

THE CIRCUIT COURT OF COLE COUNTY, MISSOURI

PUBLIC COMMUNICATIONS)
SERVICES, INC., et al.,)
)
 Plaintiffs,)
)
 vs.) **Case No. 11AC-CC00543**
)
KELVIN L. SIMMONS,)
COMMISSIONER OF)
ADMINISTRATION, et al.)
)
 Defendants.)

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

The case was called for trial on October 6, 2011. Plaintiff Public Communications Services, Inc. (PCS) appeared by its representative Joseph Pekarovic and by plaintiffs’ counsel, John D. Landwehr, Dale C. Doerhoff, Heidi Doerhoff Vollet, and William E. Peterson. Plaintiff Brian Duty appeared in person and by plaintiffs’ counsel. Plaintiff William “Skip” Smith appeared by plaintiffs’ counsel. Defendants appeared by Assistant Attorney General Mark E. Long. Intervenor Securus Technologies, Inc. (Securus) appeared by its corporate representative Steve Viefhaus and by counsel Lowell D. Pearson, Harvey M. Tettlebaum, R. Ryan Harding, and Jason Richey. The parties answered ready. Plaintiffs adduced evidence.

The trial resumed on October 13, 2011. Plaintiffs adduced evidence and rested. Intervenor moved for judgment based on lack of standing by the Plaintiffs. Argument heard and motion taken under advisement. Defendants adduced evidence and rested. Intervenor adduced evidence and rested. Objections to testimony of James Moody and motion to strike his testimony taken under advisement, and the parties were directed to file suggestions by October 20, 2011. Parties directed to file proposed findings of fact and conclusions of law by October 31, 2011 and

requested to address standing, ripeness, and whether a contract exists between the State of Missouri and Securus.

On October 20, 2011, the parties filed their stipulation to the admission of the testimony of James Moody, with legal conclusions withdrawn per stipulation. By agreement, the objections and motion to strike were considered moot. Evidence closed.

Having considered the evidence and arguments, and being fully advised, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Plaintiff PCS provides offender telephone services in Missouri and other states. PCS has been the provider of offender telephone services for correctional facilities operated by the Missouri Department of Corrections for the last five years.¹

2. Plaintiff Brian Duty is a lifetime resident and taxpayer of the State of Missouri. He is also a customer of the Missouri offender telephone system in that he has a pre-paid account, which he funded with his own money.

3. Defendant Kelvin L. Simmons is the duly appointed Commissioner of the Missouri Office of Administration.

4. Defendant James Miluski is the Director of Purchasing and Materials Management (DPMM) within the Office of Administration.

5. The Missouri Office of Administration is an agency of the State of Missouri and part of the executive department of Missouri state government.

¹ As of the date of the first day of trial on October 7, 2011, PCS was the exclusive provider of offender telephone services in Missouri. As of the date of the second day of trial on October 13, 2011, PCS was still providing offender telephone services in a few corrections facilities, and Securus had begun providing services in most facilities.

6. The Missouri Department of Corrections is an agency of the State of Missouri and part of the executive department of Missouri state government.

7. Intervenor Securus Technologies, Inc. is a provider of offender telephone services and was selected by DPMM as the winning bidder for the current contract that is in dispute.

A. Missouri's offender telephone system

8. Missouri has more than 30,000 offenders in its correctional facilities. These offenders cannot have their own telephones and must use telephones provided in the facilities in order to communicate with friends and family by phone.

9. The offender telephone system provides offenders with three ways to purchase calls: (1) debit calls, which are debited directly from the offender's inmate bank account; (2) pre-paid calls, which are accounts set up with the contractor by friends and family members that allow offenders to call those family members; and (3) collect calls, wherein the offender places a call through the offender telephone system that is billed to the party accepting the call.

10. There has been a trend away from collect calls to debit and pre-paid calls.² In 2009, the offender telephone system operated by PCS had a volume of approximately 1.4 million collect calls, 6 million debit calls, and 2.8 million pre-paid calls. In 2010, the number of collect calls dropped to 1.3 million, while the number of debit and pre-paid calls rose to 7.1 million and 3.7 million calls, respectively.

² PCS was the first service provider in Missouri to institute debit and pre-paid calls. The total call volume under PCS tripled over the call volume handled under previous service providers, which had processed collect calls only.

11. In 2009, the total number of call minutes handled by the offender telephone system was more than 113 million minutes. In 2010, the total number of minutes increased to more than 117 million minutes.

12. There are more than 80,000 customers of the Missouri offender telephone system, including some 50,000 friends and family members who have pre-paid accounts. Each month, these friends and family members make a total of approximately 12,400 funding transactions into pre-paid accounts, or approximately 148,800 such transactions per year.

B. Missouri's solicitation of proposals for the new offender telephone system contract through RFP B2Z11019.

13. With the PCS five-year contract term set to expire in May 2011, the Office of Administration, DPMM, issued a Request for Proposal (RFP) for a new offender telephone system contract on December 20, 2010. The new contract would be for a term of five years, with two optional one-year extensions. The RFP number assigned to this bid was B2Z11019.

