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STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

June 11, 2002

Marc S. Gerstman, Esq.
Robinson Square
313 Hamilton Street
Albany, NY 12210

Ms. Belinda Jackson
Purchasing Officer
New York State Thruway Authority
200 Southern Boulevard
Albany, NY 12201-0189

Dear Mr. Gerstman and Ms. Jackson:

Re: Seasonal Market, New Baltimore
Rest Area
Contract No. X100407

This is in response to the bid protest filed with the Office of the State Comptroller by Mr. Gerstman on behalf of the Capital District Farmers' Market Association (CDFMA) in relation to the award by the New York State Thruway Authority (NYSTA) of the above-referenced contract to Black Horse Farms, Inc. (Black Horse) for the operation of a Seasonal Market at the New Baltimore rest area. CDFMA alleged:

- The NYSTA unfairly discontinued the Tailgate Farm Market Program at the New Baltimore rest area and issued a Request for Proposals (RFP) inviting vendors to submit proposals for the operation of a Seasonal Market at the New Baltimore rest area. The removal of the New Baltimore rest area from the Tailgate Farm Market Program excludes members of CDFMA and other small farmers from selling their produce at the New Baltimore rest area, and the requirements specified in the RFP made it difficult or impossible for small farm operators to compete for the contract, particularly the requirement of seven day a week operation of the Seasonal Market.

- By removing New Baltimore from the Tailgate Farm Market Program, and awarding a Seasonal Market contract to Black Horse, the NYSTA violated the public policy of the State of New York, which favors the operation of farmers' markets.
- In awarding the contract to Black Horse, the NYSTA "ignored the history of contentiousness between Black Horse and the NYSTA" and "numerous consumer fraud [and] weights and measures violations" by Black Horse.
- The contract limits the operation of the Seasonal Market to no more than one vendor at the New Baltimore rest area, which prevents the NYSTA from realizing additional revenues, and deprives the public of the opportunity to be offered an enhanced variety of locally grown food.
- The RFP was "tailor made" for Black Horse, since it excluded maple syrup and Christmas trees from the list of permissible products, which had the effect of eliminating the most likely competitors from the procurement competition. The fact that the NYSTA received only one proposal – from Black Horse – is evidence that the competition was unfair.

The NYSTA responded to these allegations as follows:

- The New Baltimore rest area is the busiest travel plaza on the Thruway system, due to its central location in the State, and to its accessibility to traffic traveling both north and south. The NYSTA made a business determination that it was in the NYSTA's best interest to provide Thruway travelers with a daily market operation that would also provide the NYSTA with a new revenue source.
- New York State's public policy in favor of farmers' markets neither required the NYSTA to permit the operation of a farmers' market at the New Baltimore rest area, nor prohibited the NYSTA from operating a Seasonal Market at New Baltimore.
- The NYSTA used an unbiased methodology to conduct the competitive procurement of a Seasonal Market operator and did not consider any prior interactions with any of the prospective vendors. Furthermore, the NYSTA had no awareness of any consumer fraud or weights and measures violations by Black Horse. Moreover, Black Horse's capability to operate the Seasonal Market is indicated by Black Horse's submission of a certificate of insurance, as required by the RFP.

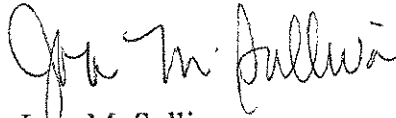
- The use of the plural term "vendor(s)" in the RFP indicated the NYSTA's willingness to consider more than one vendor, and the NYSTA confirmed to the CDFMA prior to the due date for proposals that the NYSTA would be willing to consider a proposal from the CDFMA on behalf of its members or other farmers. Nevertheless, the CDFMA failed to submit a proposal.
- Maple syrup, Christmas trees, and other products were excluded from consideration for the Seasonal Market because they were deemed inappropriate for the market, might require refrigeration, or could conflict with existing concessionaire contracts. A canvass of the potential bidders indicated that they did not participate in the competition for various reasons unrelated to the RFP's requirements, such as lack of interest, too busy, too far from the travel plaza, and satisfaction with existing marketing opportunities.

Taking the protest issues in the same order as recited above, we determine as follows:

- It is within the NYSTA's legitimate business judgment to determine whether or not a farmers' market will be operated at a particular rest area. The fact that the New Baltimore rest area is the busiest rest area in the Thruway system is, in our opinion, an adequate justification for the NYSTA's business decision to operate a revenue-producing Seasonal Market at the New Baltimore rest area. Similarly, the fact that New Baltimore is the Thruway's busiest rest area justifies the requirement of seven day a week operations.
- Article 22 of the Agriculture and Markets Law sets forth the State's policy in favor of farmers' markets. However, there is nothing in Article 22 that requires the operation of a farmers' market at any Thruway rest area or prohibits a Seasonal Market at the New Baltimore rest area.
- The lack of any specific evidence of any "contentiousness" or of any consumer fraud or weights and measures violations on the part of Black Horse precludes overturning the contract award on the basis of such matters.
- The NYSTA's explanation for the lack of proposals, which was based on a canvass of non-bidders, and which followed a broad effort to solicit proposals, indicates that there was a serious effort to conduct a competitive procurement process without restricting the competition to a single bidder.
- The NYSTA had reasonable and credible business reasons for precluding certain products from the Seasonal Market procurement. While these exclusions may have had the incidental effect of limiting the scope of the competition, they were, nevertheless, within the NYSTA's discretion.

In conclusion, it appears from the procurement record, and the submissions of the CDFMA and the NYSTA, that the NYSTA's decisions in this procurement were within the scope of the NYSTA's business judgment and did not violate any applicable legal standards. Accordingly, the bid protest is denied, and the Bureau of Contracts will approve the contract between the NYSTA and Black Horse Farms.

Sincerely,

A handwritten signature in cursive script, appearing to read "Joan M. Sullivan".

Joan M. Sullivan
Director of Contracts

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