

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

In the Matter of the Bid Protest
filed by Standing Stone Gaming, LLC,
with respect to the procurement of
video lottery central system services
by the Division of the Lottery
Contract No. C010021

Determination of
Bid Protest

SF - 20030009

The Office of the State Comptroller (OSC) has completed its review of contract C010021 between the Division of the Lottery (Lottery) and MultiMedia Games, Inc. (MultiMedia), for video lottery central system services. For the reasons set forth below, the protest is DENIED and the contract between the Division of the Lottery (the Lottery) and MultiMedia Games, Inc. (MultiMedia), is approved.

Bid Protest Review

Standing Stone Gaming, LLC (Standing Stone)¹ submitted a bid protest to the Lottery on June 7, 2002. On July 11, 2002, the Lottery denied the protest. On August 1, 2002, Standing Stone submitted an appeal to the Director of the Lottery. On August 12, 2002, the Lottery Director denied the appeal. On January 3, 2003, the Lottery submitted the MultiMedia contract to OSC for the Comptroller's approval. On January 6, 2003, Standing Stone submitted a bid protest to OSC.²

In the course of OSC's determination of the Lottery's request for approval of the MultiMedia contract, OSC has considered the bid protest issues raised by Standing Stone. OSC's decision to deny the bid protest and approve the contract is based on

¹ The contract proposal submitted to the Lottery identified the proposer as "S.S.G., STANDING STONE GAMING, An Enterprise of the Oneida Indian Nation." The bid protest submitted to the Lottery and the appeal to the Lottery Director were also submitted in the name of Standing Stone. However, the protest submitted to OSC on January 6, 2003 was submitted in the name of the "New York Collaboration E-Team (NYCE Team)," which is the name Standing Stone used in the contract proposal to refer to the group consisting of itself and the suppliers/subcontractors (IBM and Scientific Games International) that had agreed to support the Standing Stone proposal. For the sake of clarity and convenience, we use the name Standing Stone to refer to all parties whose interests are represented by Standing Stone Gaming's protest to OSC.

² Another bid protest was submitted to the Lottery by GTECH Corporation (GTECH), which had submitted a contract proposal that was disqualified from further consideration after the Lottery completed its evaluation of the technical merits of the competing contract proposals. The Lottery denied GTECH's protest, and the Lottery Director later denied GTECH's appeal. GTECH did not submit a further protest to OSC.

consideration of the entire procurement record submitted by the Lottery, as well as all the materials submitted on behalf of Standing Stone.

Background

Section 1617-a of the Tax Law, as added by Chapter 383 of the Laws of 2001, authorizes the Lottery to operate a Video Lottery Gaming system offering lottery players the ability to play lottery games by using Video Lottery Terminals (VLT's) installed at racetracks at various locations in the State. A VLT is a computer terminal equipped with a video display monitor and pushbuttons, levers, or other controls a player uses to play the lottery game(s) available on the terminal. A VLT is equipped with a slot or other device into which a player inserts money or some other thing of value to begin play. A VLT is also equipped with a printer that a player uses to print a voucher if he or she is entitled to collect a prize or an unused credit balance at the end of play.

On January 11, 2002, the Lottery issued a Request for Proposals for "Implementation and Operation of a Central System Supporting Video Lottery Terminals" (the RFP). The central system specified in the RFP was to include, among other things, a central computer "which registers player wagers, randomly draws, stores and distributes electronic instant lottery tickets to site controllers, and performs certain accounting and security functions."

The RFP was clarified and revised by Questions and Answers dated January 23, 2002, January 25, 2002, February 13, 2002, February 15, 2002, February 20, 2002, and February 22, 2002, and by an Amendment Number 1 dated February 13, 2002.

On March 13, 2002, the Lottery received proposals from four vendors: Sierra Design Group, MultiMedia, Standing Stone, and GTECH.

