



Mr. Kenrick Sifontes

Audit Director

Office of the State Comptroller

59 Maiden Lane

New York, NY 10038

Re: Audit Report 2020-S-67 – Procurement Practices

Dear Mr. Sifontes,

On January 24, 2022, the Office of the State Comptroller (the “OSC”) submitted its draft audit report (the “Draft Report”) based on your review of the purchasing and procurement practices of the New York Racing Association, Inc. (“NYRA”). As requested in the Draft Report, this letter serves as NYRA’s Management Response to the Draft Report. All capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Draft Report.

In general, NYRA disagrees with and objects to many of the stated conclusions that the OSC issued in the Draft Report (the “OSC Findings”). NYRA’s specific concerns are detailed below. However, at the outset, it is imperative for NYRA to address certain overarching and repeated issues that warrant special attention.

Of primary concern is the repeated use of inflammatory, conclusory headings and non-sequitur statements that mislead the reader. We respectfully stress the importance of the OSC taking a discerning look at its language choices and the consequences that such language may have on the accuracy of its findings. For example, in the opening paragraph, the OSC states:

“Our audit found NYRA does not have adequate monitoring and oversight over its purchasing and procurement process; consequently, sufficient competition is not fully promoted, and overspending may have occurred.”

This statement is overly vague, inaccurate and misleading. The purchasing and procurement process at NYRA undergoes robust monitoring and oversight both internally at the level of the procurement, legal and finance departments and externally by the Franchise Oversight Board. Moreover, the statement fails to note that the OSC only found a handful of isolated occurrences of what it (subjectively) deems to be potential overspending. Similarly, the OSC does not present facts underlying its statement that NYRA fails to promote sufficient competition. Indeed, the minimal number of examples that the OSC offers to support its findings undermines this broad conclusory statement.

Another significant concern to NYRA is the fact that the OSC fails to clearly and accurately describe the permitted use of business exception memos (“BEM”) as an adjunct to competitive bidding. To remove all doubt, the purchasing and procurement manual (the “Manual”) *expressly permits* NYRA to purchase goods and services in the absence of a competitive bid as long as such purchases meet specific criteria detailed in the relevant section of the Manual.

Even though use of this tool is expressly permitted, when a BEM is requested, the decision undergoes a careful review by the finance, legal and procurement departments before it is finally approved. Furthermore, BEM valued at fifty thousand dollars or more are reported to the FOB as part of a larger monthly contract report. NYRA is also required to notify the FOB thirty days prior to signing any contract procured using a BEM that is worth two hundred thousand dollars or more. Thus, the OSC’s conclusory finding that “NYRA obtained significant goods and services without competition; instead, using BEMs” is misleading.

Finally, NYRA is genuinely puzzled by the OSC’s statement that NYRA should “strengthen the integrity of the purchasing and procurement process by updating the Manual and obtaining FOB’s approval.” NYRA, on its own initiative, submitted a revised procurement policy to the FOB and has been actively working with the agency to finalize that policy. Moreover, NYRA updated its procurement procedures manual to strengthen and modernize the procurement process. The OSC’s statement deliberately ignores that the updating process is already ongoing, a fact NYRA told the OSC on multiple occasions, both orally and in writing.

Specific Responses to the OSC Findings:

1. Misrepresentation of the Audit Scope Period – “Our audit covered the period from January 2018 through December 2020.”

Discussion: This is factually incorrect. On January 15, 2021, the OSC submitted an Initial Data Request document explicitly stating the audit scope period as the period of January 2018 through the end of fieldwork . . .”

Throughout the audit, the OSC requested information pertaining to 2021. By way of example, on September 27, 2021, the OSC sent an email requesting information relating to 2021 RFQ/ RFP sample selections.

2. Misleading Key Finding – “Contrary to Manual requirements, over 15,000 transactions under \$1,000 each, totaling approximately \$4.79 million, were made to purchase goods or services from suppliers outside of the approved vendor list.”

