



STATE OF ARKANSAS  
**Department of Finance  
and Administration**

OFFICE OF THE ARKANSAS LOTTERY

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Little Rock, Arkansas 72203-3238  
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<http://myarkansaslottery.com>

**B1**

January 10, 2017

The Honorable Gary Stubblefield, Co-Chair  
The Honorable Monte Hodges, Co-Chair  
Joint Budget Committee – Peer Review  
One Capitol Mall, 5<sup>th</sup> Floor  
Little Rock, AR 72201

RE: Request for Review and Approval of Agreement for Contractual Services for  
Advertising, Marketing, and Public Relations Services

Gentlemen:

The Department of Finance and Administration Office of the Arkansas Lottery (OAL) requests review by the Joint Budget Committee - Peer Review of an Agreement for Contractual Services for Advertising, Marketing, and Public Relations Services. I respectfully request that this matter be included on the agenda of the January 18, 2017, JBC Peer Review meeting. The following information provides background on this matter:

1. The Office of State Procurement, on behalf of OAL, issued a Request for Qualifications (RFQ) for Advertising, Marketing, and Public Relations Services on September 15, 2016 (Exhibit A).
2. OAL determined that the proposal dated October 13, 2016, met or exceeded each of the requirements of the RFQ and was the Successful Vendor pursuant to OAL's competitive bid process (CJRW RFQ Response, Exhibit B).
3. Vendor or other parties to the proposed Agreement: CJRW and OAL (the proposed Agreement is enclosed as Exhibit C).
4. Term of the proposed Agreement: The term of the contract shall be for five (5) years and shall commence on January 8, 2017. Upon mutual agreement by CJRW and OAL, the contract may be renewed by OSP on a year-to-year basis, for up to two (2) additional one-year terms or a portion thereof.

The Honorable Gary Stubblefield  
The Honorable Monte Hodges  
Page 2  
January 10, 2017

5. Value (cost or cost savings) projected for the proposed agreement: The Total Projected Cost is \$34,500,000.00. The terms of compensation are set forth in the CJRW Cost Schedule (Exhibit D).

Please call me if you have any questions or need additional information.



Bishop Woosley  
Director

Enclosures

cc: The Honorable Asa Hutchinson, Governor of Arkansas  
Mr. Larry Walther, Director, Arkansas Department of Finance and Administration

**AGREEMENT FOR CONTRACTUAL SERVICES FOR ADVERTISING,  
MARKETING, AND PUBLIC RELATIONS SERVICES**

THIS AGREEMENT, effective as of January \_\_\_\_, 2017, by and between the Department of Finance and Administration Office of the Arkansas Lottery ("OAL" or "Lottery"), 124 W. Capitol Avenue, Suite 1400, Little Rock, AR 72201 and CJRW, 300 Main Street, Little Rock, AR 72201, witnesses that the parties have made the agreements set forth below:

**RECITALS**

WHEREAS, the State of Arkansas has, pursuant to Arkansas law, established the Lottery and authorized the Director of the Lottery ("Director") to enter into contracts for advertising, marketing and public relations services; and

WHEREAS, the Lottery issued a Request for Qualifications ("RFQ") for Proposals of Advertising, Marketing, and Public Relations Services, and whereas, upon evaluation of the proposals submitted in response to the RFQ, the Lottery determined that the CJRW proposal dated October 13, 2016, ("Proposal") met or exceeded each of the requirements of the RFQ and was a Successful Vendor pursuant to the Lottery's competitive proposal process; and

WHEREAS, based on in-depth evaluations of CJRW, the Lottery desires to enter into a contractual services agreement with CJRW for Advertising, Marketing, and Public Relations Services; and

WHEREAS, CJRW desires to enter into such an agreement;

NOW, THEREFORE, in consideration of the above premises, and the mutual promises set forth below, and subject to compliance with Arkansas Law, the Lottery and CJRW, with this agreement (the "Agreement"), hereby make the following agreements:

**AGREEMENTS**

1. Contract Elements and Incorporations by Reference and Order of Priority

The contract elements ("Contract Elements"), which are incorporated by reference, and the order of priority shall be as follows;

- a. The RFQ (Exhibit A)
- b. CJRW RFQ Response (Exhibit B)
- c. CJRW Cost Schedule (Exhibit C);
- d. OAL Rules for Claims in Contract or Tort (Exhibit D);



2. Term of Contract: Five (5) years from date of award. Upon mutual agreement by CJRW and OAL, the contract may be renewed by OAL on a year-to-year basis, for up to two (2) additional one-year terms or a portion thereof.

