

STATE OF NEW YORK  
OFFICE OF THE STATE COMPTROLLER

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In the Matter of the  
Bid Protest filed by Motorola, Inc.  
with respect to the procurement of a contract for  
the New York State Statewide Wireless Network  
by the New York State Office for Technology  
Contract Number C000102

Determination  
of Bid Protest  
SF-20050147

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September 19, 2005

This Office has completed its review of the above-referenced procurement conducted by the New York State Office for Technology ("OFT") and the bid protest filed by Motorola, Inc. ("Motorola") 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 procurement, and that the procurement was fair and was conducted in accordance with law. As a result, we hereby deny the protest.

## **BACKGROUND**

### **Facts**

On June 3, 2002, OFT issued an RFP for competitive proposals for the design, construction, network operations and maintenance of the New York State Statewide Wireless Network ("SWN"). The SWN is intended to operate as an integrated statewide wireless radio network to provide a common communications platform for State public safety and public service agencies. Upon approval of the New York State Office for Technology, the network will include local governments at the option of the locality. A key goal of the system will be achievement of "interoperability", i.e., the ability of public safety agencies to talk to one another via radio communications systems, and to exchange voice and/or data with one another on demand when needed.

The SWN is intended to enable public service and public safety entities operating within the State of New York to better respond to and protect the citizens of New York State by permitting immediate coordination of public safety resources in emergency situations.

The SWN project calls for three alternative levels of partnership intended to maximize cooperation among the State and local government entities:

1. Full system partnership, whereby a local government would adopt the SWN as its fully integrated operational radio communications network. The locality would

replace its existing infrastructure and migrate to the SWN as its primary radio communications network.

2. Interface/gateway partnership, whereby the local government would maintain its existing local radio infrastructure and systems, but utilize a gateway to interface with the SWN network. This level of partnership would be favorable for localities that do not have an immediate need to replace their existing radio systems.

3. Infrastructure partnership, which is a basic, entry-level partnership. The State and a locality participating in this type of partnership would each maintain its separate radio communications network, but share infrastructure to the extent practical, such as by co-locating antennas at physical sites.

In accordance with State Finance Law Section 160(7) which provides, *inter alia*, that technology is to be deemed a service for purposes of the procurement laws, the RFP provided that the method of award would be based on "best value".<sup>1</sup>

The RFP described the administrative, technical and financial requirements that the proposal was to contain. The RFP also set forth the relative weight of the administrative, technical and financial proposals to be used in determining the award. The weighting was to be performed as follows:

1 <sup>st</sup> Level:	<i>Administrative Proposal</i> <i>Responsiveness of Proposal</i>	Pass/Fail
2 <sup>nd</sup> Level:	<i>Technical Proposal</i>	70%
3 <sup>rd</sup> Level:	<i>Financial Proposal</i>	30%

The administrative criteria required to be included in the proposals included:

- Formal offer
- Bidder eligibility certification
- Subcontractor declaration
- Bidder and key subcontractor certifications
- Conflicts of interest disclosure
- Financial viability submission
- Bid bond
- Letter of credit
- Contract administration team information
- Environmental preservation plan

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<sup>1</sup> See State Finance Law Section 163(1)(j) (defining "best value" as the "basis for awarding contracts for services to the offerer which optimizes quality, cost and efficiency, among responsive and responsible offerers.")

The technical criteria required to be included in the proposals included:

- Proposed technical solution
- Experience and references
- Project implementation team information
- Subscriber equipment design architecture description
- Strategy for providing non-proprietary, open competitive environment for acquisition of system compatible subscriber equipment
- Siting plan
- Radio frequency plan
- Network technical design
- Network operations and maintenance
- Proposed migration plan
- Paging services
- Environmental preservation plan

The financial criteria required to be included in the proposals included:

- Financial proposal identifying all services and products, and applicable rates and fees
- Guaranteed not-to-exceed price for each financial proposal category
- Description of lease with option to purchase payment structure
- Financing and amortization assumptions and costs
- Supporting details, assumptions, and calculations for pricing
- Details with respect to training, ongoing operations and maintenance costs
- Pricing data for subscriber equipment
- Pricing by category for system operations centers
- Information regarding optional services and equipment listed in the RFP
- Confirmation that proposal not include costs for land acquisition or certain taxes

In addition to the evaluation criteria identified in the RFP, prior to receipt of the proposals, OFT developed a methodology for evaluating the proposals based on the administrative, technical and financial criteria.

Five proposals were received pursuant to the RFP: three from M/A-COM, Inc. ("M/A-COM") and two from Motorola. OFT disqualified the Motorola proposals from consideration for award, finding that they were non-responsive because they included numerous terms which materially deviated from the RFP requirements.

Notwithstanding the fact that OFT had found both Motorola proposals to be non-responsive, OFT allowed both Motorola bid proposals to proceed through the normal bid evaluation process for the purpose of obtaining a "best value" score, in order to see how the Motorola bid proposals would have been ranked had they been deemed responsive. In the interest of maintaining fairness and objectivity in this process, OFT withheld notice

of the non-responsiveness determination from the technical evaluators until after they had finished their initial scoring process.<sup>2</sup>

The RFP called for the project to be structured as a capital lease, with the State to have the option to purchase the project infrastructure at any time during the contract's twenty year term. The RFP required the contractor to be solely responsible for financing the cost of construction for each region of the project, with the State to have no payment obligation until after a region had been built and the State had accepted the region, following completion of acceptance and conformance testing. Thus, the contractor was to assume responsibility for the design and development costs associated with the project.

Motorola altered this payment structure, from payment upon completion of regional buildouts and successful conformance testing by the State, to interim milestone payments to Motorola prior to completion and acceptance by the State. The Motorola proposals were premised on the State using a public entity to assume responsibility for obtaining project financing, as the conduit/issuer of a tax-exempt bond issue, and assumed action on the part of the State Legislature to effect this financing model. Under this approach, Motorola would divest itself of ownership of the project infrastructure by sale to the public conduit.<sup>3</sup>

OFT found that this financing model proposed by Motorola would shift the risk of securing project financing away from the proposer and solely to the State. Further, OFT determined that this model would negate the State's rights to terminate the project at any time without further liability under the conditions provided for in the RFP, since principal and interest on the bonds that would be issued to finance the project would still be owed if the project were terminated short of full completion. OFT also determined that inherent in this financing model was the assumption by the State of the risk of interest rate fluctuations prior to the State's entering the market, with the result that the buy-out schedule furnished in the bid would not truly be a not-to-exceed buy-out amount, as had been required in the RFP.<sup>4</sup>

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<sup>2</sup> If either of Motorola's proposals had received the highest "best value" score, presumably at that time OFT would have notified Motorola that it was disqualified.

<sup>3</sup> As noted above, the SWN project is structured as a lease with an option to purchase. The RFP provided that "[f]inancing to support the design and development costs are the responsibility of the Prime Contractor". (RFP Volume # 1, Section 12.18(A)(5), p. 111). M/A-COM, as prime contractor, will guarantee all contractual obligations of its subcontractors. In addition, TYCO International, Ltd., M/A-COM's parent company, will guarantee all of M/A-COM's obligations under the contract.

<sup>4</sup> In its first bid protest, filed with OFT on May 21, 2004, Motorola contended that OFT had acted arbitrarily and capriciously in finding that Motorola's financing model was non-responsive in a material respect. (Motorola, Inc.'s Bid Protest of OFT Solicitation [01-007], pp. 13-14). As this issue is not addressed in the Motorola protest document filed with this Office, it appears that the protestor has abandoned this argument. As part of its contract review process, this Office would normally independently assess a determination by an agency that a proposal was non-responsive, but in this case, since neither Motorola proposal attained the highest score, such a review was not necessary.

Scoring of each of the five proposals submitted was conducted by the OFT evaluation team, with the following results:<sup>5</sup>

	Motorola Mandatory	Motorola Alternate	M/A-COM Mandatory	M/A-COM Alternate	M/A-COM Alternate (with financing option)
Overall Score	565.9	578.6	950.1	907.2	920.3
Rank	5	4	1	3	2

OFT determined that the M/A-COM Mandatory Bid Proposal offered the best value, and awarded the contract to M/A-COM in April 2004.

