

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

In the Matter of the Appeal filed by Strates Shows, Inc. with respect to the procurement of Midway Services for the New York State Fair conducted by the New York State Department of Agriculture and Markets.

**Determination
of Appeal**

SF-20140222

Contract Number – X300306

June 24, 2014

The Office of the State Comptroller has completed its review of the above-referenced procurement conducted by the New York State Department of Agriculture and Markets (AGM) for a midway operator at the New York State Fair. We have determined that the grounds advanced by Strates Shows, Inc. (Strates or Protestor) are insufficient to merit the overturning of the contract award made by AGM and, therefore, we deny the Appeal. As a result, we are today approving the AGM contract with W.G. Wade Shows, Inc. (Wade) for midway services at the New York State Fair.

BACKGROUND

Facts

On December 20, 2013, AGM issued a Request for Proposals (RFP) for the provision of midway services to the New York State Fair for a 10-year period, commencing with the 2014 State Fair.¹ The Protestor was a long term incumbent of this concession contract. Potential bidders were required to attend a mandatory tour of the Fairgrounds held during the 2013 New York State Fair. Six potential bidders attended the mandatory tour, including Wade and the Protestor.

The RFP was structured such that, on a 100 point evaluation scale, 75 points went to the technical component and 25 points were assigned to the cost/revenue portion. The technical evaluation was further broken down into 11 subcategories with the top three subcategories being: Midway Operations (20 points), Safety (15 points) and Efficiency of Ticketing (10 points). With respect to cost, the RFP required that a bidder (i) agree to a minimum annual payment to the State of \$750,000, (ii) bid a fixed percentage of all revenue derived from ride tickets (20 points), and (iii) bid a fixed dollar amount per linear foot of booth space for game, attraction and concessions (5 points). The minimum bid per linear foot was \$50.

AGM received three proposals, from Wade, Strates and North American Midway Entertainment. Each of the offerors was permitted to give an oral presentation to the

¹ In June 2013, AGM requested and obtained permission from OSC to issue the RFP for a 10-year contract term.

technical evaluators. After the oral presentations, evaluators were allowed to change their scores provided that they documented the rationale for any change. After its evaluation of the proposals, on March 12, 2014 AGM issued a conditional award to Wade. By letter dated March 25, 2014, upon Strate's request, AGM provided Strates with a debriefing regarding the reasons that Strate's proposal was not selected for an award. By letter dated April 9, 2014, Strates protested AGM's decision to award the contract to Wade. In AGM's determination dated April 18, 2014, AGM denied the protest and by letter dated May 2, 2014, Strates appealed AGM's protest decision to this Office.

Procedures and Comptroller's Authority

Under Section 112(3) of the State Finance Law (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. We consider the issues raised in this Appeal as part of contract review function pursuant to such section of law.

In carrying out the aforementioned responsibilities proscribed by SFL §112, this Office has issued a Contract Award Protest Procedure that governs the process to be used when an interested party challenges a contract award by a State agency.² These procedures govern initial protests to this Office of agency contract awards and appeals of agency protest determinations. Because this is an appeal of an agency Protest decision, the Appeal is governed by this Office's procedures for protest appeals.

In the determination of this Appeal, this Office considered:

1. The documentation forwarded to this Office by AGM in connection with its contract award submission.
2. The correspondence between this Office and AGM arising out of our review of the contract.
3. The following correspondence/submissions from the parties (including the attachments thereto):
 - a. The Protestor's Appeal of AGM's protest determination, dated May 2, 2014;
 - b. AGM's Answer to the Appeal, dated May 29, 2014;
 - c. Wade's Answer to the Appeal, dated May 9, 2014;

² OSC Guide to Financial Operations, Chapter XI.17.

- d. Protestor's submission dated June 6, 2014 (correspondence from Jonathan P. Nye of Whiteman Osterman & Hanna LLP to Charlotte Breeyear); and
- e. AGM's Response to OSC's Information Request, dated June 10, 2014.

Applicable Statutes

This procurement is not subject to the competitive bidding requirements of State Finance Law § 163, as this is not an expenditure contract but is rather a revenue contract, i.e. a contract which generates revenue for the State without any expenditure of state funds. 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 commodities or services.

