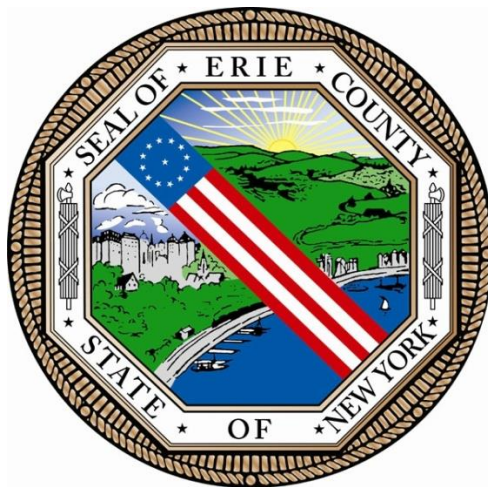


**January 2020**

**ERIE COUNTY DEPARTMENT OF PUBLIC WORKS  
AUDIT OF CAPITAL PROJECTS  
JANUARY 1, 2014 THROUGH DECEMBER 31, 2016**



**STEFAN I. MYCHAJLIW  
ERIE COUNTY COMPTROLLER**

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**HON. STEFAN I. MYCHAJLIW**

**ERIE COUNTY COMPTROLLER'S OFFICE  
DIVISION OF AUDIT & CONTROL  
95 FRANKLIN STREET  
BUFFALO, NEW YORK 14202**



February 23, 2018

Erie County Legislature  
92 Franklin Street, 4<sup>th</sup> Floor  
Buffalo, New York 14202

Dear Honorable Members:

The Erie County Comptroller's Office has completed an audit of the Erie County Department of Public Works ("DPW") Capital Projects for the period January 1, 2014 through December 31, 2016.

We conducted our audit in accordance with Generally Accepted Government Auditing Standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions. Our objectives were to:

- Determine whether internal control procedures are in place and operating effectively.
- Determine if capital projects were bid according to applicable laws.

We believe the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

Management of DPW is responsible for establishing and maintaining a system of internal control. The objective of such a system is to provide management with a reasonable, but not absolute, assurance that transactions are executed in accordance with management's authorization and recorded properly. Due to the inherent limitations in the system of internal controls, errors or irregularities may nevertheless occur and not be detected.

In our opinion, internal controls over capital projects were inadequate. Not all capital project work sampled was bid in accordance with applicable laws.

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## **BACKGROUND**

The Erie County Department of Public Works (“DPW”) is divided into four divisions: Buildings and Grounds, Highways, Weights and Measures, and Fleet.

The Highway Division (“Highways”) is responsible for the planning, construction, repair or reconstruction, and maintenance of the County road system. Highways also inspects and evaluates the condition of County roads and bridges. The division is also responsible for the administration of all operating and maintenance highway and bridge projects, as well as capital highway and bridge projects.

The Buildings and Grounds Division (“B&G”) provides technical assistance and guidance in the planning, design, and execution of physical improvements made by the County to ensure that capital projects meet established standards. The division inspects and supervises construction projects and administers construction or repair contracts. County capital projects are coordinated by the division.

A capital project is defined as public works involving an expenditure of more than \$35,000. Capital projects must comply with state and local laws including, New York General Municipal Law Section 103 (“NYS GML §103”); New York General Municipal Law Section 101 (“NYS GML §101”); New York State Highway Law Section 38; and Local Law 1 (2009) "Erie County's Lowest Responsible Bidder Law" (“EC LL 1 – 2009”).

## **AUDIT FINDINGS**

### **I. Highways**

We selected all six overlay projects for the years 2014 to 2016, as they were funded with cash. Additionally, using a haphazard method, we selected three road reconstruction projects, which are typically a full-depth pavement replacement. The projects were tested for compliance with bidding laws, propriety of project change orders, funding authorization, and project cost. The results of testing on selected projects were not intended to be representative of the population of Highways projects.

#### **1. Compliance with Bidding Laws**

We tested nine road projects selected for compliance with NYS GML §103, NYS Highway Law §38, and EC LL 1 – 2009.

No instances of non-compliance were found.

