

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

PUBLIC COMMUNICATIONS SERVICES, INC., et al.,

Appellants-Respondents,

v.

KELVIN L. SIMMONS, COMMISSIONER OF ADMINISTRATION, et al.,

Respondents-Appellants.

DOCKET NUMBER WD74740 Consolidated with WD74769

Date: September 24, 2013

Appeal from:
Cole County Circuit Court
The Honorable Daniel R. Green, Judge

Appellate Judges:
Division One: Mark D. Pfeiffer, P.J., Victor C. Howard and Alok Ahuja, JJ.

Attorneys:
James R. Layton, Jefferson City, MO, for appellant.
Heidi D. Vollett, Jefferson City and Lowell D. Pearson, Jefferson City, for respondent.

MISSOURI APPELLATE COURT OPINION SUMMARY

COURT OF APPEALS -- WESTERN DISTRICT

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Prior to October 2011, appellant Public Communications Services, Inc. (“PCS”) held the contract to provide telephone services for inmates within correctional facilities operated by the Missouri Department of Corrections (“DOC”). In 2011, the Office of Administration’s Division of Purchasing and Materials Management issued a Request for Proposals (“RFP”) to solicit bids for a new five-year contract, with two optional one-year extensions.

The RFP specified the mandatory requirements which each qualifying bid must contain. The RFP also invited bidders to propose additional, optional services, at an additional per-call-minute charge, if they chose. Seven companies submitted bids satisfying the RFP’s mandatory requirements, including PCS, and the eventual winning bidder, Securus Technologies, Inc. PCS protested the award of the contract to Securus, and then filed this lawsuit, arguing that the Office of Administration had acted arbitrarily and capriciously in awarding the contract to Securus. After conducting a bench trial, the circuit court rejected PCS’ claims. PCS appeals.

AFFIRMED.

Division One holds:

Securus challenges PCS’ standing to challenge the award of the offender telephone services contract to it. As Securus notes, multiple Missouri cases have held that a disappointed bidder competing for a government contract does not have a special pecuniary interest in the award of the contract to it, and therefore generally lacks standing to challenge the award of the contract to another bidder. Despite this general rule, however, Missouri decisions recognize that members of the public have standing to challenge a contract award where the contracting authority exercises its discretion to solicit and evaluate bids unlawfully or capriciously. Because PCS’ arguments contend that the Purchasing Division acted arbitrarily, capriciously, unfairly, and in violating of the competitive bidding process established by chapter 34, RSMo, it has standing to assert its claims.

PCS' first argues that the contract between the State and Securus is void because the State failed to give any analysis, subjective or objective, to the quality or cost of the optional services Securus proposed (at an additional cost), and failed to give other qualified bidders an opportunity to bid on those optional services. PCS argues that, if the additional cost of Securus' optional services is considered, Securus is not the lowest and best bidder, and should not have been awarded the DOC contract.

The circuit court rejected PCS' argument because it concluded that the optional services proposed by Securus did not become part of the contract awarded to it; therefore, the fact that the State failed to evaluate the optional services, or seek competing bids for the supply of those services, was irrelevant. This conclusion is supported by substantial evidence. Under the competitive-bidding statutes, the Office of Administration could not award a contract to Securus that purchased services on which all bidders were not given a fair opportunity to bid. Consistent with this legal requirement, the agency informed PCS before bids were received that it would give all bidders a chance to amend their proposals, if the Office of Administration desired to purchase optional services beyond the RFP's mandatory requirements. The fact that the agency did not evaluate the cost or quality of the optional services proposed by Securus also supports the trial court's conclusion that those optional services did not become part of the contract. Although PCS emphasizes that the notice of contract award stated that Securus' proposal was "accepted in its entirety," in the context of the RFP, and the other surrounding circumstances, that phrase is most reasonably read to refer only to the services required by the RFP, not to any optional services Securus offered to provide at an additional cost.

PCS also argues that the contract is void because the State failed to consider an important aspect of Securus' proposed pricing – its \$6.95 per-transaction fee for prepaid accounts – before determining that Securus was the lowest and best offeror. The evidence indicates, however, that the evaluation committee did consider these fees as part of its subjective evaluation, even though it may not have assigned a specific, numerical value to this aspect of Securus' proposal. The evaluation committee acted reasonably in assessing the prepaid account transaction fees in this manner, because it could reasonably conclude that the precise cost effect of the prepaid account fees could not be accurately estimated. As the State points out, if per-transaction fees are raised, users may respond by making fewer, larger deposits into their accounts to minimize the fees incurred. In addition, Securus' proposal specified that it would not charge *any* fee for prepaid account transactions by check or money order; only transactions conducted with a credit card would be assessed the \$6.95 fee. The record does not reflect the relative percentage of prepaid account transactions during PCS' tenure that were conducted by check or money order, rather than by credit card; moreover, users who intended to fund a prepaid account by credit card might change their behavior, and instead pay by check or money order, when faced with a \$6.95 fee for credit-card transactions.

Before: Division One: Mark D. Pfeiffer, P.J., Victor C. Howard and Alok Ahuja, JJ.

Opinion by: Alok Ahuja, Judge

September 24, 2013

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