

IN THE COUNTY LEGISLATURE OF JACKSON COUNTY, MISSOURI

AN ORDINANCE repealing section 1051., Jackson County Code, 1984, relating to County purchasing policy, and enacting, in lieu thereof, one new section relating to the same subject.

ORDINANCE NO. 5236, June 24, 2019

INTRODUCED BY Theresa Galvin and Dan Tarwater III, County Legislator

BE IT ORDAINED by the County Legislature of Jackson County, Missouri, as follows:

Section A. Enacting Clause. Section 1051. Jackson County Code, 1984, is hereby repealed, and one new section enacted in lieu thereof, to be known as section 1051., to read as follows:

1050. Formal Competitive Bids, Notice Inviting.

Notice inviting bids shall be provided in the manner and utilizing such media as the Director of Finance and Purchasing or his or her designee deems most appropriate to the subject matter of the bid and the applicable timeline available with the objective of encouraging fair and unbiased competition. The notice shall be designed to secure a reasonable distribution and a competitive bidding process and may include direct mail, electronic mail, online listing services, newspaper advertisements, and/or such other means as the director may deem appropriate. In addition to any other solicitation, all purchases, leases, or sales shall also be advertised by notices posted on public bulletin boards in the courthouses in Kansas City and Independence.

1051.1 Notice of Solicitation, Content, Timing.

The notice inviting competitive bids shall be distributed and/or posted at least five (5) business days preceding the last day for receipt of bids or proposals and shall include a general description of the products or services to be leased or purchased and state where bid forms and specifications may be obtained and the time and place for submission and opening of bids.

1051.2 Bidders and Suppliers List.

The Director of Finance and Purchasing shall review the bidders and suppliers list for prospective bidders and shall solicit bids from as many such bidders as is necessary to assure a reasonable distribution of the solicitation and adequate competition.

1051.3 Certain Solicitations, Evaluation Process.

Each solicitation that is to be accomplished by way of a Request for Proposals, Request for Statements of Qualifications and Interest, or a similar procurement mechanism, and that will result in a recommendation to the County Legislature for the award of a contract, shall contain in the notice and/or specifications the following statement: " Any Evaluation Criteria or weighting of criteria is used by the County as tool to assist the County in selecting the best proposal for the County. Evaluation scores or ranks alone do not create a right or expectation of a Contract

or Agreement with the County. Ultimately, the County may choose to award to any Respondent, regardless of score or rank.”

Effective Date: This ordinance shall be effective immediately upon its signature by the County Executive.

APPROVED AS TO FORM:

Jim D. Baker
Chief Deputy County Counselor

Ben Comins
County Counselor

I hereby certify that the attached ordinance, Ordinance No.5236, introduced on June 24, 2019, was duly passed on July 29, 2019 by the Jackson County Legislature. The votes thereon were as follows:

Yeas 5

Nays 4

Abstaining 0

Absent 0

VETOED - August 8, 2019

This Ordinance is hereby transmitted to the County Executive for his signature.

7.29.19
Date

Mary Jo Spino
Mary Jo Spino, Clerk of Legislature

I hereby approve the attached Ordinance No. 5236.

August 8, 2018 - Veto message from the County Executive. (See Attached)

Date

Frank White, Jr., County Executive



FRANK WHITE, JR.
Jackson County Executive



August 8, 2019

Veto Message from the County Executive

Ordinance 5236

TO THE JACKSON COUNTY LEGISLATURE:

I am returning herewith without my approval Ordinance 5236, which seeks to amend the County's Purchasing Code. Most notably, the proposed amendment would require that certain solicitations include the following language: "Ultimately, the County may choose to award to any Respondent, regardless of rank or score." This language is notable both for its clear conflict with state law as well as its brazen departure from fair and competitive procurement practices.

First, it is important to note that despite Ordinance 5236 dealing solely with the county's purchasing policy, the Ordinance was interestingly assigned to the Legislature's Rules Special Committee, despite the fact that the Rules of the Legislature state that the Finance and Audit Committee shall be responsible for matters relating to the "county purchasing policy." While, once again according to the Rules of the Legislature, the Rules Special Committee is solely responsible for "(m)atters relating to the Rules of the Legislature."

Second, during testimony on Ordinance 5236, a witness stated that the Ordinance would prevent prospective bidders from participating in the evaluation of their own bid and that this language was used by other governmental organizations. Very simply this language does not prevent prospective bidders from participating in an evaluation process, nor does it even relate to such a practice. In addition, we requested from the witness examples of other jurisdictions that use the language referenced above. While examples were provided, none of which included the same or even similar language to that being proposed above.