14. Over the course of the next several months, DPMM issued four amendments to RFP B2Z11019, and one Request for Best and Final Offer (BAFO) that further revised RFP B2Z11019. The RFP with all amendments and the BAFO was admitted into evidence as Trial Exhibit 3.

1. RFP requirements.

15. Generally speaking, RFP B2Z11019 solicited bids for an offender telephone system that has much the same requirements of the existing PCS system. For example, the RFP required the offender telephone system to (1) be "capable of handling collect, debit, and pre-paid calls," (Trial Ex. 3 (RFP), p. 8, ¶2.2.1), (2) integrate with the state agency's canteen system (*id.*, p. 10, ¶2.3.1), (3) utilize PINs (*id.*, p. 11-12, ¶2.5); (4) include call monitoring, data storage, and

administrative controls by corrections staff (*id.*, p. 13-14, 15-17); and (5) generate various reports (*id.*, p. 17, 23).

16. RFP B2Z11019 further stated that in light of the substantial increase in telephone call volume, as a mandatory requirement of the RFP, “the contractor shall be responsible for listening to and reviewing a minimum of five percent (5%) of all offender calls at no charge to the State of Missouri.” Trial Ex. 3, p. 24 (¶2.23.1). More specifically, paragraph 2.23.1 of RFP B2Z11019 stated:

The contractor-provided monitoring shall utilize a combination of technology and sufficient personnel for the purpose of collecting intelligence from the offender telephone system to identify, at a minimum, the following:

- a. Suspicious or suggestive key words or phrases;
- b. Phrases that suggest threats to the security of the facility and its personnel; and
- c. Criminal activity outside the facility.

Trial Ex. 3 (RFP), p. 24 (¶2.23.1) (emphasis added)

17. Under a heading entitled “Optional Products and Services,” RFP B2Z11019 stated, in full, that “The contractor should provide services for the detection and/or interruption of wireless communications devices, such as cellular telephones and data communications devices within the corrections facilities.” *Id.*, p. 25 (¶2.25.1).

18. In the pricing section of the RFP, the RFP stated that offerors could provide price increases “for any other optional services proposed by the offeror.” *Id.*, p. 43 (¶A.4)

2. The RFP’s bid evaluation methodology.

19. RFP B2Z11019 stated that bids would be analyzed based on a comparative assessment of the proposal “in accordance with the evaluation criteria stated below:”

Cost Evaluation	90 points
Experience/Reliability of Organization	20 points
Proposed Method of Performance, Solution Functionality and Expertise of Personnel	80 points
MBE/WBE Participation	10 points

Trial Ex. 3 (RFP), p. 36 (§4.2.1).

20. With regard to evaluation of cost, RFP B2Z11019 provided that:

The offeror must respond to Exhibit A with firm, fixed pricing for all applicable costs necessary to satisfy the requirements of the RFP. All prices quoted shall be firm, fixed for the contract period ... Unless stated herein, the state shall assume absolutely no other costs exist to satisfy the RFP's requirements....

Id., p. 37 (§4.3.1).

21. With regard to evaluation of cost, RFP B2Z11019 further provided that:

The cost evaluation shall be based on the pricing provided in Section A.1 of Exhibit A (pricing pages) using the following estimated quantities that are based on previous usage:

- Collect Call, Pre-Paid Call and Debit Minutes: 113,052,258 per year;
- Collect Call Per Call Set-Up Fee: 1,439,350 collect calls per year.

Id., p. 37 (§4.3.2).

22. RFP B2Z11019 further provided:

Cost evaluation points shall be determined from the result of the calculation stated above using the following formula:

$$\frac{\text{Lowest Responsive Offeror's Price}}{\text{Compared Offeror's Price}} \times \frac{\text{Maximum Cost}}{\text{Points (90)}} = \frac{\text{Cost Evaluation}}{\text{Points}}$$

Id., p. 37 (§4.3.4).

23. Despite the large number of pre-paid account transaction fees and trend toward pre-paid calls, the RFP did not factor pre-paid account fees in the cost evaluation. Instead, RFP B2Z11019 stated that “the state reserves the right to subjectively evaluate the proposed pre-paid set-up fee as part of the proposed method of performance, solution functionality, and expertise of personnel....” *Id.*, p. 37 (§4.3.5).

24. Optional product and service pricing also was not part of the cost evaluation. RFP B2Z11019 stated that as to such optional services, “the state reserves the right to

subjectively evaluate availability and cost of the proposed optional products and services as part of the proposed method of performance, solution functionality, and expertise of personnel.” Trial Ex. 3, p. 37 (¶4.3.7).

C. Concerns PCS expressed to DPMM before the deadline for submission of proposals.

25. Approximately two weeks before the responses to RFP B2Z11019 were submitted, Joseph Pekarovic and Eric Gonzalez, another employee of PCS, met with DPMM employee Brent Dixon, the “buyer” for the offender telephone system, and expressed concerns about the pricing model in the RFP.

