

REPORT BY THE
AUDITOR GENERAL
OF CALIFORNIA

**THE DEPARTMENT OF MOTOR VEHICLES
DID NOT COMPLY WITH ALL THE
STATE PROCUREMENT REQUIREMENTS**



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STATE OF CALIFORNIA
Office of the Auditor General

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February 5, 1990

P-949.2

Honorable Elihu M. Harris, Chairman
Members, Joint Legislative
Audit Committee
State Capitol, Room 2148
Sacramento, California 95814

Dear Mr. Chairman and Members:

We reviewed the Department of Motor Vehicles' (department) procurement of a contract to produce a new state-of-the-art California driver's license and identification card (license card). A magnetic stripe on the new license card will store information that can be decoded by electronic readers. The purpose of the new license card is not only to modernize the department's issuance of license cards and its record keeping but to provide instant identification data to the department, law enforcement agencies, and retailers. The Department of General Services' (DGS) Office of Procurement provided administrative oversight during the procurement process.

We found that the department and the DGS did not always follow state procurement procedures and, as a result, may have to rebid the contract to ensure that the procurement is legal and in the best interests of the State. For example, the department did not determine whether the deviations from the request for proposal (RFP) of seven proposals from three vendors were material or immaterial. According to the RFP, if the deviations are determined to be material, the vendors are disqualified. If the department disqualifies these vendors, then the State does not have two or more qualified bidders, as required by law. Also, the department allowed the selected vendor to deviate from a requirement specified in the RFP but did not inform other interested vendors of this option. As a result, the department may have provided the successful vendor an unfair advantage, and the State may not have received the best product at the lowest cost. Furthermore, the department did not ensure that the vendor selected to demonstrate its proposal actually demonstrated all requirements, and did not require its testing contractor to fulfill all the terms specified in its contract. In addition, the DGS did not notify a vendor in writing

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of all the test results concerning its proposals, possibly placing the vendor at a competitive disadvantage. Finally, the department did not obtain approval from the Department of Finance before spending funds on the project.

Background

The department is responsible for administering a Drivers Licensing and Personal Identification Program for the State of California. The principle objective of this program is to issue licenses to individuals who are eligible drivers and personal identification to other individuals. The department estimates that over 7.2 million driver's licenses and over 1.3 million identification cards will be issued by the department during the 1989-90 fiscal year.

The department conducted a survey in the summer of 1987 to determine what improvements could be made to the current California driver's license. As a result of that survey, the department developed a set of goals for a more secure, attractive, durable, and accurate license card. After conducting a feasibility study and issuing a feasibility study report, the department mailed a request for information to 137 vendors on August 31, 1988; 12 vendors replied. Through an RFP, the department then solicited proposals for the production of plastic driver's licenses, identification cards, and salesperson licenses imprinted with a color photo and a magnetic stripe. The data encoded on the magnetic stripe is to include personal statistical information such as the card holder's name, address, license number, height, and weight. The data must be readable by available electronic equipment that can be connected to communication networks capable of making inquiries and retrieving, displaying, and printing information. The contract is to cover a period of approximately five years, and its estimated value is \$38.4 million.

Section 1203 of the State Administrative Manual (SAM) states that the DGS, in its review of contracts, meets its responsibilities by ensuring that the best interests of the State are preserved; that agencies of the State are complying with laws, rules, and regulations; and that expenditures are made as wisely and economically as possible while considering the needs of the agencies. Agencies may be authorized by the DGS to conduct their own procurement activities; however, the DGS has not delegated this responsibility to the department.

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On February 21, 1989, the department received nine proposals. The department conducted confidential discussions with the vendors, analyzed the proposals, and tested the sample license cards that were provided with the proposals. The department received the vendors' final proposals by June 8, 1989. Throughout the procurement phase, the department amended the RFP ten times by changing some of the specifications and by extending the project schedule.

After submitting sample license cards to an independent contractor for testing, the department selected one bid from the National Business Systems, Inc., from a field of 17 bids from six vendors and issued an Intent to Award on September 15, 1989. Four vendors filed protests with the DGS. However, one of the protests was filed after the protest due date and was not recognized.

Scope and Methodology

The purpose of this audit was to review the procurement of a contract to produce California State driver's licenses and identification cards. To assist in our review of the procurement process, we obtained the services of a consultant, Peat Marwick Main and Company.

To determine whether the department's procurement process complied with state law and regulations, our consultant reviewed state procurement requirements, particularly as they pertained to information technology, and reviewed the department's procurement policies and practices pertaining to the RFP. Our consultant interviewed department officials regarding the procurement process, including management, contracting and procurement staff, technical analysts and specialists. Our consultant interviewed all of the staff of the DGS' Office of Procurement who assisted in the procurement process. Additionally, our consultant examined the records of the procurement at the department and the DGS. To understand the vendors' perspective of the procurement process, our consultant interviewed representatives of selected vendors.

Our consultant also reviewed the technical requirements in the RFP and examined the evaluation and selection procedures. In addition, our consultant reviewed the final proposals to determine whether they responded to the RFP and reviewed each of the protests filed by vendors.

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We reviewed and verified the work of our consultant, interviewed department and DGS officials, and gathered further documentation concerning this procurement. We also obtained the services of another consultant group, Deloitte & Touche, to provide us with information related to the technology and costs of magnetically storing data.

Number of Qualified Bidders Uncertain

Competitive bid requirements in the awarding of public contracts are established to encourage competition; guard against favoritism, extravagance, fraud, and corruption; and secure the best work or supplies at the lowest price practicable. Section 12811 of the California Vehicle Code states that no contract is to be awarded to any nongovernment entity for the processing of driver's licenses unless the department receives "two or more qualified bids from independent, responsible bidders." According to an opinion of the Legislative Counsel, two or more bids must be received from two or more different bidders, and a qualified bid is a proposal submitted to the department that meets all the requirements specified in the RFP (see Appendix A).

According to the department's RFP for a contract to produce the new license cards, each final proposal would be reviewed in detail for compliance with requirements. If a proposal failed to meet an RFP requirement, the State would determine if the deviation were material, in which case the proposal would be rejected and given no further consideration. An immaterial deviation, on the other hand, could be accepted. If the deviation were accepted, the proposal would be processed as if no deviation had occurred. The DGS is ultimately responsible for determining whether deviations are material or immaterial.

The department received 17 bids from six vendors by the final bid date of June 8, 1989. It reviewed the proposals to determine whether they met all the technical requirements and scored them according to a value system, described in the RFP, based on cost and functionality. The vendor whose proposal achieved the highest score was to perform a demonstration; if it passed the demonstration, that vendor would be awarded the contract.

The department's evaluation committee found that all 17 proposals from the six vendors deviated in some way from the RFP requirements. However, the department was not consistent in its review of the proposals to determine whether the deviations were material or

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immaterial. For example, the department determined that 4 proposals, from three vendors, had material deviations and that 6 of 9 proposals from another vendor had immaterial deviations. However, the department did not make a determination on the remaining 7 proposals from three vendors. The selection and evaluation report states that no final determination was made on these 7 proposals because they did not score points high enough to be awarded the contract. According to the evaluation team leader, a draft of the evaluation and selection report that was sent to the DGS from the department's evaluation team stated that the deviations of the 7 proposals from the three vendors were material. However, according to the team leader, in a meeting of department and DGS officials, the DGS decided that it was not necessary at that time to determine whether the deviations were material or immaterial. As a result, these findings were not reflected in the final report. According to the team leader, during a nondelegated procurement process, the DGS makes the final determination as to whether or not a deviation is material or immaterial.

Because the DGS has not determined whether all deviations from the RFP were material or immaterial, the department may not have two or more qualified bids from two or more bidders as required by law. Three of the six vendors are disqualified because all of their proposals had material deviations. Two of the remaining three vendors had four proposals with deviations, but the department did not determine whether the deviations were material or not. If the department determines that these deviations are material, as it did in an earlier assessment, only one vendor remains. Although this vendor submitted 9 proposals, the requirement that there be two qualified bidders is not met. Therefore, the State is not ensured that the procurement is valid.

Unfair Procurement Practice

According to the California Public Contract Code, the Legislature intends that state agencies procure goods and services in a competitive framework. The purpose of competitive bidding is to secure public objectives at the lowest practical cost and to avoid the possibilities of graft, fraud, and collusion. Competitive bidding is based upon full and free bidding to satisfy state requirements and the acceptance by the State of the lowest bid submitted by a responsible bidder. However, in the RFP process, the selection of the vendor may be based on factors other than cost, all of which must be stipulated in the RFP. A fair and equitable procurement process requires that all the information pertaining to the procurement be known to all bidders.

