



**In the
Missouri Court of Appeals
Western District**

METRC, LLC,	)	
	)	
Appellant,	)	WD83565
	)	
v.	)	OPINION FILED: January 26, 2021
	)	
SARAH STEELMAN, ET AL., AND	)	
BIO-TECH MEDICAL SOFTWARE,	)	
INC.,	)	
	)	
Respondents.	)	

Appeal from the Circuit Court of Cole County, Missouri
The Honorable Daniel R. Green, Judge

Before Division Four: Cynthia L. Martin, Chief Judge, Presiding, Alok Ahuja, Judge and
Mark D. Pfeiffer, Judge

Metrc LLC ("Metrc") appeals from a judgment in favor of the Division of Purchasing and Materials Management¹, the Division of Purchasing and Materials Management's Director, the Office of Administration, and the Office of Administration's Commissioner (collectively "OA"), and Bio-Tech Medical Software, Inc. d/b/a BioTrackTHC ("BioTrack"). The judgment declared that Metrc's contract to provide the

¹The Division of Purchasing and Materials Management is a division within the Office of Administration.

State of Missouri with a medical marijuana seed-to-sale tracking solution did not permit Metrc to charge the State or industry participants for proprietary Radio Frequency Identification ("RFID") tags over and above the firm, fixed price for the seed-to-sale tracking solution set forth in the contract. Metrc argues that the trial court committed legal error in interpreting the contract. Finding no error, we affirm.

Factual and Procedural Background²

On November 6, 2018, the citizens of the State of Missouri adopted Article XIV, section 1 of the Missouri Constitution, addressing the right to access medical marijuana. On March 4, 2019, OA issued a request for proposal ("RFP") soliciting bids from outside organizations to provide a Medical Marijuana Information System to assist the Department of Health and Senior Services ("DHSS") with implementing the medical marijuana program. The Medical Marijuana Information System required three components: (i) a patient registry solution; (ii) a facility licensing application solution; and (iii) a seed-to-sale tracking solution. The only component at issue in this case is the seed-to-sale tracking solution.

OA's RFP was issued pursuant to the competitive bidding process described in sections 34.040³ and 34.042 ("Chapter 34"), which permits the award of a contract to the "lowest and best" bidder. Section 1.2.2 of the RFP provided that it was the vendor's responsibility to ask questions, clarify, or advise OA if the vendor found any of the RFP's language, specifications, or requirements to be ambiguous, contradictory or arbitrary.

²The factual and procedural background is drawn from a joint stipulation of facts and from stipulated exhibits submitted by the parties to the trial court.

³All statutory references are to RSMo 2016 as supplemented unless otherwise indicated.

Section 2 of the RFP described the criteria applicable to selecting a successful vendor, including some that were mandatory requirements and some that were desirable attributes. Each vendor was required to indicate whether it would or would not comply with a noted requirement or desirable attribute, and was advised that the vendor's responses would become "binding in the event the proposal is accepted by the state." Section 2 instructed that if a vendor indicated it would comply with a noted requirement or desirable attribute, "this signifies that compliance to the requirement will be met in its entirety, and the vendor is not partially meeting the requirement." Section 2 generally instructed that "[u]nless otherwise specified herein, the contractor shall furnish all material, labor, facilities, equipment, and supplies necessary to perform the services required herein."

Article XIV, section 1, of the Missouri Constitution requires a seed-to-sale tracking system. A seed-to-sale tracking system tracks medical marijuana plants from their immature plant stage until the product is sold to a qualifying patient or caregiver. Section 2.6 of the RFP outlined the requirements for the seed-to-sale tracking solution. It provided that the tracking solution must include inventory control processes and a tracking system "which may be accessed by Facility Licensees and the state agency, based on internal and external user level permission." Under the general requirements of section 2, "external users" are defined as "Cultivators, Dispensary, Testing, Transportation and Infused Product Manufacturers, Qualifying Patient, Patient Minor, Patient Caregivers and/or Patient/Caregiver Cultivators."

The RFP required vendors who indicated they would comply with section 2 requirements or desirable attributes to complete Exhibit A, Pricing Page. At the top of Exhibit A are the following instructions:

The vendor shall provide ***firm, fixed pricing*** for the original contract period and maximum pricing for each potential renewal period for the Medical Marijuana Information Solution,⁴ for each of the line items specified below, pursuant to all mandatory requirements herein including all software licensing, hosting, maintenance, technical support, implementation, and training. ***The vendor must clearly describe any one-time required firm, fixed costs necessary to meet the RFP requirements*** herein. The vendor must indicate any other relevant information related to the pricing of their proposed products/services.

