

STATE OF NEW YORK  
OFFICE OF THE STATE COMPTROLLER

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In the Matter of the Appeal filed by Kapsch  
TrafficCom USA, Inc. with respect to the  
procurements for operation of the Region 1 and 10  
Transportation Management Centers conducted by  
the New York State Department of Transportation.

**Determination  
of Appeal**

**SF-20230155**

Contract Numbers – C038048 & C038092

January 16, 2024

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The Office of the State Comptroller has reviewed the above-referenced procurements conducted by the New York State Department of Transportation (NYSDOT) for operation of the Region 1 and Region 10 Transportation Management Centers (TMC).<sup>1</sup> We have determined the grounds advanced by Kapsch TrafficCom USA, Inc. (Kapsch) are insufficient to merit overturning the contract awards made by NYSDOT and, therefore, we deny the Appeal. As a result, we are today approving the NYSDOT contracts for operation of the Region 1 TMC to Gannett Fleming Management Services, LLC (Gannett) and operation of the Region 10 TMC to WSP USA Services, Inc. (WSP).

**BACKGROUND**

**Facts**

NYSDOT issued two separate requests for proposals (RFP) seeking qualified consultants to provide personnel for the operation of electronic traffic and information management systems at NYSDOT's Region 10 TMC on March 3, 2023 (R10),<sup>2</sup> and at NYSDOT's Region 1 TMC on April 25, 2023 (R1)<sup>3</sup> (R10 RFP, Section 1.1, at p. 1; R1 RFP, Section 1.1, at p. 1<sup>4</sup>). Both RFPs sought a responsive and responsible offeror "to operate, manage, supervise, maintain [and administer] TMC systems and facilities at the [TMC]" in each region (R1 RFP, Section 3.2, at p. 7; R10 RFP, Section 3.2, at p. 6).

Both RFPs provided that the contract for each region would be awarded on the basis of best value (R1 RFP, Section 6.1, at p. 34; R10 RFP, Section 6.1, at p. 29). An offeror's technical proposal would constitute 70% and the cost proposal 30% of the total evaluation score (R1 RFP, Sections 6.2 and 6.3, at pp. 35–36; R10 RFP, Sections 6.2 and 6.3, at pp. 29–31). Offerors'

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<sup>1</sup> NYSDOT issued separate solicitations for operation of the Region 1 TMC and Region 10 TMC.

<sup>2</sup> NYSDOT's Region 10 TMC operates on Long Island, New York, serving the counties of Nassau, Suffolk, and Queens (R10 RFP, Section 1.1, at p. 1).

<sup>3</sup> NYSDOT's Region 1 TMC is located in Latham, New York, serving the counties of Albany, Essex, Greene, Rensselaer, Saratoga, Schenectady, Warren, and Washington (R1 RFP, Sections 1.1 and 1.2, at pp. 1-2).

<sup>4</sup> The Region 1 RFP is not paginated. For purposes of this Determination, this Office includes page numbers as they would have appeared, if included.

technical scores and cost scores would then be combined to produce a final best value score for each offeror and the offeror with the highest overall score would be tentatively selected for contract award (R1 RFP, Sections 6.7 and 6.8, at p. 36; R10 RFP, Sections 6.7 and 6.8, at p. 32).

Kapsch submitted proposals to NYSDOT in response to the Region 1 and Region 10 TMC RFPs by the respective deadline for each solicitation.<sup>5</sup> On May 19, 2023, Kapsch received a letter from NYSDOT simultaneously notifying Kapsch it was the tentative awardee for operation of the Region 10 TMC, that NYSDOT had identified concerns regarding Kapsch's responsibility, and, accordingly, NYSDOT's Contract Review Unit (CRU) was conducting a review to determine whether Kapsch was responsible and eligible for award of the contract. On July 12, 2023, NYSDOT CRU held a meeting with Kapsch to discuss its responsibility status with respect to both the Region 10 and Region 1 TMC contract awards. On September 7, 2023, NYSDOT notified Kapsch of its non-responsibility determination and that as a result Kapsch was ineligible for contract award under the Region 1 and Region 10 TMC RFPs.<sup>6</sup> On September 8, 2023, NYSDOT notified Kapsch of its non-award for both regions. As a result, NYSDOT awarded the Region 1 TMC contract to Gannett and the Region 10 TMC contract to WSP, as the responsive and responsible offerors with the next highest overall score for their respective regions.

