

STATE OF NEW YORK  
OFFICE OF THE STATE COMPTROLLER

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In the Matter of the Bid Protest filed with respect to the acquisition of media services to provide entertainment by the Department of Motor Vehicles, Contract No. C000491

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Determination  
of Bid Protest  
SF-19980084

November 23, 1998

This Office has completed its review of the above-referenced process by the Department of Motor Vehicles ("DMV") to enlist a firm to provide media services to provide entertainment in DMV Offices, and the bid protest filed by RNS Communications, Inc. ("RNS"). For the reasons detailed below, we deny the protest and will approve the contract after it is forwarded to us by the Attorney General.

## **BACKGROUND**

### **Facts**

DMV conducted a process to enlist a firm "to install and maintain an automated system of information and advertising services for the purpose of entertaining or informing our customers waiting for services in district or branch offices, and shortening perceived waiting times," through the use of a Request For Proposals ("RFP"). The RFP called for no expenditure of state moneys, as "[a]ll equipment expenses, installation and maintenance costs, program preparation and implementation are the sole responsibility of the bidder." DMV would receive a portion of the revenue earned by the firm chosen through the RFP process, from advertising revenue the firm received.

The RFP contemplated awards for the following: Item A. Large Seating and Queuing Areas; Item B. Information Centers Located on Walls; and Item C. Free-Standing Displays. The RFP listed "Selection Criteria" which would be utilized to evaluate the proposals received for each of the above "Technical" Items, with nine criteria for evaluation of Item A, five criteria for evaluation of Item B, and six criteria for evaluation of Item C. Additionally, the RFP listed four criteria for evaluation of "Financial" components of the proposals.

Pursuant to this RFP, four firms submitted timely proposals: Video Interactive Advertising ("VIA"); Muffin-Head; Pegasus Internet Communications, Inc. ("Pegasus"); and RNS. While the RFP anticipated proposals for each of the three Items stated above, VIA and Pegasus bid only on Item A. Muffin-Head bid only on Items A and C. RNS bid only on Items A and B. Following the receipt of these proposals, DMV asked all four firms for additional information and clarification on a variety of issues in their proposals. VIA, Pegasus and RNS responded with further information. Muffin-Head withdrew from consideration. DMV then interviewed staff of VIA, Pegasus and RNS, allowing each to

make a personal presentation.

A seven person evaluation committee considered all proposals. It determined not to make an award on Items B and C, since no offers remained on Item C and the sole offer on Item B, from RNS, was determined to be too commercial. Therefore, the evaluation committee scored the proposals only on the nine "Technical" criteria (regarding Item A) and on the four "Financial" criteria. Each of these thirteen criteria was equally weighted, with a maximum of ten points for each, for a maximum possible score of 130 per evaluation committee member, or a maximum total score of 910 for the entire seven member committee. On May 12, 1998 at the bid opening, DMV awarded the contract to Pegasus, based on the cumulative evaluations of seven DMV evaluators, as follows: Pegasus - 785, RNS - 586, and VIA - 485.

### **Protesting Party<sup>1</sup>**

RNS is a firm that submitted a proposal which was not selected by DMV. RNS has already been providing some form of the entertainment services in 20 DMV offices.

### **Procedures and Comptroller's Authority**

The Comptroller is required by section 112 of the State Finance Law ("SFL") to approve all State contracts which exceed \$10,000 in amount before such contracts become effective. We consider the issues raised in this bid protest as part of our contract review function pursuant to such section of law.

As part of the review by this Office, we considered the following: correspondence from or on behalf of RNS dated August 20, 1998, August 25, 1998, September 14, 1998, and September 28, 1998; and correspondence from DMV dated September 23, 1998. At the request of the Attorney General, we also considered an allegation made in an earlier protest by VIA dated June 25, 1998 (see fn. 1, and discussion below).

## **ANALYSIS OF BID PROTEST**

### **Protestor's position**

RNS asserts that the award by DMV was flawed for the following reasons:

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<sup>1</sup>VIA had submitted a protest to DMV, alleging a number of improprieties in the award process. After DMV denied that protest, VIA chose not to appeal to the Comptroller. The Attorney General received a copy of VIA's protest, however, and has asked this office to consider one issue raised by VIA. As RNS protested after the contract had already been signed by DMV, this protest is being considered by the Comptroller and not by DMV.