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, State Finance Law § 174, 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. Moreover, 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. Therefore, we believe that absent some express language in State Finance Law § 163 expanding the former State Finance Law § 174 to include revenue contracts, the current law does not require competitive bidding of revenue contracts.

While the statute does not require competitive bidding, the Comptroller, in fulfilling his statutory duty of assuring that state contracts subject to Comptroller approval are awarded in the best interest of the State, 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, we generally require that such contracts be let after a reasonable 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. In light of these non-statutory standards, we will proceed to analyze the issues raised in this Appeal.

ANALYSIS OF BID PROTEST

Appeal to this Office

In its Appeal, the Protestor challenges the procurement conducted by AGM on the following grounds:

1. AGM interpreted a mandatory requirement of the RFP – that the bidder certify that it had no other obligations that could impact its ability to provide the services listed in its proposal – in such a way as to render that provision meaningless;
2. AGM interpreted the RFP in a manner that would allow offerors to rely on subcontractors that may pose significant concerns without any review or impact on the offeror's score;
3. AGM ignored facts from which it would reasonably be inferred that Wade may have colluded with other bidders to impermissibly restrict competition; and
4. AGM's scoring methodology and evaluation was fundamentally flawed.

Response to the Appeal

In its Answer, AGM contends the Appeal should be rejected and the award upheld on the following grounds:

1. Wade satisfied all the mandatory requirements of the RFP and submitted a compliant certification;
2. The evaluation team was able to properly score Wade's proposal without considering the potential use of subcontractors;
3. The Protestor's allegations of bidding collusion are mere speculation and without any basis; and
4. The Protestor's objections to AGM's scoring are without merit.

DISCUSSION

AGM's Interpretation of the Certification Requirement in the RFP

Section 3.4(1) of the RFP required offerors to certify that "no other obligation or engagement, contractual or otherwise, will conflict with or in any way impact its ability to provide the rides, games, attractions and concessions listed in its proposal during the Great New York State Fair." While Wade provided the requisite certification, the Protestor argues that Wade has at least three other commitments in distant geographic locations during the 2014 New York State Fair and, therefore, AGM should have found

Wade nonresponsive to this requirement. The Protestor further argues that, in interpreting this certification requirement in a manner that permits Wade's overlapping commitments, AGM is rendering the certification requirement meaningless.

In its Answer to the Appeal, AGM explained that the intent of this provision was not to provide an absolute bar to any overlapping engagements but, rather, to ensure that an offeror has the ability to provide the promised services notwithstanding its other obligations (AGM Answer to the Appeal, at 6-7). While the language of the RFP could have been clearer, we are satisfied that AGM reasonably interpreted its own specification. Furthermore, we do not agree that this interpretation renders the certification meaningless, since the certification importantly ensures that the offeror has no *conflicting* obligations; that is, competing engagements that would impair or compromise the offeror's ability to provide the services set forth in its proposal to the New York State Fair.

Finally, we note that Wade responded to this allegation by explaining that it has the capacity to provide services at several fairs at the same time, albeit possibly with the help of subcontractors, and listed several instances in which it had successfully done so (Wade's Answer to the Appeal, at 3-5). This explanation of Wade's capability, and references confirming that Wade successfully managed multiple simultaneous fairs, were also contained in Wade's proposal. In addition, Wade asserted that it could provide all the rides listed in its proposal from its own inventory (Wade's Answer to the Appeal, at 5). Based on this, AGM found that Wade's overlapping commitments would not have a negative impact on the promised services during the 2014 New York State Fair (AGM Answer to the Appeal, at 7-8).

We find AGM's assessment to be reasonable and, thus, do not agree with the Protestor's suggestion that Wade's offer was merely aspirational. Wade certified that it could meet all its obligations, explained how it was capable to do so (and has done so in similar situations in the past), and has reaffirmed that commitment post-award. Accordingly, we agree with AGM that Wade satisfied the RFP's certification requirement.

