



ERIE COUNTY COMPTROLLER
HON. STEFAN I. MYCHAJLIW

September 30, 2019

Dear Commissioner Geary:

The Erie County Comptroller's Office Audit Division (Comptroller) is in receipt of your letter entitled Response to the Draft Report of the Erie County Department of Public Works (DPW) Audit of CHIPS Reimbursement Claims for the period January 1, 2018 to December 31, 2018, dated May 15, 2019.

The Comptroller provides the following response:

1. LIMITS ON WORK COMPLETED / PERFORMED BY MUNICIPAL FORCES

The Comptroller has determined that the DPW response did not provide information that directly addresses the limits on work, as defined in Section II, Part H, Item 2 of the NYSDOT CHIPS guidelines which states that when the estimate for the construction work exceeds \$250,000, the work must be performed by contract let by competitive bid.

The NYSDOT Division of Legal Affairs was in agreement with our interpretation of the NYSDOT CHIPS guidelines, therefore the Comptroller maintains its position as stated in the audit report that DPW failed to comply with the provision of Section II, Part H. Please refer to the "Subsequent Events" section of the audit report for additional information. Accordingly, the audit opinion will remain as originally stated in the audit report. We have attached the schedule of projects provided to you previously for reference.

The Comptroller recommends that DPW discuss the workforce requirement provision and obtain a legal opinion from the Office of the State Comptroller that is beyond the plain meaning of the statutory text.

2. REVENUE ACCRUAL

Thank you for acknowledging this finding and implementing the appropriate corrective action.

Thank you for providing us with a response to the draft of the audit report and for the professionalism and courtesy extended to us during the audit.

Sincerely,

Scott W. Kroll
Deputy Comptroller – Audit

UNAUDITED

SCHEDULE OF PROJECTS PERFORMED BY COUNTY FORCES THAT EXCEEDED \$250,000 (EXCLUDING OIL & STONE PROJECTS)

<u>Project Route / Name / Other</u>	<u>Project Type</u>	<u>Total Project Cost</u>
Claim 2 (4/1/17 - 3/31/18):		
Route 240 / Glenwood (Town of Concord)	Hwy. Reconstruction Hot Mix Asphalt Overlay	\$ 831,570.34
Claim 1 (4/1/18 - 11/1/18):		
2018 Dodge Road (Town of Amherst)	Hwy. Resurfacing Cold Milling with Hot Mix Asphalt Replacement	\$ 338,736.89
2018 Lakeview Road (Town of Hamburg)	Hwy. Resurfacing Cold Milling with Hot Mix Asphalt Replacement	505,515.72
2018 Zimmerman Road (Town of Hamburg)	Hwy. Resurfacing Cold Milling with Hot Mix Asphalt Replacement	290,580.62
2018 Bullis Road (Town of Elma)	Hwy. Resurfacing Cold Milling with Hot Mix Asphalt Replacement	388,299.78
2018 Girdle Road (Town of Elma)	Hwy. Resurfacing Hot Mix Asphalt Overlay	377,937.45
Claim 2 (4/1/18 - 2/1/19):		
2018 Holland-Glenwood Road (Town of Colden)	Hwy. Resurfacing Hot Mix Asphalt Overlay	\$ 418,966.80
2018 Vaughn Street (Town of Concord)	Hwy. Resurfacing Hot In-Place Recycling	672,583.52
TOTAL		\$ <u>3,824,191.12</u>

NOTE: *Project Name* , *Project Type* , and *Total Project Cost* obtained from Form CP73 filed for each claim.

UNAUDITED

Kroll, Scott

From: Rutkowski, Edward (DOT) <Edward.Rutkowski@dot.ny.gov>
Sent: Monday, September 30, 2019 4:24 PM
To: Kroll, Scott
Subject: RE: CHIPs Threshold Question

[Caution: this email is not from an Erie County employee: attachments or links may not be safe.]

Scott,

I agree with your statements.