3. Terms of Compensation: The terms of compensation are set forth in the CJRW Cost Schedule (Exhibit C).

4. Additional Covenants

a. It shall be a breach of ethical standards for a person to be retained, or to retain a person, to solicit or secure a state contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, except for retention of bona fide employees or bona fide established commercial selling agencies maintained by the contractor for the purpose of securing business. CJRW hereby covenants and agrees that no person shall:

(i) be excluded from participation in, or be denied benefits of, this Agreement, or  
(ii) be excluded from employment, denied any of the benefits of employment or otherwise be subjected to discrimination on the grounds of handicap or disability, age, race, color, religion, sex, national origin or ancestry, or any other classification protected by federal, Arkansas state constitutional, or statutory law. CJRW agrees to, upon request, show proof of such nondiscrimination and shall post in conspicuous places, available to all employees and applicants, notices of nondiscrimination.

b. CJRW further agrees to maintain documentation for all charges against OAL under this Agreement or any modifications or amendments thereto. The books, documents, papers, accounting records, and other evidence pertaining to products and/or services to be provided or performed or money received under this Agreement shall be:

(i) maintained for a period of five (5) full years from the date of the final payment; and

(ii) subject to audit or inspection at any reasonable time and upon reasonable notice by OAL or its duly appointed representatives. CJRW agrees to make such materials available at its offices, and copies thereof shall be furnished to OAL or its duly appointed representative by CJRW, at no cost to OAL or its duly appointed representative, if requested by OAL or its duly appointed representative. Such records shall be maintained in accordance with any applicable provisions of generally accepted accounting principles (or other applicable accounting principles or policies) and any other applicable procedures established by OAL from time to time.

c. CJRW and OAL shall be bound to confidentiality of any information that its employees may become aware of during the course of performance of contracted services. Consistent and/or uncorrected breaches of confidentiality may constitute grounds for cancellation of the Contract.

d. CJRW represents and warrants that its performance under the Contract will not knowingly infringe any patent, copyright, trademark, service mark, or other intellectual property rights of any other person or entity and that it will not constitute the unauthorized use or disclosure of any trade secret of any other person or entity.

e. The parties further agree that any and all disputes which may arise from this Contract shall be governed and resolved under OAL Rules for Claims in Contracts or Torts.

IN WITNESS WHEREOF, the parties have executed this Contractual Services Agreement on this 8<sup>th</sup> day of January, 2017.

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W. Bishop Woosley  
Director  
DFA-Office of the Arkansas Lottery

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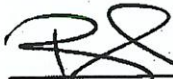
Jill Joslin  
Senior Vice President  
CJRW