On May 19, 2004, the New York State Assembly held a public hearing on the SWN project. The Assembly heard testimony from representatives of OFT, Motorola, M/A-COM and other organizations. OFT and Motorola also provided the Assembly with supplementary documentation.

Following execution of a contract with M/A-COM, OFT forwarded the contract to the New York State Attorney General's Office for approval as to form. Such approval was provided on February 16, 2005, and the contract was formally submitted to OSC for review on February 17, 2005, pursuant to State Finance Law Section 112.

Motorola filed its bid protest appeal with the Comptroller on February 25, 2005. The relief requested by Motorola is not a determination that the contract for the SWN should be awarded to it, but rather, that the Comptroller disapprove the award of the contract to M/A-COM.

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

The Comptroller is required by Section 112 of the State Finance Law ("SFL") to approve State agency procurement contracts which exceed \$15,000 before such contracts become

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<sup>5</sup>The scores represented the total points received by each proposer, based upon its overall evaluation scores. While the RFP required proposers to submit a "Mandatory Bid Proposal" satisfying all of the RFP requirements, it also permitted proposers to submit "Alternative Approaches" to the stated requirements as long as they did not constitute material deviations from the stated requirements. (RFP Volume # 1, Section 2.11, p. 22).

effective. Because a contract has already been signed by OFT, the Comptroller has reviewed the bid protests filed by Motorola as part of his review of the contract award.

In determination of this protest, the following correspondence/submissions from the parties were considered:<sup>6</sup>

- Motorola Protest Memorandum, dated May 21, 2004 (1<sup>st</sup> Motorola Protest)
- Decision of the SWN Project Director, dated August 16, 2004
- Motorola Notice of Appeal, dated September 7, 2004 (Appeal No. 1)
  
- Motorola Protest Letter, dated June 29, 2004 (2<sup>nd</sup> Motorola Protest)
- Decision of the SWN Project Director, dated October 1, 2004
- Motorola Notice of Appeal, dated October 20, 2004 (Appeal No. 2)
  
- Motorola Protest Letter, dated July 16, 2004 (3<sup>rd</sup> Motorola Protest)
- Decision of the SWN Project Director, dated October 12, 2004
  
- Motorola Protest Letter, dated August 6, 2004 (4<sup>th</sup> Motorola Protest)
- OFT Notification to Motorola in response, dated September 20, 2004
  
- Motorola Protest Letter, dated October 20, 2004 (5<sup>th</sup> Motorola Protest)
- OFT Notification to Motorola in response, dated November 19, 2004
  
- Motorola Protest Letter, dated November 4, 2004 (6<sup>th</sup> Motorola Protest)
- OFT Notification to Motorola in response, dated December 17, 2004
  
- Decision of the Chief Administrative Officer of OFT, dated January 24, 2005
  
- The Memorandum of Motorola, Inc. to Supplement the Procurement Record Regarding Award of Contract to Construct the New York Statewide Wireless Network Pursuant to New York State Office for Technology RFP 01-007 (received by the Comptroller on February 25, 2005, and referred to hereinafter as the "Motorola Memorandum"), the exhibits to the Motorola Memorandum, and the supporting affidavit of

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<sup>6</sup> It should be noted that rather than labeling each of its six submissions as a separate protest (as they were treated by OFT), Motorola characterized its later submissions to OFT as supplements to earlier ones, apparently to deflect OFT's argument that Motorola's submissions were filed on an untimely basis. Since we have concluded that denial of the bid protest filed with OSC should not be predicated on a finding that Motorola's objections were presented to OFT too late, we need not undertake a detailed review to determine whether Motorola's multiple submissions should be regarded as separate protests or as supplements to earlier protests.

Coyle Schwab, a Vice President of Motorola, dated February 24, 2005 (referred to hereinafter as the "Schwab affidavit")

M/A-COM was provided with a copy of the protest which Motorola filed with OSC. While OFT afforded M/A-COM the opportunity to submit papers responsive to the protest, M/A-COM declined to do so.

### **Protesting Party**

The protestor, Motorola, is one of two vendors which submitted a proposal in response to the RFP.

### **ANALYSIS OF BID PROTEST**

#### **PROTESTOR'S POSITION**

Motorola's protest is based upon the following allegations:

- The RFP was deeply flawed and resulted in a procurement that violates State standards. In this connection, Motorola contends:
  - The massive cost of the project far exceeds OFT's cost predictions.
  - The wide discrepancy in cost between the two proposers' bids demonstrates that the RFP must have been flawed.
  - The RFP resulted in inadequate competition, with only two companies submitting bids.
  - The RFP requirements were overly rigorous.
  - The State does not currently possess the licensed wireless spectrum required for the SWN and cannot obtain such spectrum until 2009 at the earliest.
- There are serious questions as to whether the contractor selected by OFT is capable of meeting the standards set forth in the RFP. In this connection, Motorola contends:
  - The technology solution offered by M/A-COM, unlike that proposed by Motorola, is unproven.

- OFT failed to give due consideration to Pennsylvania's experience with the use of M/A-COM technology in connection with Pennsylvania's statewide wireless network. The Pennsylvania project has experienced significant delays and cost overruns, raising questions as to M/A-COM's ability to complete the New York SWN.
- Deployment of the SWN is likely to have enormous environmental impact, especially in some of the most sensitive areas of the State.
- OFT has materially altered or ignored the terms of the RFP. In this connection, Motorola contends:
  - OFT reversed an RFP requirement that proposers be responsible for compliance with local zoning laws.
  - OFT failed to finalize the SWN contract within sixty days of the notice of award as required by the RFP.
  - OFT deviated from the RFP specifications that all towers be self-supporting steel structures.
- OFT failed to respond to Motorola's requests under the Freedom of Information Law ("FOIL").

## **AGENCY'S RESPONSE TO PROTEST**

OFT's response to the protests is as follows:

- The Bid Protest Policy contained in the RFP clearly establishes a limitations period for the filing of formal protests "concerning errors, omissions or prejudice in the bid specifications or documents" of twenty days prior to the due date for proposals. Motorola failed to file a timely formal protest of the bid specifications, and therefore its challenges to the bid specifications are time-barred. (January 24, 2005 Decision of the Chief Administrative Officer, pp. 6-7).
- Motorola's argument that the contract price was far in excess of OFT's projected cost for the SWN is misplaced. The projected cost issue was addressed in the Question and Answer period provided to proposers. In response to a question citing a news article reporting a \$400 million projected cost, OFT advised that "...[t]he actual amount that will be required to be spent to design, construct, operate and maintain the SWN will be determined based upon the bid proposals submitted in response to this solicitation..." (August 16, 2004 Decision of the SWN Project Director, pp. 14-15).

- Motorola's argument that the RFP was overly rigorous and prescriptive, leading to confusion and ambiguity, is without merit. OFT had a rational basis – primarily public safety – to support certain specifications that led to higher costs and limited design flexibility. Motorola failed to demonstrate that the specifications were defective or that competition was limited. (January 24, 2005 Decision of the Chief Administrative Officer, p. 9).
- Motorola has failed to establish that the procurement was defective because only two proposers participated. Given the magnitude, complexity, and technically specialized nature of the project, it was to be expected that the number of proposers would not be large. The RFP produced bids from two consortia collectively comprised of more than twenty entities. (January 24, 2005 Decision of the Chief Administrative Officer, p. 9).
- Motorola has failed to establish that the large discrepancy in the pricing of the proposals was tied to flaws in the RFP, or that the bid history of other procurements is of any relevance. The pricing difference is attributable to differences in the approaches toward building and maintaining the SWN which were proposed by each proposer. (January 24, 2005 Decision of the Chief Administrative Officer, pp. 9-10).
- The Project Director was correct in rejecting Motorola's argument that the RFP was arbitrary and capricious because it relied on the use of radio spectrum which the State does not yet own. The State, not the contractor, has the burden of obtaining necessary licenses, and the State has identified a plan of action to scale back the project in the event frequencies cannot be obtained. Motorola's argument that the lack of spectrum made it impossible for bidders to price delays is refuted by the fact that Motorola did price such delays in its bid proposal. (January 24, 2005 Decision of the Chief Administrative Officer, p. 10).
- Section 12.23 of the RFP provides that "[t]he Prime Contractor shall comply with all present and future applicable laws" and requires the contractor to obtain all necessary approvals required by law to fulfill its contractual obligations. Motorola's contention that the RFP was altered after the proposals had been submitted, by OFT's removal of a requirement that it was to be the contractor's responsibility to ensure compliance with local zoning laws, is incorrect. Motorola is charged with knowledge of applicable case law establishing the principle that governmental agencies are immune from local zoning laws where the public interest outweighs the interests served by the local zoning laws. OFT did not change or waive any RFP requirements related to zoning but, even if it did, such a change would not have altered the essential character

or purpose of the contract. (January 24, 2005 Decision of the Chief Administrative Officer, p.10-11).