The Role of Subcontractors and Vendor Responsibility Issues

The Protestor asserts that AGM's scoring was undermined because Wade's use of certain subcontractors was not properly factored into the evaluation. The Protestor calls into question the responsibility and/or safety record of two potential subcontractors of Wade, Powers Great American Midways (Powers) and Dreamland Amusements Inc. (Dreamland). With regard to Powers, the Protestor points to news articles about an accident on a ride at the 2013 North Carolina State Fair that Powers oversaw. The Protestor also notes that, in 2009, Dreamland settled charges brought by the New York Attorney General's Office that it had made false representations to the New York State Labor Department concerning wages. The Protestor argues that these issues should have been factored into AGM's technical scoring of Wade, particularly in the areas of

safety, aesthetics, guest relations and the overall quality and nature of rides and concessions listed in Wade's proposal (Appeal, at 9).

1. Impact on Technical Scoring

Whether or not these issues should have been factored into Wade's technical score depends, in part, on what the RFP required offeror's to disclose and what the evaluation instrument was intended to evaluate. In terms of safety, the RFP required each offeror to include in its proposal, among other things, "a safety plan that states the standard protocols for inspection, maintenance, employee training, reporting of mechanical failure, injury and remediation of safety concerns" (RFP, at section 3.5[B]). In addition, offerors were required to "[l]ist the five (5) most egregious safety breaches encountered at other venues and the actual remedial/corrective action taken to address the breach" (RFP, at section 3.5[B][6]). We believe the most reasonable interpretation of this section is that the required disclosure applies only to the offerer, not potential subcontractors. Indeed, to read this section otherwise would have required that offerors include in their proposals the numerous documents requested in this section from subcontractors as well (e.g., safety protocols, policies and procedures). We do not believe that this is what was intended by the RFP.

Moreover, since this contract is for a 10-year term, we agree with Wade that it would be unreasonable to expect offerors to predict what companies might be used over the life of the contract and disclose that at the time that proposals were submitted (unless of course subcontractors are known at that time). Therefore, we see no impropriety with Wade's failure to disclose the 2013 safety incident involving Powers. Furthermore, Wade provided a sample copy of its subcontractor agreement which requires the subcontractor to meet all the same standards and obligations that Wade offered to the State in its proposal (attached to Wade's Answer to the Appeal). As the prime contractor, Wade is responsible for the midway services and no significant safety issues have been identified as being associated with Wade. Based on this and our reading of the RFP, we believe it was appropriate for AGM to evaluate the safety portion of the technical scores based on the information provided by the offeror without taking into consideration issues surrounding subcontractors.

Offerors were also required to submit "a plan to improve the aesthetics of the Midway ... to include but not be limited to: the location of rest stations, the beautification of trash receptacles and covered areas as well as the enhancement of signage" (RFP, at section 3.5[E]). In addition, the proposals were required to describe "Guest Relations" including "the process to manage guest relations including the staff assigned to this activity ... [t]he policy for which a refund will be made ... [t]he protocols to ensure staff are neat, clean and responsive to guests' needs" and a description of "any employee conduct manuals [and] training policies ..." (RFP, at section 3.5[F]). We do not believe that Wade's plans for the improvement of aesthetics or guest relations services would be impacted by subcontracting for rides; therefore, use of Powers or Dreamland would not impact Wade's technical score in these categories.

Finally, the "Midway Operations" section of the RFP required offerors to describe its proposed rides, games, attractions and food concessions (RFP, at section 3.5[D]). Although Wade will likely enter into subcontracts with Powers and Dreamland for rides and/or games thus impacting its midway operations (see AGM's Response to OSC's Information Request, dated June 10, 2014), Wade affirmed that all of the rides it proposed to AGM could be provided from its own inventory (Wade's Answer to the Appeal, at 5). Therefore, we do not believe that it was necessary for AGM to have factored subcontractors into its score on the Midway Operations category which covers the overall quality and nature of rides and concessions listed in Wade's proposal.