Evaluation of Proposals: Contract Award

The RFP set forth a detailed procedure for evaluating proposals. Part 5.0 of the RFP explained that the technical portion of each proposal would be evaluated for compliance with the specifications and requirements detailed in the RFP. The technical evaluation was divided into seven categories, with specific points allowed in each category, as follows:

1) Central Computer System	20
2) Site Controller and VLT Communications	15
3) Communications Network (Site Controller to Central Computer)	10
4) Software Applications (including progressives), Files and Reporting	15
5) Facilities	5
6) Implementation, VLT Protocols, and EPROMs	15
7) Vendor Experience, Personnel and Corporate Capability	<u>20</u>
Total Technical Points	100

Section 5.6 of the RFP provided for the scoring of the financial portions of only those proposals achieving a technical score of 70 or more. The RFP provided that 66 additional points would be awarded to "the lowest cost acceptable Proposal," with more costly proposals receiving a proportionately lower score determined by a formula. Under section 5.7, the proposal receiving the highest combination of technical and price points would be selected for the contract award.

In applying these procedures, the Lottery first arrived at the following scores for technical merit:

Sierra Design Group	97 points
MultiMedia	91 points
Standing Stone	74 points
GTECH	67 points

Following the elimination of the GTECH proposal for failure to achieve the specified minimum technical score, the Lottery evaluated the pricing proposals (by applying the specified formula) and arrived at the following scores for financial value:

	Price (as a percentage of net video <u>lottery sales</u>)	
MultiMedia	0.7495%	66 points
Standing Stone	0.9400%	62 points
Sierra Design	1.2750%	55 points

Combining the technical and financial scores, the Lottery determined the total scores as follows:

MultiMedia	157 Total Points
Sierra Design	152 Total Points
Standing Stone	136 Total Points

The Lottery estimated the cost of the MultiMedia contract proposal as \$17,305,880 for a term of six years. For the same term, the estimated cost of the Standing Stone proposal was \$21,704,506; and \$29,439,623 was the estimated cost for

the Sierra Design proposal. Based upon the highest combined score, the Lottery determined that the MultiMedia proposal represented the best value. Therefore, MultiMedia received the contract award, which the Lottery announced on May 29, 2002.

After the award, the Lottery and MultiMedia signed a written agreement, which the Attorney General approved as to form on or about December 30, 2002. On January 3, 2003, the Lottery submitted the contract to the Comptroller for approval.

Procedures and Comptroller's Authority

Section 112 of the State Finance Law (SFL) provides that no State contract valued at an amount exceeding \$15,000 is valid unless it is approved by the Comptroller and filed in his office. As indicated above (see Bid Protest Review), OSC has reviewed the issues raised by Standing Stone's protest as part of the procurement and contract review pursuant to SFL section 112.

Discussion

Article 11 of the State Finance Law defines the acquisition of technological systems as a procurement of services.³ According to State Finance Law section 163(4)(d), "[s]ervice contracts shall be awarded on the basis of best value to a responsive and responsible offerer."

"Best value' means the basis for awarding contracts for services to the offerer which optimizes quality, cost and efficiency, among responsive and responsible offerers. Such basis shall reflect, wherever possible, objective and quantifiable analysis." SFL §163(1)(j).

"Responsive' means a bidder or other offerer meeting the minimum specifications or requirements as prescribed in a solicitation for commodities or services by a state agency." SFL §163(1)(d).

"Responsible' or 'responsibility' shall have the same meaning as such terms have been interpreted prior to the effective date of this article [April 1, 1995]." SFL §163(1)(c). Both before and after the enactment of this provision, the terms "responsible" and "responsibility" have been interpreted as referring to a contract offerer's (1) technical experience and skill (see, e.g., Construction Contractors Assn v. Board of Trustees, 192 A.D.2d 265, 600 N.Y.S.2d 953 [2d Dep't, 1993], Eldor Contracting Corp. v. Town of Islip, 277 A.D.2d 233, 716 N.Y.S.2d 681 [2d Dep't, 2000]); (2) financial ability to carry out the obligations of the contract (see, e.g., Adelaide Environmental Health Associates, Inc. v. NYS Office of Gen. Services, 248 A.D.2d 861, 669 N.Y.S.2d 975 [3d Dep't, 1998]); and (3) honesty and integrity (see, e.g., Tully Construction Co. v. Hevesi, 214 A.D.2d 465, 625 N.Y.S.2d 531 [1st Dep't, 1995]).