- Motorola incorrectly asserts that OFT changed the terms of the RFP, post-bid submissions, by allowing M/A-COM to use antenna support structures which do not meet the RFP requirement that all towers be self supporting steel structures. Motorola misstates the RFP requirements, which do permit antenna support structures as well as standard towers (steel structures). (January 24, 2005 Decision of the Chief Administrative Officer, pp.11-12).
- Motorola's bid was non-responsive in that its proposed finance plan, based on a tax-exempt financing model, did not meet the RFP's requirements. (August 16, 2004 Decision of the SWN Project Director, pp. 40-48).
- Motorola has not been prejudiced by OFT's failure to respond to Motorola's FOIL requests. (August 16, 2004 Decision of the SWN Project Director, pp. 32-34).
- OFT cites a report prepared by a consulting firm with respect to the statewide wireless network being implemented by Pennsylvania (utilizing M/A-COM technology) to refute Motorola's claim that significant delays and cost overruns encountered on the Pennsylvania project are attributable to M/A-COM's technology solution rather than other factors. OFT also contends that Motorola failed to demonstrate that the Pennsylvania and New York projects are similar in scope and specifications, and therefore did not establish the relevance of the Pennsylvania experience to SWN. (January 24, 2005 Decision of the Chief Administrative Officer, pp. 13-15).
- OFT had the authority to waive the RFP provision requiring execution of a contract with the successful proposer within sixty days of contract award. (October 12, 2004 Decision of the SWN Project Director, pp. 8-14).
- OFT rejected Motorola's reference to the statewide wireless project being undertaken by Virginia as time-barred and lacking in substantiation as to relevance and materiality. (January 24, 2005 Decision of the Chief Administrative Officer, p. 15).

## **Applicable Statutes and Guidelines**

The requirements of competitive procurements are set forth in section 163 of the SFL, which provides that contracts for services shall be awarded on the basis of “best value” from a responsive and responsible offerer.<sup>7</sup> Best value is defined as the basis for awarding contracts for services to the offerer which optimizes quality, cost and efficiency, among responsive and responsible offerers.<sup>8</sup>

The SFL also requires that “[w]here the basis for award is the best value offer, the state agency shall document, in the procurement record and in advance of the initial receipt of offers, the determination of the evaluation criteria, which whenever possible, shall be quantifiable, and the process to be used in the determination of best value and the manner in which the evaluation process and selection shall be conducted.”<sup>9</sup>

Section 163(2)(b) of the State Finance Law provides that the procurement process is “[t]o be based on clearly articulated procedures which require a clear statement of product specifications, requirements or work to be performed . . .”

## **DISCUSSION**

### **Timeliness of Motorola’s protests at OFT level**

At the outset, we note that OFT’s decisions to reject many of the arguments raised in the bid protests which Motorola filed with OFT were based, at least in part, on OFT’s determination that Motorola did not comply with the Bid Protest Policy and procedures outlined in the RFP, in terms of timeliness.

We need not determine whether OFT’s untimeliness determinations were proper, because OFT did not rely solely on procedural irregularities in making its decisions on the protests. Its review of Motorola’s arguments on the merits is substantiated in the procurement record and, for the reasons set forth below, we find that OFT adequately refuted those arguments, again on the merits. Accordingly, we need not examine in detail each and every procedural objection advanced by OFT, but are rendering our decision to deny the protest on the following substantive grounds.<sup>10</sup>

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<sup>7</sup> SFL Section 163(10).

<sup>8</sup> *Id.* Section 163(1)(j).

<sup>9</sup> *Id.* Section 163(7).

<sup>10</sup> Even if a State agency bars a protest argument on the grounds that it was untimely, such a determination would not prevent the Comptroller, upon appeal of such determination, from reviewing the underlying substantive arguments. This is especially true to the extent that a protest asserts that the award of the contract violates the provisions of a state statute governing such award.

## Applicable standards for OSC's review of protest

### Position of Parties

The first argument advanced in Motorola's protest to OSC, which is procedural in nature, is that OSC has ample authority to reject OFT's recommendation on the award of the SWN contract to M/A-COM if it is determined that the agency failed to comply with State competitive bidding laws. Motorola cites State Finance Law Section 112 and various provisions of the New York State Procurement Council Procurement Guidelines in support of this argument. OFT on the other hand suggests that with respect to factual issues OSC should sustain the agency's position if OSC finds a rational basis for such decisions.

### OSC's Position

Preliminarily, we note that it is, in our view, clear that OSC, in carrying out its responsibilities under section 112, can approve a contract only if it is satisfied that all applicable statutory requirements have been satisfied.

With respect to factual issues, we believe OSC may reject a contract award based upon its factual determination that such an award would be improvident.<sup>11</sup> Furthermore, in undertaking such review, we do not believe that OSC is limited in its analysis to consideration of whether there was a rational basis for the agency's determination (*see generally, Kinski v. Levitt*, 69 A.D. 2d 940, Third Dep't, 1979, *aff'd* 49 N.Y. 2d 850, 1980, *cert. den.* 449 U.S. 840). Rather, OSC may conduct a *de novo* review of the record and make its own analysis of the facts pertaining to the procurement.

However, while recognizing that OSC is not legally required to defer to agency decisions on contract awards, as a matter of policy OSC may in its discretion give some deference to factual determinations of agencies, especially where such determinations are within the technical expertise of the agency and are reasonably supported by the record. Therefore, as outlined below, in undertaking our review, we have exercised our discretion to give deference to OFT's factual determinations with respect to technical matters within its expertise.<sup>12</sup>

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<sup>11</sup> In *City of New York v. State of New York* (87 N.Y. 2d 982, 1996), Judge Bellacosa, though dissenting in part from the majority on other grounds, noted that "[t]he Constitution and the Legislature have designated the State Comptroller as the unique protector of the State's pocketbook (*see generally* NY Const, art V § 1; State Finance Law § 8)." (87 N.Y. 2d at 988).

<sup>12</sup> Given the unprecedented magnitude and the highly technical nature of the SWN procurement, and the vital public interests to be served by this project, in order to further satisfy itself whether OFT's selection of M/A-COM as the contractor for the SWN was appropriate, OSC retained an independent consulting firm to review the M/A-COM technology solution and its suitability for attaining the goals of the SWN. Nothing in the consulting firm's findings has led us to conclude that the system proposed by M/A-COM lacks the functionality required for the SWN.

## **The merits of Motorola's substantive arguments**

The substantive questions presented on this protest for OSC to determine are:

(1) Did inherent flaws in the RFP result in a procurement that stifled competition and violated State standards?

(2) Did OFT act properly in determining that M/A-COM was capable of performing its contractual obligations?

(3) Did OFT materially alter or ignore the terms of the RFP in making its determination to award the contract to M/A-COM?

Based upon our consideration of the assertions of Motorola, the responses of OFT, and our review of the procurement record, the contract, and the bid protest documents, we will consider each of these issues, including related sub-issues, in the discussion below.

### **(1) THE ALLEGEDLY FLAWED NATURE OF THE RFP**

Motorola cites the variance between the alleged projected cost of the project and the costs that were actually proposed; the fact that proposals were received from only two firms; the large differential in price as between the two firms which submitted proposals; and requirements regarding radio frequencies and zoning<sup>13</sup> in support of its position that the RFP was flawed.

OFT asserts that Motorola's contentions emanate from Motorola's bias toward its own established technology, which it has implemented in other states.

