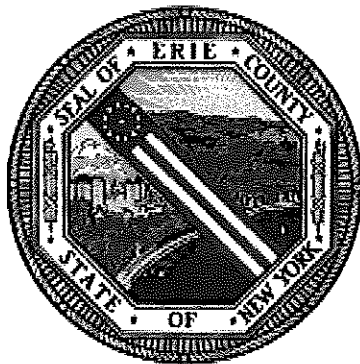

REPORT TO THE ERIE COUNTY LEGISLATURE
92 FRANKLIN STREET
BUFFALO, NEW YORK 14202

April 2010

ERIE COUNTY DEPARTMENT OF PUBLIC WORKS – HIGHWAY DIVISION
AUDIT OF ROAD AND BRIDGE RELATED CONSTRUCTION CONTRACTS
FOR THE PERIOD JANUARY 1, 2005 – DECEMBER 31, 2008



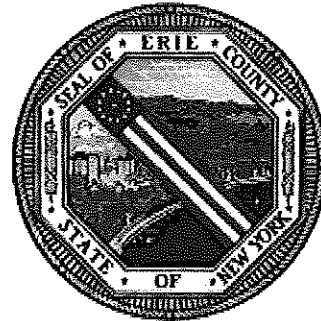
MARK C. POLONCARZ

ERIE COUNTY COMPTROLLER

Michael R. Szukala
Deputy Comptroller - Audit & Control

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

April 8, 2010



Honorable Members
Erie County Legislature
92 Franklin Street, 4th Floor
Buffalo, New York 14202

Dear Honorable Members:

The Erie County Comptroller's Office has completed an audit of the Department of Public Works ("DPW") – Highway Division's ("Highways") road and bridge related construction contracts for the period January 1, 2005 through December 31, 2008.

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

Our objectives were to determine whether the bid, award, and monitoring processes for highway and bridge construction projects, including the establishment and awarding of change orders and/or contingencies, were done in accordance with applicable laws, and policies and procedures, and whether adequate internal controls exist over these processes.

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

In our opinion, except for the lack of legislative approval for four (4) projects bid on behalf of DPW by the Division of Purchase ("Purchase"), the internal controls in place were adequate to ensure that construction projects were properly bid and awarded.

I. SUMMARY OF FINDINGS:

1. Projects awarded without legislative approval – Four (4) of the thirteen (13) road construction contracts did not receive the required approval by the Erie County Legislature.
2. No formal procedures exist for closing completed projects – There are no written procedures for the closing of completed capital projects. This results in the accumulation of numerous completed projects in the County's SAP financial and accounting system that contain cash that could be used for other purposes. The County has many open capital project accounts with available budgets and/or appropriations which have been dormant for years.

Details of the preceding findings may be found in the section entitled "AUDIT RESULTS AND RECOMMENDATIONS."

II. REPORTING REQUIREMENTS:

A draft copy of this report was provided to DPW for their review. Their responses to our Interim Audit Memoranda were included in the preparation of this report

III. BACKGROUND:

Highways is responsible for the maintenance and construction of 1,187 miles of County roads, 278 bridges and 450 major culverts. This Division also inspects and evaluates county roads and bridges and plans and designs appropriate construction, reconstruction, repair and maintenance projects. Highways hires and supervises contractors on some construction projects. Highways also assists local jurisdictions and maintains a highway map of all county roads.

This Division receives revenues from a variety of sources to support its operations. Federal and State aid and the transfer tax make up the majority of the revenue. Other revenue comes from the sale of supplies to local governments, and permit fees for work done by utility companies.

In order for Highways to perform any road or bridge work using outside contractors, they advertise for the work using Requests for Proposals. Bids are received and the lowest responsible bidder is supposed to be awarded the contract. In almost all contracts, changes are made to work performed. This can be due to a number of reasons including, for example, ground being less stable than predicted or unforeseen weather conditions. When this happens, contractors create "change orders" which can either adjust a bid specification quantity up or down, or add a new specification based on an unforeseen problem. DPW then reviews the change orders and approves or disapproves of the request and supplemental payment to the contractor for the additional work. Change orders are not seen as being good or bad, but as a normal part of doing business. See the Appendix for a listing of the construction projects and all related bids and change orders.

