

November 22, 2019

Office of the Assistant Attorney General
Antitrust Division
Department of Justice
Main Justice Building, Room 3109
950 Pennsylvania Avenue NW
Washington, DC 20530
Attn: Makan Delrahim, Assistant Attorney General

Dear Mr. Delrahim:

Pursuant to the Department of Justice ("Department") Antitrust Division's Business Review Procedure, 28 C.F.R. §50.6, our client, the Association of Independent Commercial Producers, Inc. ("AICP" or "Association"), requests a business letter review concerning its proposal to develop a competitive, online platform for advertisers to solicit, submit, and review bids from independent production and post-production companies. This letter and the supporting documents contain commercially sensitive information, the disclosure of which would adversely affect AICP. AICP requests confidential treatment to the fullest extent provided for by 28 C.F.R. § 50.6(10).

I. Background

AICP represents, exclusively, the interests of independent companies that specialize in the production and post-production (*i.e.*, editing and special effects) of commercials in various media (*e.g.*, film, video, digital media) for advertisers and advertising agencies. The Association, with national offices in New York and Los Angeles as well as regional chapters across the country, serves as the primary trade association for the U.S.-based commercial production industry and representative on issues that affect the industry, which has been estimated to account for \$5 billion-plus in total production and production related expenses annually (*i.e.*, costs for labor, talent, post-production editing/special effects and music). Such expenses are generated by television commercials, online films, and website content produced domestically and overseas for the U.S. market. AICP assists its members by: disseminating information; representing production and post-production companies within the advertising community on business related issues, in labor negotiations and in dealing with employment issues; representing production and post-production

companies before governmental officials; providing professional development services; and promoting American production and post-production works via events and awards shows. AICP is dedicated to promoting and advocating for independent production and post-production companies that create branded communications for advertising agencies, advertisers, and media companies.

The AICP volunteer Board of Directors and its elected Officers manage the Association. AICP General members are commercial production and post-production companies. Associate members are suppliers of equipment, and other physical and service components of the production and post-production processes that the industry depends on in order to create state of the art commercial advertising messages for Advertisers.

The AICP was incorporated in 1972 under the New York Not-For-Profit Corporation Law. It is federally and state income tax exempt as “business league” under Section 501 (c) (6) of the Internal Revenue Code.

II. The Current Commercial Production Bidding Process

There are two categories of AICP General members: production and post-production companies. Production company members are primarily responsible for filming the commercial. Post-production company members provide services such as visual effects and editing. The bidding process for commercial production begins with the advertiser, *i.e.*, the brand owners of services and products that are advertised via motion picture advertising messages on broadcast television, cable television, internet, point of purchase and other platforms for moving picture advertisements (the “Advertiser”). Advertisers invite production companies to participate in the competitive bidding process. The Advertiser may appoint an advertisement agency (the “Agency”) to supply the creative “story boards” for the commercial and otherwise work on the commercial and in that case, the Agency may facilitate the bidding process.

Currently, bidding on commercial productions is primarily conducted in two ways: Either Agencies on behalf of Advertisers or – in advertiser-direct productions where the Advertiser has decided not to engage an Agency for creative development – the Advertiser itself directly submitting project specifications to production companies. Production companies then directly submit responsive bids to the Agencies or Advertisers as the case may be. Alternatively, bidding is done through bidding platform businesses that provide bidding exchange services of various kinds for use by bidders, Advertisers and Agencies. In some cases, Advertisers and Agencies have formed affiliated entities that offer bidding platform services to the industry.

Increasingly, AICP members are being required by their Advertisers and Agencies to use third-party portals in order to bid on an Advertiser project. These portals require that members submit pricing and other competitive and highly confidential information as part of the bid process. Third-party portals are either affiliated with Agencies or Advertisers -- for example Ariba (used by Unilever), BQMS (used by Samsung), Jaggaer (used by the U.S. Air Force), My Sourcing (used by L’Oreal), and pepConnect (used by Townhouse) – or are stand-alone companies that offer their

services to Advertisers and Agencies, for example, Octerra (formerly, Studio Now), a private commercial portal used by numerous Advertisers and Agencies.