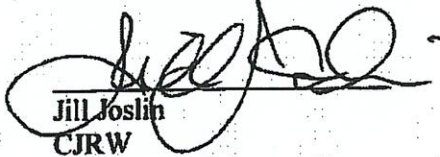
## CJRW COST SCHEDULE

| Service   | Price                    |
|---|--------------------------|
| <b>Media Placement<br/>(TV, Radio, Print, Billboard, Digital,<br/>Social)</b> | <b>13% of media cost</b> |
|   |                          |
| <b>Advertising, Marketing &amp; PR Services</b>                               | <b>Hourly Charge</b>     |
| Creative Director   | \$0                      |
| Art Director  | \$0                      |
| Copy Writer   | \$0                      |
| Graphic Designer  | \$0                      |
| Senior Account Supervisor   | \$0                      |
| Strategic Planning  | \$0                      |
| Account Manager/Coordinator   | \$0                      |
| Staff Accountant  | \$0                      |
| Promotional Specialist  | \$0                      |
| Promotional Staff   | \$0                      |
| Public Relations Director/Planning  | \$135                    |
| Public Relations Coordinator  | \$135                    |
| Production Director   | \$0                      |
| Media Planning/Traffic/Production<br>Supervision                              | \$0                      |
| Social Media Planning/Management  | \$95                     |
| Digital Media Planning/Management   | \$0                      |
| Media Tracking  | \$0                      |
| Workshop Meeting Attendance   | \$0                      |
| Research Material Collection  | \$0                      |
| External Printing   | Outside vendor cost      |
| External TV, Radio, Billboard, Digital, Print,<br>Social, and POS Production  | Outside vendor cost      |
| Website Creative Development  | Outside vendor cost      |
| Website Hosting, Content Management and<br>Maintenance                        | Outside vendor cost      |

The signatures below signify the party's agreement as to the negotiated prices contained in this Cost Schedule.



Bishop Woosley  
Office of the Arkansas Lottery



Jill Joslin  
CJRW

**Comparative Analysis**

**CIRW Model**

|      | Proposed Budget | Media Buy (77% Proposed Budget) | Commissions (13% Media Buy) | Invoice Total (Media + Commissions) | Total Due To CIRW | Excess Budget (Budget - Media Buy - Commissions) |
|------|-----------------|---------------------------------|-----------------------------|-------------------------------------|-------------------|--|
| FY17 | 6,000,000       | 4,620,000                       | 600,600                     | 5,220,600                           | 600,600           | 779,400  |
| FY18 | 6,500,000       | 5,005,000                       | 650,650                     | 5,655,650                           | 650,650           | 844,350  |
| FY19 | 7,000,000       | 5,390,000                       | 700,700                     | 6,090,700                           | 700,700           | 909,300  |

**MHP Model**

| # Additional Budgeted Projects | Proposed Budget | Media Buy (77% Proposed Budget) | Commissions | Hourly Fees | Total Due to MHP | Excess Budget (Budget - Media Buy - Commissions) |
|--------------------------------|-----------------|---------------------------------|-------------|-------------|------------------|--|
| FY17                           | 2               | 6,000,000                       | 231,000     | 501,837     | 732,837          | 647,163  |
| FY18                           | 2               | 6,500,000                       | 250,250     | 501,837     | 752,087          | 742,913  |
| FY19                           | 1               | 7,000,000                       | 269,500     | 438,283     | 707,783          | 902,217  |

**Model Comparison**

|      | Due to CIRW | Remaining Budget (CIRW) | Due to MHP | Remaining Budget (MHP) |
|------|-------------|-------------------------|------------|------------------------|
| FY17 | 600,600     | 779,400                 | 732,837    | 647,163                |
| FY18 | 650,650     | 844,350                 | 752,087    | 742,913                |
| FY19 | 700,700     | 909,300                 | 707,783    | 902,217                |

**Prior year percentage calculations**

|      | Media Buy | Commissions | Commissions (%) | Media Total (Media Buy + Commissions) | Production Total (Hourly Fees + Other) | Invoice Total (Media + Production) | Estimated Total Due to Vendor |
|------|-----------|-------------|-----------------|---------------------------------------|--|------------------------------------|-------------------------------|
| FY15 | 3,416,945 | 154,988     | 4.83%           | 3,581,932                             | 653,405                                | 4,610,066                          | 539,717                       |
| FY16 | 3,902,351 | 195,206     | 5.00%           | 4,097,557                             | 788,523                                | 4,886,080                          | 491,874                       |

**Assumptions:**

- Analysis performed using FY15 and FY16 invoiced amounts for 3 vendors: Mitchell Communications, The Communications Group, and Mangan Holcomb Partners
- Media buy percentage for future years is be equal to the average of FY15 and FY16 as % of total invoiced  
 $((3,416,945 + 3,902,351) / (4,610,066 + 4,886,080)) = 77\%$

**Notes:**

- Assumption of 2 major initiatives estimated at \$63,554 each
- Assumption of 1 major initiative estimated at \$63,554