2005-2008 DPW Highway Division Construction Projects					
Project Name	Bid Date	Contractor	Bid Amount	No. of Change Orders	Final Cost
1 North French overlay	11/16/2006	Accadia Site Contracting	\$ 1,987,718.71	2	\$ 1,868,233.74
2 Girdle Rd Improvement	7/24/2007	Accadia Site Contracting	\$ 227,358.00	2	\$ 284,238.27
3* Tonawanda Creek Rd.	9/11/2008	Accadia Site Contracting	\$ 1,954,228.33	0	\$ 1,938,413.39
4 2007 Road Rehab A	9/7/2007	Amherst Paving	\$ 169,140.00	2	\$ 304,818.83
5 Glen Ave Bridges	2/3/2005	Concrete Applied Tech	\$ 1,499,789.10	3	\$ 1,713,990.35
6* Freeman Rd Bridge	3/27/2008	Concrete Applied Tech	\$ 1,651,557.50	1	\$ 1,787,955.26
7* Como Park Blvd	3/27/2008	Concrete Applied Tech	\$ 2,771,865.70	1	\$ 2,907,259.76
8* Wehrle Drive	3/27/2008	Dipizio Construction	\$ 15,589,200.00	2	\$ 16,137,355.05
9 Lake Shore Ave Bridges	12/2/2004	Donald J. Braasch	\$ 1,180,240.03	3	\$ 1,313,375.85
10 Vermont Street	5/4/2006	Kandey Co. Inc.	\$ 384,000.00	1	\$ 402,965.89
11 2007 Road Rehab B	9/13/2007	Milherst Construction Inc	\$ 434,750.00	1	\$ 395,950.43
12 Dann Rd Bridge Repair	5/3/2007	Nichols, Long, & Moore	\$ 221,798.50	2	\$ 263,797.88
13 Four Rod/Stolle Roads	5/4/2006	UCC Constructors	\$ 487,811.00	1	\$ 480,830.66
Total			\$ 28,559,456.87		

* - These projects are still active at January 21, 2010 and the project cost is not final.

IV. AUDIT RESULTS AND RECOMMENDATIONS:

The findings discovered during audit testing were documented and communicated to DPW via Interim Audit Memoranda ("IAM"). The details of the significant findings are presented in this section.

1. Projects awarded without legislative approval.

During our audit, we noted that four (4) of the thirteen (13) road and bridge construction contracts active during our scope period totaling \$1,053,046, were not approved by the Erie County Legislature as required by Article 11, Section 1102(c) of the Erie County Charter. These four (4) contracts (listed above as lines 2, 4, 11 and 12) were advertised and awarded by Purchase on behalf of DPW.

This was also a finding in our DPW Audit of Contract Administration for the period January 1, 2003 to April 30, 2004, and communicated to DPW in an Interim Audit Memorandum dated November 29, 2004. The Comptroller's Office sought an opinion from the County Attorney's office at that time. The County Attorney's response stated that, although this does not violate New York State law, Legislative approval is required for construction contracts by Article 11, Section 1102 (c) of the Erie County Charter. This section states that "... the commissioner of public works shall advertise and call for bids on the construction of each public works project of the county, open such bids

publicly, tabulate them and submit recommendations with respect thereto to the county legislature and county executive.” As a result, the use of Purchase to procure construction contracts does not comply with the County Charter requirement for Legislature approval.

WE RECOMMEND that both DPW and Purchase take the steps necessary to comply with the Erie County Charter and Code regarding the bidding of construction projects and obtaining Legislature approval of all awarded contracts.

In response to our IAM #1 informing DPW of this finding, they asserted that these four (4) contracts are for goods and services that can be bid through Purchase. DPW cited the Erie County Code, Article 3, Section 3.07 (a) which states “The Division of Purchase shall also purchase or contract for those services which are subject to bidding.” However, the very next sentence in Section 3.07 (a) contradicts DPW’s assertion and states “A service contract which is subject to approval by the Erie County Legislature or contracted for by a department head pursuant to charter or code authority shall not be considered a purchase or contract made by this division.”

In the final analysis, Article 11, Section 1102 (c) of the Charter, which is quoted in our finding above, supersedes other sections of the Charter and the Code because it is directly on point with the bid process for construction projects. This section of the Charter clearly states that DPW must make recommendations to the county legislature with respect to the construction of each public works project of the county. In addition, it is our understanding that Charter provisions take precedence over Code provisions (see Auditor Comment #2).