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According to the department's RFP, the State may reject any or all bids and may or may not waive any immaterial deviation or defect in a bid. However, material deviations cannot be waived. According to the RFP and to Section 5212 of the SAM, a material deviation is one that is not in substantial accord with one or more requirements of the RFP; provides an advantage to one bidder over other bidders; has a potentially significant effect on the delivery, quantity, quality, or amount paid to the vendor; or significantly affects the cost to the State.

One of the requirements of the RFP is that the license cards include a magnetic stripe capable of holding a minimum of 268 characters of data. However, the department selected a vendor whose proposal did not meet this requirement. According to our consultant, 268 characters of data will not fit onto a single density magnetic stripe without some form of compression. The selected vendor's proposal included a single density magnetic stripe that abbreviates or compresses the required information. According to this proposal, a compression of data is possible because the electronic readers that will decipher the magnetic data can be programmed to decode the compressed data and because some information stored on the stripe is redundant. For example, the data "PROVISIONAL UNTIL AGE 18" or "AGE 21 IN (date)" or "SENIOR CITIZEN" can be derived by calculating the person's age from the issue date and date of birth. Through this technique, the successful vendor believes that enough characters of data can be saved so that it is possible to use a single density magnetic stripe. According to the vendor's proposal, reliability and reduced cost influenced the use of this compression technique in its proposal.

According to the evaluation team leader, the ability of the magnetic stripe to store the required data was more important than the physical placement of the characters on the stripe. Additionally, according to the team leader, the evaluation team based its decision regarding compliance on tests of the card samples using equipment provided by the vendor, on a demonstration of the data printout, and on information presented by the vendor at the demonstration. The evaluation team had no method of physically counting the characters recorded on the magnetic stripe.

Of the six vendors who submitted final proposals to the RFP, the successful vendor was the only one to propose the use of single density recording. The department did not revise the RFP to inform other vendors that the magnetic stripe need not hold a minimum of 268 characters of data.

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Since the department did not ensure that all proposals comply with the RFP requirements, the department may have provided the selected vendor an unfair cost advantage. If the other vendors had not been restricted to the requirement of 268 characters of data, they might have submitted a greater variety of proposals and been more competitive. The successful vendor's proposal stated that the use of the single density compression technique reduced the cost of the system. Therefore, a vendor using a single density method may have had a cost savings advantage.

Demonstration Not Conducted As Required

The RFP states that the license card procurement might require a demonstration of the proposer's response to specific requirements. The department also developed a benchmark/demonstration manual that listed 87 objectives. The vendor whose final proposal was selected would be required to demonstrate all mandatory technical requirements applicable to its proposal against the objectives. Mandatory objectives were identified by an asterisk; some requirements had to be met only if certain solutions were proposed.

On June 15, 1989, the DGS mailed the benchmark/demonstration manual to each of the six vendors that had submitted a final proposal by June 8, 1989. According to the manual, once the State selects a vendor to perform the demonstration, participation is mandatory. If the vendor fails to demonstrate the claims made by the proposal, the proposal may be rejected.

The department determined that 77 of the original 87 objectives were applicable to the proposal submitted by the selected vendor and were mandatory. However, this vendor actually demonstrated only 64 objectives. The vendor certified that the 13 objectives not demonstrated could be met, and the evaluation team accepted these certifications. For example, the vendor certified rather than demonstrated compliance with specifications regarding license card warpage, surface distortion, straightness, contamination of electronic readers by the card, ability of the magnetic card to retain the stored information, composition of the card, and the ability of the electronic readers to respond to inquiries and retrieve data.

The department's testing contractor tested license card samples representing all proposals of the six vendors that submitted final proposals, including those of the vendor who performed the demonstration. However, the contractor tested only four of the

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specifications certified by the vendor during the demonstration. The card samples passed three of the tests but did not pass one part of the warpage tests. While all five of the vendor's cards subjected to the tests withstood warpage, the magnetic stripes on four of the cards did not adhere to the card. Despite the failure of the magnetic stripes to adhere, the department accepted the results of this test for warpage as satisfactory and did not include the results in the final evaluation and selection report. According to the evaluation team leader, because the RFP does not have a technical requirement for magnetic stripe adherence, the results of the test could not be considered in determining deviations. However, the testing contractor saw the test of the magnetic stripe's adherence as necessary to determine an acceptable degree of warpage. Therefore, the department cannot be assured the card will perform as desired.

The vendor explained corrections or solutions for the six other specifications that were not demonstrated, including those for required photographic backgrounds, maximum weight for field equipment, and allowable time to shut down equipment. Another specification required that the camera used to take photographs would not operate with insufficient light. Although the vendor's camera operated regardless of the amount of available light, the vendor certified it would correct the problem. Also, to meet the requirement that there be no more than a 0.1% error rate in the electronic reading of license cards, the department tested approximately 76 cards, not enough to provide a statistically valid test.

According to the evaluation team leader, certain specifications could not have been demonstrated, but the benchmark/demonstration manual did not make this clear. However, all vendors received the same information regarding the demonstration, so no vendor had an advantage over another. Also, the evaluation team recognized that the number of cards produced at the demonstration would not constitute a statistically valid sample, but it was unreasonable to require the vendor to produce that large a number of card samples. According to the team leader, the evaluation team checked the vendor's card samples and the documentation for its quality control methods to ensure the accuracy of magnetic stripe data.

According to the RFP, a demonstration serves several purposes: it verifies the claims made in the bid; it corroborates the evaluation of the bid; and it confirms that the hardware and software are actually in operation. Because the State did not require the vendor to demonstrate all the required objectives, it cannot ensure that the vendor's product will meet the State's needs.

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Some Testing Not Conducted

According to the RFP, the license cards must be durable enough to last ten years. The department's intent was to extensively test the durability of license card samples submitted by vendors and consider as final proposals only those products passing the tests. After receiving the final proposals, the department decided to have an independent laboratory evaluate the security and durability of the samples. The independent contractor was to simulate normal use of the license card to determine which cards, if any, would last for ten years. To test their durability, the cards were bent and folded, subjected to abrasive materials and extreme temperatures, laundered, and exposed to chemicals and ultraviolet light. Additionally, the contractor's scientists designed tests to assess the security features of the cards. A rating system was developed to rank the samples. The contract for conducting the testing was for \$78,000.

The department's testing contractor found that all the sample cards had some deficiency. However, the testing contractor did not test for or determine whether the license cards would be durable enough to last ten years. According to the contractor's business coordinator, although the tests probably would not equate to a full ten years of use, they did indicate the general durability of the samples. Since the contractor did not fulfill the specific terms of its contract, the State cannot be assured that any of the cards will last ten years.

Late Notification of Test Results

The department requested that vendors submit samples of proposed license cards for testing early in the procurement process to allow the department time to test the samples and return the results to the vendors before the final proposal due date of June 8, 1989. The purpose of this testing was to detect problems and give feedback to the vendors, allowing them to adjust for these problems before submitting their final proposals. The DGS informed vendors of test results.

Three vendors who used a holograph developed by the same manufacturer submitted sample license cards for testing by the required submission date of May 2, 1989. One of these vendors submitted three different samples with different laminate features, one of which was the holograph. The department determined that all of the cards with the holograph feature were unacceptable because the holographs were too dark. The DGS notified all three vendors of the department's tests. However, the report received by one of the vendors did not include the

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holograph test results. This vendor reportedly called the DGS on May 17, 1989, and during the week of May 22, 1989, for the holograph test results. However, the vendor was not told the results until May 31, 1989, when it called the department again, and the department sent the DGS a summary of the holograph test results so that it could be forwarded to the vendor. However, the DGS cannot confirm that it eventually notified the vendor in writing of the test results.

On May 24, 1989, the manufacturer who had developed the holographs reportedly sent samples of an improved product to each of the three vendors using its holographs. By June 8, 1989, the two vendors that had initially submitted holographs and were told by the DGS of their unacceptability submitted final bids with the improved holographs. The third vendor, who was reportedly not informed of the test results, submitted two final bids, neither of which used the newer holograph. The vendor who scored highest in the evaluation and selection phase and was selected to perform the demonstration was one of the two vendors who submitted the improved holograph.

When the department tested the sample license cards it had requested, it was obligated to ensure that the test results were reported to all vendors within a reasonable time period. According to a DGS official, the DGS notified the vendor of the incomplete test results it received from the department. However, the DGS did not ensure that the missing test results were promptly sent to the vendor. As a result, the vendor may not have had sufficient time to revise its proposal, and, therefore, may have been placed at a competitive disadvantage.

Resources Spent Prior to Approval

Section 4921 of the SAM states that a feasibility study must be conducted and a feasibility study report (FSR) approved before funds are spent on any information technology project. The department should have obtained approval of its FSR by the Office of Information Technology (OIT) before it spent funds on this project. The department submitted the FSR on July 7, 1988, but did not obtain the OIT's approval until November 18, 1988. However, the department formed a project team and began development work on the project in August 1988. Also, the department sent a request for interest to 137 vendors on August 31, 1988. If it does not obtain prior approvals, the department bypasses the review of a control agency whose purpose is to safeguard the financial interests of the State.