Section 163(9)(a) of the State Finance Law places on the state agency procuring commodities or services the responsibility of selecting a formal competitive procurement process, such process to include ". . . a clear statement of need; a description of the required specifications governing performance and related factors; a reasonable process for ensuring a competitive field; a fair and equal opportunity for offerers to submit responsive offers; and a balanced and fair method of award." (Emphasis added).

OFT determined that public safety issues were of paramount concern in this procurement, and it contends that if the RFP stated rigorous and costly specifications in an effort to address that concern, it was the agency's prerogative to do so. (See August 16, 2004 Decision of the SWN Project Director, pp. 17-18).

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<sup>13</sup> The zoning issues raised by Motorola are more appropriately dealt with in the context of Motorola's contention that OFT materially deviated from RFP requirements after the proposals had been submitted. (See pp. 22-26, *infra*).

That public safety concerns were of overriding importance for the SWN procurement is evident from a reading of the "Procurement Overview" introductory provisions of the RFP:

**"Public Service and Public Safety Mission**

This procurement is being undertaken by the State of New York, acting by and through the New York State Office for Technology, and is critical in the aftermath of the global events of September 11<sup>th</sup>, 2001, to enable public service and public safety entities operating within the State of New York to better respond to and protect the citizens of New York State. The SWN will provide essential connectivity to coordinate the delivery of governmental services to the citizens of New York, and to enable immediate coordination of public safety resources in emergency situations to ensure the public's safety and welfare. The new state-of-the-art communications network will significantly enhance the safety of both the State's emergency service responders, and the citizens they serve." (RFP Section 1.01(A), p. 8).

For the reasons discussed below, we find Motorola's arguments in support of the proposition that the RFP was fundamentally flawed to be unpersuasive, and further find that in light of the key objectives of this procurement, OFT acted reasonably in issuing the specifications which were prescribed.

**(A) The difference between projected cost and costs actually proposed**

In support of its position that the RFP was flawed, Motorola argues *inter alia* that one must come to that conclusion because the project will be much more costly than the \$400 million that had been projected, citing a newspaper report as factual support for that dollar amount as the projected cost figure.

OFT refutes the argument by stating that there was no preconceived understanding of, or cap on, the projected cost, as confirmed by a review of the Questions and Answers that became part of the Official record of the procurement (RFP, Vol. 1, Section 2.05, p. 19). Official Question No. 14 read as follows in relevant part:

"I read an article that states 'New York to Issue RFP for \$400 Million Statewide Wireless Network'. Does this mean that the most NY is planning on spending is \$400 million? . . ."

The Answer to Question 14 advised prospective bidders that "...[t]he actual amount that will be required to be spent to design, construct, operate, and maintain the SWN will be determined based upon the bid proposals submitted in response to this solicitation ...". (August 16, 2004 Decision of the SWN Project Director, pp. 14-15).

We believe that the Motorola argument is without merit. The competitive bidding process has determined the cost of the project, in accordance with statute. Furthermore, a

significant difference between an estimate and actual bid prices does not necessarily mean that the RFP was flawed – although prior to approving a contract, we would require from the agency an explanation and justification for any major difference. In this case, we are satisfied that there is no such major discrepancy. OFT has advised us – and our audit has confirmed – that OFT did not estimate the cost of the entire project at the \$400 million figure reported in the newspaper article. While this figure was within the range of some early cost estimates for building the infrastructure only (but, in fact, toward the low end of the range of estimates), such estimate did not cover projected costs for financing of the project, or for operating and maintaining the SWN over the twenty year life of the contract. We have concluded, based upon the documentation in the procurement record, that there was not a significant discrepancy between the successful proposer's not-to-exceed price for construction of the project infrastructure, and the estimated cost for that work.

**(B) The large differential between the costs bid by the two proposers**

Motorola submitted two alternative proposals, one costing \$3.4 billion and the other costing \$2.6 billion and, in its protests, asserted that the winning bid for the SWN was reported to exceed \$1 billion. Motorola contends that this wide disparity between its bids and the winning M/A-COM bid was inconsistent with historical differences between the two proposers' submissions for other states' wireless networks, which averaged between 5% and 15%, and further demonstrated that the RFP was inherently flawed.

OFT refuted Motorola's argument on this point by noting that information provided to OFT by Motorola confirmed that there was a 200% pricing differential between M/A-COM's and Motorola's bids on the Pennsylvania statewide wireless network project. (Decision of the SWN Project Director dated August 16, 2004, pp.19-21). While Motorola dismisses the Pennsylvania example as irrelevant,<sup>14</sup> we are not persuaded that the SWN proposers' cost differential compels the conclusion that the RFP was flawed. We find that there is a reasonable basis for OFT's conclusion that the large differential between the two proposers in terms of project cost was chiefly attributable to differences in each company's technology solution, rather than to problems with the RFP specifications. (January 24, 2005 Decision of the Chief Administrative Officer, pp. 9-10).

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<sup>14</sup> Motorola, Inc.'s Notice of Appeal of Decision of the SWN Project Director, filed with OFT on September 7, 2004, pp. 9-10. Motorola points to Connecticut's completion of its statewide wireless network at a cost of \$47 million and Virginia's planned network projected cost of \$329 million as authority for its contention that the New York SWN could be built for far less than the cost proposed by M/A-COM. (Schwab affidavit, paragraph 4). Motorola has submitted nothing that would convince us that the nature and scope of the Connecticut project render that state's network relevant to the SWN. The Virginia project is ongoing, and there is no assurance that the projected cost and the actual cost will be the same.

**(C) Only two firms submitted proposals, evidencing the stifling of competition in the procurement due to flaws in the RFP**

OFT rejected Motorola's argument that, based on the fact that only two companies submitted proposals, one must deduce that competition for the award was stifled because of inherent flaws in the RFP. OFT notes that the proposals that it received from M/A-COM and Motorola reflected participation in the procurement by more than twenty companies making up two consortia, and that given the size and complexity of the project, it would be reasonable to expect that the pool of firms capable of performing the work would not be large<sup>15</sup>. (See paragraph (D) below for discussion of the rigorous technical specifications of the RFP which OFT required proposers to meet in order to attain the necessary functionality of the SWN).

All prospective bidders were held to the same RFP requirements. We find no factual basis in the record for concluding that OFT took any action in its conduct of the procurement, (whether motivated by favoritism or otherwise), which had the effect of limiting competition.

Rather, OFT's concern for the desirability of fostering competition with respect to the SWN project is evidenced by the fact that the RFP required the successful proposer to submit a technology solution that would provide SWN end-users with the opportunity to procure subscriber equipment (SWN-compatible land mobile radio communications equipment) on a competitive basis, over the life of the contract. Toward that end, the RFP required that all proposers submit a detailed strategy for guarantying a "non-proprietary, open competitive environment for acquisition by SWN Users of network compatible Subscriber Equipment throughout the Contract term." (RFP Section 11.01, p. 89). One such acceptable strategy provided for in the RFP was a commitment on the part of the contractor that all essential intellectual property rights relating to the equipment be licensed on a "on a fair, reasonable and non-discriminatory basis to multiple manufacturers of standard commercial land mobile radio communications equipment for public safety/service use that operate in the frequency bands proposed for SWN . . ." Indeed, the contractor's failure to fully implement its proposed strategy was to be deemed a material breach of the contract, constituting grounds for contract termination. (RFP Section 11.01, p. 89).

For the reasons stated, the limited number of proposals submitted does not lead us to conclude that the RFP was flawed.

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<sup>15</sup> The Motorola project team consisted of Motorola, Inc., Harris Corporation, Lockheed Martin Management & Data Systems, TRW, Inc., Bechtel Corporation, o2Wireless Inc. d/b/a Baran Telecom, IBM Corporation, GDP Telecom, Inc., Vitek Public Safety Solutions Inc., Buford Goff & Associates, and Parsons Brinkerhoff. The M/A-COM project team consisted of M/A-COM, Inc., General Dynamics, Verizon, Alcatel USA, Black & Veatch, Sun, Cisco, ADT, LA Group, Niagara Mohawk, Intergraph, and Bear Stearns.

**(D) The RFP requirements were overly rigorous**

Motorola claims that the RFP technical specifications were overly rigid and inflexible, thereby deterring other potential proposers from participating in the procurement, and unnecessarily driving up the cost of the project.

