

STATE OF NEW YORK  
OFFICE OF THE STATE COMPTROLLER

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In the Matter of the Bid Protest filed by LI Clean Tech, LLC with respect to the procurement of the long-term lease and development of five parcels of land at Republic Airport, conducted by the New York State Urban Development Corporation (d/b/a Empire State Development Corporation) on behalf of the New York State Department of Transportation

**Determination  
of Bid Protest**

**SF-20170093**

January 5, 2018

Contract Numbers – X197552-X197555

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The Office of the State Comptroller (OSC) has reviewed the above-referenced procurement conducted by the Empire State Development Corporation (ESD), on behalf of the New York State Department of Transportation (DOT), for the long-term lease and development of five parcels of land at Republic Airport. We have determined the grounds advanced by LI Clean Tech, LLC (LICT) are insufficient to merit overturning the contract awards made by DOT and therefore, we deny the protest. As a result, we are today approving the DOT contracts with Stratosphere Development Co., LLC (Stratosphere), an affiliate of Talon Air (Talon), for the long-term lease and development of five parcels of land at Republic Airport.<sup>1</sup>

**BACKGROUND**

**Facts**

**The First RFP**

On December 2, 2014, DOT issued a Request for Information (RFI) to determine the existence of parties interested in providing “Operational Services at Republic Airport for NYS DOT.” The RFI set forth ten categories of operational or management services which DOT anticipated would be the subject of a subsequent Request for Proposals. The RFI requested that interested parties submit ideas related to the provision of operational services consistent with DOT’s vision for Republic Airport.

On March 23, 2015, DOT issued a Request for Proposals for “Operations and Management Services and Business Development Services at Republic Airport” (2015 RFP).<sup>2</sup> The 2015 RFP required that offers have either “in-house capacity and expertise in the field of real estate development” or “a consultant team member...that has such experience” (2015 RFP,

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<sup>1</sup> The leases discussed herein are between DOT as lessor and Stratosphere as lessee. Stratosphere and Talon are closely related entities. They share common ownership and both conduct different aspects of the aviation business at Republic Airport. The various submissions filed with this Office use the names Stratosphere and Talon interchangeably, but the companies are distinct legal entities.

<sup>2</sup> The 2015 RFP added “Business Development” to the scope of services originally contemplated in the RFI.

at pg. 6). The development was slated to be the marketing and repurposing of underutilized parcels within Republic Airport to increase revenue and create new jobs at the facility (*see* 2015 RFP, at pg. 6). The 2015 RFP contemplated both aeronautical and retail/commercial development.

Submissions in response to the 2015 RFP were received by May 4, 2015 and, after an evaluation by DOT, an aviation facilities management company, AvPorts Management, LLC (AvPorts) was conditionally designated by DOT as the contract awardee on December 10, 2015. Stratosphere did not submit a formal proposal in response to the 2015 RFP.

AvPorts assumed management responsibilities at Republic Airport in the spring of 2016. Sometime thereafter, a decision was made to withdraw the real estate development component from the scope of the AvPorts award and DOT entered into a contract with AvPorts to manage Republic Airport.

### The Second RFP

On February 9, 2016, ESD, on behalf of DOT, issued a Request for Proposals “for the long-term lease of five development parcels at Republic Airport” (2016 RFP). The 2016 RFP, devoid of the management responsibilities contained in the 2015 RFP, offered leases to develop the same parcels of land which had previously been included in the 2015 RFP. Unlike the 2015 RFP, the 2016 RFP stated that “aviation or aviation-related uses are preferred” (2016 RFP, at pg. 3). By the April 15, 2016 proposal due date, three entities submitted proposals in response to the 2016 RFP: (i) Stratosphere, (ii) LICT and (iii) Blumenfeld Development Group.