A major concern among AICP members is that these third-party portals retain confidential member data and job-specific data and make it available to other, undisclosed recipients. For example, member data is aggregated with other bidders' data and sold as business content to Advertisers who are not direct parties to the transaction for which the data was disclosed in confidence. Moreover, individual company data submitted in the bidding process can be retained by the third-party portal company even where the AICP member is not awarded the bid.

Other trends can be identified in the third-party portal process that potentially detract from an otherwise open and transparent bidding process: Agencies that have access to the portal and even the portal entity itself may, through affiliates that are active in the production business, seek to participate in the bidding process unbeknownst to their bidding competitors or even to the Advertiser. This form of participation may confer an unfair bidding advantage through the portal access. Agency access to the portal is not automatically under the direct supervision of the Advertiser -- a factor that can reduce the transparency of the bidding process from the vantage point of the Advertiser. The bidding interphase platform under development by an AICP subsidiary described below, and that is the subject of this request, will strive to enhance the level of services offered by competitive third-party portal services.

The industry trends described above equally affect production and post-production companies that are not AICP members. Hence, the bidding interphase platform that is proposed by AICP will be available to companies that are not AICP members as well as to the Advertisers and Agencies.

III. AICP's Proposed Bidding Interphase Platform

AICP's Delaware for-profit, wholly-owned subsidiary, AICP Service, Inc. ("ASI") is developing a bidding interphase platform that will address concerns in the industry regarding the confidentiality, transparency and integrity of the competitive bidding process. The ASI bidding interphase platform (the "Bidding Platform") consists of an online platform for the solicitation, submission and review by the Advertiser of estimates (*i.e.*, "bids") from independent production and post-production companies in both single bid and multiple bid situations.

A. Purpose and Goal

The purpose of the Bidding Platform is (i) to provide a secure and confidential information exchange mechanism for competitive bidders and bid receivers (including Agencies and the Advertiser's cost consultants, if the advertiser so designates) to solicit bids from production companies, (ii) for Advertisers to disseminate their specifications for their commercial productions to production companies and (iii) for Advertisers to evaluate the bids submitted leading to the award of the production of the commercial in a competitive environment that safeguards transparency for the Advertiser into all aspects of bidding. A fundamental advantage of the Bidding Platform over other bidding platform models is that all data belonging to production companies,

Agencies and Advertisers are not retained or stored in ASI systems beyond the immediate need to facilitate exchanges during the bidding process. This ensures that confidential and proprietary bidding specifications and production information cannot be used by third parties or ASI for any marketing or unauthorized purposes.

The primary product will be the Bidding Platform described herein.

B. Projected Subscribers and Users

Projected subscribers to (*i.e.*, customers of) ASI's Bidding Platform are Advertisers. Projected users are Agencies, cost consultants (entities that advise Advertisers on the projected costs of commercial productions) and production company bidders.

The identities of Advertisers and Agencies that conduct direct or electronic bidding through platforms are numerous. Businesses that offer bidding platform services are on the rise, but it is not possible to offer any market share information -- other than the observation that the motion picture production world is increasingly driven by software solutions and by data and information exchange services. Given the ease of entry to the bidding platform business, there is an increasing number of such commercial, professional bidding platforms throughout the U.S. production markets. Similarly, it is difficult to project and identify those Advertisers that will elect to develop and solicit bids through the Bidding Platform. Costs are projected to be reasonable and competitive assuming an Advertiser processes one commercial production per week through the Bidding Portal. The current projected fee structure is [REDACTED]. This would result in a total fee payment [REDACTED] of a single production project.

IV. Guiding Principles behind the Bidding Platform

The overall structure of the Bidding Platform rests on four fundamental principles:

1. **Data Privacy:** The Bidding Platform will not retain any bidder data. All data lives on the bidder's private, dedicated database and is only presented to the Advertiser for viewing, not for retention. In other words, data is never transferred to any ASI or other third-party database. The Bidding Platform merely provides credentials, which allow communication between the Advertiser and the bidders.
2. **Transparency:** The Bidding Platform allows all bidders to see who has been invited to bid on the same project. All bidders for one project will be provided with the same bidding specifications provided by the Advertiser, *i.e.*, the same budget targets, timelines and allocation of responsibilities. **If the Advertiser or their designated agent changes any or all of a bid specification, the Bidding Platform will notify the advertiser and all of the bidders on the project simultaneously.**
3. **Equal Access:** Bids will not be available for review by the Advertiser or its designated Agency or consultants until all bids have been submitted. Additionally, the

Advertiser may choose to prevent the Agency from viewing a bid at all if the Agency presents a conflict by having an affiliated entity in the bidding pool. Bidders may not be added to the bidding process without all bidders being notified by the Bidding Platform that an additional bidder has joined the bidding pool.