(Emphasis added.) Section 2.16.3 of the RFP provided that "[o]ther than the payments and reimbursements specified on Exhibit A, Pricing Page, no other payments or reimbursements shall be made to the contractor for any reason whatsoever, including, but not limited to taxes, travel expenses, shipping charges, insurance, interest, penalties, termination payments, attorney fees, liquidated damages, etc." Section 3.18.1 of the RFP addressed conflicts of interest and provided that "[e]xcept for payment as set out in this contract, the contractor and its personnel ***shall not accept any*** collateral gift, ***payment, commission, or other direct benefit arising from or connected to performance under this contract.***" (Emphasis added.)

Interested vendors were instructed to submit the signed RFP; Exhibit A, Pricing Page; and a Technical Proposal consisting of, among other things, a Proposed Project

⁴Exhibit A to the RFP used the term "Solution" instead of "System," and periodically the parties in this case have interchanged the terms. We use the term "System," as that is how the RFP was titled. The parties' inconsistency in referring to "System" or "Solution" is not relevant to resolving the issues in this case.

Implementation Plan. Several vendors submitted proposals in response to the RFP, including Metrc and BioTrack.

Metrc's proposal included a Proposed Project Implementation Plan designated as Exhibit B. In Exhibit B, Metrc explained how it has implemented its marijuana information systems in other states. Under Exhibit B's "State Specific Configuration" section, it states:

Every state government has differing rules and regulations, which have resulted in numerous software configurations and functions and ***features that can be 'switched on/off' as per each state's requirements.*** Metrc employs a best practices approach to its ***customizable configurations*** that borrow from a dozen other states. . . . The Metrc team will work with the State to conduct a Fit/Gap analysis that is designed to configure the system to the State's needs while also identifying gaps that may need additional development.

(Emphasis added.) On the next page, in describing Metrc's seed-to-sale tracking system, Exhibit B states:

The industry-side portal is the way that the licensed marijuana licensees (employees and businesses) will report . . . their seed-to-sale activities, as the state requires. The tagging of plants and packages utilizes multi-model (RFID, bar-code, printed, human readable) ***tags, purchased by the industry directly through the state's Metrc portal. They are then drop shipped from our tag provision facility to the licensed marijuana establishment.*** . . . The tags have proprietary security features that we can discuss during the RFP process only, along with our other security measures.

(Emphasis added.)

Metrc's initial response to the RFP also included Exhibit A, Pricing Page. Section A.3 of Exhibit A described the required pricing information for the seed-to-sale tracking solution and consisted of line items 11 through 15. Line item 11 required Metrc to list the price for a "Firm, Fixed Monthly Subscription including Maintenance for the Seed-to-Sale Tracking Solution ***for 55 internal state agency users and unlimited external users[.]***"

(Emphasis in original.) Metrc's pricing on line item 11 was "\$40.00 per month, per licensed facility (Industry Paid)[.]"

Line Item	Description	Estimated Quantity	Unit of Measure	Original Contract Period Firm, Fixed Price					1st Renewal Period Maximum Monthly Pricing	2nd Renewal Period Maximum Monthly Pricing
				Year 1	Year 2	Year 3	Year 4	Year 5		
11	Firm, Fixed Monthly Subscription including Maintenance for the Seed-to-Sale Tracking Solution <i>for 55 internal state agency users and unlimited external users</i>	12	Monthly	\$40.00 per month, per licensed facility (Industry Paid)	\$40.00 per month, per licensed facility (Industry Paid)	\$40.00 per month, per licensed facility (Industry Paid)	\$40.00 per month, per licensed facility (Industry Paid)	\$40.00 per month, per licensed facility (Industry Paid)	\$40.00 per month, per licensed facility (Industry Paid)	\$40.00 per month, per licensed facility (Industry Paid)

Line item 15 required Metrc to list the price for "Firm, Fixed Monthly additional Subscription Licenses including maintenance for Seed-to-Sale Tracking Solution for internal state agency users in excess of the 55 internal state agency users included in line item 11." Metrc's pricing on line item 15 was: "Plant tags - \$0.45 per plant grown. Package tags - \$0.25 per case level package created. (Industry paid)[.]"