1. The revenue sharing plan contemplated in the RFP "places the State at legal and financial risk from false product claims, misrepresentation, slander, and disgruntled advertisers and customers."

2. The revenue sharing agreement DMV accepted from Pegasus, as opposed to the guaranteed rental agreement offered by RNS,<sup>2</sup> is less financially advantageous in terms of actual generation of revenue.

3. A visual only entertainment service, as opposed to a visual/audio entertainment service, is most accepted and effective for the general public and most appealing to advertisers. Therefore, the DMV award of a contract for visual/audio services is inappropriate.

4. Among the bidders, only RNS has the experience and track record to adequately perform this contract.

5. DMV is now using the award to Pegasus for a limited test not contemplated by the RFP rather than committing to the system-wide full-term contract specified in the RFP.

6. The RFP did not comply with the requirements of SFL, §163(9)(b) since it did not state the "relative importance and/or weight of cost and the overall technical criterion to be considered by a state agency in its determination of best value."

### **The Attorney General's Question**

As was raised in the earlier protest by VIA, the Attorney General requests that we consider whether the action by DMV in requesting and accepting further clarification and information after the closing date for the submission of proposals is a violation of SFL, §163(9)(c).

### **Agency's response to the protest**

DMV asserts that the award was in full compliance with the law. It responds to the protest as follows:

1. The revenue sharing plan places the State at no discernible legal or financial risk and maximizes DMV revenues.

2. The RNS guaranteed rental proposal does not guarantee the State more money than the Pegasus proposal. Rather, the Pegasus proposal generates more revenue and

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<sup>2</sup>The RNS proposal guarantees a fixed rental, "coupled with an overage percentage share to conform to the RFP."

generates it more quickly.

3. A visual/audio entertainment service is better suited to the purposes DMV envisions and has worked well elsewhere.

4. RNS is not the only bidder with the requisite experience. Pegasus has substantial relevant experience.

5. DMV is using the award as was stated in the RFP, i.e., district-wide for the stated contract term and not for a limited test.

6. The RFP was not deficient and was in accord with law.

## **APPLICABLE STATUTES**

SFL, §160(3) defines "commodity" as material goods, supplies, products, construction items or other standard articles of commerce other than technology which are the subject of any purchase or other exchange." SFL, §160(7)) defines service as "the performance of a task or tasks... which is the subject of any purchase or other exchange."

SFL, §163(9) states, in relevant part, "[f]or purchases from sources other than preferred sources and for purchases in excess of the discretionary buying threshold... (b)... [w]here appropriate, the solicitation shall identify the relative importance and/or weight of cost and the overall technical criterion to be considered by a state agency in its determination of value...(c) [w]here provided in the solicitation, state agencies may require clarification from offerers for purposes of assuring a full understanding of responsiveness to the solicitation requirements."

## **DISCUSSION**

### **Use of Revenue Sharing Approach/ Relative Merits of Proposals**

Issues 1 and 2 relate to the method of generating revenue via this procurement. Both of these arguments question factual determinations by DMV. Preliminarily, we note that we are generally reluctant to substitute our judgment for that of the procuring agency on factual matters where the agency has made a reasonable determination based on the information before them.<sup>3</sup>

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<sup>3</sup>While recognizing that legally this office is not required to defer to agency determinations of fact (see, Konski v. Levitt, 69 AD2d 940 (3rd Dept, 1979), affd 49 NY2d 850, cert den 449 US 840), as a matter of policy we believe it is generally appropriate to give deference to agency factual determinations which are reasonably supported by the record. By contrast, we will generally not give deference to agency legal determinations, particularly those

The protester's first argument, that the use of a revenue sharing methodology in the RFP<sup>4</sup> places the State at legal and financial risk, is not accompanied by any supporting documentation. We cannot give much weight, if any, to unsupported, speculative assertions in a bid protest. Nor can we, on our own, discern how a revenue sharing agreement places the State at any real risk as suggested by the protester. "False product claims, misrepresentations, slander, and... (suits by) disgruntled advertisers and consumers" are, in our opinion, no more likely to arise from a revenue sharing proposal than from a guaranteed revenue arrangement. Therefore, we summarily reject this argument.<sup>5</sup>