4. Security: The Bidding Platform is secured using Bcrypt salt/hash encryption.

V. The Projected Bidding Process

A. The Request for Bids (RFB) Process

The Advertiser initiates the bidding process by creating a new commercial job that is assigned a bid number through a private dashboard in the Bidding Platform that accesses information specific to the Advertiser. An Advertiser-defined combination of the Advertiser and/or their Agency representatives develop one comprehensive bid specification on which all bidders will base the creation of their estimates. Either the Advertiser or the Agency will identify the bidders to be invited to participate in the bidding process for the job. Both AICP members and non-members are eligible for identification and participation in the Bidding Platform.

During the development of the bid specifications, the Advertiser has the option to disclose the budget range targets to the bidders, including specific budget parameters within the different production areas. The Advertiser will use the specification to outline the various phases of production which comprise the job being described. "Phases" include:

- Production
- Editorial
- Social Media
- Audio Post, Music and Sound Effects
- Visual Effects and Animation
- Video Finishing
- Interactive Media

Details for bidding each Phase are defined within the Phases themselves. The Advertiser will then choose its bidders and assign these bidders to the various Phases for which the bidders are invited to bid. Bidders can be assigned as many Phases as the Advertiser or its Agency choose depending on their capabilities and areas of strength. The Advertiser, exclusively, will decide whether or not the bidder names will be visible to all of the bidders. If the Advertiser chooses to mask that information, the bidders will only be shown the number of other bidders in the pool for each of the Phases being bid. Additionally, all bidders in the system will be identified as either independent companies or companies with ownership or affiliations with the Advertiser or Agency. The Agency will allow bidders to independently decide if they wish to participate in the bidding process with affiliated production units. This information will not be able to be masked from the bidders.

All additional general parameters and information necessary to provide an accurate estimate will be outlined in the Bidding Platform. This specification is made completely transparent to the Advertiser, regardless of who fills it out. It will be uniform and consistent when it is displayed to the bidders, eliminating the ability for the Advertiser or Agency in the process to skew a bidding outcome by providing different bid specifications to different bidders.

Within the RFB creation tool, the Advertiser has the option to fully describe all deliverables: the identity of the billed party, and any bid-, or Advertiser-specific parameters regarding acceptable billing practices. This information is visible to the Advertiser regardless of who fills out the specification and, once finalized, will be visible to all of its designated production partners (*i.e.*, the Agency or other consultants). The Advertiser has the option at any time in the process of building the RFB to grant access to some or all of the information to the Agency or to deny the Agency access. Any information made available to any bidder is visible to the Advertiser and all other bidders simultaneously. An Advertiser's data cannot be aggregated with other Advertisers' data.

Regardless of who fills out the bid specification (the Advertiser or its Agency), all selected bidders, and all bids and creative treatments prepared by the bidder are necessarily visible to the Advertiser.

B. Submission of Bids

The production companies identified by the Advertiser or Agency for receipt of the RFB will receive an email notification that an RFB is ready for review. All bidders will receive the notification simultaneously. Every bidder will be provided access to the job specifications created by the Advertiser, including budget targets (if revealed by the Advertiser), other bidders (either the number of bidders or the identity of bidders as the Advertiser determines in its sole discretion), and important dates and deliverables lists. Once a bidder submits a bid, it will only be able to view the specifications on which it based its bid estimates. Each bidder will complete the bid process as they traditionally have using any of the major recognized bid software tools available in the industry. Each software package will provide an export format to the bidder so that the bidder can output a text file version of their estimate, which the Bidding Platform system can read. Once all bidders have submitted their bids (and unless the Advertiser directs otherwise), the bids will be simultaneously available for review by the Advertiser (and the Agency or any involved consultant if the Advertiser so wishes). The Bidding Platform will convert the bid data into a uniform presentation so that the Advertiser may compare bid estimates.