The RFP required, among numerous other technical specifications, a network system that would provide mobile voice communications and mobile data communications for 95% area coverage and 97% on-road/navigable waterways coverage throughout the State of New York, and also specified certain minimum delivered audio quality requirements. (RFP, Exhibit #1, Sections 2.07(B) and [C]). The SWN was to be designed to initially accommodate at least 25,000 users, and to ultimately accommodate a full capacity of at least 65,000 users. (RFP, Exhibit # 1, Section 2.08[D]).

Motorola contends that significant cost savings would be achieved if the RFP had called for only 95% on-road/navigable waterways coverage, rather than 97%, in that many tower sites could be eliminated. (*See Schwab Affidavit*, paragraph 1.1; *Motorola Memorandum*, p. 19). Motorola also asserts that the 95% area coverage requirement was overly rigorous, in that it “increased the number of towers, lengthened implementation time, exacerbated environmental impact, and ultimately drove up the overall system cost.” (*Motorola Memorandum*, pp. 11-12).

Mr. Schwab’s affidavit details numerous other coverage, spectrum, site construction, network operation, network maintenance, and infrastructure options which had been included in Motorola’s alternate proposal as alternatives to the RFP requirements. It is claimed that implementing these alternative approaches in the SWN would result in major cost savings without departing from industry norms.

OFT counters that it was fully aware of the cost implications when the RFP specifications were being prepared, and notes numerous instances where alternative design approaches were discussed.

“Several areas where less expensive alternative requirements could be pursued were brought to the State’s attention during the procurement. The written record shows that, having been made aware of cost saving alternatives, OFT made informed decisions which generally held to the higher standards in the interests of public safety rather than driving decisions based solely upon cost, while implementing a few cost saving alternatives where public safety would not be negatively impacted.” (*Decision of the SWN Project Director* dated August 16, 2004, pp. 17-18, footnotes omitted).

We find that the record establishes that OFT acted reasonably in setting the goal of obtaining for the State of New York a state-of-the-art network infrastructure system,

rather than one which employed more traditional technology.<sup>16</sup> Accordingly, we will not overturn OFT's judgment as to the desirable functionality of the SWN as reflected in the RFP requirements, nor will we preempt OFT's selection of the M/A-COM technology solution as the means to implement those requirements.

#### **(E) Availability of licensed wireless spectrum**

Motorola asserts that OFT acted unreasonably in premising the RFP requirements on the availability of adequate 700 MHz spectrum, when that spectrum is not currently available because it is occupied by other users. Motorola further states (but without citation to a specific authority) that the FCC has confirmed that usable frequency will not become available until at least 2009. Also in this regard, Motorola argues that it was "impossible" for proposers to determine how to price and bid the delays that could occur, depending upon when adequate spectrum became available. (Motorola Memorandum, pp. 15-16).

OFT disputes Motorola's argument that the spectrum availability issue prevented proposers from determining how to price the project, based on the fact that Motorola itself submitted a proposal which crafted a solution to this problem.<sup>17</sup> Furthermore, all prospective proposers were required to bid to the same specifications.

In the course of its contract review process, OSC solicited and obtained information from OFT as to the present status of appropriate spectrum availability for the SWN. OFT has advised that the State currently has adequate frequency licenses to support coverage for the anticipated 25,000 initial (primarily State agency) users. Furthermore, it is anticipated that as the project moves forward and partnerships with local governments are developed, those local partners will offer the opportunity to bring additional frequencies to the SWN to support coverage for what is expected may ultimately be a total of up to 65,000 users over the course of the contract. In addition, as the regional build-out process moves forward, additional spectrum is expected to become available. OFT has advised that it will apply for such spectrum as it becomes obtainable and when additional user capacity is required.

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<sup>16</sup> The M/A-COM technology proposed for the SWN utilizes Time Division Multiple Access (TDMA), a means of supporting more than one conversation per radio channel by assigning each conversation to a timeslot. This technology offers significantly greater system usage efficiency than the more traditional Frequency Division Multiple Access (FDMA) technology. While Motorola's proposal contemplated an eventual conversion of the SWN to TDMA, it provided for use of FDMA in the initial stages of the project. The OFT Project Director has noted that Motorola has provided its own proprietary TDMA based technology solution outside of North America, and that the company has been awarded over 36 contracts incorporating this technology in 22 countries, including governments and law enforcement agencies in Great Britain and Asia. (October 1, 2004 Decision of the SWN Project Director, p. 18).

<sup>17</sup> Motorola's proposal provided that in the event of delays caused by the State's failure to provide frequencies, it reserved the right to request payment for additional costs, to be handled through the change order process. (August 16, 2004 Decision of the SWN Project Director, p. 23).

Under the terms of the RFP, the State retained the responsibility for obtaining adequate spectrum to implement the SWN, and advised prospective proposers in the RFP that it was in the process of acquiring spectrum in the 700 and 800 MHz public safety bands. The RFP permitted proposers to offer alternative frequencies capable of public safety use (provided that appropriate documentation establishing availability were provided), and also specifically permitted the use of VHF highband in regions requiring off-road augmented coverage overlays to the mobile network. Finally, the RFP reserved to the State the right to scale back the project to reflect actual frequency availability in the event that sufficient frequencies could not be obtained by the State. (Decision of the SWN Project Director, dated August 16, 2004, p. 22).

As in the case of Motorola's objection to the RFP's allegedly overly rigorous requirements, we cannot conclude that OFT acted unreasonably on this issue which, we believe, falls within the realm of its technical expertise.

#### **(F) OFT's failure to respond to Motorola's FOIL requests**

Although Motorola asserted before OFT, as grounds for reversal of the award of the contract to M/A-COM, OFT's non-compliance with FOIL (New York Public Officers Law Section 87), Motorola alluded to, but did not stress the FOIL issue in the bid protest documents submitted to OSC. (Motorola Memorandum, p. 26).

At the outset we note that determinations of whether an agency has complied with FOIL are not within the jurisdiction of this Office. Indeed, in order to be successful on a bid protest on the grounds of a State agency's non-compliance with FOIL, a protestor would have to demonstrate that the FOIL non-compliance violated the Procurement Guidelines, which say that the State agency should debrief the losing offerer on the shortcomings of its own proposal. Motorola makes no such demonstration here.

However, in the course of our contract review process, OSC had access to and reviewed the entire procurement record. Nothing has come to our attention which would suggest that OFT's failure to provide Motorola with the documentation it had requested would have affected the propriety and outcome of the procurement.

### **(2) OFT'S DETERMINATION THAT M/A-COM IS CAPABLE OF PERFORMING ITS CONTRACTUAL OBLIGATIONS**

#### **(A) The Pennsylvania Statewide Public Safety Radio System Project**

Motorola contends that the M/A-COM technology solution is "unproven"; that there are serious questions as to whether M/A-COM will be able to construct and implement the SWN in a manner that will attain the objectives of the project; and that OFT's selection of the technology solution proposed by M/A-COM "could result both in unexpected costs and delays in building the system and in a system that ultimately does not work."

(Motorola letter to OFT of June 29, 2004, attached to OFT Decision of the SWN Project Director dated October 1, 2004 as Exhibit 3).

In support of its assertion that it proposed a “proven” technology, Motorola points to its already having developed statewide networks in 23 other states (although apparently none utilized the TDMA system which OFT selected by awarding the contract to M/A-COM). Motorola also relies heavily on Pennsylvania’s experience with its statewide wireless network, in which M/A-COM’s TDMA technology solution is being employed, as evidence that the M/A-COM technology selected for New York’s SWN is unproven. (Motorola, Inc.’s Notice of Appeal of Decision of the SWN Project Director, received by OFT on September 7, 2004, at p. 10).

