06, which “supersede[d] Executive Order 05-30” and increased the state’s target WBE percentage to 10%.

50. Executive Order 15-06 announced: “state agencies shall make every feasible effort to increase the percentage of goods and services procured” from WBEs to achieve the

annual goal of 10% WBE participation.

51. 1 CSR 40-1.050(20)(A) provides: “Executive Order 15-06 states that the State of Missouri’s Annual Aspirational Program Goals for [MBEs and WBEs] are both ten percent (10%) of all state annual procurement funds expended by executive branch agencies. These goals are a benchmark by which M/WBE opportunities to participate in state procurement are monitored and evaluated.”

52. Defendants did not follow the law in calculating MBE/WBE participation points. The RFP calculates points based on the state’s purported target percentage, but fails to use the actual state target percentage set forth in 1 CSR 40-1.050(20)(A) and Executive Order 15-06.

53. The RFP’s method of calculating WBE participation points was unreasonable, arbitrary, and capricious. Under the RFP, if an offeror commits to 10% WBE participation (the state’s target), the offeror is assigned the same evaluation points as an offeror that only commits to 5% WBE participation. (*See* Exhibit 1 ¶ 4.6.2). In other words, an offeror receives no credit for reaching the actual state target of participation; instead, it receives the same credit as an offeror that only meets half of the WBE participation target.

54. The RFP’s method of calculating MBE participation points was unreasonable, arbitrary, and capricious. Even though the MBE participation target is the same as the WBE participation target, the RFP does not treat MBE and WBE participation equally. An offeror that commits to 5% MBE participation does not receive full points, but an offeror that commits to 5% WBE participation does.

55. Because the RFP’s method for calculating MBE/WBE participation was unlawful, unreasonable, arbitrary, and capricious, the contract is void and of no effect. *See* § 34.150.

WHEREFORE, World Wide respectfully requests this Court enter an order declaring

that Defendants did not follow state law in awarding the contract; declaring the procurement was conducted in an arbitrary, capricious, and unreasonable manner; declaring that as a result of Defendants' unlawful, arbitrary, capricious, and unreasonable award of the contract, the resulting contract is void and of no effect; preliminarily and permanently enjoining Defendants from entering into any contract resulting from the RFP; and providing any other relief that the Court deems just and proper.

COUNT III

Defendants violated the procurement requirements established in law by unreasonably, arbitrarily, and capriciously calculating cost points.

56. World Wide incorporates the preceding paragraphs of this petition as if fully set forth herein.

57. Defendants used the formula described in Paragraph 27 of the petition to award points for "Cost." This cost formula compares the offeror offering the low cost bid to the offerors not offering the low cost bid.

58. This formula fails to use a baseline number unrelated to the calculation of all offerors in order to compare the calculations of the proposals.

59. Using this formula, the highest cost offeror will always receive cost points, even if the offer is unreasonably expensive. Conversely, an unreasonably low offer will receive maximum cost points, even if the offer is so low that the offeror cannot perform the contract.

60. As a result, this cost formula awards points unreasonably, arbitrarily, and capriciously, and the contract is void as a result.

WHEREFORE, World Wide respectfully requests this Court enter an order declaring the procurement was conducted in an arbitrary, capricious, and unreasonable manner; declaring that as a result of Defendants' arbitrary, capricious, and unreasonable award of the contract, the

resulting contract is void and of no effect; preliminarily and permanently enjoining Defendants from entering into any contract resulting from the RFP; and providing any other relief that the Court deems just and proper.

COUNT IV
Defendants violated the procurement requirements established in law by
failing to treat the offerors equally.

61. World Wide incorporates the preceding paragraphs of this petition as if fully set forth herein.

62. Defendants did not treat World Wide and SHI equally when evaluating their references.

63. Defendants considered the offerors' "references" a relevant factor in evaluating the offerors' Experience of Organization. (Exhibit 3 at 18). Defendants sought project references and reference contact information from the offerors. (Exhibit 1 B.2).

64. World Wide listed various projects as references and further responded:

WWT [i.e., World Wide] respects and protects the privacy of our customers and it is our policy to withhold specific customer contact information in RFP responses when requested to do so. For questions about the references below, or to obtain additional information, please contact the State of Missouri WWT Senior Account Manager, Molly Jones.

(Exhibit 2). WWT provided Molly Jones' contact information for the projects referenced.

(Exhibit 2).

65. Defendants did not list World Wide's references as a deficiency in the first BAFO request or the revised first BAFO request.

66. An accurate copy of World Wide's response to the revised first BAFO request is attached as Exhibit 5. In this response, World Wide volunteered additional information about its references:

Due to customer concerns related to confidentiality and access to proprietary information, or when NDAs are in place, or when the customer's internal policies do not permit direct contact, the WWT State of Missouri Senior Account Manager will arrange direct contact between the State and the listed reference customers.

However, for the State of Missouri reference projects provided in WWT's original response, we invite direct contact with the following associations: [contact information of various individuals was listed listed].

In WWT's original proposal, we provided a total of 14 reference projects. Including the State of Missouri contact information provided above, 11 of the 14 may be contacted directly by the State, unmediated by WWT. Contact for two reference projects (MEDCOM and MODOT) must be mediated by WWT. One project (U.S.-based Global Aeronautics Manufacturer) is provided as a case study only as the customer prohibits contact of any kind.

(Exhibit 5).