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**OFFICE OF STATE PROCUREMENT**  
1509 West Seventh Street, Suite 300  
Little Rock, Arkansas 72201-4222  
Phone: (501) 324-9316  
Fax (501) 324-9311  
<http://www.dfa.arkansas.gov/offices/procurement>

December 30, 2016

Alex T. Gray  
Steel, Wright, Gray & Hutchinson, PLLC  
400 West Capitol Ave, Suite 2910  
Little Rock, Arkansas 72201

RE: Bid Number SP-17-0033

Dear Mr. Gray,

Thank you for your letter dated December 14, 2016, and especially for the supplemental information you provided by a subsequent letter dated December 20, 2016. In your letter of December 14, 2016, you advise that, on behalf of Ghidotti-Vines, you are protesting the anticipation to award a contract to CJRW, Inc. ("CJRW") in connection with the request for qualifications SP-17-0033 (the "RFQ"), which was issued by the Office of State Procurement ("OSP") on behalf of the Office of the Arkansas Lottery ("OAL"). The stated purpose of the RFQ is to obtain advertising, marketing, and public relations services for OAL. The RFQ was issued on September 15, 2016. It specified a bid opening date of October 13, 2016, at 2:00 pm. The anticipation to award the contract to CJRW was posted on the OSP website on December 6, 2016.

OSP is committed to working towards ensuring that all who deal with the procurement system of this State are treated fairly and equitably. The protest process provided in Ark. Code Ann. § 19-11-244 aids me in this endeavor by affording a bidder, offeror, or contractor an opportunity to alert me of any facts that, if true, show that it was aggrieved by a violation of Arkansas Procurement Law or other irregularity with a procurement but for which the protestor would likely have been awarded the contract that the protestor seeks to put at issue.

The protest that you submitted on behalf of Ghiddotti-Vines (the "Protest") posits that Ghiddotti-Vines was aggrieved because CJRW should have been excluded from consideration because CJRW failed to meet a mandatory requirement of the RFQ by failing to disclose all potential conflicts of interest. In support of this contention, Ghiddotti-Vines relies on RFQ Section 2.5H. The Protest notes that Section 1.5A of the RFQ provides that "[t]he words **must** and **shall** signify a Requirement of this solicitation and that vendor's agreement to and compliance with that item is mandatory." Section 1.5B further states that "[e]xceptions taken to any Requirement in this Bid Solicitation, whether submitted in the vendor's response or in subsequent correspondence, shall cause the vendor's response to be disqualified."

For reasons set forth more fully below, the Protest is not sustained.

## REASONING

Upon review of the information Ghiddotti-Vines has submitted, it does not appear to have been aggrieved. Most importantly, Ghiddotti-Vines does not even appear to exist as an entity. Instead the submission that was submitted under the name Ghiddotti-Vines appears to have been the joint submission of two legally distinct entities, Ghidotti Communications, LLC ("Ghidotti") and Vines Media, LLC (Vines"), which contracted with each other for the purpose of submitting a response to the RFQ.

Your letter of December 20, 2016 properly notes that Section 1.14(A) of the RFQ specifically allows for joint responses to the RFQ. However, it fails to note that Section 1.14 also expressly identifies several substantive and material requirements for vendors submitting joint responses. Section 1.14 provides:

- A. A joint response submitted by two or more vendors is acceptable. However, a single vendor **must** be identified as a prime contractor.
- B. The prime contractor **shall** be held responsible for the contract and **shall** be the sole point of contact.
- C. Any joint response submitted **must** completely define the roles, responsibilities, duties, and obligations of each contractor individually.
- D. Any joint response submitted **must** be signed by an official authorized to bind the each of the vendor(s) to a resultant contract. This requirement **shall** also apply to the Response Signature Page and all Agreement and Compliance Pages included in the Response Packet.

