

STATE OF NEW YORK  
OFFICE OF THE STATE COMPTROLLER

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In the Matter of the Bid Protest filed by  
Grandstand Sales, Inc. with respect to the  
procurement for the Grandstand Concession  
Operation at the New York State Fairgrounds  
conducted by the New York State Department  
of Agriculture and Markets  
Contract Number – X001000

Determination  
of Bid Protest  
SF-20090269

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August 7, 2009

This Office has completed its review of the above-referenced procurement conducted by the New York State Department of Agriculture and Markets (hereinafter "Department") for the Grandstand Concession Operation at the New York State Fairgrounds via a Request for Proposals (hereinafter "RFP") and the bid protest filed by Grandstand Sales, Inc. (hereinafter "Grandstand") with respect thereto. As outlined in further detail below, we have determined that the grounds advanced by the protestor are without sufficient merit to overturn the contract award by the Department. We therefore hereby deny the protest and are today approving the Department contract with American Food and Vending Co., Inc./Food Consultants, Inc. (hereinafter "American").

## **BACKGROUND**

### **Facts**

The Department issued a RFP for proposals from vendors seeking a license to operate concessions throughout the annual New York State Fair, during every event held at, or utilizing, the grandstand and racetrack, and during other events as agreed upon by the Licensee and the Department. Pursuant to the RFP a vendor obtaining a license to operate the concessions would be required to provide for the sale of food, beverages and alcoholic beverages.

In response to the RFP, American and Grandstand submitted proposals for providing concession services at the grandstand venue for events held at such venue throughout the life of the contract, including the 2009 New York State Fair. Upon review of the submitted proposals, the Department, based upon the pre-established evaluation methodology (see, SFL §163[7]), determined that the American's proposal was the best value. Subsequently, the Department notified American that it was the successful proposer, and also notified Grandstand and the other vendors submitting proposals that they were not the successful proposer.

By correspondence, dated June 9, 2009, addressed to Ms. Cynthia Itzo, Assistant Director of Fiscal Management for the Department, and Comptroller Thomas P. DiNapoli, Mr. Garber, on behalf of his client Grandstand, filed an Initial Protest (hereinafter "Protest") with this Office to challenge the Department's award of the contract to American. By correspondence dated June 17, 2009, this Office was notified that American was also provided a copy of the Protest. On July 10, 2009 this Office received the Department's response to the Protest.



On July 13, 2009, this Office received by U.S. Mail a Notice of Petition, along with a Memorandum of Law and an Affidavit from Gary C. Hobbs, Esq., all filed on behalf of Grandstand challenging the procurement process and requesting a preliminary injunction (hereinafter "Litigation Papers"). Upon review of the Litigation Papers, it appeared to this Office that Grandstand raised an additional argument in the litigation that it had not raised in the Protest. Specifically, Grandstand asserts that the proposal submitted by American was defective on the ground that "American's proposal was merely to staff, supply, equip, and operate only two (2) of the four (4) main grandstand concession areas located at the Empire Expo Center." This Office considered the additional ground raised in the Litigation Papers as part of the Protest, and addresses the argument below.

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

Under Section 112 of the State Finance Law (hereinafter "SFL"), before any revenue contract made for or by a state agency, which exceeds ten thousand dollars (\$10,000) in amount becomes effective, it must be approved by the Comptroller.<sup>1</sup> In carrying out the aforementioned responsibilities proscribed by SFL §112, this Office has issued Contract Award Protest Procedures that govern the process to be used when an interested party challenges a contract award by a State agency.<sup>2</sup> These procedures govern initial protests to this Office of agency contract awards and contract awards made by this Office and appeals of agency protest determinations. Because the Department did not provide for a protest procedure in its solicitation, the Protest is governed by this Office's procedures for initial protests.