The Bidding Platform has built in protections to ensure integrity of the bidding process. For example, bidders are automatically and simultaneously made aware of any changes to the bid specifications or the bidding pool, which eliminates the ability for anyone in the bid process to skew a bidding outcome by providing different bid specifications to different bidders. All bids remain private to the Advertiser, who may choose to provide access to the bidding data (in whole or in part) to its Agency or other consultants. Bidders are never able to see another bidder's submission and data. Bidder data and creative approach treatments can be protected from sharing

with the Agency if the Agency's in-house or affiliated entities participate in the bidding pool. Bidder data cannot be aggregated with other bidders' data except for the express purpose of review by the Advertiser (or Agency, at the Advertiser's discretion) prior to job award. There is no advantage to using any specific software system for bidding as all bids are converted to the same format.

C. Reviewing Submitted Bids

Once all bid estimates have been submitted by bidders, the Bidding Platform will allow the Advertiser or Agency to review and compare the bid estimates in a consistent, uniform, digital format that includes interactive tools for bid assessment. Because of standardization --subject to any customizations required by the Advertiser -- it will be possible to evaluate all bids in the same manner. To protect against any possible manipulation, it will not be possible to alter or revise bids, add to the pool of bidders, or change specifications (for example, by the Agency) without the full knowledge and consent of the Advertiser.

No data will be aggregated, retained, or collected. Data may not be accessed beyond the bid reviewing process by the Advertiser and/or its Agency and all data submitted by bidders will remain part of the bidders' private databases, not ASI's.

All bidders will be informed once the job has been awarded, and the winning bid's data will remain available for review by the Advertiser along with the rest of the Advertisers awarded bids. However, the data itself will remain hosted on the bidder's database and not transferred to any other entity server in order to protect against further aggregation or use by persons other than the Advertiser.

D. Pricing and Access

The Bidding Platform will be paid for entirely by the Advertiser. For a limited time as determined by ASI, AICP members and non-member production companies will have free access to the Bidding Platform. Use of the Bidding Platform is not an AICP membership requirement and is completely voluntary as the user (Advertiser, production company, or Agency) determines on a job by job basis.

VI. ASI Structure and Governance

The AICP wholly-owned subsidiary, ASI, was incorporated on August 23, 2019. Certain AICP employees will provide services to ASI and/or assist with the development of the Bidding Platform. However, such employees will be subject to a strict confidentiality agreement and AICP will not have access to any data submitted through the Bidding Platform. The first Board of Directors consists of Matthew Miller and Daniel Rosenbloom. Mr. Rosenbloom is serving as the first president. The sole shareholder of all the outstanding shares of ASI is the AICP.

A Board of Directors of approximately five to seven individuals will manage ASI. The Board will not be comprised of any AICP production company members or firms (*i.e.*, potential bidders). Instead, individual stakeholders in the industry (who are not platform users) will be invited to sit on the Board in addition to two AICP officers who have industry experience but are not representatives of potential bidders.

VII. Pro-Competitive Safeguards in the Bidding Process

The Bidding Platform is a non-exclusive platform upon which Advertisers may view and compare bid submissions made visible to them by the Bidding Platform. It is an improvement over current third-party bidding portals that retain the bidder's and Advertiser's competitive data during and after the bidding process. The Bidding Platform does not retain or aggregate any bidder data except for the limited purpose of review by the Advertiser. As a result, any nonpublic information, including competitive information, submitted through the Bidding Platform relating to a particular job request will not be shared with or made available to other bidders who utilize the Bidding Platform, or other AICP members or third parties at any time. The data remains in the bidder's segregated database and the Bidding Platform is simply a mechanism that enables review of data for purposes of the bidding process.

Each production company that is invited to respond to an Advertiser RFB will make its own independent decision on whether to participate in the bidding pool and participate in the Bidding Platform. Some production companies may advise the Advertiser that it prefers to use a bidding process as described in Part II above. Following a period where the Bidding Platform will be free for all production company users, users will be able to utilize the Bidding Platform for a per usage fee in an amount reasonably related to the services provided and competitive with other businesses that offer bidding platform services. Advertisers and Agencies will continue to have the alternative option of utilizing existing third-party bidding platforms for their RFBs. Additionally, ASI employees who work with the Bidding Platform will be held to a strict standard of confidentiality. AICP believes that the use of the Bidding Platform, for reasons of enhanced confidentiality of proprietary information coupled with enhanced transparency to Advertisers, will promote competition and competitive bidding.

