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March 26, 2008

Ms. Carmen Maldonado
Office of the State Comptroller
Division of State Services
State Audit Bureau
123 William Street – 21st Floor
New York, NY 10038

RECEIVED
Office of the State Comptroller

APR 04 2008

Lynn Canton
Deputy Comptroller

Re: OSC Report 2006-S-8
Construction Contract Payments
90-day Update

Dear Ms. Maldonado:

As required by Section 170 of the Executive Law, the Department of Transportation offers the following 90-day update on actions taken to implement the audit's recommendations:

Recommendation 1: Ensure that Inspector's Daily Reports for Force Account work contain all the details needed to verify the accuracy of the costs claimed by the contractors, and clearly distinguish Force Account work from regular contract work when projects contain both types of work.

Response: We agree with this recommendation. The Inspector's Daily Report should be completed in accordance with the Manual of Uniform Record Keeping (MURK) requirements. The Inspector's Daily Report (MURK 1d) was revised by Engineering Bulletin 07-003, dated 1/23/07, and is now called the Daily Work Report (MURK 1). The Daily Work Report includes additional detail to allow the inspector to log the number and classification of labor and the type and identification number of the equipment for up to four different operations per form. Two new forms were also created, the Daily Work Report – Description Continuation (MURK 1-1) and the Daily Work Report – Contract Pay Item Continuation (MURK 1-2).

90-day Update: To help ensure the revised forms are completed in accordance with MURK requirements, the forms have been and will continue to be discussed at the

various training sessions. These include the Regional Engineer-In-Charge (EIC) Meetings/Training Sessions which began in February 2008 and will continue in all Regions through March, as well as the annual EIC and Office Engineer training sessions, which for 2008 commence in March.

In addition, the Department has and will continue to routinely conduct MURK reviews on its projects. As part of these reviews, Daily Work Reports are examined on a sample basis to ensure that they are completed in accordance with MURK requirements.

Recommendation 2: Modify the CAM to require the names of individual workers on Force Account projects to be recorded on the Inspector's Daily reports.

Response: We do not agree with this recommendation. We believe that the changes made in response to Recommendation 1 will provide sufficient detail for verifying the records submitted by the contractors without burdening the inspectors with excessive paperwork. As we progress our audits of force account work (see Recommendation 4) and are able to assess the effectiveness of these new controls, we will make additional process adjustments as needed to provide reasonable assurance that the force account payments are accurate.

It should also be noted, that the Office of Construction has developed and is testing a new electronic force account tracking system called eFAW. The new system will automate and simplify force account tracking and documentation for the contractors, as well as provide more detailed information for the Department's project staff to use in reviewing force account reimbursement requests. This system will include the names of individual workers in a labor resource table.

90-day Update: Testing of the eFAW system, which will require the contractor to report individual names of workers for force account work, continues. We anticipate that eFAW will be implemented by December 31, 2008.

Recommendation 3: Require EICs, regional supervisors, regional managers, and the Finance Unit to more closely monitor progress payments on Force Account work for compliance with Department requirement.

Response: We agree with this recommendation. As noted in the report, the Computerized Engineer's Estimate System (CEES) has been modified to include a control that would prevent the 90 percent payment limit from being exceeded. The updated version of CEES is now in use on all Department construction projects.

90-day Update: This recommendation has been implemented and no further action is required.

Recommendation 4: Ensure that the Contract Audit Bureau provides adequate audit coverage of compliance with force account work.

Response: We agree with the recommendation. The Contract Audit Bureau has had insufficient staff in the past to provide audit coverage of force account work associated with construction contracts. However, we are hiring new staff and will be developing audit planning and risk assessment procedures to identify high risk construction contracts, and begin providing audit coverage of these higher risk contracts using current staff and audit resources supplied by an independent Certified Public Accounting firm currently under contract with the Department. We expect to have adequate coverage of compliance with force account work in place by June 30, 2008.

90-day Update: The Contract Audit Bureau has obtained detailed payment data relative to force account work and will complete an assessment of the data to identify high risk force account work by April 30, 2008; after which, it will begin detailed auditing of these payments.