By letter dated August 31, 2016, Stratosphere was designated as the developer of parcels A, B, C and D at Republic Airport. LICT was initially designated to develop parcel E. However, LICT declined to remit a non-refundable \$50,000 deposit and, after some negotiations, the designation for parcel E was rescinded and awarded to Stratosphere. The designation of Stratosphere to develop the parcels was conditioned upon a successful environmental review and all applicable governmental approvals. In response to an inquiry from the Republic Airport Commission, ESD held a public meeting at Republic Airport with respect to the development plans on March 2, 2017.

Subsequent to the March 2, 2017 public meeting, by letter dated March 10, 2017, LICT protested the designation of Stratosphere as the developer under the 2016 RFP (Protest). On March 21, 2017, Stratosphere filed its Answer to the Protest (the Stratosphere Answer). By notice dated July 20, 2017, DOT formally announced Stratosphere as the awardee of leases for all parcels under the 2016 RFP. On August 2, 2017 DOT provided an e-mail notification to all other bidders of the formal award to Stratosphere. DOT also filed its answer to the Protest on August 2<sup>nd</sup> (DOT Answer). On August 4, 2017, Stratosphere filed a supplementary response (Stratosphere Supplemental Answer). On August 15, 2017, LICT filed a reply (LICT Reply).<sup>3</sup>

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<sup>3</sup> Stratosphere’s Supplemental Answer was outside the scope of submissions permitted as of right under the Comptroller’s Contract Award Protest Procedure, and LICT’s Reply was untimely (*see* 2 NYCRR 24.4[d], [e]). Therefore, in an exercise of its discretion, this Office formally considered these submissions. In addition, LICT submitted additional correspondence dated October 31, 2017 and Stratosphere and DOT responded to that

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

Under State Finance Law (SFL) § 112(3), before any contract made by a state agency, where the State provides consideration other than money and the value exceeds twenty-five thousand dollars, becomes effective it must be approved by the Comptroller.

In carrying out the aforementioned responsibilities prescribed by SFL § 112, OSC has promulgated a Contract Award Protest Procedure (OSC Protest Procedure) that governs the process to be used when an interested party challenges a contract award by a State agency.<sup>4</sup> This procedure governs initial protests to this Office of agency contract awards and appeals of agency protest determinations. Because there was no protest process engaged in at the department level, the Protest is governed by section 24.4 of Title 2 of the Codes, Rules and Regulations of the State of New York.

This procurement is not subject to the competitive bidding requirements of SFL § 163, as this is not an expenditure contract involving the purchase of goods or services, but rather a revenue contract, i.e., a contract that generates revenue for the State. However, in fulfilling this Office's statutory duty under SFL § 112, we generally require that revenue contracts be let pursuant to a competitive process, or the agency document why competition is not appropriate or feasible (*see* OSC Bid Protest Determination SF20140222, at pg. 3, found at [http://www.osc.state.ny.us/contracts/bidprotestdecisions/bpd\\_SF20140222.pdf](http://www.osc.state.ny.us/contracts/bidprotestdecisions/bpd_SF20140222.pdf)).

In the determination of the Protest, this Office considered:

1. the documentation contained in the procurement record forwarded to this Office by DOT with the DOT/Stratosphere contracts;
2. the correspondence between this Office and DOT arising out of our review of the proposed DOT/Stratosphere contracts; and
3. the following correspondence/submissions from the parties (including the attachments thereto):
  - a. LICT's Protest, dated March 10, 2017;
  - b. Stratosphere's Answer, dated March 21, 2017;
  - c. DOT's Answer, dated August 2, 2017;
  - d. Stratosphere's Supplemental Answer, dated August 4, 2017; and
  - e. LICT's Reply, dated August 15, 2017.

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correspondence by letters dated November 28, 2017 and December 1, 2017, respectively. As these final documents are beyond the submissions contemplated in the OSC Protest Procedure, while these submissions were reviewed by this Office, these submissions are not formally addressed in this Determination (*see* 2 NYCRR § 24.4[f]).

<sup>4</sup> 2 NYCRR Part 24.