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Conclusion

The Department of Motor Vehicles was not consistent in determining whether all deviations from its RFP for new license cards were material or immaterial for all proposals. Material deviations would disqualify a bidder. If the deviations are determined to be material, the State may not have two or more qualified bidders as required by law. Also, the department may have provided the vendor who was selected to be awarded the \$38.4 million contract to produce California's license cards an unfair advantage. As a result, the State may not have received the best product at the lowest cost. Furthermore, the department did not ensure that the vendor selected to demonstrate its proposal actually met the requirements of the RFP, and did not conduct all the tests specified in the RFP. Moreover, four of the five cards the successful vendor submitted failed one of the warpage tests, yet this failure was not listed on the final selection and evaluation report. In addition, the Department of General Services did not notify a vendor in writing of all the test results on its proposals, thus possibly placing the vendor at a competitive disadvantage. Finally, the department did not obtain approval from the Department of Finance's Office of Information Technology before spending funds on this project. Although approval was eventually received, the financial interest of the State may not have been protected between the time work commenced and approval was received.

Recommendations

To ensure that the procurement process is competitive, that the State receives the products and services it contracts for, and that the financial interest of the State is protected, the Department of Motor Vehicles should take the following actions:

- In cooperation with the Department of General Services, determine whether the RFP deviations for the seven proposals from three vendors are material or immaterial. Also, determine whether the selected vendor's card warpage problems identified by the department's testing contractor are material or immaterial deviations from the RFP requirements. If there are not two qualified bidders as a result of this determination, the procurement should be rebid;

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- Determine, before entering into a contract with the selected vendor, that other vendors would not have submitted lower cost proposals if the requirement that the magnetic stripe contain 268 characters of data had been relaxed. If it is determined that other vendors would have submitted lower cost proposals, this procurement should be rebid;
- In the future, require contractors to provide all the services they contract to perform;
- Require that vendors selected to demonstrate their proposals actually demonstrate all mandatory requirements and determine whether any of the testing deficiencies found represent material deviations; and
- Obtain all the necessary control agency approvals before spending funds on any project.

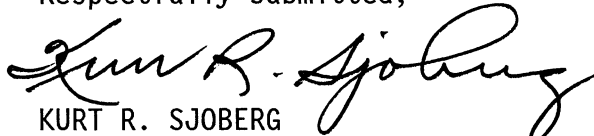
To ensure a competitive procurement process that provides all vendors an equal opportunity to bid, the Department of General Services should take the following action:

- Notify all vendors of test results on their draft proposals promptly so that the vendor can make changes to the proposal before the due date for final proposals; and
- Provide administrative oversight and guidance to the department for executing the recommendations listed above.

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We conducted this review under the authority vested in the auditor general by Section 10500 et seq. of the California Government Code and according to generally accepted governmental auditing standards. We limited our review to those areas specified in the audit scope section of this letter.

Respectfully submitted,


KURT R. SJOBERG
Acting Auditor General

Appendix A: Legislative Counsel Opinion

The Department of Motor Vehicles' response to the report

The Office of the Auditor General's comments on the response from the Department of Motor Vehicles

The State and Consumer Services Agency's response to the report

The Office of the Auditor General's comments on the response from the State and Consumer Services Agency

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APPENDIX A

Legislative Counsel of California

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January 18, 1990

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Department of Motor Vehicles:
Records: Contracts - #25735

Dear Mr. Sjoberg:

QUESTION NO. 1

Are all of the records maintained by the Department of Motor Vehicles restricted only to use by the department?

OPINION NO. 1

Not all of the records maintained by the Department of Motor Vehicles are restricted only to use by the department.

ANALYSIS NO. 1

The Department of Motor Vehicles (hereafter the department) is required to maintain records of each vehicle registered in this state and every application for a license to operate a motor vehicle (Sec. 1800, Veh. C.¹). The department also receives accident reports (Sec. 1806), reports from the courts (Sec. 1803) and juvenile authorities (Sec. 1816) of violations of vehicle and drug laws, and reports from traffic

¹ All section references are to the Vehicle Code, unless otherwise indicated.

violator schools pertaining to attendance by traffic violators (Sec. 1803.5), which the department is required to file in its records (Sec. 1806).

Section 1808 provides for public inspection of some of the department's records. Section 1808 reads as follows:

"1808. Notwithstanding Sections 16005 and 20012, and except as provided in Sections 1808.4 [home addresses of specified public officers; see Sec. 1808.2 for similar exception], 1808.5 [physical or mental condition and controlled substance violations], and 1808.7 [first dismissal of complaint for traffic violator school attendance], all records of the department relating to the registration of vehicles, other information contained on an application for a driver's license, abstracts of convictions, and abstracts of accident reports required to be sent to the department in Sacramento, except for abstracts of accidents where, in the opinion of a reporting officer, another individual was at fault, shall be open to public inspection during office hours. All abstracts of accident reports shall be available to law enforcement agencies and courts of competent jurisdiction."

In addition, under Sections 1807.5 and 1808.6, certain convictions of driving offenses are not open to public inspection.

However, other than the exempted records discussed above, the other records of the department specified in Section 1808 are open to public inspection during office hours.

Therefore, not all of the records maintained by the department are restricted only to use by the department.

QUESTION NO. 2

May a merchant use, for commercial purposes, information obtained from a driver's license or identification card issued to a person by the department, if that person voluntarily makes that information available to the merchant?

OPINION NO. 2

A merchant may use, for commercial purposes, information obtained from a driver's license or identification card issued to a person by the department, if that person voluntarily makes that information available to the merchant.

ANALYSIS NO. 2

Drivers' licenses and identification cards issued by the department are commonly used for identification by merchants, especially in accepting personal bank checks. In this regard, Chapter 1102 of the Statutes of 1981, the statute which enacted the requirement that an applicant for a driver's license or identification card include a legible print of the thumb or finger, declared that "[t]he state has adopted a policy that the driver's license and identification card issued by the Department of Motor Vehicles are the basic identification documents in this state ... " (Sec. 3, Ch. 1102, Stats. 1981; see Perkey v. Department of Motor Vehicles, 42 Cal. 3d 185,188; hereafter Perkey).

Although, as discussed in Analysis No. 4, there are legal restrictions on the dissemination of certain information, if a person voluntarily discloses the contents of his or her driver's license or identification card to a merchant, there is no prohibition in the law against the use of that information by the merchant for commercial purposes.

Therefore, we conclude that a merchant may use, for commercial purposes, information obtained from a driver's license or identification card issued to a person by the department, if that person voluntarily makes that information available to the merchant.

QUESTION NO. 3

May records of the department be disclosed to law enforcement agencies?

OPINION AND ANALYSIS NO. 3

As indicated in Analysis No. 1, not all of the records maintained by the department are restricted only to use by the department. Furthermore, there are specific provisions regarding records of the department with respect to law enforcement agencies.

Records of the department of specified convictions are required to be available to the courts, specified peace officers, the Attorney General, district attorneys, prosecuting city attorneys, probation officers, and parole officers (Sec. 1807.5). Abstracts of accident reports are required to be available to law enforcement agencies (Sec. 1808), and certain confidential conviction records are required to be disclosed to law enforcement agencies (Sec. 1808.6). All records open to the public are

required to be accessible to law enforcement agencies (Sec. 1810.5). Thus, generally speaking, records of the department may be disclosed to law enforcement agencies.

However, as also indicated in Analysis No. 1, some records of the department may not be disclosed to any other agency. In addition, as discussed in Analysis No. 4, Section 1798.24 of the Civil Code imposes various restrictions on the disclosure of certain personal information.

QUESTION NO. 4

May law enforcement agencies obtain and use fingerprint records of the department that are digitized and electronically stored for identification, evidentiary, or other enforcement purposes?

OPINION NO. 4

Law enforcement agencies may obtain and use fingerprint records of the department that are digitized and electronically stored for identification, evidentiary, or other enforcement purposes, if the use is needed in an investigation of unlawful activity under the jurisdiction of the law enforcement agency or is for licensing, certification, or regulatory purposes of that agency.

ANALYSIS NO. 4

An application for a driver's license or identification card is required to contain a thumbprint or fingerprint (subd. (c), Sec. 12800; subd. (c), Sec. 13000). Furthermore, whenever the department is required to maintain vehicle registration records and indexes, and driver's license records and indexes, they may be maintained by electronic recording and storage media (Sec. 1801).

As discussed in Opinion and Analysis No. 3, any records of the department open to public use are required to be made available to law enforcement agencies, as well as certain conviction and accident report records of the department.