RNS's second argument challenges the determination by DMV that Pegasus offered a superior financial proposal. RNS asserts that the Pegasus proposal's revenue projections are overblown, uncertain and undocumented. Specifically, RNS asserts that the only way Pegasus can reach its revenue goals is to offer so much advertising that the purpose of the system, i.e., entertainment/information and not advertising, is defeated. However, even if RNS is correct, we know of no standard which would allow us to determine that any specific percentage of advertising makes an entertainment/information system unappealing. Nor did the RFP state percentage limits on advertising.<sup>6</sup> Even more significantly, we are satisfied that DMV developed a reasonable method for determining which proposal offered the greatest financial strength. Specifically, the evaluation committee scored each proposal on the following financial grounds: projected revenues, projected return to Department (DMV), supportive data validating estimates, and most favorable financial advantage for the State. The scores received by Pegasus far outranked the scores received by RNS. Based upon our review of the financial proposals, it does not appear that the scoring of these two proposals was unreasonable. Therefore, since DMV has adopted and fairly applied a reasonable scoring methodology, we will not disturb the

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concerning the interpretation of the procurement statutes.

<sup>4</sup> Section 1.10 of the RFP stated, "[r]evenues produced are split between the service provider and the Department on an agreed upon percentage basis based on gross advertising sales. Please submit a business plan which achieves the objectives set forth in this RFP..." The Pegasus proposal which resulted in the contract award was in accord with the RFP.

<sup>5</sup>We note that, in any event, DMV clearly made a reasonable determination in seeking a revenue sharing agreement, as such agreement brings a greater potential for higher revenue than a guaranteed rental agreement, and a greater potential for early revenue than a guaranteed rental agreement coupled with back-loaded revenue sharing tied to achievement of specific performance objectives.

<sup>6</sup>The RFP listed, as one of many evaluation criteria, "Ratio of DMV materials vs. vendor advertising." Therefore, the evaluation committee could award higher scores to those proposals with less advertising and award lower scores to those with more advertising.

DMV determination that Pegasus offered the best financial proposal.

### **Use of Video/Audio System**

As noted above, this office generally will grant deference to agency determinations of factual issues which appear reasonable and supported by the record. This is especially true with respect to factual matters that relate to technical or programmatic issues where the agency has greater expertise than this Office. Therefore, we will grant DMV substantial deference with respect to the third issue raised by the protester, regarding the use of a video/audio system rather than a video only system, since DMV's technical and programmatic expertise on this matter outweighs our own. At least some audio features were contemplated by the RFP (see Section 2.0). Contrary to the RNS assertion that a video/audio system will not work, DMV had information that such a system has been used successfully elsewhere. DMV has the most expertise of any entity in judging the needs and desires of its customers. Therefore, we will not disturb its determination to require a video/audio system.

### **Responsiveness/Experience of Pegasus**

In Issue 4, the protester asserts that Pegasus is a "company with no experience, no track record, no financial stability." In reply to DMV's response that Pegasus has appropriate experience, the protester tailors its assertion somewhat, now stating that it does not "refute the expertise of... Pegasus... in their technical and video graphic accomplishments or Pegasus' success in operating an advertising agency in Long Island." Instead, it claims that the Pegasus experience is not relevant to the experience needed to successfully implement this contract.

We must first look at the RFP to determine what experience was required of the bidders. If, indeed, Pegasus does not have the required experience, its proposal would be non-responsive to the RFP and would disqualify it from being awarded the contract. Here, however, the RFP did not mandate any specific prior experience. Instead, it listed as an evaluation criterion for the evaluation committee to consider: "Demonstrated ability to obtain advertising accounts, including evaluation of the firm's client list." Thus, it cannot be said that Pegasus was non-responsive to the RFP.