## **ANALYSIS OF THE PROTEST**

### **Protest to this Office**

In its Protest, LICT challenges the procurement conducted by DOT on the following grounds:

1. DOT improperly rescinded that part of the award under the 2015 RFP which contained “Business Development Services” at Republic Airport.
2. LICT was not timely notified of the designation of Stratosphere as the contract awardee under the 2016 RFP and, as a result, was deprived of valuable time to formulate its Protest.
3. LICT was placed at a disadvantage in the procurement under the 2016 RFP because the development proposals of the designee under the 2015 RFP were subject to inspection by Stratosphere and other competitors.
4. Stratosphere received favorable treatment during the 2016 procurement and expedited permits in prior years from DOT as a result of campaign contributions made by Stratosphere’s principal to the campaign of the Governor.
5. Talon, an affiliate of Stratosphere and a long-standing tenant at Republic Airport, has a history of safety violations at Republic Airport which render Stratosphere unsuitable for the contracts in question.
6. The real estate brokerage firm of Newmark, Grubb, Knight & Frank (Newmark) acted improperly in conducting its duties as leasing agent for ESD. Moreover, Newmark had a conflict of interest since at the time it was providing services to the State it was already representing Adam Katz, owner of Talon and Stratosphere.
7. Stratosphere is not a responsible bidder, and will be unable to deliver the services promised at the price proposed.

### **DOT’s Response to the Protest**

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

1. The provisions on parcel development in the 2015 RFP were ancillary to the core operations and management services being solicited for the Republic Airport. The 2015 RFP clearly indicated that parcel development would be at the discretion of DOT. DOT acted within its discretion when it eliminated the parcel development provisions and later requested ESD’s assistance in managing the development under the 2016 RFP.

2. The award designations referred to in the Protest were informal. LICT had ample time and opportunity to formulate and file the Protest.
3. DOT is not aware of any proprietary information submitted in response to the 2015 RFP being released to competitors of LICT or the public. The winning proposal from the 2015 RFP was made available under FOIL in accordance with standard procedure.
4. No bias, undue influence or political considerations came to bear in the 2016 procurement. The process was conducted fairly and was consistent with state law and procurement guidelines. The issuing of Talon's Fixed Base Operator (FBO) permits in prior years was based on the appropriate scrutiny by multiple levels of government.
5. Talon underwent an evaluation and approval process in obtaining its FBO permit at Republic Airport, which encompassed several years of inspections and approvals by both state and federal agencies. The location, specifications, construction and certification of Talon's recently installed fuel tank farm have been determined to meet all State and Federal standards.
6. Newmark was already under contract with ESD when it was selected to assist with the negotiation of these leases. In accordance with State law, Newmark provided disclosure forms to ESD which indicated no conflicts. Neither DOT nor ESD is aware of any contractual arrangement between Newmark and Talon, Stratosphere or Mr. Katz, that would create a conflict of interest. There is no basis for alleging any information was provided improperly to Talon or any other entities by Newmark.
7. Both DOT and ESD concluded that Stratosphere/Talon's proposal met or exceeded the requirements of the 2016 RFP. No issues have been identified in the vendor responsibility documentation and DOT and ESD have concluded that Stratosphere/Talon is a responsible vendor.

### **Stratosphere's Response to the Protest**

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

1. Unlike the previously withdrawn "Business Development" component of the 2015 RFP, the 2016 RFP properly afforded preference to aviation-related uses. This is consistent with the Federal Aviation Administration (FAA) Airport Compliance Manual, federal grant assurances between DOT and the FAA and covenants and restrictions contained in the deed to the real property at issue. Additionally, using the sites for aviation purposes makes the most economic sense.
2. Stratosphere never received information about any bids under either the 2015 or 2016 RFPs.