³ "For the purposes of this article, technology shall be deemed a service." SFL §160(7).

Standing Stone's protest relied on three issues related to the requirements of best value, responsiveness, and responsibility:

1. Risk. Standing Stone contended that MultiMedia lacks experience with systems of the size and complexity required by the RFP, that MultiMedia does not possess sufficient resources to fulfill the requirements of the RFP, and that the system offered by MultiMedia is not sufficiently compatible with the VLT's that will be employed in the video lottery network described in the RFP. Therefore, Standing Stone contended that the selection of MultiMedia represented an unacceptable risk for the State of New York. In effect, this point alleged that the contract award was not made to a responsive and responsible offerer.

2. New York State Business Participation. Standing Stone contended that the contract award to MultiMedia, which has an office in Austin, Texas, is contrary to the policy of the State of New York to maximize the participation of New York State business enterprises in State contracts. In effect, this point alleged that the contract award did not achieve the best value for the State of New York.

3. Proposal Evaluation. Standing Stone contended that the Lottery did not properly apply the RFP's requirement of written disclosure of pending investigations and litigation and did not properly evaluate MultiMedia's involvement in investigations and litigation related to Native American gaming. In effect, this point also alleged that the contract was not awarded to a responsive and responsible offerer.

According to Standing Stone, MultiMedia does not have sufficient experience with operating video lottery gaming systems of the type required by the RFP. However, Standing Stone's protest itself admitted that MultiMedia has a record of successfully operating video lottery networks.⁴ The procurement record shows that of the 20 points available for the category of "Vendor Experience, Personnel and Corporate Capability," the Lottery gave MultiMedia a score of 19 and Standing Stone a score of 16. During OSC's review of the procurement record, we asked the Lottery for additional information on MultiMedia's experience. The Lottery responded with documentation showing that, in addition to the VLT networks that Standing Stone conceded have been operated by MultiMedia, there is also a record of MultiMedia's operation of progressively larger Indian gaming networks consisting of terminals offering bingo-based (Class II) games. The Lottery found that as of the end of 2002, MultiMedia's operational networks included 2,109 Class III units (VLT's) and 8,217 Class II units, for a total of 10,326 terminals in operation. In contrast, Standing Stone's protest referred to an unspecified

⁴ Standing Stone's January 6, 2003 bid protest letter to OSC quoted from MultiMedia's annual report filed with the SEC in December 2002: "During 2002, [MultiMedia] had an average of 1902 Class III video lottery terminals in service, compared to 1,379 units in 2001."

number of terminals,⁵ which it contended should have been evaluated more favorably by the Lottery.

The Lottery Evaluation Committee's report contained the following statements explaining the committee's decision to award Standing Stone a lower technical score than MultiMedia:

"Generally, the evaluation committee felt that the [Standing Stone] system represented a prototype which had never been implemented in a production environment similar to what New York requires (i.e. multiple racetracks supported by a single central system).

"The evaluation committee believed it was not clear how the various partners related to each other or what each one was responsible for.

*

"Various kinds of gaming experience for the three partners was identified, however, very little of it was applicable to the type of video lottery operation to be used in New York. This lack of experience was reflected in the prototype nature of the proposed system and the vendor seemed to acknowledge this with statements like 'very few modifications . . . to meet Lottery requirements.' This reinforced the appearance that this was a system put together specifically for New York and had never been used in any other gaming jurisdiction."