2. Vendor Responsibility of Powers and Dreamland

In the course of our contract audit, AGM informed us that Wade is tentatively planning on entering into subcontracting arrangements with Powers, Dreamland and/or a third entity which is an affiliate of Wade (AGM's Response to OSC's Information Request, dated June 10, 2014). AGM conducted a vendor responsibility review of Powers and Dreamland and, in response to a request from this Office, AGM provided vendor responsibility documentation on both entities (Vendor Responsibility Profiles for Powers and Dreamland, submitted by AGM on 6/13/14). AGM investigated and considered several issues, including the specific allegations raised by the Protestor. Regarding Powers, AGM concluded that the accident that occurred at the 2013 North Carolina State Fair did not render Powers nonresponsible. Specifically, AGM found that Powers was neither the manufacturer nor owner of the faulty ride which was subcontracted out for by Powers (Vendor Responsibility Profile for Powers, submitted by AGM on 6/13/14). Additionally, AGM noted that Powers received the Amusement Ride Safety Award from the State of North Carolina itself in 2013 (Vendor Responsibility Profile for Powers, submitted by AGM on 6/13/14; Corky Powers' Resume, Wade Proposal, at 15). With respect to Dreamland, AGM found that the labor-related charges were ultimately settled and resolved (Vendor Responsibility Profiles for Dreamland, submitted by AGM on 6/13/14). AGM documented the process it undertook to determine that Powers and Dreamland were responsible vendors and, based on our review, we find this process to be sufficient.

3. USDOL Enforcement Action Against Wade

In its Appeal, the Protestor also raises a concern about Wade's responsibility. The Protestor notes that there is a pending enforcement action against Wade by the U.S. Department of Labor, and the Protestor argues that this should have been evaluated and considered by AGM. Wade has responded that the case is solely against Wade Shows, Inc., not W.G. Wade Shows, Inc. (the entity that AGM seeks to contract with), and that Wade Shows, Inc. disputes the allegations and is currently

attempting to settle the matter (Wade's Answer to the Appeal, at 10-13).³ While this issue would properly be considered by AGM in conducting its vendor responsibility review, we disagree that this issue should have factored into the technical scoring of Wade in the categories of employee conduct (Guest Relations) and Safety (see Protestor's Letter, dated June 6, 2014, at 1; RFP, at sections 3.5[B], [F]).

Turning to the issue of vendor responsibility, the vendor profile of Wade submitted by AGM shows that the agency followed up on this issue and provided a comprehensive assessment. Noting that the allegations are being "sharply contested" by Wade Shows Inc. and that the issues do not relate to Wade's ability to perform its contractual obligations, AGM concluded that the matter did not impact Wade's responsibility as a vendor (Vendor Responsibility Profile for Wade, submitted by AGM on 6/3/14). Based on our review of the full vendor responsibility profile of Wade submitted by AGM, as well as our independent vendor responsibility review of Wade, we have no reason to disturb AGM's vendor responsibility determination.

Allegations of Collusion Among the Offerors

The Protestor argues that AGM ignored the appearance of collusion among Wade and two other qualified offerors. Specifically, the Protestor notes that Powers and Dreamland were among the six bidders that attended the mandatory tour and were therefore deemed qualified to bid. Powers and Dreamland, however, never submitted proposals and, later, a Powers' principle attended Wade's oral presentation and another Powers' principle appeared on Wade's "management team" in its proposal. The Protestor argued that these facts, when taken together, lead to a conclusion that Wade and Powers entered into an arrangement after the mandatory tour to restrict competition by having Powers refrain from submitting a proposal in exchange for a promise that Powers would be a subcontractor in the event that Wade won an award. The Protestor argues that AGM erred by not considering the possibility of collusion in its determination on the protest.

In its protest determination, AGM found that the Protestor's allegations of collusion were "mere speculation" and were "made without any basis" (AGM Determination, at 15). AGM further relied on the statements from Powers and Dreamland as to why they did not submit a proposal: Powers stated that its contract with the Dutchess County Fair precluded it from meeting the mandatory contract requirement contained in section 3.4(1) of the RFP (the certification requirement