26. Mr. Pekarovic told Mr. Dixon that he was concerned that entities may submit prices for the basic features of the system at less than their actual cost, but make up for any deficits through higher priced optional services, which were to be subjectively evaluated. Mr. Dixon responded that this was to be a firm fixed price contract and made other comments which Mr. Pekarovic understood as an assurance that DPMM would evaluate proposals on an equal basis.

27. Although Mr. Dixon did not expressly say so, Mr. Pekarovic reasonably believed after the conversation that if the state were interested in optional features proposed by one offeror at an additional price, DPMM would subject that optional service to competitive proposals through a BAFO request.

28. DPMM had used a BAFO request in this manner under similar circumstances in 2006 when the offender telephone system was last put out for bid.

D. Responses to RFP B2Z11019.

29. Seven entities submitted what were deemed to be acceptable responses to RFP B2Z11019: CenturyLink, Consolidated Communications Public Services, PCS, Securus

Technologies, Synergy Telecom Service Company/Telcomate, Talk Telio LLC, and Unisys Corporation.³ CenturyLink's response included four separate proposals.

30. CenturyLink's response, with its four proposals, was admitted into evidence as Trial Exhibit 10. Consolidated Communications Public Services' response was admitted into evidence at Trial Exhibit 11. PCS's response was admitted into evidence as Trial Exhibit 8. Securus' response was admitted into evidence as Trial Exhibit 9. Synergy's response was admitted into evidence at Trial Exhibit 12. Talk Telio's response was admitted into evidence as Trial Exhibit 14. Unisys' response was admitted into evidence as Trial Exhibit 13.

31. The Securus proposal included a \$0.05 per minute call charge for debit, pre-paid, and collect calls; a \$1.00 collect call set up fee; and \$6.95 per transaction fee for pre-paid accounts, which was the highest pre-paid account transaction fee in any of the proposals. Trial Ex. 9, p. 231-232.

32. At Securus' "base rate" price of \$0.05 per minute, Securus stated it would provide personnel to listen to 5% of calls and a technology called SCP OTS Key Word spotting technology that would provide "a 'first look' for call monitors into possible criminal activity based upon key words identified by investigators." Trial Ex. 9, p. 174, 176.

33. The Securus proposal included four optional services that would be provided at an additional cost of \$0.01 per minute each for a total of an additional \$0.04 per minute that would raise the Securus bid from \$0.05 per minute to \$0.09 per minute, one of the highest per-minute costs of all providers.

34. The four optional services to be provided at an additional cost of \$0.01 per minute were:

³ Noir & Ocrum, LLC also submitted a response, but it was deemed unacceptable because of a failure to meet mandatory requirements of the RFP. See Trial Ex. 42.

- an investigative biometric tool from JLG Technologies called “Investigator ProTM” that would provide voice recognition services to be used in call monitoring. *Id.*
- an offender voicemail system that would allow friends and family members to leave up to ten 30-second voicemail messages each month. *Id.*, p. 191.
- a cell phone detection fund that would provide (1) \$1 million of funding to the State of Missouri for each 117 million minutes of annual call volume, (2) approximately \$170,000 to Securus, and (3) Securus’ agreement to assist the Department of Corrections in finding a vendor that would be able to provide cell phone detection or interruption services ultimately selected by the Department. The Securus proposal did not endorse or offer to provide the state with any specific cell phone detection or interruption product. *Id.*, p. 186-188.
- an “optional” “enhanced investigative personnel package” that would include an additional twelve personnel that would provide the Missouri Department of Corrections with additional investigative capabilities related to call monitoring. *Id.*, p. 195.

35. Based on annual call volumes of 117 million minutes, each additional \$0.01 per minute increase in a company’s base rate would generate approximately \$8.2 million in revenues over seven years of the contract (five years based, plus two years of extensions).

36. The \$0.04 per minute of optional services Securus proposed would thus add \$32.8 million to the overall cost of Securus’ proposal and make its proposal one of the most expensive of all bidders.

Other companies' proposals included as part of their base rates a number of the services that Securus offered at an additional cost.

E. The State's evaluation of proposals.

37. DPMM's employee Mr. Dixon, who testified live at trial, performed the price point calculations and assessed MBE/WBE points and blind/sheltered workshop points.⁴

38. An evaluation committee (Evaluation Committee) consisting of individuals from the Office of Administration and the Department of Corrections performed the subjective evaluation.

39. The Evaluation Committee's members included Amy Roderick, Inspector General of DOC who testified live at trial, and two other persons from whom deposition testimony was received into evidence, Theresa Roedel, an employee with OA's Information Technology Services Division, and Joan McDonnell, a manager at DOC.

