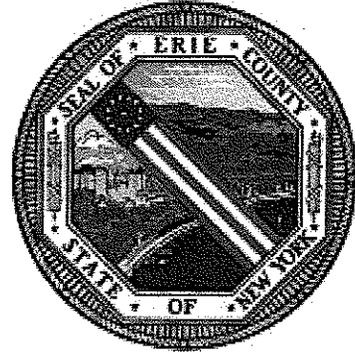


**HON. MARK C. POLONCARZ
ERIE COUNTY COMPTROLLER'S OFFICE
DIVISION OF AUDIT & CONTROL
95 FRANKLIN STREET
BUFFALO, NEW YORK 14202**



TO: CHERYL GREEN, ERIE COUNTY ATTORNEY

**CC: KRISTIN KLEIN-WHEATON, FIRST ASSISTANT COUNTY ATTORNEY
MARTIN POLOWY, SECOND ASSISTANT COUNTY ATTORNEY**

FROM: ERIE COUNTY COMPTROLLER, DIVISION OF AUDIT & CONTROL

DATE: APRIL 3, 2009

RE: REVIEW OF BID NUMBER A260051-004 PHOTOCOPIER SERVICES

In March 2009 the Office of Comptroller was contacted by First Assistant County Attorney Kristin Klein-Wheaton of the County's Department of Law, requesting that our Division of Audit and Control commence a review of the bid process, vendor billing, County payments and related issues regarding the County's 2006 award of a new contract for rented photocopier machines. We were informed that in 2008 the vendor for that service had commenced litigation against the County concerning their services and County payments. In mid-March 2009, this Office commenced a limited review and our findings are contained in this report.

ISSUES:

- Was the award of this bid proper in the first instance?
- Was Erie County ("County") overcharged by the vendor for the services that were provided?
- Was the scope of the service provided by the vendor proper under the bid?

Exhibits:

- A - Copy of July 12, 2006 contract between the County and Duplicating Consultants, Inc.
- B - July 10, 2006 letter notifying Duplicating Consultants they were the successful bidder
- C - July 24, 2006 letter from Xerox to the County
- D - Certain electronic mail messages from ComDoc to the County
- E - Version one of the bid matrix
- F - Version two of the bid matrix
- G - June 30, 2006 letter directing the award of the contract to Duplicating Consultants

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- H - July 20, 2007 letter to Duplicating Consultants informing them the County intended to purchase more machines
(To avoid confusion between the letter I and the number 1, there is no Exhibit I)
- J - Affidavit from John Rocchio, President of Duplicating Consultants
- K - Provides for payments made only for specified bid rate of \$141.66
- L - Provides for payments for color machines at a higher color machine rate
- M - Provides for future payments to be made only for specified bid rate of \$141.66
- N - Provides for future payments for color machines at a higher color machine rate
(To avoid confusion between the letter O and the number 0, there is no Exhibit O)
- P - Provides for 'click' payments with all copies billed at the black and white rate
- Q - Provides for 'click' payments with color copies billed at a color rate
- R - Provides for payments made only for bid rate of \$141.66 for only 247 machines
- S - Provides for 'click' payments with all copies billed at the black and white rate for only 247 machines

BACKGROUND

In the spring of 2006, at the request of the Division of Information and Support Services ("DISS"), the County's Division of Purchase ("Purchase") put out for bid the "rental lease of low to medium volume photocopier equipment" (bid number A260051-004). Bids were opened by Purchase on March 16, 2006. Purchase and DISS determined that the low bidder was Duplicating Consultants, Inc. ("DC") and a contract was awarded to this company to provide new photocopier equipment to the County. A copy of the contract between the County and DC, and by incorporation the winning bid, is attached as Exhibit "A." DC was notified in writing that they were the winning bidder (hereto attached as Exhibit "B").

In July 2006, Joseph Gervase, who had been Director of Purchase, but was formally promoted to Director of DISS effective June 12, 2006, received a letter from the General Counsel of Xerox, ("Xerox"), a losing bidder on the above contract. Through this letter, Xerox protested the award of the contract to DC. Xerox alleged that the bid from DC did not meet the requirements as specified under the bid. Xerox also alleged that the County had been conducting trials with DC, giving DC an unfair advantage. The letter from Xerox also suggested that the bid from DC had an unfair advantage because the bid was improperly re-bid, thereby giving DC an advantage in seeing Xerox pricing in the first round. Xerox's letter is attached as Exhibit "C."