Kapsch filed a joint protest of its non-award of the contracts for operation of the Region 1 and Region 10 TMCs with NYSDOT on September 14, 2023 (Protest). NYSDOT conducted a debriefing regarding both solicitations with Kapsch on September 22, 2023. NYSDOT denied Kapsch's joint bid protest on October 3, 2023 (NYSDOT's Protest Determination). Kapsch filed an appeal of NYSDOT's denial of the Protest with this Office on October 17, 2023 (Appeal), to which NYSDOT responded on October 26, 2023 (Answer).

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

Under State Finance Law (SFL) § 112(2), with certain limited exceptions, before any contract made for or by a State agency which exceeds fifty thousand dollars becomes effective, it must be approved by the Comptroller.

In carrying out this contract approval responsibility, OSC has promulgated a Contract Award Protest Procedure (OSC Protest Procedure) governing the process to be used by an interested party seeking to challenge a contract award by a State agency.<sup>7</sup> This procedure governs 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 section 24.5 of the OSC Protest Procedure.

In the determination of the Appeal, this Office considered:

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<sup>5</sup> Three (3) total firms submitted proposals in response to the Region 10 TMC RFP by the April 6, 2024, submission deadline, while two (2) total firms submitted proposals in response to the Region 1 TMC RFP by the May 24, 2023, submission deadline.

<sup>6</sup> More details regarding the vendor responsibility review and Kapsch's opportunity to be heard are included in the *Discussion* section below.

<sup>7</sup> 2 NYCRR Part 24.

1. the documentation contained in the procurement records forwarded to this Office by NYSDOT with the NYSDOT / Gannett and NYSDOT / WSP contracts;
2. the correspondence between this Office and NYSDOT arising out of our review of the proposed NYSDOT / Gannett and NYSDOT / WSP contracts; and
3. the following correspondence/submissions from the parties (including the attachments thereto):
  - a. Protest;
  - b. NYSDOT's Protest Determination;
  - c. Appeal; and
  - d. Answer.

## **ANALYSIS OF THE APPEAL**

### **Appeal to this Office**

In its Appeal, Kapsch challenges the procurements conducted by NYSDOT on the following grounds:

1. NYSDOT's non-responsibility determination for Kapsch is arbitrary and unsupported by evidence; and
2. NYSDOT failed to provide Kapsch with the requisite due process prior to issuing a determination of non-responsibility.

### **NYSDOT Response to the Appeal**

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

1. After providing Kapsch with the requisite due process, NYSDOT made a properly supported determination of non-responsibility, rendering Kapsch ineligible for award of the contracts; and
2. A challenge of NYSDOT's non-responsibility determination should be addressed through an Article 78 proceeding and not through this Appeal process.<sup>8</sup>

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<sup>8</sup> OSC has the authority to consider vendor responsibility when determining whether to approve or non-approve a State agency's contract award pursuant to SFL § 112, including a review of whether a vendor responsibility determination made by a State agency had a rational basis and was adequately documented (*see In re. Worth Constr. Co. v. Hevesi*, 11 Misc. 3d 513 (S. Ct. Albany Cty. 2006)). Thus, this Determination will address Kapsch's grounds for Appeal as set forth above.

## DISCUSSION

### **Vendor Responsibility**

Kapsch asserts that “NYSDOT improperly and unlawfully refused to award the contracts to Kapsch, despite Kapsch being described by NYSDOT itself as the best value contractor for both projects, on the basis that Kapsch is not a responsible contractor” (Appeal, at p. 2). Kapsch alleges that NYSDOT’s non-responsibility determination “is grounded in suspicion,” “without evidence,” and is based on alleged issues that do not “rise[] to the level of what New York courts consider irresponsible” (Appeal, at pp. 3, 6).

NYSDOT contends that the CRU “determined Kapsch was not responsible based on several factors” and “[b]ased on that robust record, the CRU made a non-responsibility determination” (Answer, at p. 1).<sup>9</sup>

SFL § 163(4)(d) provides that “[s]ervice contracts shall be awarded on the basis of best value to a responsive and *responsible* offeror” (emphasis added). SFL § 163(9)(f) states that “[p]rior to making an award of contract, each state agency shall make a determination of responsibility of the proposed contractor.” For purposes of SFL § 163, “[r]esponsible’ or ‘responsibility’ means the financial ability, legal capacity, integrity, and past performance of a business entity” (SFL § 163(1)(c)). “The standard of review of an agency’s decision to award or deny a contract is whether there is a rational basis to support that determination” (*Schiavone Constr. Co. v. Larocca*, 117A.D.2d 440, 444 (App. Div. 3d Dep’t 1986)).