With respect to the Pennsylvania statewide wireless network project, Motorola cites several newspaper articles detailing significant cost over-runs and delays in implementing the project. In support of its position that the problems with the Pennsylvania project were attributable to M/A-COM’s “unproven” technology, Motorola also relies on the August 31, 2004 report of iXP Corp.,<sup>18</sup> a consulting firm retained by Pennsylvania to review and make recommendations with respect to that project. A review of the report, however, confirms that the consulting firm found that the cause of the difficulties experienced by Pennsylvania was not the M/A-COM technology, but rather, Pennsylvania’s decision to act as its own integrator on the project. The report concluded that:

“... the Radio Project Office (RPO) was not structured to support the implementation and management of a newly developed technology – this was less a decision of the RPO than a collective decision of the Commonwealth. This is the overriding issue hindering successful completion of this project. All other observations and findings in this report regarding issues impeding successful implementation, both real and perceived, have as their root the structure and charter of the RPO. It should be noted that purchasing and implementing a newly developed technology is neither a good or bad decision. It is simply the fact that if the decision is to go with a newly developed, state-of-the-art solution, then you must structure and manage the implementation and risks accordingly.” (iXP Corp. Report, Motorola Memorandum, Exhibit F, pp. 5-6, emphasis in original).

The iXP report indicates that the consulting firm found M/A-COM’s performance generally acceptable.<sup>19</sup>

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<sup>18</sup> iXP Corp. is the consultant hired by OSC to assist in analyzing the technological issues raised in this procurement.

<sup>19</sup> The iXP report concluded that “[p]rior performance-based experience suggests that M/A-COM has, and will continue to work diligently with the Commonwealth to complete and resolve any development issues. To date, although slow moving in some areas, their performance has been technically thorough and committed to the directed process of completion. From a business perspective, M/A-COM must make this project a success as they see the future of communications systems being this IP packet-based approach.” (iXP Corp. Report, Motorola Memorandum, Exhibit F, p. 6)

On the issue of the “proven” versus “unproven” nature of the M/A-COM technology solution, the iXP report noted:

“1.1.2 Will the Technology Work?

At a high level of technology development, the selection of an IP based, packet switched, software based communications infrastructure is a well-founded choice. This technology is the coming, future, or current state-of-the-art depending on the application and industry to which it is being applied. In future years, this investment will pay dividends compared to investing an equivalent amount of money in an older, traditional radio communications technology. The best evidence of this view is the massive success of the Internet in providing communications on a worldwide basis. Its success is largely based on the viability of its technology infrastructure; emulated by the M/A-COM system.”<sup>20</sup>

In contrast to the situation in Pennsylvania, the New York SWN project is to be set up as essentially a “turn-key” operation, in that it places on the contractor the obligation to design and fully implement the system.

Motorola itself recognized the dissimilarities in the two projects in its Supplemental Testimony submitted to the Assembly. After disputing the OFT Director’s Assembly testimony that Pennsylvania represented an example of M/A-COM’s technology having been successfully deployed, Motorola’s Supplemental Testimony flatly stated that “. . . it is not appropriate to compare the Pennsylvania project to the New York project.” In support of this proposition, Motorola cited the fact that Pennsylvania – and not M/A-COM – was required to acquire and construct the sites. In addition, there are significant differences in the technological specifications for the two states’ projects. (Motorola Memorandum, Exhibit C, p.5).

In short, the record does not support the conclusion that Pennsylvania’s experience with the use of M/A-COM technology casts material doubt on M/A-COM’s ability to implement the SWN.

**(B) Impact on the environment**

Motorola contends that attainment of a key objective of the SWN project, namely, implementation of the SWN with minimum adverse impact on the environment, will not be attained utilizing the technology solution offered by M/A-COM.<sup>21</sup> Motorola further claims that OFT’s decision to mandate 95% area coverage and 97% road coverage in

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<sup>20</sup> iXP Corp. Report, Motorola Memorandum, Exhibit F, p. 6)

<sup>21</sup> Section 1.01(B) of the RFP provides in relevant part: “Environmental preservation, including but not limited to, reducing the proliferation of towers and minimizing the number and height of standard tower sites, is also a priority for the State.”

every part of the State demands a tower-intensive design, which will, in particular, have aesthetically unpleasing effects in the Adirondack and Catskill Mountain regions.

Given the number of towers that a 700/800 MHz frequency system would require, the RFP authorized an approach permitting 700/800 MHz coverage to be augmented by the use of VHF channels in the Adirondack and Catskill regions, with the objective of significantly reducing the number of towers required to meet coverage requirements in those areas. (RFP Exhibit # 1, Section 2.05; August 16, 2004 Decision of the SWN Project Director, pp. 26-27).

As evidence of its contention that many towers will need to be constructed in the Adirondack Park area in order to implement the SWN, Motorola cites OFT's decision to approve Saratoga County's request that three new towers be constructed within the relatively small portion of the county that is within the Adirondack Park. OFT determined that construction of these new towers was necessary in order to attain 95% area coverage. This determination was based on the fact that, unlike the State, the county lacked adequate VHF spectrum and necessary 700/800 MHz spectrum to utilize a VHF overlay alternative solution, which would have limited the number of new towers required. In addition, because Saratoga County's existing communications system was seriously outdated, in order to be sure that citizens were protected there was a pressing need for a new system to be in place. (See New York State Office for Technology Statewide Wireless Network Report on a Review of Saratoga County's Selection of Radio Tower Sites inside the Adirondack Park, dated September 30, 2004).

Fundamentally, Motorola's environmental impact argument represents a challenge to the RFP's 95% area coverage and 97% road coverage specifications, since it is largely these requirements which drive the number of towers that will be needed for the SWN. In light of the importance of the public safety interests to be advanced by the SWN, we do not find OFT's imposition of these coverage requirements to be unreasonable.

### **(3) THE ALLEGATION THAT OFT MATERIALLY ALTERED OR IGNORED THE TERMS OF THE RFP**

#### **(A) Zoning issue**

Section 12.23 of the RFP provides in relevant part as follows:

"The Prime Contractor shall comply with all present and future applicable laws, codes, ordinances, statutes, rules and regulations with respect to any of the duties or responsibilities of the Prime Contractor arising from the Contract . . .

"The Prime Contractor, including its agents, successors and/or assigns and Contractors and subcontractors shall obtain all necessary licenses, certificates and

other approvals required by law to fulfill the Prime Contractor's obligations under the Contract at its sole expense . . ."

Section 12.26 of the RFP provides as follows:

"The State reserves the right to terminate or modify this Contract in part upon the happening of any of the following:

\* \* \* \* \*

"(2) Inability to obtain rights and interests in site locations or zoning approvals sufficient for all or any portion of the system design, such inability to be determined by the State in its sole judgment . . ." (Emphasis added).

Motorola takes the position that the above quoted language in the RFP required proposers to comply with local zoning requirements, with the result that Motorola priced its proposal significantly higher than it would have absent this requirement. Motorola further contends that OFT dropped this requirement after award of the contract to M/A-COM, materially altering the RFP in a manner prejudicial to Motorola. Motorola also concludes that the RFP was flawed in that it did not require proposers to break down their expected compliance costs in their proposals, resulting in an inability on the part of OFT to take advantage of the cost savings. Furthermore, Motorola asserts that OFT should have given it an opportunity to adjust its proposal to reflect the alleged change in the RFP requirements.

In support of its position, Motorola relies on an excerpt from the testimony given by OFT Director Michael McCormack at the May 19, 2004 Assembly hearing on the SWN project, as well as the Draft Generic Environmental Impact Statement issued on the project.<sup>22</sup>

In response to questions from Assemblyman Brodsky, Mr. McCormack testified, in substance, that while the RFP suggested that the process would be subject to local zoning, OFT later changed its position based on subsequent court decisions. He noted, however, that neither bidder was prejudiced, because both bid to the same specifications.<sup>23</sup>

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<sup>22</sup> By the time the Draft Generic Environmental Impact Statement was issued on September 29, 2004, both proposers were already on notice of OFT's intention to invoke (at least selectively) the zoning law exemption guidelines of the Appellate Division's decision in the Crown case. (See pages 25-26 *infra* for a discussion of this court decision). Mr. McCormack's testimony before the Assembly, which referred to that court decision, had taken place in May 2004.

<sup>23</sup> The following colloquy took place between Assemblyman Brodsky and Michael McCormack at the May 19, 2004 Assembly hearing:

"Mr. Brodsky: So it's your testimony that the bidders are not subject to local zoning laws?

Mr. McCormack: Based on where we are now, yes.