Discussion: This finding lacks substantial context. The intention of the policy was not to limit purchases under \$1,000 to only suppliers on the approved vendor list. Rather, purchases under \$1,000 from an approved vendor were originally exempt from the purchase order (“PO”) process and could be purchased directly by the requisitioner. As stated in the Manual, “If available, all goods and services must be purchased from suppliers on the approved supplier list...Purchasing must approve any purchases outside of the approved vendor list prior...”

Contrary to the OSC implication, NYRA has the full authority to purchase from a supplier outside of the approved vendor list while also remaining in compliance with the Manual. The additional

requirement for such purchases is that they must be approved by the Purchasing Department, which is evidenced by the creation of the PO.

It is also relevant to note that this process has been revised since 2010, and all purchases, regardless of dollar amount, are required to be submitted to Purchasing for review and obtain a PO.

3. Misleading Key Finding – “NYRA could not provide copies of change orders to support the payment of \$787,517 to a construction contractor.”

Discussion: This finding lacks context. NYRA provided the summary detailing the five (5) components making up the \$787,517 change order, along with the approved payment application authorized by architect of record asserting that the additional work was justified and accurate.

4. Misleading Key Finding – “Some of NYRA’s procurement practices deviated from the requirements in the Manual. These deviations allowed a NYRA employee to select his company to do business with NYRA and receive payments totaling almost \$200,000.”

Discussion: This statement is overly broad and incomplete. The OSC offers one isolated incident that occurred in 2019 to justify its broad conclusion that “NYRA’s procurement practices deviated from the Manual requirements.” The OSC also fails to note that NYRA voluntarily disclosed that this violation occurred, that it was fully investigated by NYRA’s Purchasing and Legal/Compliance Departments and that corrective action was taken against the individuals involved.

5. Misleading Statement - “The Agreement sets out requirements that NYRA must meet in order to retain the franchise, including a requirement that NYRA keeps its expenses at commercially reasonable levels and in accord with racing and wagering industry standards.”

Discussion: It appears the language used by the OSC implies that NYRA is not keeping its expenses at commercially reasonable levels, despite there being absolutely no basis in fact or in the OSC’s own findings for making such a generalized statement. NYRA takes the requirements of the Franchise Agreement very seriously and it is irresponsible for the OSC to imply that NYRA is not in compliance with the Franchise Agreement without any factual support.

6. Inflammatory and Misleading Section Title – “Circumvention of the Competitive Bidding Requirement using Bid Exception Memos”

Discussion: As discussed above in NYRA’s general response, BEMs are expressly permitted by the Manual. Thus, the title in OSC’s report, “Circumvention of the Competitive Bidding Requirement Using Bid Exception Memos,” is misleading and inflammatory in nature. As provided in the Manual, there are four ways for NYRA to enter into a contract with a vendor: (1) Competitive bid via RFQ/RFP or obtaining three quotes (depending on the contract amount), (2) Emergency contract, (3) Sole Source contract, and (4) Single Source contract. Each and every one of these means to a contract is acceptable and in compliance with the Manual. Additionally, contracts awarded via BEMs are only executed once the justification is vetted by the Purchasing, Finance,

and Legal departments. It is an egregious and misleading implication to connect an BEM with a purchasing policy violation.

7. Misapprehension of the Manual – “According to the Manual, the procurement record should, at a minimum, include the justification for single or sole source purchases, competitive methodology utilized, and reasonableness of price”

Discussion: Please see NYRA’s general response above.

8. Misleading Finding – “During our 3-year scope, NYRA utilized BEMS to make 302 purchases (83 in 2018; 118 in 2019; 101 in 2020) totaling approximately \$30.5 million.”

Discussion: See NYRA’s response to #6 above.

9. Misapprehension of the Manual – “In fact, no other documentation to justify the lack of competition was provided except for a few sentences noted in the BEM.”