Line Item	Description	Estimated Quantity	Unit of Measure	Original Contract Period Firm, Fixed Price					1st Renewal Period Maximum Monthly Pricing	2nd Renewal Period Maximum Monthly Pricing
				Year 1	Year 2	Year 3	Year 4	Year 5		
15	<i>Firm, Fixed Monthly additional Subscription Licenses including maintenance for Seed-to-Sale</i>			Plant tags - \$0.45 Per plant grown. Package tags - \$0.25 per case level	Plant tags - \$0.45 Per plant grown. Package tags - \$0.25 per case level	Plant tags - \$0.45 Per plant grown. Package tags - \$0.25 per case level	Plant tags - \$0.45 Per plant grown. Package tags - \$0.25 per case level	Plant tags - \$0.45 Per plant grown. Package tags - \$0.25 per case level	Plant tags - \$0.45 Per plant grown. Package tags - \$0.25	Plant tags - \$0.45 Per plant grown. Package tags - \$0.25

<i>Tracking Solution for internal state agency users in excess of the 55 internal state agency users included in line item 11</i>	1	<i>Per User Per Month</i>	package created. (Industry paid)	package created. (Industry paid)	package created. (Industry paid)	package created. (Industry paid)	package created. (Industry paid)	package created. (Industry paid)	per case level package created. (Industry paid)	per case level package created. (Industry paid)
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After reviewing the initial responses received from bidders, OA issued Best and Final Offer ("BAFO") requests to several vendors, including Metrc. OA's BAFO request to Metrc identified several deficiencies in Metrc's proposal with respect to line items 11 and 15 in Section A.3 of Exhibit A. Specifically, OA's BAFO request advised Metrc:

Exhibit A, Pricing Page of the RFP requires the vendor to provide firm, fixed pricing for each of the line items specified on the Pricing Pages. . . .

Metrc, LLC failed to provide unit pricing as required by Exhibit A, Pricing Page for line items 11 and 15. Metrc, LLC provided per month, per licensed facility pricing for line item 11 and plant tag per plant grown pricing and package tag per case level package created pricing for line item 15, which does not comply.

In order for Metrc, LLC's proposal to be considered responsive to the RFP requirements, Metrc, LLC must provide (1) firm, fixed Monthly Subscription including Maintenance for the Seed-to-Sale Tracking Solution for 55 internal state agency users and unlimited external users for line item 11 and (2) Firm, Fixed Monthly additional Subscription Licenses including maintenance for Seed-to-Sale Tracking Solution for internal state agency users in excess of the 55 internal state agency users included in line item 11 for line item 15 on Exhibit A, Pricing Page, as required by the RFP.

On March 27, 2019, Metrc submitted its BAFO response. Metrc did not alter Exhibit B, but did alter its proposed prices on line items 11 and 15 in Section A.3 of Exhibit A. The pricing on line item 11 was altered from "\$40.00 per month, per licensed facility (Industry Paid)" to \$163,200 per year.

Line Item	Description	Estimated Quantity	Unit of Measure	Original Contract Period Firm, Fixed Price					1st Renewal Period Maximum Monthly Pricing	2nd Renewal Period Maximum Monthly Pricing
				Year 1	Year 2	Year 3	Year 4	Year 5		
11	Firm, Fixed Monthly Subscription including Maintenance for the Seed-to-Sale Tracking Solution <i>for 55 internal state agency users and unlimited external users</i>	* 340	40.00	163,200.00	163,200.00	163,200.00	163,200.00	163,200.00	\$13,600.00	\$13,600.00

Metric explained that this "estimated unit total was derived from the state's rules which, projected the total number of expected businesses to be licensed by the state at 340. Our per unit cost per licensed business is \$40 per month making our fixed monthly cost \$13,600."

The pricing on line 15 was altered from "Plant tags - \$0.45 per plant grown. Package tags - \$0.25 per case level package created. (Industry paid)," to \$0.

Line Item	Description	Estimated Quantity	Unit of Measure	Original Contract Period Firm, Fixed Price					1st Renewal Period Maximum Monthly Pricing	2nd Renewal Period Maximum Monthly Pricing
				Year 1	Year 2	Year 3	Year 4	Year 5		
15	<i>Firm, Fixed Monthly additional Subscription Licenses including maintenance for Seed-to-Sale Tracking Solution for internal state agency users in excess of the 55</i>	150	<i>Zero dollars Per User Per Month</i>	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00

	<i>internal state agency users included in line item 11</i>									
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On March 29, 2019, OA emailed Metrc, requesting clarification with regard to line item 11 on Exhibit A of Metrc's BAFO response, as follows:

On line item 11, please clarify whether the pricing stated for the Original Contract Period, years 1 through 5, and the two renewal periods are firm, fixed prices or whether the pricing is dependent upon the number of businesses that will actually be licensed by the state.