40. Mr. Dixon helped facilitate the committee's work, but was not a member of the committee.

1. DPMM's assessment of cost points.

41. Mr. Dixon's pricing calculation worksheet was admitted into evidence as Trial Exhibit 41.

42. In assessing cost points, Mr. Dixon used each company's per-minute base bid and multiplied that number by an estimated quantity of annual call minutes (here, 113,052,258 minutes per year) for each of the five years of the contract and the two additional years of optional renewals. He then took each company's per collect call set-up charge, if any, and

⁴ DPMM concluded that every responsive proposal, including PCS's and Securus's proposals, met the criteria for the maximum points for MBE/WBE participation (10 points) and for blind/sheltered workshop preference (10 points).

multiplied that number by an estimated quantity of collect calls (here, 1,439,350 calls) for each of the five years of the contract and the two additional years of optional renewals. The per-minute and collect call sums were then added together to reach what DPMM called the “Total Price for Collect, Pre-Paid, and Debit Call and Set-up Charge per Collect Call.” Trial Ex. 34, Dixon Depo. pp. 41-44.

43. No companies’ transaction fees were taken into account in the cost evaluation. *Id.* & *id.*, p. 57.

44. Talk Telio, which bid \$0.05 per minute for collect, prepaid, and debit calls, with no per-collect call set-up charges, was deemed the lowest price under the above formulation and was accorded the maximum 90 cost points. Trial Ex. 41, p. 1.

45. Companies with higher costs were awarded their points based on the following ratio:

$$\frac{\text{Lowest Responsive Offeror's Price}}{\text{Compared Offeror's Price}} \times \frac{\text{Maximum Cost}}{\text{Points (90)}} = \frac{\text{Cost Evaluation}}{\text{Points}}$$

46. When assessing Securus’ cost points, Mr. Dixon used Securus’ \$0.05 per minute base bid for collect, pre-paid, and debit calls, and its \$1.00/call collect call set-up charge. None of the costs for Securus’ optional services was factored into the cost calculation. *Id.*, p. 56. Securus received 72 cost points as a result.

47. PCS’s cost points were calculated at its base rate bid of \$0.07 per minute and per collect call set up charge of \$0.25. PCS received 61 cost points as a result.

2. The Evaluation Committee's assessment of experience, reliability, method of performance, solution functionality, and expertise of personnel points.

48. The Evaluation Committee produced a memorandum summarizing its subjective evaluation analysis (the Subjective Assessment Memo). The Subjective Assessment Memo was admitted into evidence as Trial Exhibit 16.

49. The Subjective Assessment Memo assigned both PCS and Securus the maximum number of points (20 points) for experience and reliability of the organization, and near identical scores (77, and 78 points, respectively) for Method of Performance, Solution Functionality and Expertise of Personnel. See Trial Ex. 16, p. 3 & 17.

50. The record is undisputed that the Evaluation Committee did not subjectively weigh the amount of pre-paid account transaction fees or the cost or quality of the optional services of any bidder. Trial Ex. 35, McDonnell Depo., p. 54; Trial Ex. 37, Roderick Depo., p. 39-42; Trial Ex. 38, Roedel Depo., p. 19-22. In other words, no bidder was given more or less points based on the amount of fees they charged or the quality or cost of the optional services they proposed. Trial Ex. 38, Roedel Depo., p. 20-21.

3. How the point totals and rankings between bidders would change if all the bids were evaluated on the same basis.

51. The State's Evaluation Report Form, which added the points accorded to each responsive offeror pursuant to the methods described above, was admitted into evidence as Trial Exhibit 15. Securus received the highest point total – 190 points – on the Evaluation Report Form.

52. The point total in favor of Securus did not take into account the cost of the four optional services that were included in the Securus proposal at a total cost of an additional \$0.04

per minute, and it did not take into account the fact that other bidders offered some of those same services at no extra cost or at a cost below that proposed by Securus.

53. If DPMM had considered the costs of Securus' optional services in the cost calculation and compared Securus on a fair and equal basis with other offerors who included comparable proposals, Securus would not have had the highest point total. PCS would have been number one with 206.5 points and would have been awarded the new contract because it submitted the lowest and best bid if the bids had been evaluated on the same basis. Securus would have come in sixth, after PCS, Unisys, and three of the Century Link proposals. See Trial Ex. 30.

54. Even if the optional services were not at issue, Securus would not have had the highest point total if DPMM had considered the amount of the pre-paid account transaction fees in the cost calculation. Securus had the highest fees – \$6.95 per transaction – and Talk Telio had no fees. Other bidders were in between. If the only change to DPMM's cost evaluation were to take into account the cost of the pre-paid account transaction, Talk Telio would have been number one with 187 points, and Securus would have come in second with 180 points. See Trial Ex. 31.

E. The contested contract with Securus.

55. On June 28, 2011, Mr. Dixon and Defendant Miluski, on behalf of the State of Missouri, issued a "Notice of Award" accepting Securus' proposal and assigning the Securus contract number C211019001.

56. The Notice of Award, which was admitted into evidence as Trial Exhibit 17, states:

The proposal submitted by Securus Technologies, Inc. in response to B2Z11019 is accepted in its entirety including their response to Best and Final Offer #001 and the email clarification from Steven Cadwell of Securus Technologies dated May 26, 2011.

Trial Ex. 17, p. 1.

57. The Office of Administration typically uses the phrase “accepted in its entirety” to accept proposals made in response to RFP requests.