In the determination of this Protest, this Office considered:

1. the documentation contained in the procurement record forwarded to this Office by Department with the Department/American contract;
2. the correspondence between this Office and Department arising out of our review of the proposed Department/American contract; and
3. the following correspondence/submissions from the parties (including the attachments thereto):
  - a. Grandstand's June 9, 2009 Protest letter addressed to Cynthia Itzo and Comptroller Thomas P. DiNapoli;
  - b. the June 17, 2009, letter from Mr. Garber, Esq., on behalf of Grandstand, to Charlotte Breeyear and Cynthia Itzo forwarding a copy of the June 9<sup>th</sup> Protest letter and advising American of the Protest;
  - c. the Department's response to the Protest dated July 10, 2009;
  - d. Litigation Papers in the Matter of Grandstand Sales, Inc. v. The State of New York Dept. of Agriculture and Markets and NYS Comptroller's Office and American Food and Vending Co., Inc. mailed to this Office and signed by Gary C. Hobbs on behalf of Grandstand;

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<sup>1</sup> SFL §112(3).

<sup>2</sup> Comptroller's G-Bulletin G-232.



- e. Reply papers dated July 15, 2009 from Gary C. Hobbs, Esq., on behalf of Grandstand;
- f. the July 16, 2009 letter, from this Office to the Department, with copies sent to Grandstand and American, requesting a response to the additional argument raised in the Litigation Papers and any reply thereto; and
- g. the Department's letter, dated July 21, 2009, responding to the letter dated July 16, 2009 sent by this Office.

### **Applicable Statutes**

The provisions of Article 11 of the State Finance Law (The Procurement Stewardship Act), in particular the procedural requirements of Section 163, apply to the purchase of services and commodities. We have previously opined, however, that Article 11 does not apply to revenue contracts (See SF-19980084; SF-19990045 and the authorities cited therein). We note that while the procedural requirements of Section 163 do not apply to revenue contracts, in carrying out the Comptroller's statutory role of approving State contracts, this Office requires that revenue contracts (where the reasonably estimated value of the consideration given by the State is in excess of \$10,000) be awarded after a fair and impartial competitive process.

### **ANALYSIS OF BID PROTEST**

#### **Grandstand's protest to this Office**

In the Protest to this Office, including the additional argument raised in the Litigation Papers, Grandstand challenges the procurement conducted by the Department on the following grounds:

- 1) The RFP contained no standards for proposers' qualifications or experience in operating concessions at major events. Specifically, there was no experience requirement, unlike in past procurements, for the following services:
  - a. operating concessions at high attendance events; and
  - b. selling alcoholic beverages at high attendance events, including handling related security issues.<sup>3</sup>
- 2) The RFP contained inaccurate and incomplete information regarding the cost of operating Grandstand concessions, the equipment required to operate the concessions and revenues likely to result from the contract.

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<sup>3</sup> In its Litigation Papers Grandstand expands on this argument to argue that "American lacks the ability to sell alcoholic beverages, which is required under the State's 2009 RFP." While the Department has not replied to this argument, we note that the RFP states that "The Licensee shall, at its own cost and expense, identify and obtain all necessary federal, state and local approvals necessary to operate the Grandstand Concession, including permits authorizing the sale of alcoholic beverages." This requirement, in our view does not require the proposers to obtain a license to sell alcoholic beverages prior to submission of the bids, but rather requires the "licensee", i.e. the winning proposer, to do so after it is awarded the contract. Indeed, sections 110 & 106 of the Alcohol and Beverage Control Law clearly provide that an individual or company cannot obtain a license to sell alcohol at the event prior to the contract award by the Department.



- 3) Nothing in the RFP authorized the two-tiered revenue system, also referred to as an over/under bid, used in the winning proposal.
- 4) The sales data provided by the Department in response to a question, posed during the question and answer period, stating that the novelties sales at the grandstand for 2008 totaled \$1,159,357 was inaccurate and incomplete, thereby making the RFP defective. The correct figure was \$664,927.27. Furthermore, Grandstand "was acutely aware of the correct data and therefore submitted a proposal lower than that of American Food & Vending."
- 5) The proposal submitted by American was defective on the ground that "American's proposal was merely to staff, supply, equip, and operate only two (2) of the four (4) main grandstand concession areas located at the Empire Expo Center. American's proposal does not include any of the equipment for the Commissary area."