Metrc responded, "The amount on Line Item 11 is our firm and fixed pricing. We utilized the state's projection in regulation for total license numbers as a key variable in arriving at our firm and fixed pricing."

OA then scored the proposals it had received. On OA's objective cost evaluation, BioTrack and Metrc scored the lowest when compared to other vendors' proposals, with BioTrack proposing the lowest overall price at roughly 4.3 million dollars, and with Metrc proposing the next lowest overall price at roughly 5.2 million dollars.⁵ OA then performed a subjective evaluation based on vendor responses to requirements and desirable attributes. OA ultimately deemed Metrc's bid to be the "lowest and best" bid. Out of 218 total points, BioTrack scored 139, and Metrc scored 143.

On April 5, 2019, the State awarded Metrc the Medical Marijuana Information System contract. The Notice of Award stated, "The proposal submitted by [Metrc] in

⁵This pricing included the two other required components of the Medical Marijuana Information System (a patient registry solution and a facility licensing application solution) that are not at issue in this case.

response to [the RFP] is accepted in its entirety with the inclusion of [Metrc's BAFO response] and email dated 3/29/19."

On April 18, 2019, BioTrack filed a bid protest challenging the award of the contract to Metrc. Metrc's and BioTrack's seed-to-sale tracking solutions differed. Metrc's seed-to-sale tracking solution would not function unless industry participants used Metrc's proprietary RFID tracking tags. BioTrack's seed-to-sale tracking solution did not require industry participants to use a proprietary tag or to purchase any other tracking device from BioTrack, and instead relied on the issuance of an "18-digit alpha-numeric string for the identifier" that permitted industry participants to use any tag that was compatible with BioTrack's software.

Among other things, BioTrack's bid protest alleged that Metrc's response to the RFP was nonresponsive and misleading because it failed to comply with the firm, fixed pricing requirements and disclose all relevant pricing information, as Metrc intended to charge industry licensees for proprietary RFID tags over and above the firm, fixed price set forth in Section A.3 of Exhibit A. BioTrack also argued that Metrc's proposal violated Article XIV, section 1 of the Missouri Constitution because requiring industry participants to purchase Metrc's proprietary RFID tags would impose an undue burden on licensees. Finally, BioTrack alleged that if OA found it proper to permit Metrc to charge for RFID tags over and above its firm, fixed price, then OA treated vendors unfairly by allowing Metrc to submit a proposal utilizing variable pricing while all other vendors conformed to the firm, fixed pricing requirements. BioTrack asked the State to cancel the contract with Metrc and to award the contract to BioTrack as the next "lowest and best" bidder, or

alternatively, to prohibit Metrc from requiring industry licensees "to use Metrc as the sole provider of expensive RFID tags," as this cost was not disclosed in Metrc's bid.

Metrc responded to the bid protest and stated:

The RFID tag prices charged by Metrc were initially disclosed by Metrc in both Exhibit A, line item 15, and in Exhibit B at p. 9. Thereafter, [OA] requested that Metrc amend Exhibit A, line item 15, to disclose only those firm, fixed fees that would be charged to the State. Metrc did so.

(citations omitted). Metrc's protest response made it clear that Metrc intended to charge industry participants for Metrc's proprietary RFID tags over and above the firm, fixed price on line item 11 of Exhibit A; confirmed that only Metrc's proprietary RFID tags are compatible with its seed-to-sale tracking solution; and described the RFID tags as "a necessary commodity needed to enable the Metrc seed-to-sale tracking system to provide the RFID component desired by the State."

On May 20, 2019, OA denied BioTrack's bid protest. OA concluded that Metrc was not permitted by the contract to charge either the State or industry participants for proprietary RFID tags required for its seed-to-sale tracking solution over and above the firm, fixed price in Section A.3 of Exhibit A of Metrc's BAFO response.

Four months later, on September 20, 2019, Metrc filed a declaratory judgment action against OA in the Circuit Court of Cole County, Missouri. Metrc asked the trial court to declare that the plain language of its awarded contract, and a rule promulgated by DHSS, 19 C.S.R. 30-95.025(7),⁶ permitted Metrc to charge industry participants for

⁶All regulatory references are to the Missouri Code of State Regulations (2019).