In light of this record, OSC cannot agree that it was improper for the Lottery to award MultiMedia 19 of the 20 points available for Vendor Experience, Personnel and Corporate Capability. Therefore, OSC concludes that the procurement record adequately demonstrates that MultiMedia possesses the requisite technical ability to fulfill the contract's requirements. More importantly, OSC concludes that there is insufficient evidence to support a determination that MultiMedia does not have enough technical ability to be considered a responsible offerer.

The Standing Stone bid protest referred to the fact that, after announcing the contract award to MultiMedia, the Lottery went on to select no more than four vendors to supply VLT's to be connected to the New York video lottery network. Standing Stone suggested that "this may have been due to the complexity of the required interface [between the VLT's and] the selected [MultiMedia] central system." However, we found no support for this contention in the procurement record.

⁵ According to Standing Stone's January 6, 2003 bid protest letter, "the NYCE Team includes companies with experience and histories of running systems of [the required] size including Standing Stone Gaming with its multiple thousand terminal casino operation, Scientific games with multiple thousand terminal lottery networks, and IBM with its multiple thousand system operations throughout the world."

For the technical evaluation category of "Implementation, VLT Protocols, and EPROMs⁶" the RFP allowed a maximum of 15 points. The Lottery awarded 12 points to MultiMedia and 14 to Standing Stone. The lower score for MultiMedia is explained by the following statement in the evaluation committee's report:

"Multimedia proposed two types of hardware communication protocols between their system and the VLTs, however, one of the methods required the VLT manufacturer to provide additional hardware and software. This was a cost that was passed on to the VLT manufacturer and because of the potential mix of protocols could result in some operational problems."

Significantly, of the two protocols offered by MultiMedia, the one criticized by the committee was not described as "unacceptable." Rather, the committee simply observed that it would shift some costs to VLT vendors and might cause some "problems." More importantly, there was no indication in the procurement record that the other protocol offered by MultiMedia did not meet all the RFP's requirements or that the MultiMedia system could not be operated by using only the more highly-rated protocol. Therefore, OSC cannot conclude that it was improper for the Lottery to determine that the MultiMedia proposal offered a responsive solution to the Lottery's requirements for interfacing with VLT's.

Standing Stone's bid protest referred to a statement in MultiMedia's 2002 annual report, which indicated MultiMedia's experience with gaming equipment supplied by Bally, WMS, and Mikohn. Noting that one of the latter (Bally) has been chosen by the Lottery to provide VLT's for New York's video lottery network, Standing Stone contended that the contract award to MultiMedia was "counter to the Lotteries [sic] stated policy of independence between the central system vendor and the terminal supplier."

Section 1.0 (Introduction) of the RFP contained the following statement:

"It is the intent of the Lottery to procure a central system that is independent of and not an integral part of a VLT manufacturer's standard offering. Accordingly, the vendor awarded the central system contract and its subsidiaries will not be allowed to provide VLTs during the duration of the contract and/or any extensions to the contract."

In the February 13, 2002 cover letter accompanying the amended RFP, the Lottery included the following clarification:

⁶ "EPROM" means Erasable Programmable Read Only Memory, which refers to the part(s) of a video lottery system used to control the frequency of random winning events determined by means of logarithms.

"No Strategic Alliances between Central System provider and VLT supplier in New York State. – As stated in Part 1, Section 1.0, Paragraph 4 of the RFP, it is and has been the intent of the New York Lottery to procure a Central System that is independent of and not an integral part of VLT manufacturers standard offering. Accordingly, the vendor would have a Central System contract and its subsidiaries will not be allowed to provide VLTs during the duration of the contract and/or any extensions to the contract. Please disregard any answers or clarifications to inquiries provided during this RFP process since January 11, 2002 which are inconsistent with the intent of the above paragraph. The Lottery will not allow any strategic alliances between the Central System provider and any VLT provider in order to maintain a complete separation between the two. This restriction precludes having an alliance with a supplier of a component part of the VLTs. Strategic Alliance is considered any partnership created by the Central System provider for the purpose of providing VLTs for the State of New York. The Central System provider is not prohibited from forming any alliance with VLT manufacturers producing VLTs for other jurisdictions." (Emphases in original).