In fact, DMV found that both RNS and Pegasus have experience in this general area. RNS has been providing some form of media services in DMV offices. The principals of Pegasus have provided some form of media services in San Francisco. The evaluation committee gave RNS a slightly higher score for this evaluation criterion. However, its finding that RNS had somewhat greater experience did not outweigh the other evaluation criteria where Pegasus was more highly rated. Again, since DMV has adopted and fairly applied a reasonable and rational scoring methodology, we will not disturb the DMV determination that Pegasus offered the best overall proposal, even though RNS may have been stronger in one criterion.

### **Award for a Test Period**

The protester's assertion on Issue 5 that, contrary to the RFP, this contract will be awarded for an initial test period, appears to be inaccurate. There is no evidence whatsoever, other than the protester's assertion, that DMV has awarded the contract to Pegasus for a limited test. Rather, the contract indicates that the award is for the statewide entire term contract specified in the RFP.<sup>7</sup>

### **Failure to Adhere to SFL, §163**

Issue 6 and the Attorney General's question would be problematic if this contract were for the procurement of commodities or services. RNS and the Attorney General correctly note that the procedures utilized by DMV did not comply with certain procedural mandates of SFL, §163. DMV did not state in the RFP "the relative importance and/or weight of cost and the overall technical criterion," (see SFL, §163[9][b], *supra*). DMV asked for and accepted further clarification from the bidders, although no such ability to do so was reserved in the RFP (see SFL, §163[9][c], *supra*). Therefore, if SFL, §163 applied to this matter, we would, in all likelihood, be required to uphold the protest and reject the contract.

It is our opinion, however, that SFL, §163 does not apply to this procurement, as this is not a contract for the purchase or other exchange of goods or services. Rather, it is a revenue or concession contract, i.e., a contract which generates revenue for the state without any expenditure of state funds. While there is no case law which expressly addresses the scope of coverage of SFL, §163, the scope of coverage of the predecessor section of law, SFL, §174 was the topic of a number of Opinions of the Attorney General. 1966 Atty. Gen. 47 (inf.) analyzed whether the predecessor statute to SFL, §163 (SFL, §174) required a State agency to competitively bid the grant of a concession on state land. The Attorney General found that the provisions of State Finance Law, §174 requiring competitive bidding applied only to "purchase contracts", that is contracts for "articles to be supplied". Quoting from 1930 Atty. Gen. 123, 124, the Attorney General stated, "[t]hough such award [of a concession] would be a contract, it is not such a contract for 'articles to be supplied' as is referred to in section 120 of the State Finance Law [the predecessor statute to SFL, §174], requiring State contracts to be let to the lowest responsible bidder." Similar findings were issued by the Attorney General in 1936 Atty. Gen. 261 and 1944 Atty. Gen. 373.

The Attorney General's opinions are in accord with court determinations analyzing other competitive bidding statutes. In Citiwide News v. NYCTA, 62 NY2d 464, the Court

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<sup>7</sup>Paragraph 3 of the contract calls for immediate installation at 7 locations and then installation at a minimum of 4 additional locations per month until all locations are installed. Paragraph 9 of the contract indicates a 3-year term of the Agreement.

of Appeals determined that a "license agreement having as its predominant focus the use of real property and the operation of a specific business thereon", is not subject to competitive bidding requirements for public work contracts under the Public Authorities Law, "for such a (license) contract does not ordinarily involve an expenditure of public money." 62 NY2d at 468, 470. <sup>8</sup> See also Bustop Shelters v. City of NY, 99 Misc 2d 198, where the Court, in analyzing competitive bidding requirements under the General Municipal Law and the New York City Charter, stated, "... it does not appear that competitive bidding is required in granting a franchise, since the award of the franchise does not involve the payment or expenditure of funds out of the city treasury," 99 Misc 2d at 203.

Additionally, there are Comptroller opinions interpreting the General Municipal Law counterpart to the State Finance Law, GML, §103. 1988 Opns St Comp No. 88-60, states:

"Contracts by which a license or concession is granted are not, generally, subject to the competitive bidding requirements of General Municipal Law, §103, since they do not ordinarily involve an expenditure of public moneys ... Nonetheless, the courts have noted that it is the duty of public officials to let out such contracts under terms which are fair and reasonable (*Blank v Browne*, 217 App Div 624, 216 NYS 664) . . . Accordingly, we conclude that a true license or concession arrangement, which does not involve a direct or indirect expenditure of public moneys and the total character of which is neither a purchase nor contract for public work, is not subject to competitive bidding. However, public officials have a duty to secure fair reasonable terms for such arrangements."