Third, on numerous occasions prior to the passage of Ordinance 5236, the County Counselor's Office voiced concerns with the legality of the final sentence of the amended language, referenced above. In addition, multiple Legislators also echoed those concerns and Legislator Lauer requested that the Ordinance simply be held until the Counselor's Office was able to prepare a written opinion on the matter. The Legislator's request was denied.



Attached to this veto message, is the memorandum requested by Legislator Lauer. As you will see, consistent with the prior statements of the County Counselor's Office, they have concluded that "at least one provision of Ordinance 5236 is inconsistent with state law." The opinion goes on to state, that the aforementioned language "suggests that the county is authorized by law to act capriciously and without reason. This is clearly not the case." Not to be overlooked, the opinion concludes by pointing that the Missouri Supreme Court recently held that an unsuccessful bidder has "legal standing to challenge an award if it alleges it was denied a fair and equal opportunity to compete in the bidding process." Therefore, the very provision that has been stated to have been created in the hopes of protecting the County from litigation, could now be used to our detriment by those suing us.

In conclusion, Ordinance 5236 attempts to require the inclusion of language in certain solicitations that is contrary to state law. In addition, we don't need statutory language to tell us that using taxpayer dollars to enter into contracts for anything but the best product for the best price, is a bad idea. For the foregoing reasons, I return Ordinance 5236 to the County Legislature without my approval and with my objections.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Frank White, Jr.", with a long horizontal flourish extending to the left.

Frank White, Jr.
Jackson County Executive



OFFICE OF THE COUNTY COUNSELOR

JACKSON COUNTY COURTHOUSE

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MEMORANDUM

TO: FRANK WHITE, JR.
COUNTY EXECUTIVE

FROM: BRYAN O. COVINSKY *BCC*
COUNTY COUNSELOR

DATE: AUGUST 8, 2019

RE: ORDINANCE 5236, COMPLIANCE WITH STATE PURCHASING LAW

You have asked for the opinion of this office as to whether Ordinance 5236, recently adopted by the Jackson County Legislature, is consistent with the Missouri state purchasing laws applicable to counties. Upon review, it is our view that at least one provision of that ordinance is inconsistent with state law.

Ordinance 5236, if it becomes effective, would require that some future county purchasing solicitations contain the following language: "Any Evaluation Criteria or weighting of criteria is used by the County as tool to assist the County in selecting the best proposal for the County. Evaluation scores or ranks alone do not create a right or expectation of a Contract or Agreement with the County. Ultimately, the County may choose to award to any Respondent, regardless of score or rank." We believe this last sentence is inconsistent with the county's duties under state law.

Chapter 50 of the Revised Statutes of Missouri contains many statutory provisions generally applicable to Missouri counties and county finances. Section 50.660, RSMo 2016, provides in part, "All contracts and purchases shall be let to the lowest and best bidder after due opportunity for competition...." This section is applicable to home rule charter counties, at least as regards contracts and purchases in furtherance of a governmental, as opposed to corporate, function. See *Information Technologies, Inc. v. St. Louis County*, 14 S.W.3d 60, 63 (Mo. App., E.D. 1999). There is Missouri caselaw authority supporting the proposition that a public body may reject any and all bids, including the lowest bid submitted. *State ex rel. Page v. Reorganized School District R-VI of Christian County*, 765 S.W.2d 317, 321 (Mo. App., S.D. 1989). However, "rejection of the lowest bid must not be made fraudulently, corruptly, capriciously or without reason." *La Mar Construction Co. v. Holt County R-II School District*, 542 S.W.2d 568, 571 (Mo. App., K.C.D. 1976). The language of Ordinance 5236 stating that the county may award to any bidder regardless of score or rank

suggests that the county is authorized by law to act capriciously and without reason. This is clearly not the case.

It's our understanding that the provision of Ordinance 5236 quoted above was originally included in the county's purchasing specifications to suggest to an unsuccessful bidder that it had no legal basis for challenging the award of a contract to a successful bidder. However, the Supreme Court of Missouri has recently made clear that an unsuccessful bidder on a public contract in Missouri does have legal standing to challenge an award if it alleges it was denied a fair and equal opportunity to compete in the bidding process. See *Byrne & Jones Enterprises, Inc. v. Monroe County R-1 School District*, 493 S.W.3d 847, 856 (Mo. banc 2016).