³ In its letter dated June 6, 2014, the Protestor alleged that Wade, "made intentional misrepresentations to OSC" in that it submitted a version of its initial protest response on the agency-level protest that identifies itself as "W.G. Wade Shows, Inc." (the entity not involved in the U.S. Department of Labor enforcement action), while Wade's actual submission to AGM at the time of the agency-level protest was submitted by "Wade Shows" and/or "Wade Shows, Inc." (the entity still under scrutiny by the U.S. Department of Labor). Thus, the Protestor alleged that Wade altered the document while representing to OSC that it was the same document that had been submitted to AGM in the first instance. Preliminarily, we note that any distinctions between Wade affiliates are not material to our determination of the Appeal. For purposes of vendor responsibility, the pending wage enforcement action was considered regardless of which Wade affiliate is involved. Furthermore, on the more general issue of the impact of this allegation on Wade's integrity, we note that Wade did not represent Appendix A to its Answer to the Appeal to be a true and correct copy of its initial protest response. Rather, it appears as though Wade cut and pasted (or "copied") the substance of that initial response and added information apparently to clarify that such response was submitted on behalf of W.G. Wade Shows, Inc. in particular.

discussed above); and Dreamland stated it did not bid because it could not meet the minimum qualifications in section 3.3 of the RFP. We agree with AGM that the facts relied on for the Protestor's allegations of collusion are unsupported and, when combined with the other rational explanations for these entities not bidding do not justify a finding of collusion.

AGM's Scoring Methodology

The Protestor argues that AGM's scoring methodology and, later, the evaluation process were fundamentally flawed in that they: 1) were based (at least in part) on a predetermined notion that Strates should not be the awardee; 2) did not factor in the agency's MWBE goals, contrary to prior RFPs for this concession; 3) erroneously discounted Strates' safety score because of its use of temporary local New York workers; 4) failed to consider the use of electronic ticketing in the cost evaluation; and 5) failed to properly calculate the additional fee offered to the State for a vendor's total booth and concession frontage when evaluating the cost score.

1. Result Oriented Procurement Process

Taking each of these issues in turn, we find as an initial matter that there is no indication that AGM's procurement design and/or evaluation process was structured so as to steer an award away from Strates. To the contrary, AGM set forth minimum requirements for offerors that Strates had no problem meeting and, in fact, Strates received the highest cost score from AGM. In terms of technical merit, AGM afforded the most weight to the Midway Operations category which focused on how the offeror would annually attract patrons by offering new rides and concessions (RFP, at section 3.5[D], worth 20 points). Every offeror had an equal opportunity to present this information. All proposals were scored in accord with a predefined evaluation instrument using the same criteria. As such, there is no basis to support the Protestor's argument that the procurement and/or evaluation process was biased against it.

2. MWBE Goals

The Protestor asserts that AGM did not make a good faith effort to achieve its MWBE goals. AGM has provided a reasonable explanation as to why it chose not to use this procurement as a means of meeting its MWBE goals pursuant to Article 15-A of the Executive Law. In particular, AGM concluded that based on the short duration of the Fair (12 days), the type of subcontracting and the lack of certified MWBEs in the carnival industry, no goal should be established for this RFP. Significantly, prior to making this decision, AGM met with a representative from the Department of Economic Development (otherwise known as Empire State Development or ESD), the State agency responsible for administering the State's goals for MWBE participation in State contracts, and the agency representative was in agreement with AGM's conclusions. Based on the foregoing, we find no merit to the Protestor's argument.

3. Temporary Work Staff

The Protestor also argues that AGM misconstrued the role of the local labor force used by the Protestor and erroneously lowered its safety score as a result. In response to the Protestor's request for a debriefing, AGM informed the Protestor that its score in the Safety category "received fewer points primarily because half of its staff is hired locally and receives relatively little training" (Debriefing Letter from AGM to Strates, dated March 25, 2014, attached as Tab 2 to Strate's agency-level protest). We are generally reluctant to substitute our judgment for that of the procuring agency on factual matters where the agency has expertise in the area or has made a reasonable determination based on the information before them (see e.g. SF19980084; SF20120243; SF20120274).⁴ Here, our review of the technical evaluators' scores and notes shows that AGM made a factual determination (presumably based in part on its prior experience in running the State Fair) that Wade's proposal deserved a higher score on Safety based on the safety training provided by Wade to its year-round employees. Since this determination is supported by the record, we see no reason to disturb it.⁵

4. Electronic Ticketing

The Protestor contends that AGM's cost scoring methodology is flawed because it failed to take into account the impact of electronic ticketing on revenue generation to the State. This argument is based, in part, on a report issued by this Office which concluded that electronic ticketing was effective in reducing opportunities for fraud and was therefore responsible for an increase in revenue at the 2011 State Fair (NYS Office of the State Comptroller Report, *Electronic Ticket Sales at the 2011 New York State Fair* [June 2012], attached as Tab 6 to Strate's agency-level protest).