In response to a question raised by OSC in the course of reviewing the procurement record, the Lottery explained its reasons for concluding that MultiMedia's license agreements with WMS Gaming (WMS) and Bally Gaming (Bally) (both of which are VLT vendors) did not violate the RFP's prohibition against strategic alliances.

According to the Lottery, MultiMedia and WMS are parties to a contract dated December 15, 1999 that is subject to an addendum dated September 7, 2000.

"Because both the [WMS] agreement and the addendum pre-existed the legislation enabling video lottery gaming in New York, and more importantly, because the license was restricted to the State of Washington, the Lottery's counsel concluded that the licensing agreements were not entered into for the purpose of providing video lottery terminals in the State of New York. Further, the licensing agreement does not constitute a 'strategic alliance' as that term is defined in the RFP because it does not create any synergy between the two companies, i.e. it does not produce a commodity or service not otherwise available, nor does it result in the sharing of expertise and resources. It simply permits [MultiMedia] to use products already in existence. The addendum permits [MultiMedia] to use the licensed products to develop new software, thus arguably creating a commodity or service not otherwise available. However, because the licensed activity is restricted to use in Washington, the addendum does not violate the RFP clause.

"The licensing agreement with Bally Gaming, Inc., dated February 13, 2001, permits [MultiMedia] to market, sell, maintain, rent or otherwise distribute licensed products only on Indian lands in the State of

Washington. The licensing agreement does not constitute a 'strategic alliance' because it 1) pre-existed the legislation; 2) does not produce a commodity or service not otherwise available, nor does it result in the sharing of expertise and resources; 3) and it is restricted to Indian land in the State of Washington and therefore could not have been for the purpose of providing VLTs in New York."

Obviously, the Lottery's statements on the subject of strategic alliances are not at all clear. It is difficult to understand the Lottery's statement that a "licensing agreement does not . . . result in the sharing of expertise and resources" and equally hard to understand why it should make any difference that the licensing agreements in question were entered into before the State of New York enacted video lottery legislation. However, under the RFP's definition of a "strategic alliance" it is literally only the Lottery's central system contractor, or the contractor's "subsidiaries," or a "partnership" created by the contractor that would be prohibited from supplying VLT's for the New York video lottery network. Nothing in the procurement record or in Standing Stone's bid protest suggests that any VLT's will be supplied by MultiMedia, or any subsidiary of MultiMedia, or any partnership to which MultiMedia is a party. Therefore, OSC will not set aside the Lottery's rejection of the contention that MultiMedia's contract proposal was non-responsive because there is no evidence that MultiMedia violated the literal terms of the so-called "strategic alliance" prohibition.

Standing Stone's bid protest contended that MultiMedia does not possess the personnel and financial resources that will be needed to fulfill the requirements of the RFP. Standing Stone contrasted MultiMedia's 279 employees with the NYCE Team's more than "300,000 employees worldwide." Standing Stone also pointed to the NYCE Team's "combined annual revenues of over \$85 billion" and to MultiMedia's disclosure of the risks facing its business operations.⁷ However, it should be noted that most of the personnel and financial resources claimed by Standing Stone are attributable not to Standing Stone itself but to the presence of IBM on the NYCE Team. It is reasonable to assume that only a very small portion of IBM's resources would actually be devoted to supporting Standing Stone's efforts.