Mr. Brodsky: Two comments: One, they don't seem to understand that. At least one of them, and perhaps the other. And two, you could choose to operate the system consistent with local

OFT admits, however, that Mr. McCormack's testimony may have been confusing, and for that reason OFT filed a supplemental submission with the Assembly on May 25, 2004 to clarify his testimony.

In the supplemental submission, Mr. McCormack advised the Assembly:

"As to some sites, the State is and would be immune from local zoning under the well established doctrine of sovereign immunity, and as further discussed in the recent legal case mentioned in my May 19<sup>th</sup> testimony . . ." <sup>24</sup> "This immunity is not specific to this project. Therefore, to the extent that construction or development of specific SWN sites falls within the scope of this immunity, the State is and will be exempt from local zoning processes.

"However, the State will not extend its exemption from local zoning to activity that otherwise would not fall within the scope of the immunity. To that end, the State will require compliance with local zoning laws where applicable and where

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zoning. That would be within the power of the State to do as a matter of contractual obligation; is that not correct?

Mr. McCormack: That would be correct.

Mr. Brodsky: You chose not to.

Mr. McCormack: In the bid we had described to both bidders that the process would be subject to local zoning. It's base upon subsequent court rulings.

Mr. Brodsky: Does the bid require them to abide by local zoning?

Mr. McCormack: In the bid and what was submitted, yes.

Mr. Brodsky: But now you are saying that's no longer the State's policy?

Mr. McCormack: Based upon recent court decisions.

Mr. Brodsky: What decision was that?

Mr. McCormack: I would have to give you that information.

Mr. Brodsky: Would you get me that? There's not a material change in the process.

Mr. McCormack: Both bidders had to bid to the same specifications.

Mr. Brodsky: But isn't the decision -- when were the bidders informed that they would not have to --

Mr. McCormack: This occurred -- the decision, the legal decision occurred in the fall of last year. So it would have been after the bidders had submitted. There would have been no --

Mr. Brodsky: Were they notified of the change in policy by the State?

Mr. McCormack: No.

Mr. Brodsky: I guess they have been now. For what reason would you change the policy, even if the law permitted you to change the policy, as it now apparently does?

Mr. McCormack: The issue about creating a statewide network, of going along and creating that, there may be some challenges in terms of how we would design a statewide network and conform in every instance to local zoning.

Mr. Brodsky: And therefore, the needs of the network became a superior value with respect to the observance of local zoning.

Mr. McCormack: I would emphasize as part of that, we would work with the local communities.

Mr. Brodsky: I understand that, but the answer to my question is, it was a superior value?

Mr. McCormack: That's based -- it's our determination."

<sup>24</sup> In a footnote, Mr. McCormack cites Crown Communications v. NYS DOT, 309 A.D.2d 863, Second Dep't, 2003, decided in October 2003. This decision was affirmed by the Court of Appeals on February 10, 2005. (4 N.Y.3d 159, 2005).

the vendors' design requires it. We have not departed from the bid specification.” (Motorola Memorandum, Exhibit B to Exhibit I).

Thus, OFT contends that it did not deviate from the bid specifications which, as noted above, obligated the contractor to comply “with all present and future applicable laws.”

#### **State of the law when RFP was issued**

In Matter of County of Monroe, 72 N.Y.2d 338, 1988, the Court of Appeals adopted a “balancing of public interests” test as the basis for determining the extent to which local zoning laws apply to governmental entities, holding that governmental entities are immune from local zoning laws where the public interest outweighs the interests served by the local law.

#### **State of the law when M/A-COM contract was executed**

Subsequent to the issuance of the RFP and prior to the award of the SWN contract to M/A-COM, in October 2003 the Appellate Division of the Supreme Court, Second Department, decided the case of Matter of Crown Communication New York, Inc. v. Department of Transportation of the State of New York, et al., 309 A.D. 2d 863, Second Dep’t, 2003. The Court held that the installation of private antennae on two state-owned telecommunications towers was exempt from local zoning regulation.

In arriving at its determination, the Appellate Division held that the private telecommunications providers “are not precluded the State’s immunity simply because they are private entities or because colocating on the DOT’s towers will advance their financial interests . . . [I]t is not the private status of the Wireless Telephone Providers but, rather, the public nature of the activity sought to be regulated by the local zoning authority that is determinative of this case.” (309 A.D.2d at 866).

In February 2005, the Court of Appeals affirmed the Appellate Division decision in Crown. The Court of Appeals found that SWN - - the very project which is the subject of our determination here - - constitutes one of the public benefits that would be served by a holding that private wireless providers are exempt from local zoning regulations under the balancing of public interests test. The Court noted:

“ . . . the State is currently in the process of developing its telecommunications infrastructure in anticipation of establishing a Statewide Wireless Network (SWN), which will replace outdated systems with a state-of-the-art digital land mobile radio network designed to permit interagency and intergovernmental communications across the state in emergency situations.” (4 N.Y. 3d at 166).

As a result of the Court of Appeals decision in Crown, the law of New York State on the subject of the applicability of local zoning regulations to SWN – which clearly was evolving during the course of the appellate journey of Crown -- is now more settled than it was when the RFP was issued.

Motorola apparently interpreted the RFP to require the contractor to comply with local zoning regulations without consideration of the State's right to assert its immunity (Motorola Memorandum, pages 22-23).<sup>25</sup>

## Analysis

We reject Motorola's interpretation of the RFP provision regarding compliance with local zoning regulations. Rather, we accept OFT's argument that the language of the RFP was broad enough to encompass an obligation on the part of the contractor to comply with present and future zoning laws as they apply to State projects, including new laws and laws that might be amended during the term of the contract. (Decision of Chief Administrative Officer dated January 24, 2005 at 10-11). We also find the language broad enough to encompass changes brought about by developing and controlling case law with respect to such State projects.

Motorola does not contend in its submissions that any potential proposer had a competitive advantage by reason of having more information with respect to OFT's position on zoning requirements than did any other potential proposer.

We conclude that OFT did not materially alter or deviate from the RFP with respect to the applicability of local zoning regulations to SWN. The RFP requirement that the contractor comply with all applicable present and future laws did not change. Rather, the state of the applicable law – and thus the extent of the contractor's obligations – became more settled after the RFP was issued.

To the extent that it may be possible for OFT to achieve cost savings or to obtain some other advantage for the State as a result of decisions which OFT may make in implementing the SWN, it was reasonable for OFT to rely on the Crown holding to achieve such objectives. It is well settled that the State may negotiate a better deal with the winning contractor. (See Matter of Palette Stone Corporation v. State of New York Office of General Services, 245 A.D. 2d 756, Third Dep't, 1997; Matter of Taub's Carpet and Tile Corporation v. Ringler, 1 A.D.3d 730, Third Dep't, 2003).

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<sup>25</sup> OFT's official response to a proposer's question on this issue was not specific with respect to OFT's intention that immunity could be invoked in dealing with local zoning regulations. Official Question and Answer No. 274 reads as follows:

"Q: If we modify existing Third Party sites on behalf of state are they exempt from local zoning?

"A: "OFT can not (sic) address or interpret the applicability of local zoning laws to this project during the pre-submission phase. Additionally, any answer is dependent upon several variables, is site specific and is contingent upon the siting plan selection.

"However, the State is undertaking, separately from this procurement, a procurement of land use counsel services which will be engaged to assist the State in complying with all applicable federal, state and local laws."

**(B) OFT's failure to enter into a contract with M/A-COM within sixty days of the Notice of Award**

OFT announced that M/A-COM was the successful proposer on April 29, 2004. OFT and M/A-COM signed the contract for the SWN on December 6, 2004.

Motorola contends that OFT materially deviated from the terms of the RFP by not entering into a contract with M/A-COM within sixty days of the Notice of Award, and by not calling for a forfeiture of the bid bond submitted by M/A-COM by reason of the delay.

Section 12.15 of the RFP provides in relevant part:

“Submission of the properly executed Bid Bond as part of the Bid Proposal shall constitute an undertaking that the Bidder, if selected as the successful Bidder, guarantees to the State of New York to timely (1) properly execute and deliver to the State the resulting Contract setting forth the final agreement of the parties within sixty (60) days of receipt of a Notice of Contract Award from the Issuing Entity, and (2) deliver to the State within sixty (60) days of Notice of Contract Award all performance, labor and material bonds and certificates of insurance (as more specifically set forth in this Section 12.16 (sic)); time being of the essence. Upon timely and successful completion of the foregoing, the obligation under the bond shall become null and void.