While electronic ticketing was not a mandatory requirement under the RFP, "Efficiency of Ticketing" was worth 10 points of the overall technical score (RFP, at section 3.5[G]). Under this category, the offeror was required to describe its process for the sale and reconciliation of tickets (RFP, at section 3.5[G]). Where an offeror was not proposing to use electronic ticketing, the RFP required the offeror to "demonstrate how the Bidder's ticketing system will maintain the Department's current efficiency and accuracy [with the use of electronic ticketing]" (RFP, at section 3.5[G]). Thus, while not a factor in the cost portion of the evaluation, electronic ticketing played a relatively important role in the technical score (which was worth 75% of the total score) as the third most valuable category out of a total of 11 technical criteria.

Contrary to the Protestor's argument, we believe that the inclusion of this category in the technical component effectively considered the impact of electronic

⁴ While recognizing that legally this Office is not required to defer to agency determinations of fact (see *Konski v. Levitt*, 69 AD2d 940 [3rd Dept, 1979], aff'd 49 NY2d 850, cert den 449 US 840), as a matter of policy we believe it is generally appropriate to give deference to agency factual determinations which are reasonably supported by the record. By contrast, we will generally not give deference to agency legal determinations, particularly those concerning the interpretation of the procurement statutes.

⁵ Furthermore, we wish to note that Wade has asserted that it plans to employ local men and women for certain aspects of its midway operation, such as in food, game and direct sales positions (Wade Answer to the Appeal, at 9-10).

ticketing with respect to the midway operations. We find no reason to disturb AGM's decision to evaluate this item as part of the technical evaluation of the offeror's proposal. Indeed, it would appear that any attempt by AGM to calculate the additional revenue that would come to the State due to the use of electronic ticketing would be speculative and, therefore, impossible to accurately score from a cost perspective. Although OSC's 2011 Report noted a 13% increase in revenue on days where weather was not a factor, and that "much of the increase was due to the electronic system and its effectiveness in reducing the risk of fraudulent ticketing activities" (OSC Audit Report, supra, at 6), there is no way to accurately predict what effect electronic ticketing will continue to have in future years. We believe that Protestor's attempt to do so in its agency-level protest is speculative at best (Strates' Protest to AGM, at 7). Finally, we note that Wade, in its proposal, has offered to use the same electronic ticketing system as the Protestor. As such, providing additional weight to the use of electronic ticketing would ultimately have no impact on the outcome of this procurement – Wade would still have been the highest scoring proposal.

5. Linear Footage Calculation for Booths and Concessions

Finally, the Protestor argues that AGM's cost scoring methodology is fundamentally flawed because AGM inaccurately calculated the revenue generated to the Fair based on the price per linear foot offered for booth and concession frontage. Under the RFP, the maximum five cost points were awarded to the offeror that provided the highest flat rental fee per linear foot of frontage, with other bidders receiving a proportional amount of points.

As noted by the Protestor, when determining which offeror would receive the five points, AGM only considered the fixed per foot fee without then multiplying that fee by the total linear feet of frontage submitted by the offeror (RFP, at section 4.3). While we agree with the Protestor that the flat fee should have been multiplied by the total number of linear feet to arrive at the most accurate frontage revenue proposed, we performed the calculation and have determined that since Wade offered the most frontage (and the highest fee per linear foot), Wade would still have received the five points and, in fact, Strates' proportionate score would have been lower under this method. Therefore, although we agree that this aspect of the cost score was flawed, correction of the error would not change the outcome of the award and, accordingly, we find it to be harmless error.

CONCLUSION

For the reasons outlined above, we have determined that the issues raised in the Appeal are not of sufficient merit to overturn the contract award by AGM. As a result, the Appeal is denied and we are today approving the AGM/Wade contract for midway services at the New York State Fair.