Xerox was not the only losing bidder to complain about the bid process and award. A sales manager for ComDoc sent a series of electronic mail messages to County officials including Kenneth Beam, Director of Central Data Processing, and Joseph Gervase, Director of DISS in July 2006 objecting to the award of the contract to DC. ComDoc asserted that based on the criteria of the bid, including pricing, ComDoc better met the terms than DC. Additionally, ComDoc asserted that they were not given an opportunity to perform an in-house equipment evaluation or presentation. These ComDoc electronic mail messages are attached as Exhibit "D."

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The Office of Comptroller has been provided with no documentation of any response from the County to these Xerox and ComDoc allegations. Whether any County official responded to these losing bidders orally or in writing is not known.

Following the award of a contract, during 2006 and 2007 DC delivered to the County and installed photocopier machines. Each machine is referred to as a "MFD" which stands for Multi-Function Device. These machines are called MFD's because they can additionally act as computer printers, scanners or fax machines if the correct software and/or circuitry is installed. Further, while the bid did not discuss color capability for MFD's, some color capability was provided to the County by DC. MFD's as provided by DC have the capability of being upgraded with color capability if the proper circuit boards are installed. If color capability is installed, the MFD tracks the number of color or black and white outputs separately.

The contract specifically uses the number 247 for the number of MFD's to be provided to the County. However, more than 247 devices have been provided to the County over the life of the contract. As of January 2009, DC billing records indicate that the County has 335 MFD's. The County has questioned who authorized these additional machines and their associated charges. The Office of Comptroller has not confirmed the physical existence or presence of 247 or 335 MFD's in the County's custody.

The 335 MFD's purportedly in the County's control and use include thirty-three (33) that are color capable. These color capable MFD's have been invoiced at amounts above the contract price per MFD of \$141.66 per unit per month. The County has questioned under what authority and which County official authorized these color capable machines and their associated charges.

DC and the County are also engaged in a dispute regarding the number of impressions (also known as "clicks" or "copies") beyond which the County pays the vendor a fee and how those impressions are calculated. The contract states an average monthly "pooled" volume of 1,057,238 impressions. By "pooled," the County apparently intended that the number of impressions be calculated county-wide before an extra charge would apply. DC has used a different method in their billing: assigning a subset of the "pool" amount to groups of machines and billing the County when the number of impressions within a group exceeds that subset. The County has questioned this billing method and the associated charges.

Color impressions are billed at .08 cents per copy. The County has questioned this billing method and the associated charges.

Enhancements to MFD's such as modifications for very high-speed use, high capacity use, fax capability, and other specialized functions are billed to the County. Bills from DC do not show these enhancements and it is difficult to tell which machines have an enhancement, and what type of enhancement. The County has questioned under what authority and which County official authorized these enhancements and their associated charges.

In November 2008, associated with DC' lawsuit against the County, a hearing was held before New York State Supreme Court Justice John Curran, at which time DC demanded that the

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County make certain payments. The Department of Law filed responding affidavits that denied certain allegations made by DC. Since that date, it is our understanding that the two parties have attempted to negotiate a possible resolution of this dispute. As of the date of this report, no resolution has been attained.

In summary, DC maintains that the County owes them for (1) unpaid monthly charges for MFD's; (2) excessive clicks; and (3) color impression charges.

In a letter dated March 6, 2009, the First Assistant County Attorney requested the assistance of the Comptroller's Office and specifically asked that the following be determined:

- Was the award of this bid proper in the first instance?
- Was the County overcharged by the vendor for the services that were provided?
- Was the scope of the service provided by the vendor proper under the bid?

The Comptroller subsequently instructed the Division of Audit and Control to assist the Department of Law on this matter.

As part of our analysis, we interviewed Mr. Beam, Mr. Gervase, and Ms. Vallie Ferraraccio, the current Director of the Division of Purchase.

Issue No. 1: Was the award of this bid proper in the first instance?

ANALYSIS:

Our objective was to determine whether the award of the bid for "Rental Lease of Low to Medium Volume Copier Equipment, A260051-004" was proper in the first instance. The bid specified a sixty (60) month lease period on a page provided by DC, but lists a thirty-six (36) month lease period in Section 4.1.1.