However, the California Supreme Court has determined that fingerprint records are related to the physical condition of a person within the confidentiality provision of Section 1808.5, and they may not be freely disseminated by the department (Perkey, 194), because they come within the limits imposed on the dissemination of "personal information" that identifies or describes an individual under the Information Practices Act of 1977 (Perkey, 192; Ch. 1 (commencing with Sec. 1798), Title 1.8,

Pt. 4, Div. 3, Civ. C.). The court further stated that, under that act, state agencies are required to limit the collection and retention of personal information to that necessary to accomplish the collecting agency's specific purpose (Perkey, 193).

In Perkey, the court said that, if the statutory scheme were construed as permitting the department to freely disseminate its fingerprint files to all interested parties, that construction would raise serious concerns under the constitutional right of privacy (Perkey, 194).

After Perkey was decided, Section 1798.24 of the Civil Code was amended (see Ch. 1453, Stats. 1987) to read, in part, as follows:

"1798.24. No agency may disclose any personal information in a manner that would link the information disclosed to the individual to whom it pertains unless the disclosure of the information is:

* * *

"(e) To a person, or to another agency where the transfer is necessary for the transferee agency to perform its constitutional or statutory duties, and the use is compatible with a purpose for which the information was collected and the use or transfer is listed in the notice provided pursuant to Section 1798.9 or accounted for in accordance with Section 1798.25. With respect to information transferred from a law enforcement or regulatory agency, or information transferred to another law enforcement or regulatory agency, a use is compatible if the use of the information requested is needed in an investigation of unlawful activity under the jurisdiction of the requesting agency or for licensing, certification or regulatory purposes by that agency." (Emphasis added.)

Thus, the Legislature amended Section 1798.24 to make personal information, such as the fingerprint information of the department, collected by one agency available to another law enforcement or regulatory agency upon request for the limited use of making an investigation of unlawful activity under the jurisdiction of the requesting law enforcement agency or for licensing, certification, or regulatory purposes by that agency. That is, the Legislature has expressly provided for transfer of personal information from one law enforcement or regulatory agency to another only for limited purposes and, therefore, does not

authorize the unrestricted disclosure condemned by the court in Perkey.

In this regard, Section 11106 of the Penal Code requires copies of certain records of the Department of Justice, including its copies of fingerprints, to be furnished to specified agencies, including law enforcement agencies (see Sec. 11105, Pen. C.), "[i]n order to assist in the investigation of crime, the arrest and prosecution of criminals and the recovery of lost, stolen, or found property ..."

Therefore, we conclude that law enforcement agencies may obtain and use fingerprint records of the department that are digitized and electronically stored for identification, evidentiary, or other enforcement purposes, if the use is needed in an investigation of unlawful activity under the jurisdiction of the law enforcement agency or is for licensing, certification, or regulatory purposes of that agency.

QUESTION NO. 5

May the department let a contract to a nongovernmental entity to process drivers' licenses or identification cards if two or more bids are received from only one bidder?

OPINION NO. 5

The department may not let a contract to a nongovernmental entity to process drivers' licenses or identification cards if two or more bids are received from only one bidder. The department may let the contract only if two or more bids are received from two or more different bidders.

ANALYSIS NO. 5

Section 12811 provides for the issuance of drivers' licenses by the department. Subdivision (d) of Section 12811 reads, as follows:

"12811. * * *

"(d) No contract shall be let to any nongovernmental entity for the processing of drivers' licenses, unless the department receives two or more qualified bids from independent, responsible bidders." (Emphasis added.)

Identical provisions are contained in subdivision (d) of Section 13005 with respect to contracts for the processing of identification cards.

To ascertain the meaning of a statute, we begin with the language in which the statute is framed (People v. Overstreet, 42 Cal. 3d 891, 895; Leroy T. v. Workmen's Comp. Appeals Bd., 12 Cal. 3d 434, 438). Statutory terms should be construed in accordance with the usual ordinary meaning of the words used (People ex rel. Younger v. Superior Court, 16 Cal. 3d 30, 43; Moyer v. Workmen's Comp. Appeals Bd., 10 Cal. 3d 222, 230; Estate of Richartz, 45 Cal. 2d 292, 294). When the language of a statute is clear, a court interpreting it should follow its plain meaning (Great Lakes Properties, Inc. v. City of El Segundo, 19 Cal. 3d 152, 155) except if necessary to avoid absurd results (Silver v. Brown, 63 Cal. 2d 841, 845).

The language in question refers to two or more qualified bids to be received from independent, responsible bidders. As discussed in Analysis No. 6, competitive bid requirements are established for the purpose of inviting competition. In view of this purpose, and the above rules of statutory construction, it would be absurd to conclude that two bids from the same bidder are bids from independent bidders.

Thus, we conclude that the department may let a contract to a nongovernmental entity to process drivers' licenses or identification cards only if two or more bids are received from two or more different bidders.

QUESTION NO. 6

If a bidder submits separate bids using different subcontractors, and that bidder is the only bidder, would that satisfy the requirement of "two or more qualified bids from independent, responsible bidders," specified in subdivision (d) of Section 12811 and subdivision (d) of Section 13005?

OPINION NO. 6

If a bidder submits separate bids using different subcontractors, and that bidder is the only bidder, that would not satisfy the requirement of "two or more qualified bids from independent, responsible bidders," specified in subdivision (d) of Section 12811 and subdivision (d) of Section 13005.

ANALYSIS NO. 6

Competitive bid requirements are established for the purpose of inviting competition, to guard against favoritism,

improvidence, extravagance, fraud, and corruption in the awarding of public contracts, and to secure the best work or supplies at the lowest price practicable (Malan Const. Corp. v. Board of County Road Com'rs., 187 F. Supp. 937, 939).

A "subcontract" is "a contract under or subordinate to a previous or prime contract... an agreement to a specified part or all of the work or to provide specified materials or all materials required for the completion of another contract" (Webster's Third New International Dictionary, p. 2274). A "subcontractor" is a person who "contracts to perform part or all of another's contract" (Id.). It follows that a subcontractor is not independent of a contractor with respect to the performance of a contract and that a contractor would be the party responsible for the performance of contract, if awarded the contract. As discussed in Analysis No. 5, Sections 12811 and 13005 require bids from two independent bidders. This requirement would not be satisfied if two bids are received from only one bidder proposing the use of two different subcontractors.

Therefore, if a bidder submits separate bids using different subcontractors, and that bidder is the only bidder, that would not satisfy the requirement of "two or more qualified bids from independent, responsible bidders," as specified in subdivision (d) of Section 12811 and subdivision (d) of Section 13005.

QUESTION NO. 7

What is the meaning of the term "qualified bids" as used in subdivision (d) of Section 12811 and subdivision (d) of Section 13005?

OPINION AND ANALYSIS NO. 7

As indicated in Analysis No. 5, no contract may be let by the department for the processing of drivers' licenses or identification cards unless the department receives two or more "qualified bids" from independent, responsible bidders.

Contracts of state agencies, including the department, for services, and the furnishing of equipment, materials or supplies in connection therewith (Sec. 10335, P.C.C.) are governed by Chapter 2 (commencing with Section 10290) of Part 2 of the Public Contract Code (hereafter Chapter 2).

There is no definition of the term "qualified bids" in the Vehicle Code, Chapter 2, or any other provision of law. Furthermore, there are no cases that have construed that term.

However, statutory terms are to be construed in accordance with the usual or ordinary meaning of the words used (Moyer v. Workmen's Comp. Appeals Bd., supra, at 230).

The courts have defined "bid" as being "no more than an offer to contract" (A.A.B. Electric, Inc. v. Stevenson Pub. Sch. Dist. No. 303 (Wash), 491 P. 2d 684, 686).

"Qualified" is defined, among other things, as "having complied with the specific requirements or precedent conditions" (Webster's Third New International Dictionary, p. 1858).

In this regard, Section 10344 of the Public Contract Code, which applies to contracts to be awarded pursuant to subdivision (d) of Section 12811 and subdivision (d) of Section 13005, reads as follows:

"10344. (a) Contracts subject to the provisions of this article may be awarded under a procedure which makes use of a request for proposal. State agencies which use this procedure shall include in the request for proposal a clear, precise description of the work to be performed or services to be provided, a description of the format which proposals shall follow and the elements they shall contain, the standards the agency will use in evaluating proposals, the date on which proposals are due and the timetable the agency will follow in reviewing and evaluating them.

"State agencies which use a procedure which makes use of a request for proposal shall evaluate proposals and award contracts in accordance with the provisions of subdivision (b) or (c). No proposals shall be considered which have not been received at the place, and prior to the closing time, stated in the request for proposal.

"(b) State agencies which use the evaluation and selection procedure in this subdivision shall include in the request for proposal, in addition to the information required by subdivision (a), a requirement that bidders submit their proposals with the bid price and all cost information in a separate, sealed envelope.