## 2. Change Orders

We tested all 20 change orders for the nine road projects selected. Fourteen change orders were related to construction services, five were related to architectural and engineering (“A&E”) services provided, and one was related to tree removal services. Our testing disclosed the following:

- 3 change orders increased the scope of the original contract to include unrelated work.
- Construction change orders increased the cost of the Lake Avenue Reconstruction (CR 200-15) project by 20%.
- Change orders increased the cost of 2014 Overlay A project by \$735,897 (32%). One of Highways’ change orders added unrelated work for a different department to 2014 Overlay A project at a cost of \$399,946.

**WE RECOMMEND** that management of DPW ensures that all work complies with all applicable laws.

## 3. Funding Authorization

We tested the funding authorization(s) from the Legislature for all nine road projects selected. We found the following:

- The Legislature approved funding after work outside the project’s final specifications was completed for 2015 Overlay B project in the amount of \$273,872.
- The Lake Avenue Reconstruction (CR 200-15) project exceeded the original funding amount. The Legislature approved additional funding after the project was completed to pay the construction contractor \$539,470 and the A&E Vendor \$8,000.

**WE RECOMMEND** that management of DPW ensures that funding is authorized by the Legislature and available to pay for the work prior to directing the vendor to perform the work.

## 4. Project Costs

We tested project costs for all nine road projects selected. We found the following:

- Permanent road striping cost was not included in the projects.
  - Permanent striping was not included as part of the specifications on any of the road projects selected.
  - The supporting documentation for the permanent road striping payments only indicated the items and quantities of striping, but not the place of installation.
  - We could not determine the amount of striping missing from the project from the supporting documentation.
- Concrete curb and gutter repair for Seneca Street was paid to the prime contractor at a cost of \$119,988 as “Harlem Gutter Repair” instead of being included in the cost for the 2015 Overlay B project.

**WE RECOMMEND** that DPW management establishes procedures to ensure that all costs associated with the completion of a capital project are included in the contract and in the project specifications.

## II. Buildings and Grounds

We selected three Buildings and Grounds projects for the years 2014 to 2016 using a haphazard method. The selected projects were each tested for compliance with applicable bidding laws, the propriety of payment for all change orders, the existence of funding authorization, and project costs. All three projects utilized an A&E vendor for project management, in addition to design work. The results of testing on the sampled projects selected were not intended to be representative of the population of Buildings and Grounds projects.

### 1. Bidding Process

We tested all 39 bids submitted for three projects for compliance with applicable law. We found the following:

- All three projects were bid properly in accordance with NYS GML §101.
- 2 bids were disqualified by the projects' A&E vendor for lacking a required criterion.
- The projects' A&E vendor approved 17 vendor bids that lacked a required criterion, such as Minority Utilization Report A, Equal Pay Certification, Non-Collusive Bidding Certificate, Experience Questionnaire, or failure to meet the Contractor's Own Workforce minimum requirement.
- A vendor failing to meet the requirement of the contractor using their own workforce for at least 25% or more of the work was awarded a construction contract in the amount of \$3,145,553.

**WE RECOMMEND** that management of DPW establishes procedures to review the propriety of the A&E vendor's bid evaluation prior to awarding contracts. **WE FURTHER RECOMMEND** DPW establishes a review process to ensure accuracy of the contract and that the correct specifications are referenced prior to bid letting.

### 2. Change Orders

Change orders generally apply to construction agreements, while amendments apply to A&E work. We tested all of the change orders for the Erie County Correctional Facility Paving Project ("ECCF Paving"), the Botanical Gardens Renovation of Houses 2 & 3 ("Botanical Gardens"), and the Medical Examiner's Instrument Lab Renovation ("ME Lab"). All 22 change orders were for construction services. We found the following:

- ECCF Paving change orders increased the total project's cost by 30%.
- Botanical Gardens change orders increased the total project's cost by 34%.
- ME Lab change orders increased the total project's cost by 10%.

### 3. Funding Authorization

We tested all of the funding authorizations for the ECCF Paving, Botanical Gardens, and ME Lab projects. We noted no exceptions with the funding of the three selected projects.

### 4. Project Costs

We tested project costs for the ECCF Paving, Botanical Gardens, and ME Lab projects. We noted no material exceptions with the cost of the three selected projects.