On May 24, 2019, several emergency rules governing the medical marijuana industry, including 19 C.S.R. 30-95.025, were filed, and took effect on June 3, 2019. 19 C.S.R. 30-95.025 was replaced with an identical original rule, effective January 30, 2020.

proprietary RFID tags over and above the firm, fixed price in Section A.3 of Exhibit A of Metrc's BAFO response. The trial court granted BioTrack's motion to intervene as a defendant pursuant to Rule 52.12(b).⁷

After a bench trial where the trial court considered a joint stipulation of facts and stipulated exhibits, the trial court issued an order and judgment ("Judgment") in favor of OA and BioTrack. The Judgment concluded that Metrc's contract was not ambiguous and that its plain language did not permit Metrc to charge the State or industry participants for RFID tags beyond the firm, fixed price on line item 11 of Exhibit A of the BAFO response.⁸ The Judgment also concluded that 19 C.S.R. 30-95.025(7) is irrelevant to interpreting Metrc's plain and unambiguous contract because: (1) the rule only permits a contractor to charge for tracking tags if the matter was not "otherwise addressed or prohibited by contract or law," and (2) the rule was issued after OA awarded the contract to Metrc and thus could not have "informed the parties' understanding of what would be allowed under the resulting contract."

Metrc filed this timely appeal.

Standard of Review

The standard of review in a declaratory judgment action is the same as in any other court tried case. *Guyer v. Kirkwood*, 38 S.W.3d 412, 413 (Mo. banc 2001). Thus, the trial

⁷All Rule references are to *Missouri Court Rules, Volume I -- State 2019* unless otherwise noted.

⁸The Judgment alternatively found that "Even if the RFP could be deemed ambiguous (despite Metrc failing to ask any questions regarding what it was permitted to charge prior to submitting its bid or during the BAFO process), the Court would still reject Metrc's reading of the contract" because such a construction "would allow Metrc to impermissibly gain a material advantage over other vendors" by failing to follow the RFP requirement to include all expenses into its firm, fixed price. Metrc does not argue on appeal that its contract is ambiguous. We therefore need not address the trial court's alternative finding.

court's Judgment will be affirmed unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law. *Id.* Here, the issue determined by the trial court was the proper interpretation of Metrc's contract. "Interpretation of a written contract is a question of law" that we review *de novo*. *State ex rel. Pinkerton v. Fahnestock*, 531 S.W.3d 36, 44 (Mo. banc 2017), *abrogated on unrelated grounds by Theroff v. Dollar Tree Stores, Inc.*, 591 S.W.3d 432 (Mo. banc 2020). The trial court interpreted Metrc's contract based on a joint stipulation of facts and stipulated exhibits. "Because the case was submitted on stipulated facts entered into between the parties in the proceedings before the circuit court, '[t]he only question before us is whether the trial court made the proper legal conclusion from the stipulated facts.'" *Cady v. Ashcroft*, 606 S.W.3d 659, 665 (Mo. App. W.D. 2020) (quoting *Mo. Elec. Coops. v. Kander*, 497 S.W.3d 905, 910 (Mo. App. W.D. 2016)). For that reason as well, "our review is *de novo*." *Id.* (citing *Mo. Mun. League v. Carnahan*, 303 S.W.3d 573, 580 (Mo. App. W.D. 2010)).

Analysis

Metrc raises a single point on appeal, arguing that it was legal error for the trial court to conclude that Metrc's contract did not permit it to charge industry participants for its proprietary RFID tags. Metrc contends that its BAFO response "plainly identifies that Metrc will charge non-state end users for RFID tags," and that 19 C.S.R. 30-95.025(7) "permits Metrc to charge licensed and certified facilities for plant and product tracking labels." We address these contentions separately.

The plain and unambiguous language of the contract does not permit Metrc to charge industry participants for its proprietary RFID tags beyond the stated firm, fixed price contained in the contract

Contracts resulting from the competitive bidding process are interpreted in the same manner as any other contract. See *Pub. Commc'ns Servs., Inc. v. Simmons*, 409 S.W.3d 538, 548 (Mo. App. W.D. 2013). "[T]he primary rule of contract interpretation is that courts seek to determine the parties' intent and give effect to it." *Chochorowski v. Home Depot U.S.A.*, 404 S.W.3d 220, 226 (Mo. banc 2013). "In determining the intent of the parties to a contract, we review the terms of a contract as a whole, not in isolation." *Tuttle v. Muenks*, 21 S.W.3d 6, 11 (Mo. App. W.D. 2000). "Where the contract consists of multiple documents," as is the case here, "all of the documents must be read together in an effort to 'capture what was intended.'" *Knob Noster R-VIII Sch. Dist. v. Dankenbring*, 220 S.W.3d 809, 816 (Mo. App. W.D. 2007) (quoting *Nodaway Valley Bank v. E.L. Crawford Constr., Inc.*, 126 S.W.3d 820, 825 (Mo. App. W.D. 2004)). We give the language used in the contract its plain and ordinary meaning. *CB3 Enters. LLC v. Damas*, 415 S.W.3d 163, 167 (Mo. App. W.D. 2013). "If, using the plain and ordinary meaning, the language is unambiguous, we may not resort to rules of construction to interpret the contract." *Id.*