67. Defendants did not list any deficiency regarding World Wide's references in its requests for BAFO 2, revised BAFO 2, BAFO 3, revised BAFO 3, BAFO 4, or revised BAFO 4.

68. The revised RFP provided that: "The evaluator's inability to contact a reference due to incorrect or inaccurate reference information or failure of the reference contact person to respond may be considered an invalid reference." (Exhibit 5).

69. In evaluating World Wide's references, Defendants stated that one of World Wide's references (the State of Missouri) responded with overall positive experience, but "the other two references listed in [World Wide]'s proposal were not contacted since direct contact information for the references was not provided." (Exhibit 3 at 19).

70. Defendants erroneously concluded that World Wide did not provide direct contact information for its references. Defendants failed to consider World Wide's response that contact with certain references was invited but must be arranged through World Wide because of client request or non-disclosure agreement.

71. In evaluating SHI's references, Defendants noted that two of SHI's references "did not respond to the state's reference request." (Exhibit 3 at 18).

72. Defendants did not treat SHI and World Wide's alleged reference deficiencies equally. Defendants determined—albeit erroneously—that World Wide did not provide a way to contact two of its references. Defendants also determined that two of SHI's references did not respond to Defendants' reference request. The remaining references for both offerors were positive.

73. Defendants awarded SHI 40 points—the maximum amount—in his category, but awarded World Wide just 35 points.

74. Defendants failed to treat SHI and World Wide equally in evaluating their references, as required under the law. *See Hanson*, 858 S.W.2d at 778.

WHEREFORE, World Wide respectfully requests this Court enter an order declaring that Defendants awarded the contract unlawfully; declaring that as a result of Defendants' unlawful award of the contract, the resulting contract is void and of no effect; preliminarily and permanently enjoining Defendants from entering into any contract resulting from the RFP; and providing any other relief that the Court deems just and proper.

COUNT V

Defendants violated the procurement requirements established in law by failing to give World Wide preference as a Missouri company.

75. World Wide incorporates the preceding paragraphs of this petition as if fully set forth herein.

76. Chapter 34 of the Revised Missouri Statutes expresses a preference for Missouri companies in competitive bidding. *See* §§ 34.070, 34.073, RSMo; *see also Info. Techs., Inc. v. St. Louis Cnty.*, 14 S.W.3d 60, 65-66 (Mo. Ct. App. 1999) (acknowledging the statutory preference).

77. Defendants did not include a mechanism in the RFP to assign a Missouri company preference as required by law.

78. Although the Method of Performance category allowed Defendants to consider the offerors' economic impact to Missouri, the RFP did not provide a meaningful way to give Missouri companies preference.

79. In evaluating the offerors, Defendants acknowledged and described World Wide's positive economic impact to Missouri and its advantages over SHI (a non-Missouri company). (*See* Exhibit 3 at 20, 23, 24, 25, 27, 28, and 29).

80. Despite recognizing World Wide's economic advantages to Missouri and SHI's deficiencies in this regard, Defendants awarded these offerors equal points in this category, showing the RFP had no meaningful way to give a Missouri company preference as required by Sections 34.070 and 34.073.

81. Similarly, the assessment of points for Cost and MBE/WBE criteria contained no mechanism to assign preference to Missouri companies.

82. The RFP's failure to assign preference to Missouri companies violated Sections 34.070 and 34.073 and rendered the resulting award of contract void and of no effect. *See* § 34.150.

WHEREFORE, World Wide respectfully requests this Court enter an order declaring that Defendants awarded the contract in violation of Sections 34.070 and 34.073; declaring that as a result of Defendants' unlawful award of the contract, the resulting contract is void and of no effect; preliminarily and permanently enjoining Defendants from entering into any contract resulting from the RFP; and providing any other relief that the Court deems just and proper.

COUNT VI

Defendants violated the procurement requirements established in law by awarding the contract to a non-responsive offeror.

83. World Wide incorporates the preceding paragraphs of this petition as if fully set

forth herein.

84. The RFP requested information from offerors regarding their methods to assist users in determining total cost of ownership of products and services acquired through the contract. (Exhibit 1 C.1.2).

85. World Wide fully complied with this requirement, but SHI did not.

86. Defendants found that World Wide “provided a detailed description of how they assist their clients in managing total cost of ownership of products and solutions through the use of collaboration tools to enable continuous process-improvement and deliver metric-monitoring to ensure the process are under control at all times.” (Exhibit 3 at 23).

87. Defendants found that “SHI’s proposal did not specifically address how [SHI] would assist agencies in determining total cost of ownership” (Exhibit 3 at 22) and “SHI did not specifically address total cost of ownership as it relates to services identified in the RFP” (Exhibit 3 at 27).

88. Defendants awarded SHI maximum points in this category. (Exhibit 3 at 22).

89. SHI’s proposal was not responsive to the RFP regarding its method of assisting agencies in determining total cost of ownership.

90. Defendants cannot accept a non-responsive proposal. *See* 1 CSR 40-1.050(18) and (19).

91. Defendants’ award of the contract to SHI when SHI made a non-responsive proposal was unlawful.

WHEREFORE, World Wide respectfully requests this Court enter an order declaring that Defendants awarded the contract in violation of 1 CSR 40-1.050(18) and (19); declaring that as a result of Defendants’ unlawful award of the contract, the resulting contract is void and of no

effect; preliminarily and permanently enjoining Defendants from entering into any contract resulting from the RFP; and providing any other relief that the Court deems just and proper.

Respectfully submitted,

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