RFQ, Section 1.14 (emphasis in original). The response that Ghiddotti and Vines submitted does not conform to these requirements. In your letter of December 20, 2016, you candidly disclose that Ghiddotti-Vines is a joint venture. In reviewing the joint response that Ghiddotti and Vines submitted, I do not see where a single contractor is identified as the prime contractor, as required in order to conform with Sections 1.14(A) and (B) of the RFQ. In fact, the verbiage of the proposal refers to Ghiddotti and Vines as if it were a single entity, instead of as two legally distinct entities submitting a joint response as part of a joint venture. *See* Ghiddotti-Vines proposal, Page 17.

I also could not locate information in the submitted proposal that was properly responsive to Section 1.14(C) of the RFQ, which requires the response to completely define the roles, responsibilities, duties, and obligations of each contractor individually. The organizational chart provided as part of the joint response that Ghiddotti and Vines submitted fails to meet this requirement. Instead it suggests that Ghiddotti and Vines comprise a singular entity, with Natalie Ghidotti listed as CEO and Brooke Vines listed as President. Given that Ghiddotti-Vines is not a single entity, but rather a joint venture of two separate entities, the full requirements of Section 1.14 apply. Because Ghiddotti and Vines submitted a joint response, and the submission fails to conform to the material requirements of 1.14(A), 1.14(B), and 1.14(C) for joint responses, neither Ghiddotti nor Vines timely submitted a conforming response.



Accordingly, the response of Ghiddotti-Vines is ineligible for further consideration. Consequently, neither Ghiddotti nor Vines can show that, but for the facts complained of in its Protest, Ghiddotti-Vines would be awarded the contract.

### CONCLUSION

For the aforesaid reasons, the Protest is not sustained. Pursuant to Ark. Code Ann. § 19-11-244(e), my decision is final and conclusive.

Although the Protest is not sustained, I would like to offer my thanks to Ghiddotti and Vines for their interest in doing business with the State of Arkansas.

Sincerely,



Edward R. Armstrong  
State Procurement Director

cc: Larry Walther, Director, DFA  
Sara Farris, Assistant Attorney General  
Bishop Woosley, OAL Director

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January 5, 2017

Jane W. Duke  
Mitchell Williams  
425 West Capitol Ave, Suite 1800  
Little Rock, Arkansas 72201-3525

RE: Bid Number SP-17-0033

Dear Ms. Duke,

Happy New Year to you and the other fine folks at Mitchell Williams, whom I hold in high regard. Thank you for your letter dated December 19, 2016, and for the supplemental information you provided in your letter dated December 20, 2016. In your letter of December 19, 2016, you advise that, on behalf of Mangan Holcomb Rainwater Culpepper, Inc. d/b/a/ Mangan Holcomb Partners ("MH"), Mitchell Williams is protesting the anticipation to award a contract to CJRW, Inc. ("CJRW") in connection with the request for qualifications SP-17-0033 (the "RFQ"), which was issued by the Office of State Procurement ("OSP") on behalf of the Office of the Arkansas Lottery ("OAL"). The stated purpose of the RFQ is to obtain advertising, marketing, and public relations services for OAL. The RFQ was issued on September 15, 2016. It specified a bid opening date of October 13, 2016 at 2:00 pm. The anticipation to award the contract to CJRW was posted on the OSP website on December 6, 2016.

The protest MH submitted (the "Protest") seeks to have CJRW and Ghidotti-Vines, two vendors that scored higher than MH when qualitatively evaluated by a committee of evaluators, disqualified from consideration for award. In its Protest MH claims that: (1) CJRW should have been disqualified for failing to disclose in its submission that one of its clients is Oaklawn Park, which MH asserts presents a conflict of interest that will necessarily prevent CJRW from meeting the general performance requirements of the RFQ; and (2) Ghidotti-Vines was not technically qualified under the terms of the RFQ and, therefore, should not have participated in oral presentations.

### **I. Ghidotti-Vines**

Ghidotti-Vines is disqualified from further consideration under the RFQ. After reviewing the materials you submitted, as well as material submitted to me by counsel for Ghidotti-Vines, it became apparent that the response that Ghidotti-Vines submitted was actually the joint submission of two legally distinct entities, Ghidotti Communications, LLC ("Ghidotti") and Vines Media, LLC ("Vines"), which contracted with each other for the purpose of submitting a joint response to the RFQ. Although Section 1.14(A) of the RFQ specifically allows for joint responses to the RFQ, it also expressly identifies several substantive and material requirements for vendors submitting joint responses. Section 1.14 provides:

- A. A joint response submitted by two or more vendors is acceptable. However, a single vendor **must** be identified as a prime contractor.