"Proposals shall be evaluated and the contract awarded in the following manner:

"(1) All proposals received shall be reviewed to determine those which meet the format requirements and the standards specified in the request for proposal.

"(2) The sealed envelopes containing the bid price and cost information for those proposals which meet the format requirements and standards shall then be publicly opened and read.

"(3) The contract shall be awarded to the lowest responsible bidder meeting the standards.

"(c) State agencies which use the evaluation and selection procedure in this subdivision shall include in the request for proposal, in addition to the information required by subdivision (a), a description of the methods which will be used in evaluating and scoring the proposals. Any evaluation and scoring method shall ensure that substantial weight in relationship to all other criteria utilized shall be given to the contract price proposed by the bidder.

"Proposals shall be evaluated and the contract awarded in the following manner:

"(1) All proposals shall be reviewed to determine which meet the format requirements specified in the request for proposal.

"(2) All proposals meeting the formal [sic] requirements shall then be submitted to an agency evaluation committee which shall evaluate and score the proposals using the methods specified in the request for proposal. All proposals and all evaluation and scoring sheets shall be available for public inspection at the conclusion of the committee scoring process.

"(3) The contract shall be awarded to the bidder whose proposal is given the highest score by the evaluation committee.

"(d) Nothing in this section shall require the awarding of the contract if no proposals are received containing bids offering a contract price which in the opinion of the state agency is a reasonable price."

Thus, Section 10344 of the Public Contract Code requires that a bid received pursuant to a request for proposal be evaluated for compliance with the terms of the request for proposal, and authorizes the department to use either of the two methods of evaluation of the proposals, as set forth in the request for proposal.

If the department uses the procedure specified in subdivision (b), the price bids are required to be separated from the work proposal, and, in evaluating a bid, the department is required to initially evaluate it for compliance with the format and standards specified in the request for proposal (para. (1), subd. (b), Sec. 10344, P.C.C.). After that initial evaluation, the bid envelope from each bidder, whose bid complies with the format and standards containing the bid price, is opened (para. (2), subd. (b), Sec. 10344, P.C.C.).

If the department uses the procedure specified in subdivision (c), the evaluation and scoring method is required to ensure that substantial weight be given to the contract price of the bidder. Under this procedure, all proposals are required to be ranked by a committee after determination that they meet the format requirements of the request for proposal (subd. (c), Sec. 10344, P.C.C.).

Thus, we conclude that "qualified bid", as used in subdivision (d) of Section 12811 and subdivision (d) of Section 13005, means a proposal submitted to the department that meets all the requirements specified in the request for proposal. Furthermore, if the request for proposal sets forth standards for the bid to meet, it must also meet those standards to be a "qualified bid."

QUESTION NO. 8

You have furnished us with a 230-page document entitled "DMV RFP-8039 Request for Proposal for ... Magnetic Stripe Drivers License/Identification Card, Release Date December 2, 1988" (hereafter the RFP), and asked whether the department is authorized to accept and consider for award proposals which deviate from the RFP.

You have advised us that "bids which deviate from the RFP" means bids which do not conform to the requirements set forth in the RFP.

OPINION AND ANALYSIS NO. 8

As indicated in Opinion and Analysis No. 7, under Section 10344 of the Public Contract Code, there are two alternative procedures that state agencies may use to award contracts pursuant to a request for proposal.

Subdivision (b) of Section 10344 of the Public Contract Code requires the department to initially determine whether a proposal meets the format requirements and the standards specified in the request for proposal. After that evaluation, the cost envelopes for the proposals meeting the format requirements and standards are opened, and the award of the contract may only be made to the lowest responsible bidder meeting the standards.

Under subdivision (c) of Section 10344 of the Public Contract Code, the request for proposal is required to describe the methods the department will use for evaluating and scoring the proposals received, and the department is required to give "substantial weight to the contract price proposed by the bidder." The department is authorized to have the evaluation committee consider all proposals meeting the format requirements specified in the request for proposal.

Among other things, the RFP requires a bidder to propose a breakdown of the proposal costs (RFP, p. VII-1). The RFP states that "[c]ost is only one of the evaluation criterion. Evaluation for this proposal will be based on several different categories, each with different scoring factors" (Id.).

The RFP provides for an extensive evaluation of proposals (RFP, pp. IX-1 to IX-7, incl.), and states that "[f]inal selection will be on the basis of highest final score and lowest total cost among the proposals which are responsive to the RFP requirements. . . . The technical and cost information will be scored, and weighted, to arrive at the final overall score" (RFP, p. IX-2).

As indicated in Analysis No. 6, competitive bid requirements are established for the purpose of inviting competition, to guard against favoritism, improvidence, extravagance, fraud, and corruption in the awarding of public contracts, and to secure the best work or supplies at the lowest price practicable (Malan Const. Corp. v. Board of County Road Com'rs., supra). They are enacted for the benefit of property holders and taxpayers, and should be so construed and administered as to accomplish their purpose fairly and reasonably with sole reference to the public interest (10 McQuillin Mun. Corp., 3rd ed., Revised, Sec. 29.29, p. 302).

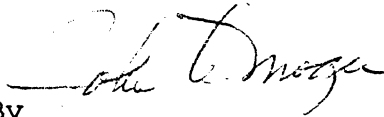
Mr. Kurt R. Sjoberg - p. 13 - #25735

With respect to a call for bids, a public agency is precluded from awarding a contract that is substantially different from the plans and specifications on which the bid is to be submitted (see Scheff v. Wiegand (Ohio), 174 N.E. 363, 364-365). In short, a bid is required to be responsive. In the situation under discussion, it means that the submitted proposal is required to conform to the specifications contained in the RFP, and, therefore, a submitted proposal varying materially from the specifications is required to be rejected (see Stinson v. Hanley, 151 Cal. 379, 381).

Thus, if the department determines that a submitted proposal varies materially from the requirements set form in the RFP, the department is required to reject the proposal.

Very truly yours,

Bion M. Gregory
Legislative Counsel



By
John A. Moger
Deputy Legislative Counsel

JM:lb

cc: Honorable Elihu M. Harris, Chairman
Joint Legislative Audit Committee

OFFICE OF THE DIRECTOR

DEPARTMENT OF MOTOR VEHICLES

P. O. BOX 932328

SACRAMENTO, CA 94232-3280



February 2, 1990

Mr. Kurt R. Sjoberg
Acting Auditor General
Office of the Auditor General
660 J St., Suite 300
Sacramento, CA 95814

Dear Mr. Sjoberg:

Secretary John Geoghegan of the Business, Transportation and Housing Agency has asked me to respond on his behalf to your letter report of the procurement practices of the Department of Motor Vehicles for the new driver license/identification card system. Attached is our specific comments regarding each issue raised in your letter following a similar format.

Thank you for this opportunity on behalf of Secretary Geoghegan and myself for allowing us to comment on your findings.

Most cordially,

A handwritten signature in black ink, appearing to read "A. A. Pierce", with a long horizontal flourish extending to the right.

A. A. PIERCE
Director

Attachment

cc: John K. Geoghegan

INTRODUCTORY

For reasons more fully stated below, the Department does not agree with the Auditor General's finding that State procurement procedures were not followed and that the contract may have to be rebid to ensure its legality.

BACKGROUND

The Auditor General's report should be corrected to reflect an estimated value of the five year contract as \$28.5 million, instead of \$38.4 million. (1)*

NUMBER OF QUALIFIED BIDDERS UNCERTAIN

This heading itself is inappropriate in view of the specific language of Vehicle Code Section 12811(d) which says that "No contract shall be let to any nongovernmental entity for the processing of drivers' licenses, unless the Department receives two or more qualified bids from independent, responsible bidders." (emphasis added). The issue is whether the number of qualified bids was certain, not whether the number of qualified bidders was certain. (2)

The Legislative Counsel submitted an opinion on this issue on January 18, 1990. The Auditor General, and the Legislative Counsel, in his mistaken opinion, have moved the words "two or more" in subdivision (d) from their place as modifiers of the words "qualified bids" to a place later in the statute, where the newly placed words become modifiers of the words, "independent, responsible bidders." What both the Auditor General and the Legislative Counsel say is not at all what the Legislature said. As the statute is written, "two or more qualified" are words which describe and modify the noun "bids," not the noun "bidders".

The best evidence that the statute is being improperly rewritten by the Legislative Counsel is in the conclusion reached in his analysis of question #5 on page 7, of his opinion. He says, "Thus we conclude that the Department may let a contract to a nongovernmental entity to process drivers' licenses or identification cards only if two or more bids are received from two or more different bidders." The underlined words, "two or more different," do not appear in the statute as modifiers of the word bidders. Those words are placed there by the Legislative Counsel. It should also be noted that the fact that the word "bidders" is plural is of no consequence. Vehicle Code Section 14 provides that "The singular number includes the plural and the plural the singular."

