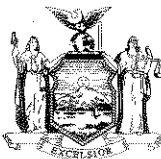


THOMAS P. DiNAPOLI  
STATE COMPTROLLER

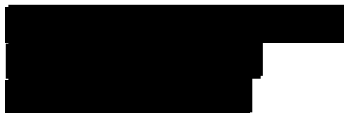


110 STATE STREET  
ALBANY, NEW YORK 12236

STATE OF NEW YORK  
OFFICE OF THE STATE COMPTROLLER

March 29, 2013

William M. Windsor



RE: NYS Office of Parks, Recreation and  
Historic Preservation Agreement with  
Maid of the Mist Corporation Contract  
#C000457/X000457

Dear Mr. Windsor:

We are in receipt of your initial and revised protests of the proposed amendment to the contract between the New York State Office of Parks, Recreation and Historic Preservation (Parks) and Maid of the Mist Corporation (Maid) for a concession to operate certain tour boat services. The underlying contract with Maid was approved by this Office on February 2, 2003. In your protests, you assert that Maid is not properly considered a sole source provider and that the contract amendment is subject to competitive bidding under the State Finance Law and the Parks, Recreation and Historic Preservation Law. Furthermore, you argue that this transaction is not properly characterized as an amendment to the underlying concession contract and is, instead, a new undertaking which is independently subject to competitive bidding requirements.

Applicability of State Finance Law § 163

The contract with Maid, even as amended, is not an expenditure contract (subject to the competitive bidding requirements of State Finance Law § 163), but is rather a revenue contract. This Office has consistently taken the position that the competitive bidding requirements of State Finance Law § 163 do not apply to revenue or concession contracts, since such transactions do not involve the purchase of, or other exchange for, commodities or services.

Initially, we note that this interpretation is supported by the express language of Article 11 of the State Finance Law and section 163, which consistently refer to State "purchasing" and "buying" thresholds. Moreover, while there is no case law which expressly addresses the scope of coverage of State Finance Law § 163, there is a well-established line of decisions by the courts, the Attorney General, and this Office, concluding that the predecessor state competitive

bidding statute and the municipal and public authority counterpart statutes, apply only to “purchase contracts” or contracts involving the expenditure of public funds. See e.g. *Citiwide News v. NYCTA*, 62 NY2d 464, 468, 470 (1984); *Allen Group, Inc. (Allen Testproducts Div.) v. Adduci*, 123 AD2d 91, 95 (3d Dept 1987); *Bustop Shelters v. City of NY*, 99 Misc 2d 198, 203 (NY County 1978); 1966 Atty. Gen. 47; 1988 Opns St Comp No. 88-60. Therefore, we believe it is reasonable to assume that absent some express language in State Finance Law § 163 expanding the former State Finance Law § 174 coverage to include revenue contracts, the current law does not require competitive bidding of revenue contracts.

#### Applicability of Parks, Recreation and Historic Preservation Law § 3.09

You also argue that this contract amendment is subject to a competitive bidding requirement pursuant to section 3.09 of the Parks, Recreation and Historic Preservation Law. While section 3.09 does contain a reference to “the bid prospectus submitted to prospective bidders ...” and “the successful bidder,” such section does not provide for any specific process to be followed and does not expressly require that concessions or licenses issued under that section be awarded after a competitive process. Therefore, it is not clear that this provision should be interpreted to require formal competition for all concessions awarded thereunder.

Finally, and most importantly, even if section 3.09 could be interpreted to require a competitive process, under long-standing competitive bidding jurisprudence, competitive bidding would not be required with respect to the original award by Parks of the concession contract to Maid in 2002 since, as discussed below, Maid was a sole source with respect to such concession at that time based upon the Canadian license. See 1983 Op St Compt No. 83-67 (“There is a long-standing common law exception to competitive bidding requirements for contracts involving sole source procurements. When the goods or services required in a contract may be obtained only through a single source so that there is no possibility of competition, the courts will not require the empty formality of inviting proposals.” [citing *Harlem Gas Co. v Mayor of New York*, 33 NY 309; 11 Opns St Comp, 1955, p 502]); *Gleason v Dalton*, 28 AD 555, 558-559]). This common law exception to competitive bidding requirements would apply to any competitive bidding requirement under the Parks, Recreation and Historic Preservation Law.