- B. The prime contractor **shall** be held responsible for the contract and **shall** be the sole point of contact.
- C. Any joint response submitted **must** completely define the roles, responsibilities, duties, and obligations of each contractor individually.
- D. Any joint response submitted **must** be signed by an official authorized to bind each of the vendor(s) to a resultant contract. This requirement **shall** also apply to the Response Signature Page and all Agreement and Compliance Pages included in the Response Packet.

RFQ, Section 1.14 (emphasis in original). The joint response submitted by Ghidotti and Vines does not conform to these material requirements. It did not identify a single contractor as the prime contractor as required to conform to the requirements of Sections 1.14(A) and (B) of the RFQ. In fact, the verbiage of the proposal refers to Ghidotti and Vines as if it were a single entity, instead of as two legally distinct entities submitting a joint response as part of a joint venture. *See* Ghidotti-Vines proposal, Page 17. The joint response of Ghidotti and Vines also failed to completely define the respective roles, responsibilities, duties, and obligations of each of the entities, and thus did not conform to Section 1.14(C) of the RFQ. Because the response submitted by Ghidotti and Vines did not conform to material requirements of Section 1.14 of the RFQ, they did not submit a timely conforming response and are excluded for further consideration in response to the RFQ at issue.

## II. CJRW

CJRW's response to the RFQ was evaluated and received the highest Grand Total score assigned to the competing responses submitted by the potential vendors. It was ranked accordingly and CJRW appears reasonably susceptible of being selected for award. I am not persuaded that CJRW can properly be said to have failed to meet the material requirements of the RFQ as MH contends. Section 2.5.H of the RFQ, added by Addendum 1 to the RFQ on September 30, 2016, addresses conflicts of interest. It provides:

Any incompatibility between the OAL and one or more of the successful vendor's clients, which inhibits or has the potential to inhibit the successful vendor of this RFQ from placing the interests of the OAL first must be disclosed as a conflict of interest on an ongoing basis. The vendor must disclose any conflict of interest to the OAL in writing within 15 days of knowledge of such conflict.

1. The vendor may use the list of competitors identified in the OAL's 5 year Business Plan as a guide in determining potential conflicts of interest. However, the vendor shall identify all conflicts of interest whether they are identified in the OAL's 5 Year Business Plan or not.

As set forth in Section 2.5.H of the RFQ, Addendum 1, the duty to disclose a conflict of interest to OAL is a duty of the "successful vendor." The term "successful" modifies "vendor." Given its plain and ordinary



meaning, and considered within the context of the RFQ, “successful vendor” means the vendor who succeeds in being awarded the contract. The intent of Section 2.5.H of the RFQ is to require the “successful vendor” to disclose to OAL, on an ongoing basis, any “conflict of interest”<sup>1</sup> that arises which inhibits or has the potential to inhibit the successful vendor from prioritizing the interests of the OAL. Once a vendor becomes the successful vendor (by being awarded a contract), then the successful vendor will have an ongoing duty to disclose, in writing, any conflict of interest to the OAL within 15 days of learning of it. *See* Section 2.5.H of the RFQ, Addendum 1.<sup>2</sup>

At this point there is not yet any successful vendor, only an anticipated successful vendor. Once there is a successful vendor, that vendor will have an ongoing duty to disclose, in writing, any conflict of interest to OAL within 15 days of learning of such incompatible obligations. *See id.* This is currently a future contractual obligation of the successful vendor. Until such time as a vendor is awarded a contract as a result of the RFQ, I cannot properly disqualify CJRW (or any other participating vendor) based on the successful vendor’s future duty to disclose conflicts of interest as provided in Section 2.5.H.