Even if moving the words "two or more" within the statute were an acceptable practice, which it is not, in this procurement the Department received 17 "qualified bids" from 6 "independent responsible bidders". In addition to moving words within the statute, the Auditor General and Legislative Counsel are, by

*The Office of the Auditor General's comments on these points begin on page 33.

implication, substituting the word "responsive" for the word "qualified". The Legislature asked for "qualified" bids. Bids are "qualified" by a number of facts, constituting compliance with Sections II and VIII of the RFP. The fact that a bid "qualifies" as a bid to be considered or evaluated does not mean that the bid is necessarily "responsive". The term "responsive" in procurement law has a very specific meaning. It is not synonymous with the word "qualified". If the Legislature had intended that two or more "responsive" bids be received from two or more responsible bidders, they would have said so in the statute. They did not.

Nevertheless, even if one assumes for the sake of argument that "qualified" does equal "responsive", the conditions of Section 12811 are still satisfied. The only basis on which two of the bidders, besides the successful bidder, can be found to be non-responsive is in the failure of their samples to contain a magnetic stripe that had a coercivity level of 3600 oersteds. However, Battelle Laboratories was only able to test one sample card from each of these vendors on this requirement. This is clearly not sufficient evidence on which to even suggest that there has been a material deviation, let alone determine that the entire bid should be declared non-responsive. (3)

A further significant indication of the mistaken analysis of this issue by the Legislative Counsel is in his response to question #7 on page 9, where he commences a lengthy quote from Section 10344 of the Public Contract Code. That section pertains to service contracts and has absolutely no application to this procurement. This is an EDP procurement, which is controlled by Public Contract Code Section 12100 et seq.

Finally, everybody seems to agree on one thing. The purpose of Section 12811(d) is to place more than one bid in competition. This was the most competitive driver's license procurement ever. Six different bidders submitted 17 qualified bids.

UNFAIR PROCUREMENT PRACTICE

This heading is also inappropriate in that the Auditor General's report mistakenly identifies the Department's protection of a proprietary aspect of the NBS proposal as an "unfair procurement practice". The Department takes two exceptions to this section of the report.

The first exception is to the finding that the RFP required the magnetic stripe on the license card to hold a minimum of 268 characters of data. In making that finding, the Auditor General is treating this aspect of the procurement process as if it were an "invitation to bid" and not a "request for proposals".

Section IV of the RFP is described as a "PROPOSED SYSTEM DESCRIPTION". The section contains broad, general guidelines within which the vendors were free to design a system proposed by them to the State for the production of magnetic stripe driver's licenses. The specific mandatory requirement with respect to the information on the magnetic stripe is in Technical Requirement No. 66 on page VI-35 of the RFP. That

requirement is that "Tracks 1 and 3 of the magnetic stripe must contain the alpha/numeric information (not already contained on track 2) that appears on the face of the driver license. See Exhibits VI-A and IV-F" (emphasis added).

The magnetic stripe on the NBS proposal which was chosen for contract award contains all of the alpha/numeric information (not already contained on track 2) that appears on the face of the driver's license. The information is in a coded form which was successfully demonstrated to produce a plain language read-out of all required information exactly as it is on the face of the driver's license.④

During the confidential discussions in the procurement process one bidder, Unisys, asked about using coded information. Unisys was advised that coded information would only be acceptable if it was compatible with DMV, private industry and law enforcement use. NBS did not ask about coding the information but in their draft proposal indicated that they would be using coded information on the magnetic stripe. In the State's response to the draft proposal, NBS was advised, as Unisys had been, that coded information must be compatible with use by DMV, private industry, and law enforcement. The instructions to both Unisys and NBS were consistent with the requirements of the RFP.⑤

Second, the Department considers the use of a coded magnetic stripe to be proprietary information in the sense that both NBS and Unisys conceived of and considered the technique, presumably to reduce their cost and consequently the cost to the State of procuring a magnetic stripe driver's license. NBS actually used the technique in their bid. The Department does not agree that techniques developed by individual bidders should be passed on to their competitors who are bidding on the same procurement. To disclose the NBS' and Unisys' ideas to a competitor would itself be improper. The Department's handling of the magnetic stripe issue is more properly described as a proper and required procurement practice than as an "unfair procurement practice". It would have been unfair to release NBS' design to the competition.⑥

SOME TESTING NOT CONDUCTED

The Auditor General's report indicates that the license samples were not sufficiently tested to determine whether the samples were durable enough to last ten years. That finding is simply incorrect. In addition to the Department's informal testing for durability, sample cards were submitted to Battelle for testing. The requirement in Rider B, Section 1.1.2 of the Battelle contract was for specific tests from which the Department could determine whether or not the cards would withstand normal usage for ten years. Obviously this did not permit a card to be carried and used in normal use for a period of ten years. Instead, the determination required that the cards be subjected to bending/folding; friction; cold and hot temperatures; laundering; chemicals/liquids; and various kinds of light. From the results of these tests, the Department was able to and did determine that the cards selected for production are, in fact, durable under normal usage for a

period of ten years. This procedure is confirmed in Section 1.2 of Rider B which requires as deliverables under the Battelle contract that "the report must give the Department the information it needs to determine the durability...of each document tested, without the performance of any additional testing by the Department." It was not required nor was it intended that the determination, with respect to durability, should be made by Battelle. The determination was to be made by the Department based upon the Battelle tests. (7)

DEMONSTRATION NOT CONDUCTED AS REQUIRED

This section of the Auditor General's report ignores several pertinent facts. First of all, the purpose of a demonstration is to require the vendor to show the State that the requirements of the RFP will be met at the time of contract performance. This showing can be made in many different ways. In this procurement, the vendor was not required to have the statewide system fully operational for several months following the award of the contract. Full implementation of this RFP requires the development of complex software packages both by the vendor and DMV. This was never contemplated to be accomplished by the time of demonstration.

Many of the certifications cited by the report involve parts of the system that will be developed by the time the contract performance begins. The vendor was able through various means, to fully satisfy the state that it was capable of performing all of the requirements of the RFP.

Additionally, many of the items referred to in the report were tested by Battelle. The successful vendor's product samples passed all of these tests to the State's satisfaction. (8)

LATE NOTIFICATION OF TEST RESULTS

This section of the report again omits pertinent facts. For example, the vendor who may or may not have received written notification of the product test results did receive verbal notification from DMV personnel during late May of 1989. Furthermore, the supplier of the hologram product was in contact with this vendor and even received card samples from the vendor to which the acceptable hologram product was affixed and returned to the vendor. For some unknown reason the vendor chose not to submit these completed acceptable samples with its final bid. Finally, if this vendor had felt that it had been somehow prejudiced, it could have requested an extension of the date to submit final bids. It did not. (9)

RESOURCES SPENT PRIOR TO APPROVAL

This section of the report may be technically correct. However, the Department had every reason to believe the FSR would be approved. Accordingly, preliminary work was begun, including the gathering of information regarding potential vendors. The RFP was not released prior to approval of the FSR and nothing was done that was in any way irrevocable. Only

preliminary work in the nature of information gathering and drafting of documents was initiated.

CONCLUSIONS

The Department of Motor Vehicles followed accepted governmental procurement standards. Following a favorable resolution of the protest now pending, the contract for procurement of a magnetic stripe driver's license should be awarded in accordance with the announced intention to award.

RECOMMENDATIONS

1. As previously discussed, the Department of Motor Vehicles and the Department of General Services have already determined that there was no material deviation in the successful vendor's final proposal, and there is a lack of conclusive evidence on which to determine that the final bids of two other vendors contain deviations which could lead to a finding of non-responsiveness. In the on-going protest proceedings, both NIS and Unisys take the alternative position that their bids were responsive. Neither the State nor NBS have a contrary position. In any event, 17 qualified bids were received from 6 independent responsible bidders. (10)
2. The Department of Motor Vehicles believes that the requirement for storing 268 characters of information was met by the NBS C-IV proposal. Additionally, since this was an RFP which asked each participating vendor to propose a solution, and since the solutions proposed are at least partially proprietary, and since no cost breakdown was required in the bid, the recommendation to reevaluate whether other vendors' costs might have been affected is inappropriate and virtually impossible to implement. (11)
3. All services that were required to be performed for testing services were performed. Of course, this recommendation is one that DMV will follow on all contracts. (12)
4. In the context of this RFP, all accepted State procedures regarding demonstration were followed. No material deviations were found in the demonstration process. In the future, DMV will continue to follow accepted State procurement procedures. (13)
5. If the Department, in its efforts to obtain the latest technology, prematurely expended State funds to better serve the citizens of this State, safeguards will be implemented to minimize the risk of recurrence.

The Department of General Services will comment on Recommendations 6 and 7.