58. On July 6, 2011, the Office of Administration provided Securus with a “formal request for Securus Technologies to start providing services as outlined in bid document B2Z111019 and awarded contract C211019001.” A copy of this formal request was admitted into evidence as Trial Exhibit 19.

59. Paragraph 3.1.1.c of the RFP states that “Any change to the contract, whether by modification and/or supplementation, must be accomplished by a formal contract amendment signed and approved by and between the duly authorized representative of the contractor and the Division of Purchasing and Materials Management prior to the effective date of such modification.” Trial Ex. 3, p. 26 (¶3.1.1.c).

60. There have been no formal amendments to the state’s contract with Securus after the state accepted Securus’ offer with the Notice of Award.

F. PCS bid protest and post award actions relating to optional services.

61. On July 11, 2011, PCS submitted a timely bid protest letter, which sets forth the grounds for protests of which PCS was aware at the time.⁵

⁵ PCS’s bid protest was denied two days after PCS filed the instant lawsuit. The record contains substantial evidence that the Office of Administration had no intention of granting PCS’s protest, spent little time investigating the basis for the protest, and intended to proceed with implementation of the Securus contract notwithstanding the protest. *See, e.g.*, PCS Pet., Ex. Trial Ex. 46.

62. Through Sunshine Law requests, PCS learned of certain communications between Securus, Office of Administration, and Department of Corrections staff relating to the \$0.04 per minute of optional services. These emails, admitted into evidence as Trial Exhibits 49, 22, and 23, show some internal confusion by Ms. McDonnell, Ms. Roedel, and Mr. Dixon as of June 29, 2011 as to the procedure for approving the \$0.04 in optional services. As of July 11, 2011, the Department of Corrections' executive staff, which included the current Director of the Department George Lombardi, provided its approval to proceed with such optional services. Ms. Roedel communicated this approval to Securus the same day.

63. Deposition and trial testimony shows that as late as September 28, 2011, six business days before trial commenced, Securus was proceeding "full speed" with implementing all of the optional services so they would be ready at, or soon after, a cutover to Securus' system that was scheduled to occur between October 11 – 14, 2011. Trial Ex. 39, Viefhaus Depo., pp. 41-44, 48, 51.

64. Mr. Viefhaus testified as the corporate representative of Securus that Securus was proceeding with implementation of the optional services based on the Department of Correction's approval of those services.

65. At trial and as the corporate representative of the Office of Administration in a deposition taken on September 29, 2011, Mr. Miluski testified that he "would desire an amendment to the contract to outline the acceptance of those optional services," and that he would not contemplate entering into such an amendment until the conclusion of this litigation because he thought "a legal conclusion needs to be made as – in regard to this case...." Trial Ex. 36, Miluski Depo., p. 37-38. Mr. Miluski stated if this Court found he was following the law and

proper procedures, he believed that he had the authority to enter into an amendment to add the optional services. *Id.*, p. 38-39.

66. Ms. Roderick testified at trial that each of the optional services are important to the Department of Corrections and assist in safety and law enforcement functions. The Department of Corrections would like to have the optional services included in the contract.

67. Mr. Dixon, both at trial and in a September 29, 2011 deposition as a corporate representative of the Office of Administration, testified that it would not be possible for the state to purchase any of the optional services from a vendor other than the vendor with whom the state contracts for the base services because the State intended to make a single award regarding RFP B2Z11019. Trial Ex. 34, Dixon Depo., p. 64-65.

G. The State's failure to investigate whether it could obtain the optional services at a lower cost.

68. Neither the Office of Administration nor the Department of Corrections undertook any efforts to determine whether the optional services that Securus offered could be obtained at a better price. Trial Ex. 35, McDonnell Depo, p. 66; Trial Ex. 37, Roderick Depo., p. 37-38; Trial Ex. 38, Roedel, p. 32.

69. PCS presented credible evidence at trial that each of the optional services that Securus offered to provide at an additional cost of \$8.2 million over the course of the contract term could be provided by another vendor at significantly lesser costs than Securus.

70. Neither the state defendants nor Securus presented any evidence that contradicted PCS's estimates.

QUESTIONS PRESENTED

- (1) Do Plaintiffs have standing to pursue their claims?
- (2) Does the contested contract between the State of Missouri and Securus currently include the optional services offered at an additional \$0.04 per minute?
- (3) Is the contested contract between the State of Missouri and Securus valid?

CONCLUSIONS OF LAW

A. Plaintiffs have standing to pursue their claims.

Intervenor Securus argues that Plaintiffs lack standing to pursue their claims. The Court disagrees. Plaintiff PCS has standing based on the fact it was an unsuccessful bidder who lost the offender telephone services contract because the contract was not fairly bid and PCS was not permitted to compete on equal terms with Securus. *Metropolitan Express Services, Inc. v. City of Kansas City, Missouri*, 23 F.3d 1367, 1371 (8th Cir. 1994) (reversing the dismissal by the trial court based on standing of an unsuccessful bidder when the contract was not fairly bid):

Applying the Missouri standing requirement, we conclude that an unsuccessful bidder has standing to challenge a contract that was not fairly bid. In *State ex rel. Stricker v. Hanson*, the court recognized that “competitive 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.’ ” 858 S.W.2d 771, 778 (Mo. Ct. App.1993) (quoting *City of Maryville ex rel. Citizens' Nat'l Bank v. Lippman*, 151 Mo.App. 447, 132 S.W. 47, 48 (1910)). Thus, an unsuccessful bidder that was denied a fair opportunity to bid on a public contract is within the zone of interests to be protected by competitive bidding requirements.