#### The 2002 Non-competitive Award to Maid

In fulfilling his statutory duty of assuring that state contracts subject to Comptroller approval are awarded in the best interest of the State, the Comptroller generally requires that agencies undertake a competitive process for revenue contracts or, alternatively, document why competition is not appropriate or feasible. Thus, notwithstanding the inapplicability of State Finance Law § 163 or Parks, Recreation and Historic Preservation Law § 3.09, we generally require that such contracts must be let after a fair and impartial procurement process which provides a level playing field for all potential bidders – except where the agency can document a sole source, single source or emergency justification for a non-competitive award.

To that end, while this Office would have generally required that Parks conduct a competitive process before making an award of the concession contract, we approved the award to Maid in 2003 upon a finding (based on Parks’ representations) that Maid was the only entity

capable of providing the services – similar to a sole source finding under State Finance Law § 163. Specifically, at the time the license was awarded to Maid, there was no facility on the U.S. side of the Falls where a licensee could winterize, maintain and store its boats, which is a necessary component of providing the scenic boat excursions under the concession. At that time, Parks also made a determination that there was no viable option for building such a facility and, thus, there was no alternative than to continue using the existing Canadian facility which, at that time, Maid held the exclusive rights to use.<sup>1</sup> Parks, therefore, concluded that Maid was the only vendor that could provide the boat tours and meet the terms of the concession contract. We believe that, given the circumstances present at that time, such a conclusion was reasonable.

As you note in your protest, the circumstances that underpinned this non-competitive award in 2002 have changed – Maid is no longer in exclusive control of the only existing dock and storage facility for Niagara Falls tour boats. However, this subsequent change in circumstances does not render an otherwise valid contract void. *See Schultz v. 400 Coop. Corp.*, 292 AD2d 16, 19-20 (1st Dept 2002) (in the case of reforming a contract, the court stated that “the fairness of a bargain is appropriately assessed at the time of its making, not from the perspective of intervening events...”); 1983 Op St Compt No. 83-67, *supra* (“in our opinion, the fact that there are now several sources from which to obtain the services would not affect the validity of the contract.”).

Based on the facts before us at the time of our approval in 2003, Maid was the only entity capable of providing the tour boat services and, therefore, the award to Maid without undertaking a competitive process was appropriate and consistent with our Office’s policy. Since we have concluded that the concession contract is valid and enforceable, it generally follows that an amendment to such contract may be executed without the need for a separate competitive process.

#### Characterization of this Transaction as an Amendment to the Base License

We have also considered whether the proposed amendment materially alters the scope of the license so as to have the effect of creating a new contract that would be subject to competitive bidding requirements irrespective of whether the initial concession contract was properly awarded in 2003. Since the terms in this amendment, including construction of the new facility, are necessary additions to the concession contract in order for Maid to continue operating scenic boat tours, we believe that the proposed changes do not alter the identity or main purpose of the original contract. *See Albert Elia Bldg. Co. v. New York State Urban Development Corp.*, 54 AD2d 337, 342-343 (4th Dept 1976). Ultimately, all aspects of the amendment are in furtherance of the concession contemplated under the contract. Therefore, unlike the change order for the tunnel project in *Elia, supra*, we do not believe that this amendment requires a separate competitive process.

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<sup>1</sup> In response to recent questioning by our Office, Parks has advised that there is nothing in their records to indicate that it considered the feasibility at that time of constructing a boat maintenance and storage facility at the currently proposed site. We also note that Parks did not obtain occupancy rights to this site, which is owned by the New York Power Authority, until a few months before it finally executed the 2002 concession contract with Maid.

Finally, we note that, to the extent that your revised protest is based on the arguments raised in the CPLR Article 78 Petition filed on behalf of Hornblower Yachts, LLC, we have carefully reviewed the arguments set forth in that Petition and find the issues raised therein are not of sufficient merit to preclude our Office from approving the amendment. As a result, your protest is denied and we are today approving the amendment.

Sincerely,



Diane Taylor  
Assistant Director, Bureau of Contracts

vmk

cc: Paul Laudato, Esq., NYS Office of Parks, Recreation and Historic Preservation  
Harold Hagemann, NYS Office of Parks, Recreation and Historic Preservation  
Mark W. Brown Phillips Lytle LLP