Metrc argues that its contract plainly states that Metrc will charge industry participants for RFID tags. Metrc is referring to Exhibit B, which was submitted with Metrc's original response to the RFP. Specifically, Metrc is referring to a passage on page 9 of Exhibit B where, as a part of explaining its seed-to-sale tracking solution, Metrc noted that the solution requires the use of proprietary RFID tags "***purchased by the industry*** directly through the state's Metrc portal." (Emphasis added.) Metrc argues that because

its BAFO response did not modify this language in Exhibit B, and because OA's Notice of Award stated that "[t]he proposal submitted by Metrc . . . is accepted in its entirety with the inclusion of [Metrc's BAFO response] and email dated 3/29/19," it was error to conclude that the contract did not permit Metrc to charge industry participants for proprietary RFID tags.

Metrc's argument improperly characterizes the Judgment. The trial court found that "[n]othing in the State's BAFO request indicated Metrc had to exclude charges to [the] industry for RFID tags, only that Metrc needed to incorporate its charges into a firm, fixed price per month." The Judgment found that the RFP required "all costs associated with providing [a] desirable attribute [to] be included in the firm, fixed price," and that vendors were required to "furnish all material, labor, facilities, equipment, and supplies necessary to perform the services required herein." The Judgment found that the RFP required inventory control processes as a mandatory aspect of a seed-to-sale solution, and that Metrc's seed-to-sale solution included its proprietary RFID tags as a necessary component. Metrc concedes, in fact, that its seed-to-sale tracking solution could not operate without Metrc's RFID tags. Thus, the Judgment found that "the plain and unambiguous terms of the RFP required Metrc to supply [its RFID tags] and build the cost of doing so into its firm, fixed price." Stated another way, the Judgment found that the contract plainly and unambiguously limited Metrc's ability to request or receive any compensation for its seed-to-sale tracking solution, including the essential RFID tags, to the firm, fixed price in the contract.

This was not legally erroneous. The parties stipulated that the contract between Metrc and the State of Missouri is comprised of: (1) the RFP and addendums, (2) the BAFO requests with additions or changes to the RFP, (3) vendor proposals, including BAFO responses, (4) any necessary clarifications of the proposal; and (5) OA's acceptance of the proposal by a notice of award, including all exhibits and attachments included in the RFP. Thus, Exhibit B's reference to industry purchased proprietary RFID tags cannot be read in isolation, but must be read as a part of the contract as a whole.

In its original RFP response, Metrc indicated it would comply with the state's seed-to-sale tracking solution requirements, including implementation of inventory control processes and a tracking system that could be accessed by industry licensees and the State. Because Metrc indicated it would comply with these requirements, Metrc was required by the RFP to include on Exhibit A, Pricing Page "any one-time required firm, fixed costs necessary to meet the RFP requirements" and to "indicate any other relevant information to the pricing of their proposed products/services." Metrc concedes that its proprietary RFID tags are a necessary commodity to enable its seed-to-sale tracking solution, as they are the only tags which are compatible with the solution. Because Metrc's proprietary RFID tags are necessary for its required tracking solution to function, the cost for the RFID tags was a cost that was necessary to meet the RFP requirements, and thus a cost Metrc was required to include in its firm, fixed pricing on Exhibit A.

Metrc's initial response to the RFP reflects that Metrc interpreted the RFP exactly as it was written. Exhibit A, line item 11 required Metrc to list the price for a "Firm, Fixed Monthly Subscription including Maintenance for the Seed-to-Sale Tracking Solution *for*

55 internal state agency users and unlimited external users." (Emphasis in original.) The RFP defined external users as: "Cultivators, Dispensary, Testing, Transportation and Infused Product Manufacturers . . . ," i.e., industry licensees. Exhibit A, line item 15 required Metrc to list the price for a "Firm, Fixed Monthly additional Subscription Licenses including maintenance for Seed-to-Sale Tracking Solution for internal state agencies in excess of the 55 internal state agency users included in line item 11."