VIII. Additional Relevant Features of the Bidding Platform

A. Absence of any Restrictions

There are no restrictions on the ability of participants in the Bidding Platform (*e.g.*, Advertisers, Agencies, cost consultants, production and/or post-production companies) to compete with the Bidding Platform, individually or through other entities. The AICP (including its officers, directors, members and employees) as sole owner of ASI is not privy to any bidding information submitted by any bidder or the specifications of any commercial project submitted by any advertiser or its agency. The ASI board of directors, while comprising in part AICP employees, is

not privy to any such information and no elected officer of AICP or officer, director, or employee of a potential bidding production company may serve as a director or officer of ASI.

B. General Information about the Commercial Production Market

The commercial production market is highly diverse reflecting the fact that for any product where there is a budget, there can be a commercial and a media outlet. Technological advances in recording live action have made the commercial format accessible to anyone with a camcorder or even an iPhone. The multiplicity of production media has also spawned countless “production companies” that can generate commercials using animation, computer generated imagery, special effects and combinations of the foregoing that now populate the commercial production landscape.

The now legendary large budget productions (*i.e.*, Michael Jackson’s Pepsi commercials of the 1970’s) are extremely rare. Even for larger production companies, the lower budget commercial is the trend and commercials in general are one product in a repertoire that includes documentaries, industrial inhouse films, entertainment motion pictures and music videos. Nevertheless, per an AICP survey in 2016, “live action” commercials (meaning recorded, dramatic, speaking roles by actors) accounted for approximately 75% of all commercial projects with the remaining 25% comprising computer-generated media, interactive media and a combination of various media.

The AICP, for membership survey and dues purposes, classifies the size of production company members based on gross annual billings of commercial projects. Thus, a “small” production company is defined as having gross billings of less than \$5 million; a “medium” production company having between \$5 million and \$19.9 million; and a “large” production company having \$20 million and more. In 2016, the latest year for which results are available, based on approximately 100 responding companies, the AICP found that 53 of the respondents were small, 20 were medium and 21 were large. The average number of commercial productions per year were 33 with only 8% of the companies reporting more than 101 commercials annually. Total AICP gross billings for 2016 were reported to be \$4.7 billion or an average of \$15.8 million.

Demographically, 2/3 of AICP member production companies have offices in Los Angeles, California and on the average employ 15.68 employees.

C. Ease of entry to the commercial production business

Award winning commercials that have proved highly successful for their featured brands have been produced at very modest cost by basically entry level producers.

See the “Crash The Superbowl) and Doritos commercial via the following links:

<https://adage.com/article/special-report-super-bowl/crash-super-bowl-changed-advertising/301966> and <https://www.youtube.com/watch?v=4NuuL1FIh1I&feature=youtu.be>.

The multiplicity of media in which a commercial can be produced today as noted above has lowered the financial and technical skill thresholds for entry. Even Agencies have formed “in-house” production and post-production units that from time to time compete with the very same production companies from whom the Agency is gathering bids.

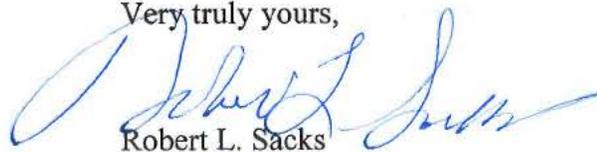
Commercials reflect business in the electronic age. Once “shot” on film, commercials are now mostly produced using digital cameras. Where once the floor of the editing room was littered with Kodak and Fuji film clippings, now editors and directors cut and paste the “film” on computer monitors in order to arrive at the final product. Where once a highly prized original negative was hand delivered to the Agency (with extra measures taken to avoid scratches) now digital images are transmitted electronically or delivered embedded in a hard drive. The Bidding Platform is designed to keep pace with the industry and promote its development.

D. Supporting documents attached to this request:

- (i) ASI and IMC Software Development Agreement.
- (ii) Bidding Platform Narrative
- (iii) License Agreement Between AICP and ASI
- (iv) Promissory Note Between AICP and ASI
- (v) ASI Articles of Incorporation
- (vi) ASI Bylaws

We would be pleased to supply you with additional information or to meet with you should you find it useful in reviewing this request.

Very truly yours,



Robert L. Sacks

Of counsel: Christopher Ondeck, Esq.