The procurement record shows that the Lottery analyzed MultiMedia's financial position before submitting the contract for the Comptroller's approval. The Lottery's analysis noted that the company enjoyed ample revenues and cash flows, had no debt, relatively low liabilities, and had adequate credit available. Moreover, the Lottery noted

⁷ In the Form 10-K report filed with the SEC in December 2002, MultiMedia said:

"We believe that our current operations can be sustained with cash from operations. There can be no assurance, however, that our business will continue to generate cash flow at current levels. Our performance and financial results are, to a certain extent, subject to general conditions in or affecting the Native American gaming industry and to general economic, political, financial, competitive, legislative and regulatory factors beyond our control. There can be no assurance that sufficient funds will be available to enable us to make necessary capital expenditures and to make discretionary investments in the future."

that MultiMedia could expect substantial additional revenues from the New York video lottery contract and could rely on a sizeable existing net worth and the presence of currently uncollateralized assets to help finance the performance of its obligations under the new contract.

The quotation (see footnote 7) from MultiMedia's SEC filing is a cautionary note to potential investors that is similar to other disclosures made by publicly traded companies. Contrary to Standing Stone's contention, it does not appear to be an indicator of financial weakness. In any event, we conclude that the disparity between the resources available to Standing Stone and MultiMedia is irrelevant for the purposes of determining whether MultiMedia is a financially responsible vendor and that the Lottery could appropriately determine that the financial resources available to MultiMedia are a sufficient basis for concluding that MultiMedia can be considered financially responsible for the purposes of the contract award.

Standing Stone noted the history of legal controversies related to MultiMedia's activities in the Native American gaming industry. According to Standing Stone, these controversies are noteworthy for two reasons. First, if it is ultimately determined that MultiMedia's activities violate the applicable laws, MultiMedia may face unanticipated liabilities and substantially decreased revenues. Therefore, according to Standing Stone, MultiMedia should not be considered financially responsible. Secondly, Standing Stone contended that MultiMedia's proposal did not adequately describe the existence of pending investigations and litigation. Therefore, according to Standing Stone, MultiMedia's proposal should be considered non-responsive to the RFP's full disclosure requirement.

The Native American gaming controversies were disclosed in the financial statements MultiMedia included in its proposal to the Lottery, as well as in public reports MultiMedia filed with the SEC. In addition, there is nothing in the procurement record or in any materials submitted by Standing Stone that indicates a likelihood that MultiMedia's activities will be held to be unlawful. To the contrary, the procurement record shows that MultiMedia has never been the subject of any successful enforcement action by the National Indian Gaming Commission or any other regulatory authority and that the company has an ongoing program of research and development designed to promptly replace any gaming products or systems that might be held to be noncompliant and thereby avoid or ameliorate adverse financial consequences. The procurement record shows that the Lottery considered these facts and circumstances before concluding that MultiMedia is a responsible vendor, and we do not find a sufficient basis for overruling the Lottery's conclusion.

Finally, Standing Stone pointed to its own status as an enterprise of the Oneida Indian nation, which has a substantial presence within the State of New York, and complained that the contract award to MultiMedia, which has fewer New York contacts, violates New York's policy of maximizing State contracting opportunities for New York State businesses. However, it must be noted that the procurement laws severely limit the application of the policy on which Standing Stone relies. Under SFL section 163,

procuring agencies enjoy the greatest latitude in seeking to maximize the participation of New York State businesses when the contract to be awarded is valued at \$50,000 or less and the offerer is a small or minority or woman-owned business. In other cases, the policy of seeking New York business participation does not override the procuring agency's statutory obligation to award a contract to the offerer whose proposal offers a combination of technical merit and financial value that provides the best value for the State.

Conclusion

For all the reasons discussed above, we find that there is sufficient justification in the record to support the Lottery's conclusion that (i) the contract award to MultiMedia was based on procurement procedures that were properly designed and applied to determine best value, (ii) the contract award was based on a responsive and responsible offer submitted by MultiMedia, and (iii) the evaluation of the Standing Stone proposal was not unfair or improper. Accordingly, Standing Stone's bid protest is denied and Contract Number C010021 between the Lottery and MultiMedia is approved.