In its initial response to the RFP, on line item 11 of Exhibit A, Pricing Page, Metrc advised it would charge "\$40.00 per month, per licensed facility (Industry Paid)." On line item 15 of Exhibit A, Pricing Page, Metrc advised it would charge "Plant tags - \$0.45 per plant grown. Package tags - \$0.25 per case level package created. (Industry paid)." These pricing entries plainly referred to industry paid costs, including RFID tags, though not as a firm, fixed total, and instead as a "per licensed facility," or on a "per tag" basis.

OA thus issued a BAFO request which notified Metrc that its responses to line items 11 and 15 failed to comply with the state's firm, fixed price requirements. Metrc's BAFO response amended line item 11 to \$163,200 per year, and amended line item 15 to \$0 per month, per user. After this BAFO response was submitted, OA asked Metrc to clarify whether Exhibit A reflected "firm, fixed prices or whether the pricing is dependent upon the number of businesses that will actually be licensed by the state." Metrc clarified that the "amount on Line Item 11 is our firm and fixed pricing. We utilized the state's projection in regulation for total license numbers as a key variable in arriving at our firm and fixed pricing." Relying on this confirmation, OA then scored the bids it had received, determined that Metrc's bid was the "lowest and best" bid, and notified Metrc that, "[t]he proposal

submitted by [Metrc] in response to [the RFP] is accepted in its entirety with the inclusion of [Metrc's BAFO response] and email dated 3/29/19."

Despite the progression of its submitted pricing information from industry paid per licensee/per tag, to a firm, fixed total price calculated from the number of licensees projected by the state, Metrc now argues that the cost of its proprietary tags was not required to be included on line item 11 of Exhibit A, because that line item only requested pricing for "Subscription and Maintenance" and not "tags," and because its pricing was only required to include costs paid by the State as "nowhere in the RFP are costs *to the industry* outlined or described." Metrc's arguments are refuted by the plain language of the RFP which required Metrc to include in its firm, fixed price ***all*** costs Metrc intended to charge for its seed-to-sale tracking solution to function for both internal and external users. Consistently, section 2.16.3 of the RFP expressly stated that except for the firm, fixed cost reflected on Exhibit A, "[o]ther than the payments and reimbursements specified on Exhibit A, Pricing Page, ***no other payments or reimbursements shall be made to the contractor for any reason whatsoever . . .***" (Emphasis added.) And, section 3.18.1 of the RFP, which addressed conflicts of interest, expressly provided that "[e]xcept for payment as set out in this contract, the contractor and its personnel ***shall not accept any*** collateral gift, ***payment***, commission, ***or other direct benefit arising from or connected to performance under this contract.***" (Emphasis added.) The contract as a whole required Metrc (and every vendor) to include in its firm, fixed price ***every*** amount the vendor would be paid from any source to provide the vendor's seed-to-sale tracking solution such that it could be used by all state and industry participants. If it was unclear to Metrc whether Metrc should have included

the cost of its RFID tags as a part of its pricing information on Exhibit A of its BAFO response, then it was Metrc's responsibility to ask questions, clarify, or advise OA of its uncertainty.

We therefore reject Metrc's argument that the trial court committed legal error by failing to look at the "entire" contract--an argument that focuses on an isolated passage in Exhibit B without regard to the "entire" contract.⁹ *See Simmons*, 409 S.W.3d at 548 ("Although [Metrc] urges us to look solely at the wording of the Notice of Award, and its use of the phrase 'accepted in its entirety,' '[i]n determining the intent of the parties to a contract, we review the terms of a contract as a whole, not in isolation.'" (quoting *U.S. Neurosurgical, Inc. v. Midwest Div.-RMC, LLC*, 303 S.W.3d 660, 665 (Mo. App. W.D. 2010))).

We conclude, after reading the contract as a whole, that Metrc's provision of proprietary RFID tags to the State and to industry participants was a necessary component of Metrc's seed-to-sale tracking solution, and that the amount Metrc expected to be paid for the RFID tags was required to be included within the firm, fixed price provided by Metrc in Section A.3 of Exhibit A in Metrc's BAFO response. As a result, it was not legally erroneous for the trial court to conclude that the contract was unambiguous, and that its plain language prohibits Metrc from charging the State or industry participants for

⁹Even if we focus on the isolated passage in Exhibit B relied on by Metrc without regard to the entire contract, we would be required to consider that the passage appears in a section addressing "State Specific Configurations," where Metrc highlights its ability to configure its seed-to-sale tracking solution "per each state's requirements" as to "match the state's rules, regulations, and regulatory needs." Read in context, Exhibit B's reference to RFID tags being "purchased" by industry participants is but a small part of Metrc's generalized description of its seed-to-sale tracking solution, all of which is touted by Metrc as subject to state specific requirements.

proprietary RFID tags beyond the firm, fixed price for its seed-to-sale tracking solution on Exhibit A of the BAFO response.¹⁰

19 C.S.R. 30-95.025(7) does not permit Metrc to charge industry participants for its proprietary RFID tags beyond the stated firm, fixed price contained in the contract

Metrc also argues that the trial court erred in concluding that its contract does not permit it to charge industry participants for RFID tags because 19 C.S.R. 30-95.025(7) permits it to do so. We disagree.