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<sup>1</sup> Section 2.5.H describes what the successful vendor must disclose as a “conflict of interest” in terms of “incompatibility” between the OAL and one or more of the successful vendor’s clients that “inhibits or has the potential to inhibit the successful vendor of this RFQ from placing the interests of the OAL first.” *See* RFQ, Section 2.5.H. As generally understood, incompatibility is the quality or state of being incompatible. *See* Merriam-Webster, *incompatibility*, <https://www.merriam-webster.com/dictionary/incompatibility> (January 4, 2016). Accordingly, absent incompatibility, there is no conflict to report under Section 2.5.H. Because the disclosure(s) will be submitted to OAL, whether a concurrent representation of one or more clients that gets disclosed to OAL by the successful vendor is incompatible with the vendor prioritizing the services OAL seeks under the RFQ will be a matter for OAL to determine in its sound business judgment on a case by case basis. As you observed on page 6 of your December 19, 2016 letter, there would not be any conflict of interest if the successful vendor agrees to subordinate or sacrifice any conflicting interest it discloses. Similarly, even without subordination, there would not necessarily be any incompatibility if the differences in the services being provided and/or the products being marketed are sufficiently distinct to allow the successful vendor to provide OAL with priority in those service areas and market segments it targets. In other words, unless the competing demands of another client actually are directly adverse so as to render the successful vendor incapable of prioritizing the competing demands of OAL, there is not an incompatibility that arises merely from having multiple clients in the same market. Using an obvious example, it should be apparent after just a moment of reflection that the mere fact that a marketing firm has clients other than OAL does not necessarily present a conflict of interest incompatible with prioritizing OAL’s interests. It should also be apparent that the mere fact that the other clients of the marketing firm also want the marketing firm to advertise their products and services, which will likely involve encouraging consumers to spend some of their discretionary dollars, is not in itself a conflict that renders concurrent engagement incompatible—otherwise every marketing firm with more than one client would have such a conflict of interest. That would be an absurd result. Instead, to be incompatible, the duties to the different clients must actually conflict to the extent that they are incapable of being discharged concurrently. I do not have to determine whether such a conflict exists to decide the Protest because the duty to disclose that is set forth in the general requirements of Section 2.5 is a future contractual obligation, and OAL will be in the best position, based on its experience and intimate familiarity with its own plans, to determine whether any engagement of the successful vendor that gets disclosed actually conflicts with OAL’s interests.

<sup>2</sup> The disclosure requirement in Section 2.5.H of the RFQ, in Addendum 1, is in a section entitled General Requirements, which contains general requirements that are mandatory performance obligations of the successful vendor. The requirement applies prospectively, not retroactively. Retroactive application would lead to an absurd result because it would be impossible for any offeror to comply if more than 15 days had passed since it learned of a conflict of interest. There is another disclosure requirement in Section 2.5.G which, like the other requirements in Section 2.5, applies prospectively. It requires disclosure of conflicts of interest within 15 days of their “occurrence.” It would be absurd to apply it retroactively as well since vendors would not be able to comply if more than 15 days had already passed since an “occurrence.”



As to other requirements of the RFQ, such as Section 2.5.E, concerning support for the strategies set forth in OAL's 5-Year Business Plan, and Section 2.6.E, dictating that the vendor and/or the dedicated staff member assigned to the OAL account shall participate in strategy development to ensure that strategies are consumer driven and consistent with OAL's 5-Year Business Plan, CJRW did not take exception to any of these mandatory requirements of the RFQ.<sup>3</sup> Consequently, if it is awarded the contract, it will be required to perform these requirements. Should CJRW fail to fulfill any contractual obligations in respect to these requirements, CJRW would then be in breach of contract and OAL can seek an appropriate remedy to address any such breach. However, it would be presumptive for me to assume that CJRW will be unable to fulfill the future contractual requirements it has agreed to satisfy based merely on the contention of a disappointed competitor interested in the same contract. CJRW's actual performance, assuming CJRW becomes the successful vendor, will be evaluated by OAL on an ongoing basis. If CJRW fails to put the business interests of the OAL first, or otherwise fails to fulfill its contractual obligations to OAL, OAL will be able to address those issues when and if such a time comes. However, prospective breaches alleged by a competitor are not proper grounds upon which to sustain a protest. At worst, if they occur, they will aggrieve OAL, not MH. MH may only protest based on facts showing that it has been aggrieved. *See* Ark. Code Ann. § 19-11-244(a)(2). In the context of a procurement, a party is aggrieved<sup>4</sup> when it would have been selected as the awardee but for the facts giving rise to the grievance raised in the protest.