Given the well-established interpretation by the courts, the Attorney General, and this Office, that predecessor state statutes and the municipal and public authority counterpart statutes apply only to "purchase contracts" or contracts involving the expenditure of public funds, we believe it is reasonable to assume that absent some express language in SFL, §163 expanding the former SFL, §174 coverage of the law to include revenue contracts, the current law does not require competitive bidding of revenue contracts. In 1995 the Procurement Stewardship Act took effect, moving competitive bidding requirements from section 174 to section 163. We are not aware of any language in the Procurement Stewardship Act which would appear to reflect a legislative intent to

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<sup>8</sup>The court further held that any incidental expenditure by the NYCTA to accomplish this license agreement does not change the outcome as "an examination of this arrangement reveals its total character as a license agreement." 62 NY2d at 473. Similarly, any incidental expenditures by DMV in this contract would not change our view of this agreement.



add revenue contracts to the list of those transactions covered by competitive bidding requirements. To the contrary, SFL, Art. 11 is entitled "State Purchasing" and SFL, §163 is entitled "Purchasing services and commodities". We therefore believe it is reasonable to assume that the Legislature did not intend to expand the scope of the bidding statutes to concession or revenue contracts.

While the statute does not require competitive bidding, the Comptroller, in fulfilling his statutory duty of assuring that state contracts are awarded in the best interest of the State, requires competitive bidding for all contracts over \$15,000, pursuant to a fair and impartial procurement process. There must still be a reasonable and fair process which assures a level playing field for all bidders and the evaluation process must still comply with the RFP. In light of these non-statutory standards, we will proceed to analyze Issue number 6 and the Attorney General's question.

As stated above, the RFP listed three technical categories and one financial category for evaluation. Each category was composed of a number of criteria, resulting in twenty technical criteria and four financial criteria. The RFP did not state that any criteria would be weighted more heavily than any other. Nor did it state how many points would be assigned to each criteria. Following the receipt of bids where, as stated above, no remaining proposal bid on the item covered by evaluation category C and only RNS bid on the item covered by evaluation category B, DMV decided to make no award on these items. Accordingly, these two evaluation categories were dropped, leaving one technical category with nine criteria and one financial category with four criteria.

As noted earlier, DMV conducted its evaluation by assigning a maximum of ten points to each of the remaining 13 criteria which were set forth in the RFP. Thus, the highest possible score would be 130 points per evaluator, or a total of 910 points total for the seven person evaluation committee cumulative score. Pegasus scored 785 points, RNS scored 586, and VIA scored 485 points. Six of the evaluators ranked the Pegasus proposal as the strongest and one ranked RNS's proposal as the strongest.

While this process did not comply with all of the procedural requirements of SFL, §163, we find that it was fair and equitable. No offeror was prejudiced by the failure of DMV to indicate that an equal weight would be assigned to each evaluation criterion mentioned in the RFP, or that a 10 point maximum scoring system per criterion would be utilized. We do not believe that the failure of the RFP to indicate the "relative importance and/or weight of cost and the overall technical criterion to be considered" is inherently unfair where, as here, each evaluation criterion mentioned in the RFP was assigned equal weight. Therefore, the evaluation process was in accord with the RFP, was fair, and was not arbitrary.

Similarly, while the action by DMV of asking for and considering clarifications and further information from the bidders was not in accord with all of the procedural

requirements of SFL, §163, we cannot say it was contrary to law. Every bidder was treated the same in that each bidders' initial proposal was found wanting and each was given the opportunity to supply clarification and further information. This was a fair and reasonable process and therefore was in accord with the law.

**CONCLUSION**

Based on the foregoing, we deny the protest and will approve the contract after it is forwarded to us by the Attorney General.



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Margaret M. Sherman  
Assistant Deputy Comptroller