3. The campaign contributions at issue were made back in 2012 and 2013 and had no effect on the 2016 RFP. Further, Talon received no preferential treatment in the process of obtaining its FBO status or fuel tank farm permits. Final approval to act as an FBO and operate its fuel farm was not granted to Talon until three-and-a-half years after its applications were filed.
4. The allegations of safety violations on the part of Talon are unsubstantiated and baseless. All required building permits, government inspections and environmental reviews were obtained. DOT and FAA both conducted investigations of the allegations and found them to be meritless.
5. There was no conflict of interest regarding Newmark. The Katz family owns and operates multiple residential and commercial properties throughout New York City and elsewhere and has dealt with multiple brokers. However, currently Mr. Katz's entities have an exclusive contract with another brokerage firm, not Newmark. Newmark never provided information of any kind to Stratosphere relating to other offerors.

### **Protestor's Reply to the Answers**

In its Reply, LICT takes issue with DOT's Answer to the Protest and reiterates the grounds set forth in the Protest.

## **DISCUSSION**

### **Removal of the Development Component from the 2015 RFP**

Initially, we note that no protest was filed with our Office in relation to the 2015 RFP and the time within which to formally challenge DOT's decision during the 2015 procurement has long since passed. Furthermore, for the reasons that follow, we believe that DOT's determination to remove the real estate development component was permissible.

The 2015 RFP contained several provisions reserving DOT's right to remove the land development component from the final award. Initially, the 2015 RFP expressly provides, in pertinent part, that the "...submission of the Contractor's proposal shall be construed by NYSDOT as the Contractor's acceptance of the RFP's procedures, evaluation criteria, and other administrative instructions" (2015 RFP, § 4). The 2015 RFP goes on to provide that, "NYSDOT asserts the prerogative with regard to the proposals submitted... (5) To adapt any or all of a successful offeror's proposal..."; (6) To negotiate modifications to the scope ... and contract terms and conditions with the selected offeror prior to contract award only if it is in the best interest of the state to do so" (2015 RFP, §§ 6.1.5, 6.1.6). Any offeror who submitted a proposal in response to the 2015 RFP agreed to all of the terms, conditions and reservations set forth in the solicitation.

It is clear from the provisions cited in the preceding paragraph that DOT reserved the right to reject the property development component of the designated proposal and, moreover,

AvPorts' acceptance of the operation and management services portion of award took place prior to the time any final contract between DOT and AvPorts was entered into.

We have no evidence that DOT acted outside its authority when it chose to accept the airport operation and management component of the designated offer received in response to the 2015 RFP, and delay the land development component to the 2016 RFP.

As to LICT's allegation that favoritism for Stratosphere led to language in the 2016 RFP stating a preference for "aviation or aviation-related uses" for development at Republic Airport, we note that such preference is supported by another important consideration - certain covenants and restrictions contained in the deed to the property. DOT's predecessor in title acquired the property by deed dated May 6, 1971 (*see* Stratosphere Answer, Exhibit L). The 1971 deed contains covenants and restrictions, which run with the land and bind all successive owners, providing that the property must be developed for airport purposes only. The deed further provides that if the covenants and restrictions are violated, title to the parcels may be regained by the grantor (the Federal Government), at the discretion of the Federal Aviation Administration.

### **Notification of Award Designation**

LICT claims it was not advised of the designation of Stratosphere as the proposed developer in a timely fashion, and that such failure deprived LICT of valued time to formulate its protest (Protest, at pg. 5). DOT responds that the designations referred to in the Protest, dated August 31, 2016 and November 10, 2016, were informal and conditional, and that the "process for protesting the RFP was separate from and independent of the preliminary designations in August and November 2016," and "[r]egardless of the timeframe, the protest was duly considered" (DOT Answer, at pg. 2).

The OSC Protest Procedure provides that an initial protest must be filed "within 10 business days of receiving notice of the contract award which it seeks to challenge or, if a debriefing has been requested by the interested party, within five business days of the debriefing whichever is later" (2 NYCRR § 24.4[b]).