## III. Supporting Documentation

### 1. Highways

We tested the supporting documentation for all bidding documents, payment requests, last inspection reports, substantial completion documentation, and project acceptance documentation. Additionally, we haphazardly selected one of the nine Highways Projects sampled, 2015 Overlay B project, and tested all engineering documentation for that project. We found the following:

- No material exceptions were noted with bid support documentation.
- Confirmed construction Requests for Proposals (“RFP”) were issued for all nine sampled projects.
- No material exceptions were noted with payment request documentation.
- No documentation exists denoting the date of substantial completion for all nine sampled projects.
- DPW was able to provide the last inspection report for 8 of the 9 projects sampled. We were informed that no engineering records for 2014 Overlay B project could be located.
- 8 of the 9 projects selected had no exceptions noted for project acceptance. The other project was not completed as of the conclusion of field work.

The only exception from our testing was the engineering documentation. The documentation review was not consistent or accurate. The 2015 Overlay B project had \$1,077,703 paid to the contractor that was not recorded on the supporting engineering documentation.

**WE RECOMMEND** that management of DPW ensures that all corresponding work that was bid is performed in accordance with the contract signed between the County and the contractor.

## 2. Buildings and Grounds

We tested the supporting documentation for all bidding documents, a haphazard selection of progress payment documentation, and all nine final payment documents including a contractor punch-list. We found the following:

- No material exceptions were noted with bid support documentation.
- 2 out of 3 B&G projects lacked supporting documentation that a construction RFP was issued.
- No material exceptions were noted with progress payment request documentation.
- The payment of the retainage for one vendor for the ME Lab was processed while lacking the Letter of Substantial Completion from the contractor.

**WE RECOMMEND** that all supporting documentation for the project be retained based on state guidelines and that all supporting documentation for final payment is provided with the final payment request.

## RESULTS OF EXIT CONFERENCE

The exit conference was held on March 15, 2019 with the Special Assistant to the Commissioner of DPW, two DPW staff members, the Deputy Commissioner of Buildings and Grounds, and a representative from the Division of Budget and Management.

The draft report was reviewed and discussed. The Special Assistant to the Commissioner of DPW requested an annotated copy of the draft report which includes Interim Audit Memoranda (“IAMs”) cross referenced to the findings of the draft report.

## AUDITOR’S POST – EXIT CONFERENCE NOTES

The Commissioner of DPW was deployed to active military service from February 25, 2019 to June 3, 2019 and the position of Deputy Commissioner of Highways was vacant due to a retirement. The IAM Annotated Draft report was provided to the auditee on April 2, 2019. DPW was to determine if an additional conference was required based upon the clarifications from the IAM Annotated Draft Copy. The Special Assistant to the Commissioner requested a brief meeting on May 9, 2019. At this meeting, the audit process was discussed as the Special Assistant was unfamiliar with the process.

On October 28, 2019, a meeting was requested by the management of DPW to determine if additional information was required by the auditee or if the auditee was going to proceed and provide a written response to the draft report provided. Due to scheduling conflicts, the meeting was rescheduled from October 29, 2019 to November 7, 2019. This meeting was subsequently canceled by the auditee. A written response to the draft audit report from the Commissioner of DPW was received by the Comptroller’s Office on December 20, 2019, which we have included in Appendix A.



ERIE COUNTY COMPTROLLER'S OFFICE

cc: Hon. Mark C. Poloncarz, Erie County Executive  
William Geary, Commissioner, Department of Public Works  
Robert W. Keating, Director, Division of Budget and Management  
Erie County Fiscal Stability Authority

## APPENDIX A – DPW’S RESPONSE TO THE REPORT



### COUNTY OF ERIE

MARK C. POLONCARZ

COUNTY EXECUTIVE  
December 18, 2019

Hon. Stefan I. Mychajliw  
Erie County Comptroller  
95 Franklin Street, Floor 11  
Buffalo, New York 14202

**Re: Response to the Draft Erie County Department of Public Works Audit of Capital Projects**

Dear Comptroller Mychajliw:

The Department of Public Works (DPW) writes to respond to the Draft Report of the Erie County Department of Public Works Audit of Capital Projects January 1, 2014 through December 31, 2016 (Audit). Please note that the time period audited was during my predecessor’s tenure, and extensive changes have been made. Our responses follow the audit and, to the extent possible, use the same headings contained therein. As more fully set forth below, we believe the opinion expressed in the audit should be an unqualified one, because the internal controls were adequate.

