

THOMAS P. DINAPOLI  
STATE COMPTROLLER



110 STATE STREET  
ALBANY, NEW YORK 12236

STATE OF NEW YORK  
OFFICE OF THE STATE COMPTROLLER

September 7, 2010

Meta Murray, Esq.  
NYS Department of Environmental Conservation  
Office of General Counsel, 14<sup>th</sup> Floor  
625 Broadway  
Albany, NY 12233-1500

Robert T. Konefal  
288 Main Street  
P.O. Box 225  
Pine Hill, NY 12465

Kevin McNamara  
EVP / CFO  
Boston Culinary Group Inc., DBA Centerplate  
201 East Broad Street  
Spartanburg, SC 29306

Dear Ms. Murray, Mr. Konefal and Mr. McNamara:

Re: Contract X007689; Belleayre  
Mountain Cafeteria and  
Cocktail Lounge Concession  
SF 20100255

This letter constitutes our determination of the protest appeal filed by Robert Konefal with respect to the above-referenced proposed procurement award by the New York State Department of Environmental Conservation ("DEC") to Boston Culinary Group, Inc. ("BC") for the Belleayre Mountain cafeteria and cocktail lounge concession. In making our determination, this Office considered: (i) the procurement record submitted by DEC with the DEC/BC contract,<sup>1</sup> (ii) the correspondence between this

---

<sup>1</sup> We note the procurement record contained Mr. Konefal's objection to DEC's determination that his bid was non-responsive.

Office and DEC concerning the Invitation for Bids (“IFB”) specifications; and (iii) DEC’s letter dated July 27, 2010 responding to this Office’s request for justification of the IFB’s specification requiring that a bidder have experience of “successful operation of a similar full service cafeteria and cocktail lounge concession for a period of not less than five (5) years within the past ten (10) years.”<sup>2</sup> As detailed below, we have determined that the issues identified in our review warrant overturning the award made by DEC to BC. As a result, we are returning the DEC/BC contract unapproved, and are hereby directing DEC to take further action with respect to this procurement consistent with this determination.

### Comptroller’s Authority

The Comptroller is required by §112 of the State Finance Law (“SFL”) to approve State agency procurement contracts which exceed \$50,000 (SFL § 112[2]) and to approve State agency contracts where the State agency gives consideration other than the payment of money that exceeds \$10,000 (SFL §112[3]) before such contracts become effective. Since the proposed DEC/BC concession contract exceeds the monetary threshold contained in SFL §112[3], it was subject to the review and approval of this Office. This Office has reviewed Mr. Konefal’s objection as part of its review of the contract award.

### Analysis

It is well settled that the central purposes of this State’s bidding statutes are twofold: “(1) protection of the public fisc by obtaining the best work at the lowest possible price; and (2) prevention of favoritism, improvidence, fraud and corruption in the awarding of public contracts.” Transactive Corp. v. Department of Social Services, 236 AD2d 48, 52 (3<sup>rd</sup> Dept. 1997) *aff’d* on other grnds, 92 N.Y.2d 579 (1998), *quoting Matter of New York State Ch., Inc., Associated Gen. Contrs. v. New York State Thruway Auth.*, 88 NY2d 56, 68 (1996). Additionally, the operating principles of the state procurement statute is “promoting fairness in contracting with the business community” and “ensur[ing] that contracts are awarded consistent with the best interests of the state.”<sup>3</sup> To this end, we believe that, whenever possible, bidders “...should be allowed to compete freely without any unreasonable restrictions.” Edenwald Contracting Co. v. City of New York, 86 Misc.2d 711, 725 (1974), *quoting* McQuillin Muni. Corp. [2d ed.] §1301. As the specifications in this instance led to only one responsive bid, we questioned the reasonableness of the restriction.

Based upon our initial review of the procurement record, it was unclear why Mr. Konefal’s bid was rejected. In the process of our review and follow-up with DEC this Office questioned whether the IFB’s requirement that a bidder have experience of “successful operation of a similar full service cafeteria and cocktail lounge concession for a period of not less than five (5) years within the past ten (10) years” was reasonable and appropriate.

<sup>2</sup> Article 4 of the IFB, emphasis added.

<sup>3</sup> Sections 163 (2) and Section 163 (2)(d) of the State Finance Law. *See also* Section 163 (1)(e).

DEC's justification for the minimum experience requirements contained in the IFB states, in part, that a bidder must "have experience operating a high volume, quick serve, quality food cafeteria in a similar environment." We agree that this is a reasonable requirement as it relates to Belleayre's mission in relation to its patron's. However, the specification in the IFB not only requires the aforementioned experience, but also requires that the bidder must have run the cafeteria and lounge as a concessionaire.

In DEC's letter dated July 27, 2010 it states that the need for the bidder to have experience as a concessionaire is based on the unique relationship between a concessionaire and the contract manager (the Superintendent of Belleayre Mountain).

However, we have reviewed other concession contracts awarded by the New York State Office of Parks and Historic Preservation and the New York State Thruway Authority for those agencies' food concessions, and discovered that those contracts do not require concession experience.

Based upon the record before us, we do not believe that DEC has provided sufficient justification to limit competition to a concessionaire operator. In fact, in its justification letter to this Office, DEC has stated that future procurements will not be limited to *experienced concessionaires*, but rather will be open to all vendors with bidders that have knowledge and experience with the food industry as a whole. Thus DEC seems to recognize that a requirement for experience as a "concessionaire" is not necessarily required.

#### Conclusion

In light of the foregoing, we are returning the DEC/BC contract unapproved. We have approved an extension of the existing DEC contract for a cafeteria and cocktail lounge concession at Belleayre Mountain so that such services will not be interrupted for the upcoming season and to provide DEC with the time necessary to conduct a re-bid for these services.

Sincerely,



Charlotte E. Breeyear  
Director, Bureau of Contracts

emm