Our review of the procurement record confirms that NYSDOT conducted a vendor responsibility review of Kapsch and reviewed Kapsch’s financial ability, legal capacity, integrity, and past performance, as statutorily required. NYSDOT provided this Office with a recording of the July 12, 2023, CRU meeting and a detailed non-responsibility determination, dated September 7, 2023, citing several areas of concern relating to integrity and past performance of Kapsch, which were discussed during the July 12<sup>th</sup> responsibility meeting and in various communications between the CRU and Kapsch. In this manner, NYSDOT documented in the procurement record a rational basis for NYSDOT’s non-responsibility determination for Kapsch. Consequently, we find no reason to disturb NYSDOT’s determination.

### **Due Process**

Kapsch contends that NYSDOT did not afford it due process prior to issuing a determination of non-responsibility (Appeal, at p. 8). Kapsch alleges that “[i]n rendering its non-responsibility determination, NYSDOT made incorrect assumptions rather than even bothering to conduct an earnest inquiry” (*Id.*).

NYSDOT responded that “[t]he [non-responsibility] [d]etermination came after NYSDOT made Kapsch aware of its responsibility concerns and Kapsch was given ample opportunity to

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<sup>9</sup> CRU is the group of NYSDOT executives charged with making vendor responsibility determinations (Answer, at p. 1).

submit materials for NYSDOT's consideration" and "NYSDOT held a meeting with Kapsch, at which Kapsch was represented by counsel, to discuss the matter" (Answer, at p. 1).

Prior to finding a vendor non-responsible, the contracting State agency must provide the vendor with due process (*see Schiavone Constr. Co. v. Larocca*, 503 N.Y.S.2d 196, 197-98 (App. Div. 3d Dep't 1986) (holding that a vendor non-responsibility finding affects a vendor's ability to carry on its business, therefore implicating a liberty interest and triggering due process protections)). Due process requires the contracting State agency to provide the vendor with notice of concerns surrounding its responsibility and an opportunity to be heard, including presenting relevant information or evidence regarding responsibility. Written submissions have been held to be sufficient to satisfy due process; a formal evidentiary hearing is not required (*see Schiavone Constr. Co.*, 503 N.Y.S.2d at 198; *see also R.W. Granger & Sons, Inc. v. State of N.Y. Facilities Dev. Corp.*, 615 N.Y.S.2d 509, 510 (App. Div. 3d Dep't 1994)).

NYSDOT initially notified Kapsch of responsibility concerns via letter dated May 19, 2023. Kapsch responded to that letter on May 25, 2023, providing information and documents in response to the concerns raised by NYSDOT. NYSDOT contacted Kapsch on June 15, 2023, to schedule a hearing with Kapsch to further discuss the concerns and held that hearing on July 12, 2023, providing Kapsch with over three weeks' notice to prepare. During the hearing, a recording of which was provided to this Office as part of the procurement record, NYSDOT once again presented its responsibility concerns and provided Kapsch (who was represented by counsel) with an opportunity to respond. Kapsch requested the opportunity to submit additional written materials following the hearing which NYSDOT granted, accepting a written submission from Kapsch on July 23, 2023. NYSDOT asked additional responsibility questions of Kapsch on July 24, 2023, and Kapsch responded on July 28, 2023. Only after these multiple written and oral opportunities to be heard did NYSDOT issue a non-responsibility determination on September 7, 2023. Contrary to Kapsch's allegations, the procurement record reflects that NYSDOT provided Kapsch with an opportunity to be heard with respect to all of the bases for its non-responsibility determination, as set forth in the September 7<sup>th</sup> determination. Furthermore, NYSDOT considered a request from Kapsch on September 21, 2023, to reconsider the responsibility determination; NYSDOT responded on October 3, 2023, affirming its prior non-responsibility determination. Accordingly, NYSDOT met, and arguably exceeded, the requirements for providing due process to Kapsch prior to finding Kapsch non-responsible.

Therefore, the procurement record supports that NYSDOT provided Kapsch with the requisite due process prior to issuing a non-responsibility determination, and this Office finds no basis to conclude otherwise.

## CONCLUSION

For the reasons outlined above, we have determined the issues raised in the Appeal are not of sufficient merit to overturn the contract awards made by NYSDOT. As a result, the Appeal is denied and we are today approving the NYSDOT / Gannett contract and the NYSDOT / WSP contract for the operation of the Region 1 and Region 10 TMCs, respectively.