Recommendation 5: **Ensure that all EICs are aware of the sampling requirements for asphalt core testing, and monitor contracts with this testing to ensure that the requirements are met.**

Response: We agree with this recommendation. While the Department contends that the instance identified by the auditors was isolated and not systematic, this topic will be included in the training agenda for Regional EIC Meetings/Training Sessions. The Department will continue to monitor contracts with this testing as part of their normal review with their project staff.

90-day Update: Construction officials have and will continue to remind staff to comply with these testing requirements at Regional EIC Meetings/Training Sessions, as well as at annual EIC and Office Engineer training sessions. Regional EIC Meetings/Training Sessions began in February 2008 and will continue in all Regions through March. The 2008 annual EIC and Office Engineer training sessions commence in March.

Recommendation 6: **Revise the MURK and the Standard Specifications to (1) clearly describe how contractors' payroll taxes, unemployment insurance payments, and worker's compensation insurance payments are to be verified by the Department and (2) require contractors to provide the Department with the payroll records and other documentation that are needed to fully verify these payments.**

Response: We agree with this recommendation. Revisions have been made to the Standard Specifications addressing many of these concerns. §109-05 B. now states:

“At the preconstruction meeting, the Contractor should provide the Engineer documentation supporting its Commercial General Liability Insurance rates for the current period, and provide updates within 30 days after the renewal date, to assist in timely preparation and review of force account reports.”

“At the Contractor’s option, a labor markup of 15% of all wages, not including supplemental (fringe benefits), for FICA, Medicare, paid holidays, Federal Unemployment tax, and State unemployment insurance in lieu of a detailed accounting.”

“Workers compensation insurance rate will be the base rate and the territorial differential only established by the NYS Workers Compensation Insurance Rating Board, subject to the Construction Employment Limitation Program limits. No other additional charges or modifiers will be allowed.”

“Insurance and other costs incurred or limited on a weekly basis will be reimbursed based on the percentage of the employees weekly gross wages paid under force account.”

Contractors may now use the 15% labor markup, which eliminates the need for tracking payroll taxes and unemployment insurances. If Contractors do not opt to use 15% labor markup, then they must provide a detailed accounting which includes year-to-date payroll information for all workers.

Workers compensation insurance rates are now the rates as established by the NYS Workers Compensation Insurance Rating Board. The Department will no longer need to obtain and verify the Workers Compensation rates provided by each contractor. The Department is continuing with efforts to develop hourly Workers Compensation rates that could be simply applied to each hour of Force Account work completed.

Contract Administration Manual (CAM) revisions to reflect these specification changes will be included in the next CAM update which should be issued prior to the start of the 2008 construction season. In addition, these issues have been and will continue to be addressed at training sessions and meetings with NYSDOT Construction staff and Contractor staff.

90-day Update: The Department implemented the 15% labor markup option noted above with the expectation that most contractors would choose this easier option rather than submit detailed accounting records. Although the level of contractor participation in this option has increased since its inception, it still remains well below Department expectations. Accordingly, the Department is considering mandatory contractor participation. A proposed revision was provided to selected industry representatives in February 2008 for their review and consideration. In the interim, we continue to improve and simplify our process for ensuring accurate payments for force account work performed by contractors who do not opt into the 15 percent markup option.

Construction staff has and will continue to be notified of the above-noted requirement that Contractors must submit detailed year-to-date payroll information if the 15% labor markup is not used. Construction staff has also been notified of the above-noted revisions made regarding workers compensation insurance rates. These issues and

revisions have and will continue to be noted at the annual EIC and Office Engineer training sessions which commence in March 2008, and Regional EIC Meetings/Training Sessions which began in February 2008 and will continue in all Regions through March.

To further simplify the process, the Office of Construction is proposing to establish a standard hourly reimbursement rate for each labor hour incurred by work type (e.g. bridge work, highway work, etc). This will eliminate the need for Department staff to have to verify if the required weekly limitations have been accurately applied by the Contractor. The Department's proposal has been provided to industry for their initial review and consideration.