LICT states that it first became aware of the informal designation to Stratosphere following the public meeting at the Republic Airport on March 2, 2017. DOT acknowledges that it did not provide LICT (or the other unsuccessful bidder) formal notice of contract award to Stratosphere until on August 2, 2017 and at that time DOT offered LICT an opportunity for a debriefing. LICT was ultimately provided a debriefing on October 20, 2017. Therefore, under the OSC Protest Procedure, LICT had until the later of, 10 business days after receiving notice of the contract award or five business days from the debriefing to file its protest. Under these facts, LICT had until October 27, 2017 to formulate and file its protest with this Office. In addition, as noted above, LICT submitted additional correspondence dated October 31, 2017, which has been reviewed in connection with our review of these contracts (*see* footnote 3, *supra*).

While it is not clear to us why DOT delayed providing formal notice and debriefings to the unsuccessful bidders, such delay did not negatively impact LICT's ability to formulate or file a protest with this Office since such delay extended the date by which LICT had to file a protest until October 27, 2017.

## **Disclosure of 2015 RFP Development Proposals**

LICT argues it was placed at a disadvantage in competing under the 2016 RFP because the land development proposal of the successful offeror on the 2015 RFP was subject to review by competitors, including Stratosphere (*see* Protest, at pg. 6). In its Reply, LICT further suggests that Stratosphere could only have outbid other applicants if it had received proprietary information (*see* LICT Reply, at pg. 2).

DOT responds it is not aware of any proprietary information being released to competitors of LICT or the public (DOT Answer, pg. 2). DOT further states that it only made the winning proposal from the 2015 RFP available under FOIL in accordance with standard procedure (*see* DOT Answer, pg. 3). Additionally, Stratosphere denies having ever received any such information (*see* Stratosphere's Answer, pg. 9).

LICT offers no proof that Stratosphere received proprietary information. Furthermore, the procurement record contains no evidence that would support LICT's assertions.

## **LICT Allegation of Favorable Treatment to Stratosphere**

LICT alleges Stratosphere received favorable treatment in the 2016 RFP process due to political campaign contributions made by Stratosphere owner, Adam Katz (*see* Protest, at pg. 6). LICT also claims that various permits were issued to Talon, an affiliate of Stratosphere, on an expedited basis (*id.*).

DOT avers the procurement process conducted by DOT and ESD was consistent with New York State law and procurement guidelines and “[t]he process was conducted fairly, equitably, and without bias of undue influence of or political considerations . . .” (DOT Answer, at pg. 3). With respect to the permits that were issued to Talon, DOT responds “the process of Talon becoming a Fixed Base Operator (FBO) at Republic . . . took several years to complete and went through multiple layers of State and Federal government approval” (DOT Answer, at pg. 3). Stratosphere denies receiving favorable treatment from the State during the 2016 RFP process and notes the campaign contributions at issue took place in 2012 and 2013, long before the evaluation process under the 2016 RFP (*see* Stratosphere's Answer, at pg. 9). In addition, Stratosphere states that the three-and-a-half-year timeline between Talon's FBO and fuel tank farm applications, and the issuance of final permits, indicates it did not receive preferential treatment (*see* Stratosphere's Answer, at pgs. 9-10).

LICT fails to provide any evidence linking Mr. Katz's lawful campaign contributions in 2012 and 2013, and any alleged favorable treatment to Stratosphere in the 2016 procurement. Further, our Office has conducted a detailed review of DOT's procurement process and has found no basis to support this assertion. Finally, the time period between Talon's FBO applications and the issuance of its FBO permits do not support LICT's assertions of preferential treatment.

### **Alleged Safety Violations**

LICT claims that Talon has a history of safety violations at Republic Airport (*see* Protest, at pgs. 6-7). LICIT claims that Talon has compromised the safety of the airport by constructing unsafe buildings, employing undocumented workers, improperly locating its fuel farm near a public roadway, and violating a host of FAA regulations (*see id*).