**THE OFFICE OF THE AUDITOR GENERAL'S
COMMENTS ON THE RESPONSE FROM
THE DEPARTMENT OF MOTOR VEHICLES**

Overall Comment:

In its response to our report, the Department of Motor Vehicles (department) does not agree with our findings that the state procurement practices were not followed and that the department should review the discrepancies to determine whether the contract needs to be rebid. Apparently, the department has come to this conclusion without fully considering the facts we present or the recommendations we make.

Because of our findings related to this procurement, we recommended that the department, in cooperation with the Department of General Services (DGS), ensure that the overall procurement was legal, competitive, and in the best interests of the State. Our comments on specific issues raised by the department follow.

Specific Comments:

- ① The \$28.5 million represents the selected vendor's bid price; however, because the contract was not awarded, we used the department's latest estimate as shown in addendum #9 of the request for proposal (RFP).
- ② According to a legal opinion by the Legislative Counsel, included as Appendix A of this report, it would be absurd to conclude that two or more bids from the same bidder are bids from independent bidders. Furthermore, the legal opinion concludes that "qualified bid" means a proposal submitted to the department that meets all the requirements specified in the RFP.
- ③ Initially, the department's evaluation team concluded that all of the vendors other than the one selected had material deviations from the RFP. This would have disqualified them, leaving only one remaining qualified bidder, thereby invalidating the procurement. However, after a meeting between the department and the DGS, the DGS decided that it was not necessary to determine whether the deviations were material or immaterial.
- ④ The RFP contained a number of requirements that proposals must meet. The department rejected four proposals from three vendors because the proposals did not meet certain RFP requirements. One RFP requirement was that the magnetic stripe have a capacity to contain 268 characters of data. However, the department selected a vendor whose proposal did not meet this requirement. Of the six vendors who submitted final proposals, the successful vendor was

the only one whose proposal included single density recording on its magnetic stripe. According to our consultant, the selected vendor's proposal included a magnetic stripe that contained no more than 214 characters of data. This proposal requires that data be abbreviated or compressed on the magnetic stripe, and this requires a reader with software to decipher the data on the magnetic stripe. Since the department did not revise the RFP to inform the other vendors that the magnetic stripe need not contain 268 characters of data or ensure that all proposals meet the RFP requirements, the department may have provided the selected vendor an unfair advantage.

- ⑤ The successful vendor was the only one to propose the use of single density recording. None of the other vendors, including UNISYS, submitted final proposals using single density recording.
- ⑥ The issue our report addresses is not whether the department should release a vendor's proposal or design to other vendors, but whether the department conducted a fair and impartial procurement. Further, the department's use of the term "proprietary information" suggests that the selected vendor's proposal uses a process that is exclusively owned or patented. However, our consultant states that the use of single density magnetic stripe encoding is standard technology used extensively throughout the banking industry. Relaxing an RFP requirement for one vendor, and not informing all the other vendors, is not a fair and impartial process.
- ⑦ As stated on page 9 of our report, the testing contractor did not test for or determine whether the license cards would be durable enough to last ten years as required by the contract. According to the testing contractor's business coordinator, the tests they conducted probably would not equate to a full ten years of use.
- ⑧ The department entered into a \$78,000 contract to have an independent laboratory test the durability and security of the license cards. In one test of durability, the magnetic stripe's adherence to the card, the independent laboratory found that 80 percent (four of five) of the selected vendor's sample cards failed. However, the department chose to ignore the results of its testing contractor.
- ⑨ Our report does not say the vendor did not know about the test results. Our report says that the department and the DGS did not ensure that the missing test results were promptly sent to the vendor. Further, the department and the DGS should not rely on outside sources to fulfill their responsibilities.
- ⑩ As discussed in comment 2, based on a legal opinion by the Legislative Counsel, we determined that the department may not have received 17 qualified bids.

- ⑪ As discussed more fully in comment 4, the selected vendor's proposal did not meet the RFP requirement that the magnetic stripe contain 268 characters of data. According to our consultant, the magnetic stripe for the vendor's proposal would contain no more than 214 characters of data.
- ⑫ See comment 7.
- ⑬ As we mention on page 7 of our report, after the department selected the vendor to demonstrate its proposal, the department determined that 77 of the original 87 objectives outlined in the benchmark/demonstration manual were applicable to the proposal and mandatory for demonstration purposes. According to the manual, if the vendor selected for demonstration fails to demonstrate the claims made by the proposal, the proposal may be rejected. The vendor demonstrated only 64 of the mandatory 77 objectives. According to the RFP, a demonstration serves several purposes: it verifies the claims made in the bid; it corroborates the evaluation of the bid; and it confirms that the hardware and software are actually in operation. Because the department did not require the vendor to demonstrate all the required objectives, it cannot ensure that the vendor's product will meet the State's needs.



State and Consumer Services Agency

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Building Standards Commission
Consumer Affairs
Fair Employment & Housing
Fire Marshal
Franchise Tax Board
General Services
Museum of Science & Industry
Personnel Board
Public Employees' Retirement System
Teachers' Retirement System
Veterans Affairs

February 2, 1990

Kurt R. Sjoberg
Acting Auditor General
660 "J" Street, Suite 300
Sacramento, CA 95814

SUBJECT: P-949.2 -- THE DEPARTMENT OF MOTOR VEHICLES DID NOT COMPLY WITH ALL THE STATE PROCUREMENT REQUIREMENTS

Dear Mr. Sjoberg:

Thank you for the opportunity to respond to your letter report number P-949.2 which addresses recommendations to the Department of Motor Vehicles (DMV) and to the Department of General Services (DGS). The following response was prepared by the DGS. It includes a response to each finding under the purview of DGS plus the two recommendations addressed to it in the letter.

FINDING: ". . . the department [DMV] did not determine whether the deviations from the requests for proposal (RFP) of five proposals from three vendors were material or immaterial. According to the RFP, if the deviations are determined to be material, the vendors are disqualified. If the department disqualifies these vendors, then the State does not have two or more qualified bidders, as required by law."

DGS Response: The DGS does not equate "qualified" bid to mean "responsive" bid. In addition, the RFP was conducted as an EDP procurement under Public Contract Code (PCC) Section 12100 et seq.; however, the Legislative Counsel opinion cited erroneously refers to PCC Sections 10290 & 10344, which are not applicable to EDP procurements. Given the erroneous citations and analysis, the DGS cannot agree with this opinion and the conclusion that a qualified bid is a responsive bid.①*

A qualified bid/proposal is one that meets the RFP requirements for submission and format of a bid/proposal. A responsive bid/proposal is a bid/proposal which has no material deviations as defined in the RFP. A deviation from a requirement is material if the deficient response is not in substantial accord with the RFP requirement, provides an advantage to one bidder over other bidders, or has a potentially significant effect on the delivery, quantity or quality of items bid, amount paid to the vendor, or on the cost to the State.

*The Office of the Auditor General's comments on these points begin on page 41.

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Acting Auditor General
February 2, 1990
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The State received seventeen (17) "qualified" bids (proposals) from six (6) "independent, responsible bidders" which the DGS Office of Procurements (OP) found to meet the RFP requirements for submission and format of a proposal. Upon determining that the proposals were qualified, the evaluation team reviewed the proposals for "responsiveness" to the administrative and technical requirements.

The evaluation team found deviations in the proposals submitted. However, in the case of the National Business Systems Imaging, Inc. (NBSI) CIV proposal which was selected, the DGS determined the proposal to be without material deviations. Following the criteria specified in the RFP, NBSI was requested to demonstrate the CIV proposal. After the demonstration, the evaluation team was satisfied that the CIV proposal met all RFP requirements.②

The sample cards supplied by all bidders in their final proposals were submitted for demonstration purposes, not for rigorous testing by an independent contractor. Subsequent tests were conducted by Battelle Labs pursuant to a request by the Legislature. These tests were not required or specified in the RFP. While some of the sample cards failed some of the tests conducted by Battelle, the sample size drawn and tested was not sufficient to draw any statistically valid conclusions. Therefore, no determination could be made from the Battelle lab tests to show conclusively that those proposals contained material deviations.

The issues raised under this finding are part of an ongoing protest hearing. The final decision on these issues will be made by the Board of Control.

FINDING: "... the department [DMV] allowed the vendor who was awarded the contract to deviate from a requirement specified in the RFP but did not inform other interested vendors of this option. As a result, the department may have provided the successful vendor an unfair advantage, and the State may not have received the best product at the lowest cost."

DGS Response: The DGS does not concur that the successful vendor was provided an unfair advantage. Specifically, the DGS does not concur that the NBSI CIV proposal has a deviation from the requirement identified in the report. The requirement was for the storage and retrieval of 268 characters of information. NBSI demonstrated that 268 characters of information as specified in the RFP can be stored and retrieved. The capability to store and retrieve that information was the concern; not how the information was stored on the magnetic stripe. NBSI successfully demonstrated this capability.③

In addition, even if the NBSI CIV response to this requirement could be construed as a deviation, the DGS does not concur that it would be a material one. The intent of the requirement is to store and retrieve the information found on the face of the card. The RFP, by its nature, asked for suggested methods or solutions of meeting this requirement.

