



## CONSTRUCTION LAW E-UPDATE

### THE NEW YORK OFFICE OF THE STATE COMPTROLLER (OSC) PUBLICLY REBUKES NYS-DOT FEBRUARY 2010

In what may be a game-changing event regarding the review and enforcement of contractor responsibility issues, the Office of the New York State Comptroller (OSC) on January 28, 2010, publicly rebuked the New York State Department of Transportation (NYSDOT) by: (1) returning as “non-approved” the \$27 million federal stimulus-funded contract for the painting of the Bruckner Expressway Viaduct and ramps on I-287; and (2) revoking the NYSDOT’s contracting privilege to use the alternative “Quick” contract review procedure for contractor pre-award responsibility assessments. This was a remarkable, public “smack-down” of NYSDOT by OSC. It will unquestionably reverberate throughout the public contracting community for some time.

In its letter to NYSDOT, OSC noted Comptroller DiNapoli’s commitment to “greater scrutiny” on federal stimulus contracts in particular. It also reminded NYSDOT that the “[f]ederal stimulus monies are subject to recoupment where contracts are inappropriately awarded. OSC will not jeopardize federal stimulus money in light of a clear failure of agency due diligence.”

Indeed, OSC had already rejected a prior NYSDOT contract involving stimulus money. It now deemed it appropriate to step up the severity of its enforcement actions by revoking certain of NYSDOT’s contracting privileges and imposing more stringent contractor review requirements. Those familiar with the NYSDOT over the years know that this

is regrettable. NYSDOT has historically been one of the more progressive public agencies in dealing with contractors who have alleged “responsibility” issues. The recent action by Comptroller DiNapoli’s Office in the current stimulus-funding era is a strong rejection of NYSDOT’s more “understanding” approach. No doubt NYSDOT will now react, and, regrettably, perhaps over-react to such a public rebuke.

The NYSDOT contract in question was Contract D261253 for the above-referenced Bruckner Express Viaduct painting project. L&L Painting was the low bidder. OSC cited several reasons for its dramatic actions, including:

- L&L’S involvement with a business named Rose Contracting, owned by a relative of the principals of L&L Painting, which was investigated by the United States Attorney, the FBI, the federal Department of Transportation and others for misrepresenting itself as a disadvantaged business in order to get special federal contracting privileges. This investigation resulted in a deferred prosecution agreement for Rose Contracting and a \$350,000 fine;
- A disqualification by the New York City School Construction Authority;
- 16 serious OSHA violations totaling \$33,500 in fines related to lead paint removal on a George Washington Bridge project; and



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- An Independent Private Sector Inspector General agreement and monitoring agreement for work with the Port Authority of New York/New Jersey.

Among OSC complaints with NYSDOT was its failure to make an independent analysis of L&L's responsibility status. Despite three separate requests by OSC, NYSDOT simply reaffirmed its determination that L&L was "responsible." Only after a newspaper article on January 5, 2010 mentioned that L&L Painting was a target of an FBI investigation did NYSDOT take action. OSC is now demanding a "written assessment" of each of the foregoing issues concerning L&L Painting.

Rescission of NYSDOT's Right to Utilize the Alternative Vendor "Quick" Responsibility Documentation Standards and Procedure

The NYSDOT was further notified on January 28, 2010 that "OSC was dismayed that ...NYSDOT did not provide any agency assessment of the issues nor any additional documentation with the initial contract submission." OSC further explained "...the Quick contracting process is only allowed on contracts where there are no known responsibility issues. This was obviously not the case for this particular contract. However, NYSDOT submitted it as a Quick contract."

OSC was clearly upset. It emphasized that NYS contracting agencies are "rightfully vulnerable to public criticism when the procurement record reviewed and approved by the State Comptroller lacks documentation of the contracting agency's awareness, consideration and resolution of potential responsibility issues."

As a result, NYSDOT no longer has "Quick" contract review privileges. For contracts commencing March 1, 2010, NYSDOT will now be required to submit a vendor responsibility profile and CCA-2 (or other Vendor Responsibility Questionnaire) for all new contracts over \$100,000.

#### G&C Commentary

Whenever the government hyperventilates over responsibility issues, at the very least, jobs are delayed (regardless of prevailing economic conditions), and, at worst, awards are denied, both justly and unjustly.

- With OSC asserting itself in this dramatic, public fashion, all New York State agencies will be looking over their shoulders.
- The trend in recent years of increased D/M/WBE regulatory scrutiny, or even criminalization, is continuing unabated. This is a highly regulated and dangerous area for the ill-advised or unadvised. Do not even consider taking any "liberties" in this area. However, note that the "goals" are just that; embrace, and do not run from



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the agency enforcement personnel. Instead, although counter-intuitive, we strongly advise that you seek their advice and do so often.

- The differing approaches of New York State (reasonable and common-sensical) and New York City (harsh) to responsibility-related issues may now, unfortunately, be blurring as NYS agencies are forced to regress into a more rigid, NYC-prosecutorial (i.e., Giulianilike) approach.
- Federal stimulus funding will come with a price, and not just the unreasonably burdensome recordkeeping and disclosure requirements already experienced. Now, not just federal agencies such as the Federal Highway Administration or the Federal Transit Administration (or, for that matter, the Federal Bureau of Investigation), but state agencies, which locally administer the federal funds, for local agency projects (such as those of the New York City Department of Transportation), will be exercising more supervision and scrutiny.