In *State ex rel. Mid-Missouri Limestone, Inc. v. County of Callaway*, 962 S.W.2d 438, 440 (Mo. App. W.D. 1998), although the trial court dismissed an action brought by unsuccessful bidders on a public contract based on a lack of standing, in affirming the dismissal, the Court of Appeals held that the plaintiffs lacked unsuccessful bidder standing because there was no contention that the contract was unfairly bid. *Id.* at 441-42. The Court stated that “the outcome

would be different” if the rejection of plaintiffs’ bid had been “fraudulently, corruptly, capriciously, or without reason,” quoting *La Mar Construction Co. v. Holt County, R-II School District*, 542 S.W.2d 568, 571 (Mo. App. 1976) (“The officials must exercise and observe good faith and accord all bidders just consideration, avoiding favoritism and corruption.”) PCS claims that the contested contract with Securus was the result of a capricious bidding process, and PCS has standing to complain in court.⁶

Plaintiffs have invoked their right to judicial review and redress under Section 536.150, RSMo., for the arbitrary, capricious and unfair manner in which the bidding procedures were conducted. Although PCS maintains that it had direct pecuniary rights involved, a party seeking judicial review need not have a direct pecuniary or property right involved to have standing. *State ex rel. Missouri Power & Light Co. v. Riley*, 546 S.W.2d 792, 797 (Mo. App. 1977). Standing results from PCS’s right to appear before the agency (in this case DPMM) and to participate in what is supposed to be a competitive bidding process. The goal is to ensure that “all who may wish to bid 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. App. W.D. 1993) (quoting *City of Maryville ex rel. Citizena’ Nat’l Bank v. Lippman*, 132 S.W. 47, 48 (Mo. App. 1910)). PCS meets the threshold for judicial review under the facts of this case.

⁶ In a 2009 appeal arising from a similar case in Cole County, the Attorney General of Missouri drew the same conclusion based on *State ex rel. Stricker v. Hanson*. After stating that generally an unsuccessful bidder may not bring an action to overturn a bid that was not awarded to it, the Attorney General stated: “There is an exception where the losing bidder challenges the bidding process as not permitting all bidders to compete on equal terms. *State ex. rel Stricker v. Hanson*, 858 S.W.2d 771 (Mo. App. W.D. 1993).” *Office of Administration v. Consolidated Communications Public Service, Inc.*, 2009 WL 2859277 (Mo. App. W.D. 2009) (Appellants’ Brief at 21).

Plaintiff Duty has standing based on his status as a customer of the offender telephone system. Customers of the offender telephone system are third-party beneficiaries of the contested contract with Securus. A third-party beneficiary has standing to litigate a contract. *See Goldring v. Franklin Equity Leasing Co.*, 195 S.W.3d 453, 456 (Mo. App. E.D. 2006). If the optional services are tacked on, the contested contract with Securus will cost the offender telephone system customers \$0.09 per minute, whereas the PCS proposal was for \$0.07 per minute. In addition, the contested contract with Securus will cost the offender telephone system customers \$6.95 per transaction fee for pre-paid accounts, which was the highest pre-paid account transaction fee in any of the proposals. The PCS transaction fee would have been \$5.00 per transaction. The fact that Plaintiff Duty and the other customers would pay \$0.02 more per minute and \$1.95 more for each pre-paid account transaction under the contested contract with Securus versus the PCS proposal means the customers will suffer a pecuniary loss if the contested contract with Securus remains in place.⁷

Plaintiff Duty also has standing based on his status as a Missouri taxpayer. Whether required or not, the State of Missouri has undertaken to provide an offender telephone system to the approximately 30,000 offenders in the custody of the Department of Corrections and to the approximately 50,000 other customers who are not offenders. Both the Department of Corrections and the Office of Administration are funded by appropriations from general revenue, which means taxpayer money is used to pay the salaries of state personnel who administer the offender telephone system. Money received by the state from the vendor is required to be deposited into the state treasury, because all money received by the state must go into the state treasury. Art. 3, §36, Constitution of Missouri. No money can be withdrawn from the state

⁷ Customers making collect calls would also pay \$0.75 more per collect call in collect call set up fees under the Securus contract than they would under the PCS proposal.

treasury except by warrant drawn in accordance with an appropriation made by law. Art. 4, §28, Constitution of Missouri.