2. No formal procedures exist for closing completed projects.

During our audit we noted that seven (7) of the eleven (11) road projects (which contain thirteen [13] construction contracts) that were active during our audit period were completed. These projects, although finished, were never closed in SAP. Past history shows that, if capital projects are not closed after they are completed, there is a chance that they may remain open for several years. When this occurs any money that is left in the project remains unused. Also, any projects with outstanding cash balances of \$1,000.00 or more require ongoing monthly monitoring to calculate additional interest which is added to the remaining project balance. If capital projects were closed in a timely manner, projects with remaining cash could be utilized for other purposes such as paying off bonded debt on that specific project, paying off other debt service or reducing the General Fund interfund subsidy to the Debt Service Fund.

Two (2) of the seven (7) completed projects have a residual cash balance of \$476,793.47, while the other five (5) have debt remaining. The residual cash is enough to pay off two (2) of the other completed projects that have debt totaling \$294,744.42. Once paid off, these two (2) projects could also be closed. The remaining cash could then be used for other purposes as described above.

WE RECOMMEND that working with Budget and the Comptroller's Division of Accounting, DPW establish a formal written policy regarding the closing of completed capital projects. When written, this policy could be included with the year-end closing instructions that are distributed to all county departments by the Comptroller's Office. **WE FURTHER RECOMMEND** that the two completed projects with residual cash balances should be closed and the cash used to close other completed projects.

In response to our IAM #2 informing DPW of this finding, DPW responded "The closing out of capital projects is the prerogative of the Budget Director."

We concur that the Director of Budget and Management has the authority to determine when capital project accounts can be closed. However, by establishing written procedures that include creating a list of completed projects on a yearly basis, there is a much greater chance that Budget would make this a part of their annual calendar. At the very least there would always be a list of completed projects that could be closed at any time and a roadmap of what should happen with that information.

3. Other testing results.

Our audit conducted additional tests to determine whether:

- All vendors have an opportunity to win bids.
- The same vendors are winning most of the bids.
- Vendors have a history of exceeding contract amounts by more than ten percent (10%).
- Final project costs exceed the second or third lowest bidder amount on a consistent basis.
- Change orders were reviewed and approved by DPW.
- Change orders in excess of the contingency fund were approved by the Legislature. (See Auditor Comment 6)

Our testing revealed no exceptions for any of the above other than those findings mentioned elsewhere in this report.

V. AUDITOR COMMENTS:

1. Closing Dormant Capital Accounts:

As noted in Section 2. of "IV. Audit Results and Recommendations", there are many completed DPW capital projects that remain open and have significant cash balances remaining. Pursuant to New York State's Local Finance Law, proceeds from a bond sale can be used (1) for the specific project identified in the bond, and (2) if any proceeds remain after completion of the project, for repayment of debt service. While not part of the original scope of the Audit, we confirmed that starting in 2007 and throughout 2008, the Office of Comptroller and Division of Budget and Management worked together to close certain capital accounts related to completed projects and transfer the proceeds from

those accounts to an account used to pay debt service. While this process has not been completed, the parties are aware of the issue and **WE RECOMMEND** that all capital accounts with residual cash remaining from completed projects be used to retire debt service by the end of 2010.

2. Proposed Erie County Charter language revision.

DPW stated that they sometimes use alternative means to expedite the bidding and awarding of road contracts to take advantage of the short construction season especially during the summer period when the Legislature is in recess. This alternative means has been to use Purchase to do bidding. However, by following this alternative procedure, two problems arise. (1) There is no legislative approval obtained as required by the Erie County Charter; and (2) Purchase is bidding for construction projects in violation of the Charter which requires advertising and bidding by DPW.

Since road construction contracts need to be completed during the short construction season and it has been a long standing procedure to use Purchase, there is an obvious conflict. While we do not condone non-compliance with the Charter, we understand the practical dilemma that periodically confronts DPW. **WE RECOMMEND** that DPW in concert with County management review the Charter and Code on this matter and request Legislature approval of the necessary local law language to amend the Charter to reflect necessary practices and procedures.