Discussion: The Manual does not require additional documentation of the justification. In fact, the OSC’s assumption that BEMs require additional documentation is based on a glaring misapprehension of language in the Manual. This OSC Finding is fundamentally flawed and does not support a conclusion that any violation or deviation from the Manual occurred. NYRA explained the OSC’s flawed assumption on numerous occasions.

NYRA’s policies do not require requestors to substantiate transactions because the need for and expense or purchases is approved by the appropriate member of the requesting department. The Purchasing Department is responsible for ensuring that the procurement adhere to the Manual. Expense justification is a function of a department’s budget and is not the core focus of the Purchasing Department. Please see NYRA’s general response above.

10. Misapprehension of the Manual – “There was no additional justification as to why NYRA officials decided to purchase from this vendor when they were also purchasing trophies from other well-known vendors.”

Discussion: As stated above, additional justification is not required by the Manual. Notwithstanding, it should be noted that trophies are a highly specialized item and the Racing Department best tries to match trophies to the race it represents. The Racing Department made a discretionary business judgment about which vendor would create the most suitable trophies for its “turf triple series,” which was added to NYRA’s program in 2019.

11. Misapprehension of the Manual – “There was no explanation why only that artist could perform and why other artists, who might have cost less, were not considered.”

Discussion: Similar to trophies, NYRA’s business leaders are well within their discretion to determine which artist would be best-suited to perform at NYRA’s premier racing and entertainment event of the year, the Belmont Stakes Racing Festival. Criteria considered when

making that decision includes, inter alia, a performer's social media presence, name recognition, availability, and cost.

12. Misapprehension of the Manual – “In 2018, NYRA used a single source exception, totaling \$18,750, for about 19 hours of vocal coaching for their on-air broadcasters and the Chief Executive Officer and President.”

Discussion: As stated above, additional justification is not required by the Manual. Notwithstanding, it should be noted that the 2018 Belmont Stakes had the potential for a Triple Crown winner, as Justify had already won the Kentucky Derby and Preakness Stakes. NYRA made the business decision to engage a renowned voice coach to prepare NYRA's executive team and on-air broadcasters for televised appearances. Any suggestion that NYRA violated the Manual is factually inaccurate. Please see NYRA's general response above.

13. Misleading Finding – “NYRA officials approved a BEM, totaling \$18,600, for the rental of an event room from the New York Mets to announce the post positions for the Belmont Stakes..., NYRA officials asserted that the Manual does not require the Purchasing Department to question the business judgment of departments' requisitioners, and that they are allowed to use BEMs.”

Discussion: This OSC Finding does not support a conclusion that any violation or deviation from the Manual occurred. The 2018 Belmont Stakes had the potential for a Triple Crown winner, as Justify had already won the Kentucky Derby and Preakness Stakes. Due to high profile nature surrounding the post position drawing, NYRA's executive management made the business decision to hold the event at Citi Field, home of the New York Mets. Once that decision was made, Purchasing's only role was to ensure that the related procurements were done within the rules of the Manual; the Manual does not require the Purchasing Department to question decisions made by the CEO and executive management. The suite rental was procured via a Sole Source exception memo, since the New York Mets are the only vendor that can offer and provide a suite at Citi Field. Any suggestion that NYRA violated the Manual is factually inaccurate.

14. Misleading Finding – “The Law and Purchasing Departments will conduct additional research to ensure that the requested exception is warranted. However, we were not provided with evidence of the additional research or diligence performed”

Discussion: The OSC was previously informed that due diligence is performed but not documented formally so the OSC was aware that no additional documentation was ever forthcoming.

15. Misleading Finding – “As part of our review of a judgmental sample of 130 procurement transactions for goods and services, totaling approximately \$13.5 million, we identified several awards that deviated from the process”

Discussion: This finding is factually incorrect. From the sample population, OSC identified four awards which they are mischaracterizing as deviations from the purchasing process and NYRA strongly refutes such implications. Please see response #16, #17, #18, and #19.