Taxpayer standing does not require a showing of loss of revenue. That strict requirement was eliminated in *Eastern Missouri Laborers District Council v. St. Louis County*, 781 S.W.2d 43 (Mo. banc 1989), overruling *Brock v. City of St. Louis*, 724 S.W.2d 721, 725 (Mo. App. E.D. 1987), and its progeny. “The primary basis for taxpayer suits arises from the need to ensure that government officials conform to the law.” 781 S.W.2d at 46. Taxpayer standing can exist even if money is added to, rather than taken from, the state treasury. *Id.*, citing *Tichenor v. Missouri State Lottery Commission*, 742 S.W. 2d 170, 172 (Mo. banc 1988).⁸

Plaintiffs have also invoked their right to an action for declaratory judgment under Rule 87. As a bidder who was unsuccessful because the new contract was not fairly bid, PCS has a legally protectable interest at stake. As a customer of the offender telephone system, Plaintiff Duty is third-party beneficiary with a legally protectable interest at stake. As a taxpayer in a case that involves money that is supposed to be deposited in the state treasury and not expended except under a lawful appropriation and also involves the integrity of the competitive bidding process, Plaintiff Duty has a legally protectable interest. There are justiciable controversies, and the questions posed are appropriate and ripe for judicial resolution. All the grounds for standing to bring an action for declaratory judgment are satisfied. *See G.M.A.C. v. Windsor Group, Inc.*, 2 S.W.3d 836, 840 (Mo. App. E.D. 1999).

⁸ Intervenor relies on *Manzara v. State*, No. SC91025 (opinion issued August 2, 2011), for its argument that without a direct expenditure of funds, taxpayer standing is lacking. However, *Manzara* concerned taxpayer standing to challenge the constitutional validity of tax credits. Tax credits do not pass through the state treasury. By contrast, all funds received by the Office of Administration and the Department of Corrections must be deposited in the state treasury. This makes the offender telephone system receipts “state funds” and supports taxpayer standing.

Plaintiffs are jointly asking for the same relief, and they are asserting multiple grounds, any one of which would be legally sufficient. *State ex rel. Stricker v. Hanson, supra* at 775.

B. The contested contract with Securus does not include the optional services.

“The basic elements of a contract are offer, acceptance and consideration.” *Luebbert v. Simmons*, 98 S.W.3d, 72, 77 (Mo. App. W.D. 2003) (quoting *Beck v. Shrum*, 18 S.W.3d 8, 10 (Mo. App. E.D. 2000)).

“A meeting of the minds must exist for a contract to exist, but this is determined objectively by looking at the intent of the parties as expressed by their actual words or acts.” *Paul’s Rod & Bearing, Ltd. v. Kelly*, 847 S.W.2d 68, 72 (Mo. App. W.D. 1991).

The Court finds that the contract with Securus as it currently exists does not include the optional services. The Department of Corrections’ executive committee approval was not effective in adding the optional services to the contract.

C. The contested contract with Securus is void to the extent the Office of Administration would be limited to purchasing the optional services from Securus.

Section 34.030, RSMo. requires the Commissioner of Administration to “purchase all supplies for all departments of the state” with limited exceptions not applicable here. Section 34.010.4, RSMo. defines the term “supplies” broadly to include “supplies, materials, equipment, contractual services and any and all articles or things” with limited exceptions not applicable here.

“In order to enter into a valid contract, the Commissioner [of the Office of Administration] must exercise his authority ‘in manner and form as directed by the Legislature.’”

State ex rel. Stricker v. Hanson, 858 S.W.2d 771, 775-76 (Mo. App. W.D. 1993) (quoting *Aetna Ins. Co. v. O'Malley*, 124 S.W.2d 1164, 1166 (Mo. banc 1938)).

“The procedures for awarding state contracts are established by statute.” *Stricker*, 858 S.W.2d at 776. Section 34.042.3, RSMo. 2000, states that when competitive proposals are the method of procurement, “the contracts shall be let to the lowest and best offeror as determined by the evaluation criteria established in the request for proposal and any subsequent negotiations conducted pursuant to this subsection.” Section 34.042.3 further provides:

In determining the lowest and best offeror, as provided in the request for proposals and under rules promulgated by the commissioner of administration, negotiations may be conducted with responsible offerors who submit proposals selected by the commissioner of administration on the basis of reasonable criteria for the purpose of clarifying and assuring full understanding of and responsiveness to the solicitation requirements. Those offerors shall be accorded fair and equal treatment with respect to any opportunity for negotiation and subsequent revision of proposals.

Section 34.040.4, RSMo. Supp. 2007, requires that “[a]ll bids shall be based on standard specifications wherever such specifications have been approved by the commissioner of administration.” *See also* 64 Am.Jur.2d *Public Works and Contracts* § 65 (1972) (“[P]ublic authorities cannot enter into a contract with the lowest bidder containing substantial provisions beneficial to him, not included in or contemplated in the terms and specifications upon which bids were invited.”).

OA’s procurement rules implementing Chapter 34’s competitive bidding requirements provide that “a formal method of solicitation must be utilized” when the procurement is estimated to be \$25,000 or more. 1 CSR 40-1.050(2).