Thanks,
Ed

Edward S. Rutkowski, P. E.
Regional CHIPS Coordinator
NYSDOT - Region 5
100 Seneca Street
Buffalo, New York 14203
716-847-3575



From: Kroll, Scott <Scott.Kroll@erie.gov>
Sent: Friday, September 27, 2019 12:51 PM
To: Rutkowski, Edward (DOT) <Edward.Rutkowski@dot.ny.gov>
Subject: CHIPs Threshold Question

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Dear Mr. Rutkowski:

Thank you for discussing the CHIPs program this morning. I told you of our efforts reaching out to the New York State Department of Transportation legal department regarding our interpretation of Highway Law Section 10-C, Sub-Section 4(e) regarding the \$250,000 threshold and their response, which was to rely on the plain meaning of the language of the law.

I told you of our Highway Department response that they had reached out to you with a similar question regarding the acceptability of using OGS Quick Quote for claiming practices.

I read to you your October 5, 2017 response, which stated "NYSDOT has determined that the OGS Quick Quote Process complies with State Finance Law competitive bidding requirements."

I then asked if your response was meant to be a comment on the \$250,000 threshold, or whether it was solely limited to whether OGS Quick Quotes comply with State Finance Law competitive bidding requirements. You stated that your response was limited to whether OGS Quick Quotes comply with State Finance Law, and was not related to the \$250,000 threshold.

Please confirm that my recollection of our conversation is accurate. If not, please clarify where it is inaccurate.

Thank you again for discussing this matter with me.

Scott Kroll | Deputy Comptroller of Audit and Control
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Scott.Kroll@erie.gov | <http://www.erie.gov/comptroller>

Kroll, Scott

From: Rossi, Joseph D (DOT) <Joseph.Rossi2@dot.ny.gov>
Sent: Wednesday, September 25, 2019 4:54 PM
To: Kroll, Scott
Subject: RE: Erie County CHIPS Question

[**Caution:** this email is **not** from an Erie County employee: attachments or links **may not be safe.**]

Good Afternoon Scott,

I'm sorry you weren't able to join us on our call several weeks prior. My conversation with your colleagues related to Highway Law Section 10-C, Sub-Section 4(e), specific to the following clause:

“whenever the estimate for the construction contract work exceeds two hundred fifty thousand dollars such work must be performed by contract let by competitive bid in accordance with the provisions of section one hundred three of the general municipal law.”

You are correct that I was unable to locate additional guidance (e.g. case law, administrative opinions, etc.) as to whether a recipient of CHIPS funding could apportion (for economic considerations) a project exceeding \$250k, or whether a recipient could utilize their own forces to conduct a portion of the greater workscope (when the entirety of those efforts exceed \$250k).

Without additional guidance, the plain meaning of the words in the statute govern, and must be strictly construed.

You are also correct that, given the Office of the State Comptroller (OSC) is the proper entity to opine on any such laws relating to the fiscal matters of the State, I suggested that your colleagues request an administrative opinion from OSC, which may be sought by referencing the following:

<https://www.osc.state.ny.us/legal/index.htm>

<https://www.osc.state.ny.us/contact.htm> (“**Legal Opinions to Local Governments** 518-474-5586”)

I hope this clarification helps.

Genuinely,

Joe Rossi

Joseph D. Rossi, Esq.
Attorney, Division of Legal Affairs

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**Department of
Transportation**

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From: Kroll, Scott <Scott.Kroll@erie.gov>
Sent: Friday, September 20, 2019 10:47 AM
To: Rossi, Joseph D (DOT) <Joseph.Rossi2@dot.ny.gov>
Subject: Erie County CHIPS Question

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Thank you for all of your assistance with helping us to better understand Section II, Part H, Item 2 of the NYSDOT CHIPS guidelines. I was unfortunately out of the office at a meeting when you spoke to the rest of the team regarding our question.

Dave Capodagli filled me in on the conversation. Because I was not present for this final conversation, and in an abundance of caution, I would like to seek your confirmation that my understanding of the conversation is correct.

You stated that you found no opinions that would disagree with our interpretation of the words of the section. In particular, it was our interpretation that when an estimate for construction work exceeds \$250,000, the work must be performed by contract let by competitive bid. The county itself should not be performing work on the contract, such as acting as a general contractor. You stated that the plain meaning of the words support that interpretation. You also suggested that we seek a legal opinion from the state comptroller.

Thank you again for all of your attention and help with our question. Please let me know if my understanding of the conversation is correct, or, if necessary, where it may be incorrect.

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