16. Misleading Finding – “This request for re-submission with best and final pricing was not allowed, according to the requirements of the Manual, as there was no documentation to support that there was a misunderstanding of the scope of work. It was requested only because NYRA officials wanted to continue doing business with the current contractor. Ultimately, the Director of Facility selected the existing contractor as the winning bidder.”

Discussion: Seeking “best and final” pricing from bidders is not limited to circumstances where there was a misunderstanding of the scope of the work. This is only one circumstance under which NYRA can seek final pricing from all bidders. The rule does not, as the OSC Finding leads the reader to believe, preclude NYRA from seeking best and final offers for other reasons. Such a narrow reading of the “best and final offer” tool is incongruent with the Manual and is contrary to NYRA’s goal of achieving maximum cost savings for the company. Moreover, this interpretation is inconsistent with the practices of other entities that adhere to strict procurement procedures. For example, the New York City Department of Education (“DOE”) defines best and final offers as “the revised and corrected final proposals submitted by proposers after discussions, if any, have been held.” The DOE even permits more than one best and final offer to be submitted if “the Chief Administrator makes a determination that it is in the DOE’s best interest to conduct additional discussions and/or require another submission of best and final offers.”

17. Misapprehension of the Manual – “the winning vendor’s initial operations with the State had been in place for approximately 8 years by the time the RFQ was submitted; therefore, it did not meet the minimum qualifications in the RFQ and should not have been awarded the contract.”

Discussion: NYRA expressly permits the submission of joint bid in its RFPs/RFQs. In this instance, the bidder filed a joint bid with a company that had been in business for twenty-five years. NYRA was satisfied that the combined length of time that these two companies had been in business would offer the experience, and more importantly, the stability, that was required of the vendor to successfully carry out the required scope of work.

18. Misleading Finding – “We identified an additional vendor who was awarded a 2018 contract, totaling \$250,495, even though he/she was not the lowest bidder.”

Discussion: This finding lacks substantial context. As stated in the Manual,

“...All other factors being equal, the award will be made to the lowest responsible bidder. If award is made to other than the lowest bidder, the relevant department head or a representative from the Purchasing Department must issue a memo to the bid folder explaining the reason for the award, subject to approval by the CFO...”

Therefore, NYRA remained in compliance with the Manual. Any suggestion by the OSC that there was a violation or deviation from the Manual is factually inaccurate.

19. Misleading Finding – “No other justification or explanation for the need for the rental of a shooting range was provided. We question the appropriateness of and the business need for these purchases and whether NYRA employees spent the organization’s monies in a prudent manner.”

Discussion: Contrary to the OSC’s statement questioning the appropriateness and business need of the purchases, the rental of Nassau County Rifle Range and purchase of the ammunition were for the purposes of firearm qualification as required by the Department of Criminal Justice Services for NYRA’s Security Guard/Peace Officers to carry firearms. The Purchase Requisition clearly stated the purpose of the purchase. Despite informing the auditors that all requisitions require a “justification” or “purpose” field to be filled out before approval, the OSC neglected to review the Purchase Requisition.

20. Misleading Finding – “NYRA did not provide copies of the change orders to support a total of \$787,517 in additional payments to this vendor.”

Discussion: This OSC Finding lacks context. NYRA provided the summary detailing the five components making up the \$787,517 change order, along with the approved payment application asserting that the additional work was justified and accurate.

21. Misleading Finding – “We note that the Manual does not specify when a comprehensive contract agreement is required, and NYRA officials indicated that their purchase orders contain the legal components of a binding contract”

Discussion: This statement is accurate in that NYRA’s purchase orders contain protective language. What the OSC fails to include in its statement is that the Manual itself does not require a comprehensive agreement. The Manual states, in relevant part:

“Purchasing in conjunction with the Law Department, shall determine if the relevant PO should be supplemented by a comprehensive agreement. The Law Department and the relevant vendor will negotiate the form of the agreement memorializing the transaction.”