“Legislative provisions requiring public works to be awarded upon a public letting to the lowest responsible bidder are intended to secure unrestricted competition among bidders, eliminate fraud and favoritism, and avoid undue and excessive costs” *Wring v. City of*

Jefferson, 413 S.W.2d 292, 298-99 (Mo. banc 1967). “[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*, *supra* at 778 (quoting *City of Maryville ex rel. Citizens’ Nat’l Bank v. Lippman*, 132 S.W. 47, 48 (Mo. App. 1910)).

In an action for judicial review of under Section 536.150, the reviewing court conducts a *de novo* review, determining the facts and whether, in view of those facts, the agency decision:

- (1) Is unconstitutional;
- (2) Is unlawful;
- (3) Is unreasonable;
- (4) Is arbitrary;
- (5) Is capricious; or
- (6) Involves an abuse of discretion.

§ 536.150, RSMo; *Missouri Nat’l Educ. Ass’n v. Missouri State Bd. Of Education*, 34 S.W.3d 266, 274 (Mo. App. W.D. 2000).

According to *Missouri National Education Association*:

An administrative agency acts unreasonably and arbitrarily if its decision is not based on substantial evidence. Whether an action is arbitrary focuses on whether an agency had a rational basis for its decision. Capriciousness concerns whether the agency’s action was whimsical, impulsive, or unpredictable. 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.” An agency must not act in a totally subjective manner without any guidelines or criteria.

Missouri Nat’l Educ. Ass’n, 34 S.W.3d at 281 (citations omitted).

Section 34.150, RSMo. provides:

Whenever any department or agency of the state government shall purchase or contract for any supplies, materials, equipment or contractual services contrary to the provisions

of [Chapter 34 of the Revised Statutes of Missouri] and regulations made thereunder, such order or contract shall be void and of no effect.

The Court is troubled by the Office of Administration's position about the optional services. The Department of Corrections wants to add the optional services to the contract, and the Office of Administration states that it believes it would have the authority to add them to the Securus contract by a simple amendment, without further competitive negotiation, and indeed that it could not put the optional services out for further bidding because it would be impossible to award them to any vendor other than Securus. This Court concludes, based on the foregoing, that if the Office of Administration bound itself to a future purchase of the optional services from Securus alone, which could be procured without further competitive bidding or negotiations, the current contract would be void. During the procurement process, DPMM failed to weigh the quality or cost of the optional services and gave no analysis whatsoever to \$32 million's worth of optional services. Chapter 34's competitive bidding requirements do not allow the Office of Administration to procure \$32 million in extra services that were not the subject of competitive bidding through a simple contract amendment. If the state defendants wish to add the optional services to the contract, and only the vendor providing the base requirements can supply those optional services, then the entire contract must be relet for competitive bidding that allows all offerors to make proposals on a level playing field.

This Court further concludes that RFP B2Z11019's solicitation of optional services without specifying the type of optional services in which the State had an interest was in violation of Section 34.040, RSMo's requirement that bids be based on standard specifications. If DPMM were allowed in a bid document to do what it did in this RFP, which was effectively to ask offerors to propose any optional services each offeror individually might propose and then to select the optional services offered by one bidder, without giving other bidders the chance to

make an offer on the same terms, it would create an exception to Chapter 34's competitive bidding requirements that would threaten to swallow the rule and undermine the entire competitive bidding scheme.

Finally, the Court disagrees with Plaintiffs' argument that the base contract with Securus is also void because of DPMM's failure to evaluate the pre-paid account transaction fees. The RFP stated that the State "reserve[d] the right" to evaluate the pre-paid account transaction fees as part of the subjective evaluation, and it was not obligated to exercise that right for the base contract to be valid.

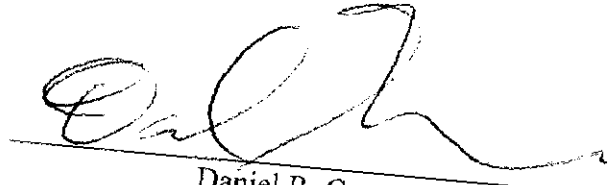
JUDGMENT

IN VIEW OF THE FOREGOING, IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

- Contract No. C211019001 with Securus is valid for the base services offered at \$0.05 per minute.
- The optional services offered by Securus in its proposal are not included in Contract No. C211019001 and cannot be awarded to Securus in the future without reletting the entire contract for competitive bidding or competitive proposals.
- Defendants are enjoined from adding the optional services to Contract No. C211019001. If the optional services are desired, the entire contract must be relet.
- All other issues raised by the pleadings are decided consistent with the foregoing adjudications.

- Parties to bear their own costs.

Dated this 30th day of November, 2011.



Daniel R. Green
Circuit Court Judge, Division II

STATE OF MISSOURI }
COUNTY OF COLE } SS

I, BRENDA A. UMSTATTD, Clerk of the Circuit Court of Cole County, Missouri, hereby certify that the above and foregoing is a full true and correct copy of

Judgment

as fully as the same remains of record in my said office.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of my said office this 6 day of December, 2011.
BRENDA A. UMSTATTD, Clerk

Deputy Clerk
Circuit Court of Cole County, Missouri