#### **Department's Response to the Protest**

Department responded to arguments raised in the Protest, as follows:

- 1) The allegation that the minimum qualification language contained in the 2004 Request for Proposals was not included in the RFP:
  - a. "has no legal basis"; and
  - b. "ignores that portion of the 2009 RFP which requires proposers to provide information about food service operations they have in New York ... which are similar to that which they propose – here grandstand concession operations", which is then factored into the evaluation of each proposal.
- 2) Each proposer's experience and qualifications in sales of alcohol was evaluated and the Department confirmed that American "has, or had, at various times 28 separate State Liquor Authority issued licenses and is well qualified to sell alcohol at large events."
- 3) The "Department has never required private security force as part of any grandstand concession RFP, nor has it, by contract, required the operator to employ a security force."<sup>4</sup>

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<sup>4</sup> We note that this Department's position is further supported by the Department's response to a question regarding whether the successful proposer would be required to provide security, posed during the question and answer period, in which the Department stated that

[t]he New York State Fair provides security in the Grandstand area. If the Licensee wishes to have additional security with their vendor locations, they are free to add these at their own cost but they can in no way impede or conflict with the security provided by the Fair. License checks to assure patrons are of the proper age for alcohol consumption are the responsibility of the Licensee as part of their liquor license. (Department Answer to Question 5).



- 4) The Department concedes that the correct amount for gross sales of novelties sold during the 2008 State Fair was \$664,927.27, and not \$1,159,357.00 as was stated in the RFP, but the error was immaterial as the RFP specifically excluded the sale of novelties and souvenirs as both a selection criteria and as a revenue source for the selected proposer. The Department further asserts that, "it is ironic that Grandstand, 'acutely aware of the correct data,' chose not to inform the Department of the very error it now seeks to use as a basis for its protest."
- 5) All proposers were required to attend a mandatory site visit, at which all proposers were given a tour and informed that the food service equipment in place was owned by the "former operator." "The RFP need not state that which is readily observable during a mandatory site visit."
- 6) The only requirement in the RFP on how a proposer could structure its proposal was that "the license fee be comprised of two components, a percentage of gross receipts based on the sale of food and beverages, and a percentage of gross receipts based on the sale of alcoholic beverages." "The selected proposer offered 31.25% on food and beverage sales up to \$750,000.00 and 33% on sales above that, and offered the same percentage and sales figures for the alcoholic beverage component." Such a proposal is not contrary to the RFP, procurement law or applicable regulation.<sup>5</sup>
- 7) The purpose of the RFP was to obtain proposals from vendors to operate concessions at the grandstand venue. "The RFP did not require that any specific location, or minimum number of locations, be operated. It is the operator's choice on how it can best provide the requested concession services." Additionally, "[t]here was no requirement in the RFP that a proposer replicate Grandstand's operations."

## DISCUSSION

This Office has reviewed the procurement record and the other materials submitted to it in relation to the Department/American contract and the corresponding Protest and Litigation Papers, and is satisfied that the Department's response to the allegations set forth in the Litigation Papers and Protest generally provides a satisfactory response to the issues raised by Grandstand. We wish, however, to expand on the Department's response with respect to Grandstand's assertions concerning the inaccurate information contained in the RFP with respect to prior sales of novelties.

As noted previously, the Department's response with respect to this allegation was that such information concerning prior sales was immaterial as the RFP specifically excluded the sale of novelties and souvenirs as both a selection criteria and as a revenue source for the selected proposer and Grandstand, being the incumbent, was aware of the error. While we agree that this information was immaterial in this case, we do not wish to suggest that this would always be the case. Clearly, there may be cases where a proposer on this type of contract, could reasonably adjust their proposed commission payments to a state agency based upon prior sales figures for ancillary

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<sup>5</sup> We note that since the Department had not created a projection of revenues, it utilized only the lower 31.25% commission rate for purposes of the cost evaluation.

items such as novelties (and the concessionaire's established share of projected future sales of such items) – even where such sales are not included as part of the evaluation methodology. Here, however, insufficient information was available to proposers at the time proposals were submitted to allow a vendor to reasonably estimate what, if any, gains could be realized from sales of novelties by the successful vendor. For that reason and the reasons cited by the Department, although the Department admittedly provided overstated figures for prior sales of novelties, in this case, this was harmless error.

## **CONCLUSION**

We find that the issues raised in the protest are not of sufficient merit to overturn the award by the Department to American and, therefore, the protest is denied and we are today approving the Department/American contract.

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