3. Re-bid of Lake Shore Bridge Project.

Original bid results for the Lake Shore Bridge Project				
Vendor Name	Alternate A Bid	Rank	Alternate B Bid	Rank
* Donald Braasch	\$1,202,000.00	1	\$1,216,000.00	1
* Kandy Co.	\$1,454,981.00	2	\$1,505,856.00	4
Paul Gallo	\$1,474,073.18	3	\$1,452,368.10	3
* Holmes and Murphy	\$1,486,513.40	4	\$1,412,363.40	2
CATCO	\$1,566,630.00	5	\$1,581,330.00	5
A & L Inc.	\$1,847,015.50	6	\$1,887,540.50	6
UCC Constructors	\$1,916,170.86	7	\$1,962,670.86	7
Nichols, Long and Moore	\$2,231,081.10	8	\$2,275,506.10	8
Sicar Inc.	\$2,360,457.90	9	\$2,365,902.90	9

* Also participated in re-bid

The original bid for the 2004 Lake Shore bridge project was cancelled when the Erie County engineer in charge noticed that Braasch was both much lower than all the other

bids and not in line with the engineer estimate¹. The Braasch bid had a very low line item bid regarding the shoring up of excavation holes. After bringing this to Braasch's attention, the engineer in charge asked Braasch if they could really do the project for that amount. Braasch said they probably couldn't.

DPW also asked Holmes and Murphy the same question. They also responded that they probably couldn't do the project for the amount of their bid. A part of the problem had to do with the way the request for bid was written with some areas being unclear. Another problem was that the second lowest bidder could not be easily determined.

The other companies were then contacted and told of the problem. All agreed to re-bid on a new RFP which contained slight changes to a couple of specifications. It can be seen that of the nine original bidders, only three re-bid. Even though the changes in the specifications were small, the increase in the bid amounts of the three companies that re-bid averaged over \$300,000 each. DPW believes that this suggests that all had originally under-bid.

Ultimately, DPW awarded the contract to Donald J. Braasch Construction.

Re-bid results for the Lake Shore Bridge Project				
Vendor Name	Alternate A Bid		Alternate B Bid	
	Adjusted	Rank	- Adjusted	Rank
Doanald J. Braasch Const	\$1,508,100.88	1	\$1,519,832.08	1
Oakgrove Construction	\$1,681,022.00	2	\$1,645,697.00	2
Kandey Co	\$1,736,986.00	3	\$1,765,286.00	3
Holmes and Murphy Inc	\$1,882,545.00	4	\$1,851,295.00	4

Some bids reflect adjustments by DPW due to vendor calculation errors.

This re-bid, when looked at in conjunction with the original bid, shows that DPW is diligent in its effort to promote responsible bids. As long as DPW continues this practice, it will ensure that vendors are not winning bids based on low ball estimates, and then charging the difference in change orders.

4. Large change order

During our testing of change orders, we noticed that the 2007 Road Rehabilitation Program - Contract A project had a change order that was 80% of the winning bid of \$169,140. In addition, the engineer estimate calculated by DPW totaled \$396,759.86 and

¹ Engineer estimate - Estimate done by an Erie County DPW engineer to estimate the quantities needed to accomplish each line item included in the bid. This does not estimate the cost per line item, just the quantities. Once the bids are opened, DPW can get a general idea if the bids are in line with what DPW thinks it will take to accomplish the job. DPW said that there have been many construction contracts in the area that defaulted and had to go into their insurance bond to finish the job. DPW said they don't want this to happen to the county and they are doing all they can to prevent this.

the Erie County Fiscal Stability Authority ("ECFSA") approved a budget on this project of \$425,000 using the engineer estimate plus both a mobilization amount and a contingency amount. Our initial concern was that if the contract of \$169,140 was approved, why did the change order total 80% of the original bid?

DPW explained that every year Highways comes up with a list roads that need to be rehabilitated based on degradation. Some years DPW knows they will not be able to do all the roads because there is not enough money. There are times, though, when a project receives a very good, low bid and has additional money available that has been budgeted to the project. When this happens DPW may take advantage of these circumstances and extend the project to include more miles of the same road.

This allows DPW to stretch their money and rehab more road miles while remaining in the budget. There appears to be no need to rebid this as a larger project since nothing changes in the specs other than increasing some of the line item amounts. The winning bidder would have been the same if all the original unit prices were carried forward.