“Upon failure by the Bidder to satisfy any of the foregoing obligations, the State shall be entitled to forfeiture of the bond.” (Emphasis added).

Motorola argues that OFT had consistently impressed upon prospective bidders that time was of the essence in this procurement and that OFT would strictly enforce all deadlines provided for in the RFP. Question and Answer number 110 of the RFP's Modifications, Clarifications and Answers to Questions read as follows:

“Q: Is there a provision for extension of the 60-day deadline for negotiations provided all parties are negotiating in good faith?

“A: “No. Time is of the essence in the build-out of this network. As such, there will be no extension of the 60 day contract negotiation period. The contract must be executed by the successful bidder within the timeframe stated or be subject to the penalties set forth in the RFP.”

Question and Answer 135 said substantially the same thing.

Motorola contends that OFT's failure to execute the contract with M/A-COM within the sixty day period violated the RFP, and was arbitrary and capricious. Motorola claims it was anticipating that OFT would strictly adhere to this time period, and therefore “assumed that it would not have an opportunity to change or negotiate any of the terms of

its bid, and hence, prepared a bid that would comply, in all respects, with the RFP, including the sixty-day contract provision. In order to meet the RFP's requirements, Motorola made certain assumptions and incorporated certain bid terms that it would not have in the absence of OFT's insistence on rigid compliance with the terms of the RFP." (Letter from Kenneth Denslow of Motorola to OFT dated July 16, 2004).

Motorola does not specify what "certain" assumptions it made or what "certain" bid terms were incorporated based upon its expectation that the contract negotiation phase of the procurement would be limited to sixty days. Indeed, Motorola appears to be arguing that the reason it submitted a proposal that was intended to comply in all respects with the RFP was that the sixty day limitation period would not have provided sufficient time for it to negotiate more favorable terms with OFT after the successful proposer had been selected. Even if we agreed with Motorola's argument that waiving the sixty day limit constituted a deviation from the RFP requirements, we cannot deem such deviation to be "material".

RFP Section 4.03(F) provided:

"The Director [of the New York State Office for Technology] reserves the right . . . to conduct Contract negotiations with the next offeror capable of receiving award should the State be unsuccessful in executing an agreement with the selected Bidder within the timeframe specified; such time frame is to be determined solely by the Director based on the best interests of the State." (Emphasis added).

Thus, OFT reserved the right to modify the time frame, if such were required in order to advance the best interests of the State.

Motorola's proposals were both disqualified as non-responsive. Had the sixty day period been strictly adhered to, and had that contract execution deadline been missed with respect to M/A-COM (thereby precluding implementation of the award of a contract to M/A-COM), Motorola would not have been able to receive the contract award in any event, because it was not "the next offeror capable of receiving award . . ."

We concur with OFT's argument that the sixty day time frame was included for the benefit of the State; that it represented a deadline that was imposed on the successful proposer, not on OFT; and that OFT had the discretion to waive this irregularity as a non-material deviation from the RFP terms.

It is well settled law that a governmental entity may waive a technical noncompliance with bid specifications if the defect is a mere irregularity and it is in the best interest of the governmental entity to do so. (Matter of T.F.D. Bus Co., Inc. v. City School District of Mount Vernon et al., 237 A.D. 2d 448, Second Dep't, 1997). In Matter of Varsity Transit, Inc. v. Board of Education of the City of New York et al., 130 A.D.2d 581, Second Dep't, 1987, *appeal denied*, 70 N.Y. 2d 605, 1987, the Court held that

“[n]oncompliance is considered material only when it would impair the interests of the contracting public authority or place some of the bidders at a competitive disadvantage.” (130 A.D.2d at 582).

Section 2.07 of the RFP gave the successful proposer the right to withdraw its proposal if the contract were not executed by the parties and approved by OSC within one year of the proposal due date of January 7, 2003. M/A-COM, however, waived this withdrawal right on April 30, 2004, making it very unlikely that the interests of OFT would be impaired by extension of the sixty day period. In light of the ongoing contract negotiations, OFT acted reasonably in not requiring forfeiture of M/A-COM’s bid bond, which M/A-COM has a continuing obligation to maintain in force. (October 12, 2004 Decision of the SWN Project Director, pp. 12-13). In addition, both proposers were subject to the same RFP terms, which applied equally to both in preparing and submitting their proposals. OFT’s waiver of the sixty day limitation, post-award, did not disadvantage Motorola, since its proposals had already been disqualified.

Therefore, in our view, OFT’s waiver of the sixty day contract award period was not a material deviation from the RFP, and does not constitute a basis upon which the contract should be disapproved.

### **(C) OFT’s alleged departure from RFP specifications for tower construction**

In the first bid protest it filed with OFT, as well as in the protest documents filed with OSC, Motorola asserted that the RFP specifications were modified after the proposals were submitted to OFT, by deleting a requirement that all new and existing sites utilized in the SWN be steel structures. This had the effect, so Motorola contends, of it having factored into its proposal new tower construction and existing tower modification requirements (at significantly greater cost) than will now actually be needed. Motorola cites Q & A 66 of the Official RFP Modifications, Clarifications and Answers to Questions<sup>26</sup> as authority for its interpretation of the RFP requirement, and (but without citing specific provisions) Mr. McCormack’s testimony before the Assembly on May 19, 2004 as authority for OFT’s alleged change in position. (Motorola, Inc’s Bid Protest of OFT Solicitation [01-007], undated, received by OFT on May 21, 2004, p. 11).

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<sup>26</sup> Q & A 66 reads as follows:

“Q: Given the repeated reference in the specification [referencing RFP Exhibit #1, Section 3.01] to the need to establish a system that must operate under the worst of conditions, is it the State’s intent to have the Prime Contractor make improvements to all structures (with the exception of 3<sup>rd</sup> party structures) such that all State owned structures used on this project will be upgraded to meet standards that are applied to newly erected structures?

“A: New antenna tower sites must be constructed and many existing antenna tower sites may need to be upgraded to achieve high-performance transmission across the state. The Prime Contractor shall apply the quality standards specified in the RFP to the construction or modification of radio communications facilities comprising the SWN.”

This language tracks language included in Sections 4.01 and 4.02 of the RFP itself, virtually verbatim.

OFT contends that in making this argument, Motorola misstates the RFP requirements with respect to tower and antenna supporting structure construction.

OFT notes that the Glossary that was included as part of the RFP defined both of the terms, "Standard Tower" and "Antenna Support Structure".<sup>27</sup> Only Standard Towers were required to be self-supporting steel structures.

Section 4.06 of RFP Exhibit # 1, entitled "Standard Towers", required that new towers were to be steel self-supporting structures unless specifically waived in writing by the State. While Section 4.06(A) of Exhibit #1 did impose certain requirements on Antenna Support Structures which are not material to the issue raised by Motorola, it does not appear that Antenna Support Structures were subject to the "steel self-supporting structures" requirement that clearly applied to new Standard Towers.

Support for OFT's assertion that the RFP did not require each site to be a steel self-supporting structure is also found at Table 9, "Site Technical Documentation", part of RFP Exhibit # 1, Section 4.02. The section lists various differing document submission requirements, depending upon whether steel was a specified construction material for a site, leading to the conclusion that steel was not the mandatory material at every site.

Therefore, we find insufficient support for any conclusion that OFT materially deviated from the RFP requirements regarding tower construction.

## CONCLUSION

We find that the procurement process followed by OFT was fair and in accordance with law. Therefore, the protest is denied.

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<sup>27</sup> "Standard Tower: A steel structure constructed for the express purpose of supporting radio, television, microwave, and/or satellite antennas and dishes. Types of towers within this definition include, but are not limited to, self-supporting lattice, guyed, or monopole designs.

"Antenna Support Structure: Any structure, of any height, material, or type of construction, intended, designed or constructed for a primary purpose other than the support of radio, television, microwave, and/or satellite antennas and dishes, but specifically modified, engineered, or renovated to accommodate their installation at a later time." (Emphasis added). (RFP Glossary).