**I. HIGHWAYS DIVISION**

**1. Compliance with Bidding Laws**

No instance of non-compliance.

**2. Change Orders**

1. Those items in specific reference to Overlay A 2014.

A. Regarding the change order of \$399,946 for Parks work, which was purportedly added without following the appropriate bidding procedures; Parks does not have engineers. In an effort to assist Parks with their paving needs, the Division of Highways incorporates their projects into our contracts. The process that is followed for present day contracts is as follows:

- a. Parks needs are identified with the Parks Commissioner prior to bidding.
- b. The scope of work is identified and quantified in the field.
- c. Drawings and quantities are prepared for bidding.
- d. The documents created above are placed within the highway bid package for public bidding.

This process ensures the work is delineated, quantified, and bid in accordance with the necessary laws.

2. Lake Ave. change orders – This project is a singular project with subsurface conditions that created extenuating circumstances. As stated in the response to the initial IAM #8, the processes for unforeseen conditions and change orders use NYSDOT provisions and will use a special contingency item within the contract. These measures have already been instituted in present day contracts.

### **3. Funding Authorization**

This section referred to IAM #5 and IAM#8, and as stated in the response to these IAMs, funding authorization practices were to change and have changed. Authorization is done on a single project basis, with design phases and construction phases being in separate resolutions and authorized prior to work beginning.

### **4. Project Costs**

This section refers to IAM #13 and the use of Highway’s Maintenance Bid Book items on a Capital projects. These items — striping, concrete curb repairs/replacement, and message boards — were purchased through the use of the bid book in the best interest of the County and the taxpayers. There was a significant cost savings and no ill intent was intended. Since the Audit, all of these items have been included in each of their perspective capital projects.

## **II. BUILDINGS AND GROUNDS**

### **1. Bidding Process**

- All bids were performed in compliance.
- It is unknown what project(s) that had two bids disqualified by the A&E vendor. Nor is it known why these bids were disqualified as this was under a previous commissioner. However, it can be stated that DPW is in the process of developing an internal policy on the bidding opening/ award process that would clarify required documentation at the time of bid.
- It is unknown which 17 A&E vendor approved bids were accepted while lacking the documentation noted in the Audit. However, DPW currently reads all bid aloud during the bid opening, tabulates all bids submitted, and records whether the required forms as part of the project documents were provided at the time of bid.
- It is understood that the project in question is refers to the one awarded to Telco Construction Inc for work associated with the “Buffalo and Erie County Botanical Gardens 2015 Houses 2 and 3 Renovation project” with a Base Bid award price of \$2,332,700. It is our understanding that your office had a conversation with the late Deputy Commissioner of Buildings & Grounds regarding this matter and no IAM was issued. The contractor stated at the time of the bid opening, that they could in fact meet the 25 percent contractors own workforce requirement.

The contract dollar value did increase to \$3,145,533 upon execution of 3 change orders; however, in review those change orders, Telco Construction Inc performed at least 25 percent of the work for the dollar amounts associated with those change orders per the documentation that they provided. Also please note, that these change orders were approved by Department of Law as well as the County Executive Office.

## 2. Change Orders

Overall, in addition to internal DPW approval by the B&G staff, as well as the associated design consultant, it is important to note that all A&E amendments and change orders were approved by the Department of Law as well as the County Executive Office through OnBase prior to payment of the work associated with any given change order.

It should further be noted that it is typical to include a construction contingency when a contractor contract is awarded to cover the costs of unforeseen conditions or issues that come up during construction that are not anticipated at the time of design. For all three of the projects in question, all change orders associated with each project were within the construction contingency amount approved by legislature for each respective certified resolution(s) authorizing the use of monies within each for each respective project.