DOT states the process of Talon gaining approval for installation of the fuel tank farm in question was the subject of a multi-layered State and Federal approval process. The installations were inspected by all required governmental agencies and outside engineers, and found to be in compliance with all relevant standards and regulations. Stratosphere responds that all of LICIT's allegations were previously the subject of a complaint filed with the FAA by a LICIT affiliate, Atlantic Air, pursuant to Part 13 of the FAA Regulations (Part 13 Complaint, 14 CFR 13.1). Stratosphere has provided as an exhibit to its Answer the decision issued by the FAA that rejected the allegations in Atlantic's Part 13 Complaint (*see* Stratosphere's Answer, at Exhibit H).

This Office generally defers to agency determinations where they are properly within the agency's expertise and supported by the procurement record (*see* OSC Bid Protest Determination SF20160231, at pg. 13, found at [http://www.osc.state.ny.us/contracts/bidprotestdecisions/bpd\\_SF20160231.pdf](http://www.osc.state.ny.us/contracts/bidprotestdecisions/bpd_SF20160231.pdf)). "In order to meet present and future state needs with respect to the provision of adequate, safe and efficient air transportation facilities and services to the public" DOT is charged with the "planning, development, maintenance and operation" of such facilities and services at Republic Airport (*see* Transportation Law § 400). In this role, DOT has concluded that the FBO application process was "heavily scrutinized by multiple layers of government and private entities" including "lengthy and substantial oversight by DOT" (*see* DOT's Answer, at pg. 3). DOT notes that the fuel tanks were subject to various inspections and certifications and comply with all requirements. Furthermore, the safety allegations referenced in the Protest largely mirror those in the Part 13 Complaint (*see* Stratosphere's Answer, at Exhibit H, pg. 1). The FAA found the allegations in the Part 13 Complaint to be either baseless or to present no impediment to Talon's operations at Republic Airport (*see* Stratosphere's Answer, at Exhibit H). LICIT has not provided any new evidence that would refute the FAA's findings in this regard.

Based on our review of the procurement record, we find it appropriate to defer to the determination of DOT as supported by the opinion rendered by the FAA, the federal agency possessing specialized knowledge of airport operation, applicable regulations and acceptable practices within the aeronautical industry.

### **Newmark as Leasing Agent**

LICT argues that Newmark acted improperly in conducting its duties as leasing agent for ESD. Specifically, LICIT states that: Newmark began negotiations with LICIT prior to the time it was authorized to do so; Newmark was authorized to negotiate with LICIT only, not with Stratosphere and, as a result, the ESD administrative fee was required only of LICIT and not Stratosphere; Newmark provided it with false information regarding runway upgrades at

Republic Airport; and Newmark had a conflict of interest in that it previously performed professional services for Stratosphere CEO, Adam Katz, in connection with properties owned by Mr. Katz in New York City (*see* Protest, at pgs. 7-8). LICT also questions whether Newmark improperly provided information on competitors' proposals to Stratosphere (*id.*). Finally, LICT challenges Newmark's instruction that LICT would have to pay a non-refundable \$50,000 contract deposit with respect to Parcel "E" (*id.*).

In its Answer, DOT responds that Newmark was already under contract with ESD to assist in the marketing and development of other sites at the time of this procurement, and that Newmark was not specifically retained in connection with the Republic Airport RFP (DOT Answer, at pgs. 4-5). DOT also states that ESD received all required disclosure forms from Newmark, and that none revealed any conflict of interest (*id.*). Finally, DOT notes that all plans regarding future development and runway upgrades at Republic Airport were public information and that all offerors had the same access to it (*id.*). Stratosphere denies that Newmark provided it with information of any kind related to its competitors (*see* Stratosphere's Answer, at pg. 13).

As an initial matter, LICT fails to offer any particulars concerning the nature of the allegedly premature negotiations. LICT also fails to state how the alleged premature negotiations had any effect on the procurement process, or how it was prejudiced as a result.