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Since the RFP does not contain cost information on specific features of the proposal, there is no evidence that the technique used by NBSI provided a cost advantage. Furthermore, the DGS cannot penalize an astute vendor for recognizing a cost effective method of storing and retrieving the required information.④

The issues raised under this finding are part of an ongoing protest hearing. The final decision on these issues will be made by the Board of Control.

FINDING: ". . . the department [DMV] did not require its testing contractor to fulfill all the terms specified in its contract . . ."

DGS Response: DMV will respond to this finding.

FINDING: ". . . [DMV] did not ensure that the vendor selected to demonstrate its proposal actually demonstrated all requirements."

DGS Response: The report employs a restricted definition of a "demonstration." The demonstration is part of the evaluation phase of the RFP. It is DGS's practice to ask the vendor to show or assure the evaluation team during the demonstration how it could meet selected requirements of the RFP. The State does not limit itself in the demonstration step from considering or evaluating any particular requirement of the RFP including those that can be certified; to do so would be unnecessarily restrictive. In this instance, NBSI was asked to demonstrate or assure the State how 77 requirements were met. NBSI successfully demonstrated 64 of the expected requirements and provided sufficient assurances, including certifications in some cases, for the other 13 requirements to the satisfaction of the State. Hence, the NBSI CIV proposal was considered responsive to all RFP requirements.⑤

This finding is an issue of an ongoing protest hearing. The final decision on this issue will be made by the Board of Control.

FINDING: ". . . DGS did not notify a vendor in writing of all the test results concerning its proposals, possibly placing the vendor at a competitive disadvantage."

DGS Response: The assertion that a vendor did not know of the test results and was not afforded an opportunity to offer a proposal containing the hologram security feature is without merit. The subcontractor supplying the hologram for that vendor did provide to that vendor a new, lighter, hologram security feature applied to card stock supplied to the subcontractor by the vendor. In addition, the vendor was notified by DMV over the telephone on or before May 31, 1989, of all test results. Upon this notification, the vendor could have requested a time extension in order to submit a proposal that included that hologram security feature. If the vendor had requested an extension, under the circumstances the State would have entertained such a request. The vendor did not request such an extension and the State presumed that there was sufficient time to submit a

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proposal. The State can only conclude that the vendor made a conscious business decision not to submit a final proposal containing the hologram security feature and, therefore, the vendor was not placed at a competitive disadvantage. ⑥

FINDING: ". . . the department did not obtain approval from the Department of Finance before spending funds on the project."

DGS Response: DMV will respond to this finding.

RECOMMENDATIONS: DMV will address the first five recommendations. A DGS response is provided for the final two recommendations in the report.

DGS RECOMMENDATION: "Notify all vendors of test results on their draft proposals promptly so that the vendor can make changes to the proposal before the due date for final proposals."

DGS Response: As in the past, the DGS will continue to follow all State procurement procedures. These include promptly notifying vendors of test results, if any, so that vendors can make changes to their proposal before the due date of final proposals.

DGS RECOMMENDATION: "Provide administrative oversight and guidance to the department for executing the recommendations listed above."

DGS Response: The DGS will provide administrative oversight and guidance to DMV when determined to be necessary. We do note, however, that several of the recommendations have been performed already or are difficult to perform. The following comments are provided by the DGS relative to the DMV recommendations.

For the recommendation regarding deviations from the RFP, we have already determined as practicable that the five proposals from three vendors referenced in the report do not conclusively contain any material deviations. ⑦ We have also determined that the selected vendor's card warpage test result does not represent a material deviation since the number of sample cards submitted for testing was not sufficient to prove any statistically significant finding. ⑧

The recommendation that the effect of changing the magnetic stripe requirement is difficult, if not impossible, to determine, but more important is the fact that this is immaterial. DGS has no way of determining objectively after the fact whether the cost would be cheaper. The technology and costs could be proprietary, in which case there would be no way to obtain this information. Regardless, the DGS believes that the requirement for storing and retrieving 268 character of information as specified in the RFP has been met by the NBSI CIV proposal and the recommendation is a moot point.

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The recommendation suggesting vendor demonstrations for all requirements reflects a misunderstanding of the demonstration process. There are times where it would be physically impossible for firms to demonstrate their products, especially those that have not yet been developed. Those products could, however, be adequately described or certified to the State's satisfaction. ⑨

Since the other recommendations are consistent with past and current State policy and simply represent prudent business practices, the DGS will continue overseeing these areas.

If you need further information or assistance on this issue, you may wish to have your staff contact W. J. Anthony, Director, Department of General Services, at 445-3441.

Sincerely,



for SHIRLEY R. CHILTON
Secretary to the Agency

SRC:pjs

**THE OFFICE OF THE AUDITOR GENERAL'S
COMMENTS ON THE RESPONSE FROM
THE STATE AND CONSUMER SERVICES AGENCY**

- ① As we mention under comment 2 to the Department of Motor Vehicles' (department) response, the Legislative Counsel has defined qualified bid as "a proposal submitted to the department that meets all the requirements specified in the request for proposal." Furthermore, if the request for proposal (RFP) sets forth standards for the bid to meet, it must also meet those standards to be a "qualified bid."
- ② As we mention on page 8 of our report, the department's independent testing contractor found that for four of the five cards submitted by the selected vendor, the magnetic stripes failed to adhere to the card. The agency indicates that, after the vendor's demonstration, the evaluation team was satisfied that the proposal met all RFP requirements. However, the department and the Department of General Services (DGS) ignored the results of the independent laboratory tests in determining the license cards' compliance with mandatory requirements.
- ③ The agency indicates that the selected vendor "demonstrated that 268 characters of information as specified in the RFP can be stored and retrieved" (emphasis added). As we mention in comment 4 to the department's response, the selected vendor proposed using single density technology, which our consultant states will store a maximum of 214 characters. The selected vendor's proposal requires that data be abbreviated or compressed on the magnetic stripe, and this requires a reader with software to decipher the data on the magnetic stripe. While 268 characters may be retrieved from the card using a reader equipped with specialized software, the vendor does not meet the RFP specification for storage of 268 characters.
- ④ The issue our report addresses is not whether an "astute" vendor is being penalized for proposing a cost-effective method of storing and retrieving the required information, but whether the procurement is fair and impartial. By not informing other vendors of the requirement that the magnetic stripe need not store 268 characters of data, the State is not assured that the procurement is fair and impartial and that the selected proposal is the most competitive.
- ⑤ As we mention under comment 13 to the department's response, after the department selected the vendor to demonstrate its proposal, the department determined that 77 of the original 87 objectives outlined in the benchmark/demonstration manual were applicable to

the proposal and mandatory for demonstration purposes. According to the manual, if the vendor selected for demonstration fails to demonstrate the claims made by the proposal, the proposal may be rejected. The vendor demonstrated only 64 of the mandatory 77 objectives. According to the RFP, a demonstration serves several purposes: it verifies the claims made in the bid; it corroborates the evaluation of the bid; and it confirms that the hardware and software are actually in operation. Because the department did not require the vendor to demonstrate all the required objectives, it cannot ensure that the vendor's product will meet the State's needs.

- ⑥ As we mention under comment 9 to the department's response, our report does not say the vendor did not know about the test results. Our report says that the department and the DGS did not ensure that the missing test results were promptly sent to the vendor. Further, the department and the DGS should not rely on outside sources to fulfill their responsibilities.
- ⑦ Initially, the department's evaluation team concluded that all of the vendors other than the one selected had material deviations from the RFP. However, after a meeting between the department and the DGS, the DGS decided that it was not necessary to determine whether the deviations were material or immaterial. We are not aware that the department or the DGS have reassessed the materiality of these deviations.
- ⑧ The department entered into a \$78,000 contract for an independent testing contractor to evaluate the security and durability of the license cards submitted by the vendors. The department now states that, because the number of cards tested by the independent testing contractor was insufficient to provide statistically valid results, the results of the testing do not represent a material deviation. However, four of the five cards submitted by the selected vendor failed one of the durability tests, yet no additional tests were required by the department.
- ⑨ We did not recommend that all claims made by the selected vendor in its proposal be demonstrated. We recommended that the selected vendor be responsible for demonstrating those requirements determined by the department to be mandatory. For further clarification, we added the term "mandatory" to our recommendation.

cc: **Members of the Legislature**
Office of the Lieutenant Governor
Attorney General
State Controller
Legislative Analyst
Assembly Office of Research
Senate Office of Research
Assembly Majority/Minority Consultants
Senate Majority/Minority Consultants
Capitol Press Corps