22. Misleading Finding – “Our review found that several of NYRA’s procurement practices were not in compliance with the FOB- approved Manual.”

Discussion: This statement is overly vague and without foundation Please see NYRA’s general response above.

23. Misleading Finding – “We found that each requisitioning department, not the Purchasing Department, is responsible for discretionary purchasing activities.”

Discussion: This finding lacks substantial context, and as NYRA communicated to the OSC numerous times, is factually inaccurate. The requisitioning department works in consultation and collaboration with the Purchasing Department. Consistent with the Manual, the Purchasing

Department works in conjunction with the requisitioning department to solicit quotes or formal proposals for a good or service. Many of NYRA's purchases are unique and specialized to a specific department, making it in NYRA's best interest to have a knowledgeable party involved in obtaining quotations. Furthermore, the requisitioning department does not select the vendor; for a purchase under \$50,000, the requisitioning department suggests a vendor and assigns the requisition to that vendor based on the lowest quote. The Purchasing Department reviews the quotes and ensures that the purchase requisition follows the Manual. Contrary to the inaccurate assumptions made by the OSC, there is no requirement to maintain formal documentation of this review; evaluating quotations prior to creating a PO is a normal daily function of the Purchasing Department and is performed with each requisition. Only after the Purchasing Department confirms that the Manual has been followed does it create and issue a PO to the suggested vendor on the purchase requisition. In the case of a competitive bid, the Purchasing Department will perform a Cost Benefit Analysis ("CBA") and communicate the results of that analysis to the requisitioning department. The Purchasing Department asks the requisitioning department if they would like to proceed with an award to the lowest responsible bidder because as explicitly stated in all bids, "NYRA reserves the authority to award a contract for all, part, or none of the services requested by this RFQ/RFP." If the proposals received to a bid are more costly than anticipated or if the goods/services do not meet NYRA's expectation, the requisitioning department can ask to cancel the bid. The question of "How would you like to proceed" is not only normal and routine but is expected in each bid. The Purchasing Department must confirm that any proposal received meets the needs and budget requirements of the requisitioning department before awarding a contract. The Director did not select the vendor, but rather gave the Purchasing Department the consent to proceed with an award to the lowest, responsible bidder, who was determined by the Purchasing Department.

24. Misleading Finding – “Although this situation was identified by NYRA, it still has not adjusted its process to comply with the Manual and thus prevent similar incidents in the future.”

Discussion: See NYRA's response to #4 above.

25. Misleading Finding - “NYRA's Internal Audit Department has not conducted a review of its procurement practices..., Periodic audits can be used to monitor the established process.”

Discussion: As explained to the OSC, this OSC Finding lacks context and is incorrect as it misrepresents the NYRA's Internal Audit Department ("IAD") and its audit activities.

During, the audit scope period, IAD performed several audit activities to promote prudent spending and support NYRA's adherence to the Manual. By way of example, in 2018, IAD planned and facilitated the entity-wide procurement training with the Purchasing Department. Also, IAD was a significant contributor to the Procure-to-Pay project to assist NYRA's transition and implementation of the new procurement system by regularly advising best practices to promote robust control environment. The implementation of the new procurement system completed in 2019. In 2020, IAD's audit plan included the Procurement Bidding Process and Procurement Data Analytics in Q3 and Q4, respectively. IAD could not execute the 2020 audit plan due to a global

pandemic and the furlough of the IAD team. Upon partial return of the IAD team, IAD planned a Procurement Data Analytics Review but that was put on hold to accommodate this audit by the OSC.