MH raises another grievance in its Protest based on statements attributed to a CJRW representative in Arkansas Business, *Whispers*, November 21, 2016. In the context of discussing whether CJRW's work for Oaklawn Park constitutes a conflict of interest that would be incompatible with it providing its services to OAL, the representative is reported as saying, "the lottery didn't see it as a conflict and neither did Oaklawn; we asked specifically at the outset, and before we went forward, we sought approval from both sides." MH argues that, if such communications occurred, CJRW must be disqualified because such communications were not through OSP.

Considering the nature of the alleged communications that the representative claimed were had, I do not see where MH would actually have been aggrieved by them. Nothing in the Protest nor in the Arkansas

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<sup>3</sup> If CJRW had taken exception to any of the mandatory requirements of Sections 2.5 or Section 2.6, it would not be qualified to be considered for award of a contract under the RFQ.

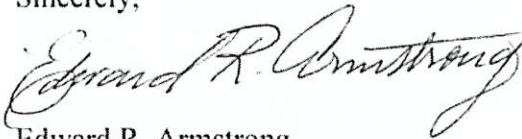
<sup>4</sup> Arkansas Procurement Law provides a statutory procedure whereby an actual bidder, offeror, or contractor who is "aggrieved" in connection with the award of a contract can protest to the State Procurement Director. *See* Ark. Code Ann. § 19-11-244(a)(2). The word "aggrieved" is not defined by statute for purposes of Arkansas Procurement Law. It has more than one ordinary meaning, ranging from merely being "troubled or distressed in spirit," to "suffering from an infringement or denial of legal rights." *See* <http://www.merriam-webster.com/dictionary/aggrieved> For purposes of administering Ark. Code Ann. § 19-11-244, it is only the second of these two meanings ("suffering from an infringement or denial of legal rights") that makes sense in the context of procurement protests. Conversely, in the context of procurement, it would be absurd to consider a party aggrieved merely because he or she was troubled or distressed in spirit. The narrower reading harmonizes with the meaning that the Arkansas Supreme Court previously gave the term "aggrieved party" in deciding what it means for a party to be aggrieved for purposes of having standing to appeal. *See Brown v. Frenken*, 112 S.W. 207, 208 (1908) ("A party aggrieved is one whose pecuniary interest is directly affected by the decree or one whose right of property may be established or divested by the decree."). It is also in accord with the legal definition of the term. *See Black's Law Dictionary* 1144 (Bryan A. Garner ed., 7<sup>th</sup> ed., West 1999) ("**aggrieved party**. A party whose personal, pecuniary, or property rights have been adversely affected by another person's actions or by a court's decree or judgment.").

Business article shows or indicates that they affected the outcome of the evaluation in any way, or that they provided CJRW with some unfair advantage in connection with the solicitation. The nature of the alleged communications that MH complains of do not show that the fairness or reasonableness of the ranking and recommendation of the evaluation committee should be disregarded. To the best of my knowledge, the evaluation process was fair and carried out in conformity with Arkansas Procurement Law and OSP Policy.

### CONCLUSION

For the aforesaid reasons, the Protest is not sustained. Pursuant to Ark. Code Ann. § 19-11-244(e), my decision is final and conclusive. Although the Protest is not sustained, I would like to thank Mangan Holcomb Rainwater Culpepper, Inc., for its continued interest in doing business with the State of Arkansas. There will be other opportunities. I would also like to thank you, very much and most sincerely, for your professionalism in representing your client in this matter.

Sincerely,



Edward R. Armstrong  
State Procurement Director

cc: Larry Walther, Director, DFA  
Bishop Woosley, OAL Director