5. Reduced Construction Projects – 2007 and 2008

During the 2007 and 2008 period of our audit scope, the County did not conduct its annual borrowing to finance highway construction projects. This lack of borrowing was due to an impasse between the County and the ECFSA over which party would perform capital borrowing. This impasse led the County to reduce, suspend or not begin certain road, bridge, culvert or related capital projects requiring financing via bonds. While certain cash advances to allow some projects to continue or commence were made by the Comptroller's Office's Division of Accounting at the request of the County Administration, many projects were not able to be acted upon due to a lack of bond proceeds.

6. Legislative Approval for Contract Expenditures and Change Orders

All construction projects bid and awarded by DPW should have Legislative resolutions authorizing funding. An additional amount should be approved and allocated to a contingency fund for DPW to utilize in approving contract change orders. Generally, this contingency is about ten percent of the bid amount. Change orders, that when in total exceed the contingency amount, require approval and authorization by the Legislature for any additional appropriations needed.

In our testing, we found that all nine (9) contracts awarded by DPW were properly funded through Legislative authorizations. In addition, for two (2) of the nine (9) contracts where change order totals exceeded the contingency amount, Legislative approval was obtained authorizing additional funding for those change orders.

RESULTS OF EXIT CONFERENCE:

An exit conference was held on April 1, 2010 with the Commissioner of DPW, members of his staff and a representative from Budget and Management. The contents of this report were discussed. The Commissioner was generally in agreement with our findings.

In accordance with the County's Audit Response System and Procedures, we request that the Commissioner prepare a written response to our office and the County Executive concerning the findings and recommendations. The final written response should be submitted to our office and the County Executive by May 5, 2010.

We also request that the Commissioner forward copies of the response to the Erie County Legislature by May 5, 2010.

ERIE COUNTY COMPTROLLER'S OFFICE

cc: Gerard Sentz, Commissioner – Department of Public Works
Hon. Christopher Collins, County Executive
Gregory Gach, Director of Budget and Management

Appendix

Project	Bidders	Bid Amount	Change orders			Final Total	\$ > Bidder #2	Comments	
			#1	#2	#3				
Glen Ave Bridges	CATCO	1,499,789.10	66,979.35	11,635.60	135,586.30	1,713,990.35	75,189.28	Revised total > Bid #2 but < Bids 3,4, & 5	
	NLM	1,638,801.07	(1)	(1)	(2) (3)				
	Donald Braasch	1,890,000.00							
	Holmes and Murphy	2,056,479.51							
	Oakgrove Construction	2,150,659.60							
Lakeshore Ave Bridges	Donald Braasch Const (A)	1,508,100.88	0.00	125,000.00	7,444.16	1,640,545.04	No	Revised total < Bids # 2, 3, & 4	
	Holmes and Murphy (A)	1,882,545.00	(1)	(1)	(1)*	1,312,684.19			
	Kandey Co. (A)	1,736,986.00							
	Oakgrove Construction (A)	1,681,022.00							
	Donald Braasch Constr (B)	1,519,832.08							
	Holmes and Murphy (B)	1,851,295.00							
	Kandey Co. (B)	1,765,286.00							
	Oakgrove Construction (B)	1,645,697.00							
	UCC Constructors	487,811.00	-6,980.34			480,830.66	No		Revised total < Bids # 2, 3, 4, 5, & 6
	ALJAA Construction	489,870.25	(1)						
Four Rod/Stolle Roads	Nichols, Long and Moore	565,757.10						Revised total < Bids # 2, 3, 4, 5, & 6	
	Kandey Co.	626,353.40							
	Tom Greenauer Const.	661,600.10							
	Accadia Site Contracting	728,891.38							
	Kandey Company	384,000.00	18,965.89			402,965.89	6,491.19		Revised total > Bid #2 but < Bids 3,4, & 5
	Aljaa Construction	396,474.70	(1)						
Vermont Street	Nichols Long & Moore	457,888.75						Revised total < Bidder #2	
	Tom Greenauer	469,500.00							
	Accadia Site Consulting	587,571.05							
North French Overlay	Accadia Site Consulting	1,987,718.71	109,906.52	-229,391.51		1,868,233.72	No	Revised total < Bidder #2	
	Milherst Construction Inc	2,187,270.75	(3)	(1)					
Dann Rd Bridge repair	Nichols Long & Moore	221,798.50	42,000.44	-1.06		263,797.88	29,631.88	Revised total > Bid #2 but < Bids 3 & 4	
	Yarussi Construction	234,166.00	(1)	(4)					
	UCC Constructors	264,264.00							
	Ed Bauer Construction	299,052.00							
2007 Girdle Rd	Accadia Site Contracting	277,358.00	921.31	5,958.96		284,238.27	5,078.02	Revised total > Bid #2 but < Bids 3,4, 5 & 6	
	CATCO	279,160.25	(3)	(3)					
	Anastasi Trucking	291,800.00							
	Occhino	307,440.64							
	Ed Bauer Construction	316,529.00							
	Amherst Paving	414,124.00							
2007 Road Rehab A	Amherst Paving	169,140.00	131,024.63	4,654.20		304,818.83	125,019.83	Revised total > Bids #2, 3,4, 5 & 6	
	Tom Greenauer	179,799.00	(3)	(5)					
	Occhino	184,778.00							
	Destro Brothers	185,220.00							
	Milherst Construction	205,520.00							
	Accadia Site Contracting	207,580.00							