The Office of Construction has begun drafting revisions to the CAM to reflect the specification revisions noted in the initial response, as well as other necessary updates to the CAM which have arisen outside the context of this audit. We expect to complete a major CAM update by December 31, 2008.

Recommendation 7: Monitor contracts with Force Account work to ensure that contractors' claims for these costs are properly and consistently verified in all the regional offices.

Response: We agree with this recommendation. Force Account documentation is reviewed by project staff, Regional staff, and Office of Construction staff. A Force Account is not considered final until the Force Account final submissions are submitted, reviewed and closed.

90-day Update: The review of force accounts has and will continue to be addressed at the EIC and Office Engineer training sessions referenced in our 90-day update to Recommendation 1. In addition, as indicated in our response to Recommendation 4, the Department has moved forward with its planned audit coverage of force account payments.

Recommendation 8: Train EICs in how to verify contractors' claimed payroll taxes, unemployment insurance payments, and workers' compensation insurance payments.

Response: As noted in the response to Recommendation 6 above, the Standard Specifications have been revised to address these concerns. CAM revisions to reflect these specification changes will be included in the next update. These revisions and these topics have been addressed at various training sessions and meetings, including EIC Training, Office Engineer Training, EIC Winter Meetings, and Regional Construction Engineer Meetings.

90-day Update: As noted in our update for Recommendation 6 above, Construction staff has been notified of the need to verify these costs and payments. These issues have and will continue to be noted at the annual EIC and Office Engineer training sessions, and Regional EIC Meetings/Training Sessions.

Recommendation 9: Develop detailed guidelines to help inspectors and EICs distinguish in-use equipment from stand-by equipment, and verify whether contractors' reimbursement claims for such equipment are accurate and reasonable. Ensure that the guidelines are appropriately applied.

Response: Revisions have been made to the Standard Specifications addressing this concern. Standard Specification §109-05B 1.c. Equipment now states, "Reimbursement will be made for the product of the hours of actual use or hours it is required to be present, and not available for mobilization elsewhere, multiplied by the hourly rate."

The Specifications and CAM do not address "stand-by" equipment. Reimbursement is made for equipment used or required to be present. Idle equipment is equipment that is not in use or parked, and compensation for idle equipment is allowed only in cases of delay.

90-day Update: Additional guidance will be included in the CAM update to be issued by December 31, 2008.

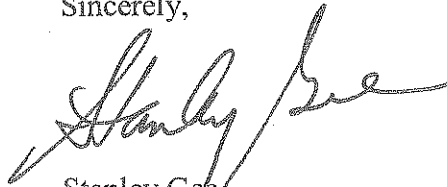
Recommendation 10: Ensure that the reimbursement rates for equipment are correctly adjusted for the age of the equipment.

Response: We agree with this comment. Equipment reimbursement rates should be adjusted by the equipment age factor. This provision will be addressed in greater detail in the next CAM revision.

90-day Update: This issue will be addressed in the CAM revision that the Office of Construction expects to issue by December 31, 2008. This issue has and will continue to be addressed at the annual EIC and Office Engineer training sessions, and Regional EIC Meetings/Training Sessions.

If you require additional information, please contact Jim Tynan at 518-457-6472.

Sincerely,



Stanley Gee
Executive Deputy Commissioner

cc: Honorable David A. Paterson, Governor of the State of New York
Honorable Laura Anglin, Director of the Budget
Honorable Thomas P. DiNapoli, State Comptroller

Honorable Joseph Bruno, Senate Majority Leader
Honorable Malcolm Smith, Senate Minority Leader
Honorable Sheldon Silver, Assembly Speaker
Honorable Ronald Canestrari, Assembly Majority Leader
Honorable James Tedisco, Assembly Minority Leader
Honorable Owen Johnson, Chairman, Senate Finance Committee
Honorable William Stachowski, Ranking Minority Member, Senate Finance Committee
Honorable Herman D. Farrell, Jr., Chairman, Assembly Ways and Means Committee
Honorable James Hayes, Ranking Minority Member, Assembly Ways and Means
Committee
Ms. Joan Millman, Executive Director, Assembly Committee on Oversight, Analysis and
Investigation