As to LICT's contention that the administrative fee was only required of LICT and not Stratosphere, the 2016 RFP explicitly states "Upon lease execution, the Designated Developer will be required to pay a portion of the ground rent to NYSDOT in addition to an ESD administrative fee of an amount equal to 6.5% of the net present value of all annual lease payments" (2016 RFP, at pg. 7). Consistent with the express requirement stated in the 2016 RFP, all designees were required to pay this fee.

LICT also challenges Newmark's instruction that LICT would have to pay a non-refundable \$50,000 deposit if it wished to enter into a contract to develop Parcel "E." That requirement is also specifically stated in the 2016 RFP, which provides that "Upon selection, the Designated Developer is expected to pay to [sic] a non-refundable security deposit in the amount equal to \$50,000 for each Site for which they are selected under this RFP" (2016 RFP, at pg. 13). Based on the plain language of the 2016 RFP, LICT's arguments in this regard are unavailing.

In response to the allegations of a conflict of interest, Stratosphere argues that the Katz family owns and operates multiple residential and commercial properties in New York City and elsewhere, has dealt with multiple brokers, and currently has an exclusive agreement with Cushman & Wakefield, not Newmark (*see* Stratosphere's Answer, at pg. 13). The fact that Stratosphere's owner, Adam Katz, an owner of numerous properties, had prior dealings with Newmark, a prominent real estate broker, does not in and of itself suggest a conflict of interest. Additionally, it is well settled that as a real estate broker, Newmark owed a fiduciary duty to act in the best interests of its client, ESD (*see Dubbs v Stribling & Assocs.*, 96 NY2d 337, 340 [2001]). LICT has failed to provide any evidence that Newmark acted improperly or was motivated by anything other than its responsibility to ESD. Moreover, ESD received required conflict disclosure forms from Newmark and found no conflict to exist.

Based on the foregoing, we find that LICT has failed to demonstrate that any conflict of interest existed in the ESD/Newmark relationship, or that Newmark acted improperly.

### **Vendor Responsibility**

LICT alleges, in a sentence at the last full page of the Protest, that “Talon is not a responsible bidder and will not be able to deliver the caliber of services described in its proposal nor for the cost proposed” (Protest, at pg. 8).<sup>5</sup>

As stated earlier, the contracts at issue are not subject to the requirements for “State Purchasing” under SFL § 163 (*see* discussion on pg. 2 of this Determination), including the express requirement that an agency award contracts to a responsible vendor (*see* SFL § 163[10]). However, as part of our review under SFL § 112, this Office ensures that any entity entering into a revenue contract with the State is a responsible vendor as that term is defined in law. Responsibility is defined as “the financial ability, legal capacity, integrity and past performance of a business entity and as such terms have been interpreted relative to public procurements” (SFL § 163[1][c]).

LICT has cited no particulars as to why Stratosphere allegedly lacks the financial or legal capacity to discharge its duties under the proposed leases. Nor does LICT provide any evidence placing the integrity of Stratosphere into question, or exposing any failings in Stratosphere’s (or Talon’s) past performance in dealings with the State. Furthermore, DOT has performed an assessment of Stratosphere’s responsibility and concluded that Stratosphere is a responsible vendor (DOT Answer, at pg. 5). Additionally, this Office has performed its own, independent review of Stratosphere’s responsibility and finds no basis to disrupt DOT’s finding.

### **CONCLUSION**

For the reasons outlined above, we have determined the issues raised in the Protest are not of sufficient merit to overturn the contract awards by DOT. As a result, the Protest is denied and we are today approving the DOT/Stratosphere contracts for the lease and development of five parcels at Republic Airport.

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<sup>5</sup> As stated in footnote 1, *supra*, the parties use the names Stratosphere and Talon interchangeably in the submissions. Since the proposed contract awardee is Stratosphere, not Talon, we will address this argument assuming that LICT meant to refer to Stratosphere.