Appendix

Project	Bidders	Bid Amount	Change orders			Final Total	\$ > Bidder #2	Comments
			#1	#2	#3			
2007 Road Rehab B	Minersl Construction							
	CATCO	434,750.00	-38,799.57			395,950.43	No	Revised total < Bids # 2, 3, 4, 5, 6, & 7
	Acadia Site Contracting	443,025.00	(4)					
	American Paving	445,480.00						
	Oochino	469,464.00						
	Tom Greenauer	478,705.00						
	Amherst Paving	517,950.00						
		527,370.60						
Freeman Road Bridge	CATCO	1,651,557.50	136,397.76			1,787,955.26	N/A	Revised total < Bids # 2, 3, 4, 5, 6, 7, 8 & 9 [Project still in progress at end of audit period]
	Oakgrove Construction	1,882,839.00	(1)					
	UCC Constructors	1,884,978.00						
	Nichols Long & Moore	1,966,256.20						
	Armand Cerrone Inc	2,162,928.50						
	Kandey Construction	2,170,030.00						
	Yarussi Construction	2,218,391.75						
	Sicar Management	2,254,103.40						
	Donald Braasch Constr	2,814,332.85						
Como Park Blvd	CATCO	2,771,865.70	135,394.06			2,907,259.76	N/A	Revised total < Bids # 2, 3, & 4 [Project still in progress at end of audit period]
	Acadia Site Contracting	2,999,308.40	(1)					
	Sicar Management	3,496,133.40						
	Destro Bros Concrete Co	3,560,810.50						
Wehrle Drive	DePue Construction Co	15,589,200.00	12,705.00	404,399.41	131,050.64	16,137,355.05	313,499.96	Revised total > Bid #2 but < Bid 3 [Project still in progress at end of audit period]
	CATCO	15,823,655.09	(1)	(1)	(6)			
	Oakgrove Construction	16,299,593.00						
Tonawanda Creek Road	Acadia Site Contracting	1,954,228.33	-15,814.94			1,938,413.39	N/A	Revised total < Bids # 2, 3, 4, 5, 6, 7, 8 & 9 [Project still in progress at end of audit period]
	UCC	2,161,279.10	(1)					
	CATCO	2,271,064.10						
	Nichols Long & Moore	2,319,722.90						
	Oakgrove Construction	2,359,100.00						
	Armand Cerrone, Inc	2,456,293.50						
	SICAR	2,514,100.95						
	Mark Cerrone, Inc	2,534,879.00						
	Pinto Construction	2,767,349.16						

KEY: (1) Revised quantities (some line items increased, some line items decreased)

(2) Schedule acceleration

(3) Increased quantities

(4) Decreased quantities

(5) Unanticipated field conditions

(6) Pipe substitution and excavation

(1)* - Change order amount reflects an adjustment of \$691,66 for the Sewer portion of the project.

The Highways change order amount is \$8,135.82.

Key: No Final total was actually lower than second lowest bidder.

N/A Project is still active, however, the current total is lower than the second lowest bidder.

Color indicated winning bidder for the project.