In addition, IAD executes a risk-based internal audit plan. Based on the annual risk assessment result, IAD selects the highest risk areas to be audited in the respective year. Further, the audit plan is refreshed regularly throughout the year and with triggering events to respond to the changing risk landscape. The OSC's blanket statement contradicts the best practices of risk-based internal audit planning. IAD will review purchasing practices as deemed appropriate.

26. Trivial Finding – “NYRA officials stated that they do not have a documented petty cash policy but that use of petty cash is infrequent and de minimis. They added they will evaluate whether to eliminate the use of petty cash and will draft a policy if they decide to keep it.”

Discussion: As OSC pointed out in the report, NYRA spent \$20,422 in petty cash, which is less than 0.01% of the total spent for purchase of goods and services from January 1, 2018, to December 31, 2020, which is clearly immaterial. By way of example, in 2020 and 2021, the total petty cash spend was \$5,788 and \$3,001, respectively.

27. Misleading Finding- “Without this documentation, NYRA cannot be assured that the gift cards went to appropriate persons. We also found that NYRA does not have a policy addressing the usage of credit cards; as a result, we could not determine whether the use of credit cards for purchasing gift cards was appropriate. Lack of a formal policy can potentially lead to overspending and inappropriate purchases.”

Discussion: This finding lacks substantial context, and as NYRA communicated to the OSC numerous times, NYRA does not have a formal credit card policy because there are only two active credit cards at NYRA; one is held by the Purchasing Department and one is held by the Facilities Department. These cards are not routinely used, and both cards are only to be used for emergency situations or when a credit card is the only method of acceptable payment. Further, credit card purchases are monitored and reviewed on a routine basis by respective departments.

Further, the purchases of gift cards using a credit card were appropriate, and they did not deviate from the procurement policy. The Purchasing Department properly procured the gift cards on behalf of the requesting department as the credit card was the only acceptable payment method. The purpose of the purchase was clearly stated, and the requesting department properly approved the purchase.

28. Misleading Finding – “We asked NYRA officials how they identify and keep track of their assets, but they did not respond; instead, they generated a more detailed capital asset ledger for our sample. When we asked if NYRA could generate this for all assets, NYRA officials responded that they could not. Regardless, we attempted to find the sample of 98 high-risk assets. NYRA officials showed us 98 items; however, since assets are not tagged, we have no assurance that the items we saw were, in fact, the ones on our list.”

Discussion: This finding lacks context. While true that NYRA does not “tag” all of its fixed assets, the far majority of fixed asset additions consist of the construction or betterment of permanent, immovable assets (e.g., barns, building refurbishments, track improvements, etc.); therefore, NYRA does not “tag” these easily identifiable assets due to virtually zero risk of theft.

Of the \$93.5M asset additions reviewed by the OSC, 81%, or approximately \$75.7 million, of the assets were characterized as Leasehold Improvements on NYRA’s balance sheet. NYRA determined in its reasonable business judgment that because most of the referred to assets are characterized as “low-risk of theft,” the benefit of implementing a tracking system does not outweigh the cost involved.

Furthermore, NYRA separately maintains a log of its vehicles and computer equipment, two asset types which could be deemed as high-risk. The OSC mis-characterized the events that transpired regarding the asset listing and multiple asset verification. For example, vehicles were properly tagged with NYRA’s asset numbers and VIN numbers.

29. Misleading Finding – “We were able to find 14 pieces during a visit to a storage facility; however, one of the pieces was not as described on NYRA’s list.”

Discussion: The finding mischaracterizes and overstates the one-off human error into a pervasive asset control issue. The inventory list contained a typographical error, where the preparer possibly typed the letter D instead of F (i.e., 38PMD instead of 38PMF). The error was quickly resolved during the storage facility visit by verifying the third-party Bill of Lading.

30. OSC Recommendations

Discussion: NYRA will evaluate OSC recommendations and take appropriate actions, as necessary.

Please feel free to contact us should you have any questions or need additional information.

Sincerely,



Renee Postel
SVP/Chief Financial Officer