1. Erie County Correctional Facility Paving Project. Unforeseen conditions necessitated the removal of unsuitable subgrade beneath the parking lot and backfill with suitable structural fill to ensure the longevity of the parking lot as well as repair of existing inlet structures.
2. Buffalo and Erie County Botanical Gardens 2015 Houses 2 and 3 Renovation Project.
  1. General Construction: A large portion (\$679,000) of the increase was due to the acceptance of Alternate G1, included within the project manual and provided at the bid open. While the 30 percent increase is relatively high, the majority of the increase was due to the acceptance of Alternate G1. If that alternate were included at the time of bid award, which is more common, the percent increase would be reduced to two percent. A two percent change is less than a typical construction project.
  2. Electrical Construction: A large portion (\$29,500) of the increase was due to the acceptance on Alternate E1 which again was included within the project manual and provided at the bid open. Other increases included: fixtures changed to LED to increase energy efficiency and unforeseen conditions including related to electrical removals unknown at the time of bid open. While the percent increase is high at 68 percent, the majority of the increase was due the acceptance of Alternate E1. If that alternate were included at the time of bid award, which is more common, the percent increase would be reduced to 11 percent and would be more in line with a typical construction project.
  3. Mechanical Construction: A large portion (\$53,000) of the increase is due to the acceptance on Alternate M1 which once again was included within the project manual and provided at the bid open and almost doubled the contract value of the contract. While the percent increase is high (126 percent), the majority of the increase was due to

the acceptance of Alternate M1. If that alternate were included at the time of bid award, which is more common, the percent increase would be reduced to 27 percent. This would still be a little more than what is normally seen on a construction project but is closer to what is typical.

4. AE Design Services: Due to the acceptance of the change orders as well as unexpected lead time for some materials to be delivered, the anticipated construction duration was extended and in turn, the design consultant needed to extend their Construction Administration services to cover the cost associated to the longer construction schedule.
3. ECMC Medical Examiner's Office Instrument Lab Renovation Project. Overall, the ECMC Medical Examiner's Office is a specialized Lab that requires certain things to maintain their certification with the State of New York to be able to operate as a Medical Examiner's Office. Without maintaining the requirement of the State, they could not keep their certifications and continue to operate. Balancing the unforeseen existing conditions, keeping the Medical Examiner Office fully operational during construction and coordinating all prime contracts per Wick's Law all the while ensuring everything is designed and constructed to keep State of New York certification presents significant challenges. Unfortunately, this can translate into change orders as described below.
  1. General Construction: Change orders were issued to address unforeseen life safety items including: asbestos abatement, structural modifications to ensure support of the existing concrete block wall, and associated modifications to HVAC systems required considering the first two unforeseen items. These items were unforeseen given the inability to visibly observe the existing conditions as items needed to be properly abated prior to removal and the ability to see existing conditions in the field.
  2. Electrical Construction: A three percent contract value increase is well under what is typically seen on construction projects.
  3. Plumbing Construction: Change Orders were issued as part of coordination with the Change Orders issued as part of the unforeseen conditions described above. Location of an existing sanitary sewer required a change from to original design to tie into a different location which required trenching through the existing floor slab and additional piping.
  4. HVAC Construction: Similar to the unforeseen conditions described as part of the General Construction Contract above, the actual existing conditions including locations of existing ductwork and other services were unanticipated. This required relocation from the original design to ensure proper function of the HVAC systems.
  5. Furniture Contract: A five percent contract value increase is well under what is typically seen on construction projects, and this was additional furniture requested by the Medical Examiner's Office after the project was in construction , because it became evident that new furniture was necessary.
  6. AE Design Services: Additional time to provide additional construction administration to provide AE services to address the changes and unforeseen conditions on all contracts noted above. Additional services included: site inspections, design, sketch/ drawing preparation, and submittal review.

**3. Funding Authorization**

No exceptions noted.

**4. Project Costs**

No exceptions noted.

**III. SUPPORTING DOCUMENTATION**

**1. Highways**

It appears this was resolved given our response to IAM #12 concerning the failure to produce given documents. The requested documentation was found at a later date and offered to the auditors for their review.

**2. Buildings and Grounds**

- Similar to the Highways Division, it appears this was resolved given our response to IAM #12 concerning the failure to produce given documents. The requested documentation was found at a later date and offered to the auditors for their review.
- DPW B&G has since developed an internal "Recommendation for Final Payment" checklist to ensure all forms and documentation is provided prior to the final payment for a contractor is processed and paid.

Thank you for the opportunity to respond to the Draft Audit Report. Again, we respectfully request that the opinion be an unqualified one. Please do not hesitate to contact me with any questions.



William Geary, Commissioner  
Erie County Department of Public Works