19 C.S.R. 30-95.025 was promulgated on May 24, 2019, by DHSS as one of several emergency rules addressing implementation of Article XIV, section 1 of the Missouri Constitution. 19 C.S.R. 30-95.025(7), provides:

(A) No entity holding a contract with the state of Missouri for a statewide track and trace system or any affiliates of that entity **may sell seed-to-sale services or services related to compliance with seed-to-sale tracking regulations to a licensed or certified facility.**

(B) Unless otherwise addressed or prohibited by contract or law, an entity holding a contract with the state of Missouri for a statewide track and trace system and any affiliates of that entity may charge a price to a licensed or certified facility for plant/product tracking labels, but no such price shall exceed the cost of producing the label in an amount that would create more than thirty (30) percent net profit on each label.

¹⁰In the argument portion of its Brief, Metrc alleges that the trial court's Judgment "misunderstands public policy and the purpose of Chapter 34." Specifically, Metrc contends that the trial court committed error "as a matter of law and policy" when it concluded that OA had the right, in determining the "lowest and best bidder," to "take into account costs and value to private entities, not just the State." This argument is perplexing, as Metrc was the successful bidder. A claim that factors beyond those properly considered played a role in the State's awarding of a contract is ordinarily a claim raised by an **unsuccessful** bidder. See, e.g., *Lee's Summit License, LLC v. Off. of Admin.*, 486 S.W.3d 409 (Mo. App. W.D. 2016).

Regardless, Metrc's claim that factors beyond those properly considered played a role in awarding Metrc's contract extends well beyond the scope of Metrc's point relied on, which argues only that the trial court failed to properly interpret the plain and unambiguous terms and provisions of Metrc's contract. The argument portion of Metrc's Brief accusing the trial court of misunderstanding public policy and Chapter 34 is not preserved for our review. *KDW Staffing, LLC v. Grove Constr., LLC*, 584 S.W.3d 833, 837 (Mo. App. W.D. 2019) (citing Rule 84.04(d)(1)).

(Emphasis added.) 19 C.S.R. 30-95.025(7)(A) prohibits the sale of "services related to compliance with seed-to-sale tracking regulations to a licensed or certified facility," and is thus consistent with the plain and unambiguous language of Metrc's contract, which required Metrc to include "any one-time required firm, fixed costs necessary to meet" the required seed-to-sale tracking solution as a part of its firm, fixed total price. 19 C.S.R. 30-95.025(7)(B) describes an exception to subsection (A), and permits a contract holder to charge industry licensees for plant or product tracking labels. However, the exception only applies "[u]nless otherwise addressed or prohibited by contract or law." We have already concluded, *supra*, that the plain and unambiguous language of Metrc's contract did not permit Metrc to charge the State or industry licensees for RFID tags over and above the amount of its firm, fixed pricing on Exhibit A. 19 C.S.R. 30-95.025(7)(B) does not afford Metrc rights beyond its plain and unambiguous contract, and is not inconsistent with Metrc's contract.

Metrc also contends that 19 C.S.R. 30-95.025(7)(B) evidences that DHSS "believed it reasonable for Metrc to charge the industry for RFID tags." We fail to see any connection between interpretation of Metrc's contract, which was awarded by OA on April 5, 2019, and 19 C.S.R. 30-95.025, which was promulgated by DHSS as an emergency rule on May 24, 2019 with an effective date of June 3, 2019. Metrc's contract does not incorporate by reference DHSS rules addressing implementation of Article XIV, section 1 of the Missouri Constitution. And Metrc does not contend that its contract is ambiguous as to require resort to extraneous evidence to determine the parties' intent. We thus agree with

the trial court's conclusion that 19 C.S.R. 30-95.025 is irrelevant to interpreting the parties' contract.

Metrc's point on appeal is denied.

Conclusion

The trial court's Judgment is affirmed.



Cynthia L. Martin, Judge

All concur