To achieve this objective we assessed the propriety of Purchase and DISS' re-bidding of the original bid package, number 260051-004. The assessment consisted of examining the bid package for an acceptable reason for rejecting all bids, resulting in re-bid of number A260051-004.

We then assessed the propriety of the award for the re-bid, number A260051-004. We inspected all documentation in the bid package, including the bid evaluation matrix prepared by the then Director of DISS

The evidence, taken as a whole, was used to form an opinion based on our objective.

The original bid, number **260051-004**, specified a **thirty-six (36) month** lease period. The request for bids was properly advertised in the Buffalo News, and the bids were opened on February 10, 2006, at 10:00 AM. Some vendors submitted bid packages with pricing for the specified thirty-six month lease period and pricing for a sixty-month lease period that was not

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specified (therefore not acceptable). The Director of Purchase and DISS' Director of Data Processing preferred the price-breaks offered on the sixty-month lease period and as such, they rejected all the bids on the basis of a change in the desired lease period from thirty-six (36) months to sixty (60) months.

The subsequent re-bid for photocopier equipment, was number **A260051-004**, and specified a **sixty-month (60)** lease period. The request for bids was properly advertised in the Buffalo News, and the bids were opened on March 16, 2006, at 10:00 AM. The bid contract was awarded to DC in a letter dated July 10, 2006 (Exhibit "B").

Xerox and ComDoc protested the award in communications dated July 24, 2006, and July 20, 2006, respectively (Exhibits "C" and "D").

We noted the following anomalies associated with the bid evaluation, prior to the bid being awarded:

- Two versions of the bid evaluation matrix were discovered in the bid file (Exhibits "E" and "F"). The weightings applied to the evaluation criteria were altered after the sealed bids were opened and the evaluation matrix was completed.
- The criteria on the bid evaluation matrix differ from the evaluation criteria listed in section 2.5 of the bid specifications for bid number A260051-004.

CONCLUSIONS TO ISSUE 1:

In our opinion, the rejection of all bids for the original invitation for bids, bid number 260051-004 was acceptable due to the County's right to change bid specifications.

In our opinion, **the award** of the bid for bid number A260051-004 **was not proper**. The evaluations for all bidders should be invalidated for the following reasons:

- The evidence obtained in the bid file indicates that the **relative weightings** for the evaluation criteria were **altered** after the bids were opened, resulting in a different winning bidder, depending on which version of the evaluation matrix was used.
- The evaluation criteria used to evaluate the bids **differed from the bid specifications**. The Director of DISS, in a memorandum dated June 30, 2006 (Exhibit "G"), listed five (5) criteria with relative weightings which were used to evaluate respondents' bids. The five criteria and relative weightings are identical to those stated in one version of the bid evaluation matrix. These five criteria are not the same as the four (4) evaluation criteria listed in section 2.5 of the bid specifications. Sections 2.5.1 through 2.5.4 list the individual evaluation criteria. Changing the evaluation criteria of section 2.5 effectively changed the bid specifications. Therefore, by default, all bids should have been rejected, and the project should have been re-bid again.

We do not express an opinion on the data contained in the bid evaluation matrix.

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We respect the evaluator(s) right to establish the relative importance of individual evaluation criteria, and acknowledge that the weighted average method of evaluation is an accepted, yet subjective, technique. However, relative weightings must be established and fixed prior to any evaluation, and ideally, should be stated explicitly in the bid specifications. Altering the weightings with knowledge of the results is always unacceptable, and fraudulent if intent can be established.

Issue No. 2: Was the County overcharged by the vendor for the services that were provided?

ANALYSIS:

With no additional written contracts, agreements or change orders to refer to, this office used the existing contract (Exhibit "A") and a DC affidavit submitted in its court proceedings (Exhibit "J") as a guide to the costs that County has incurred.

Bid Number 260051-004 lists the cost of a MFD as \$141.66 per month or \$34,991.32 per year. The bid also lists the cost of impressions over the monthly average as .0085 cents per copy, and the monthly average beyond which overage charges are incurred to be 1,057,238. The winning bid was for 247 MFD's. However, DC stated in their affidavit that the number of free copies per machine is 7,154. Therefore, the total pooled number of black and white copies is 2,160,508 for 302 machines (Exhibit J footnote 1).

Disallowed Charges

Purchase's formal Instructions to Bidders includes the following statement: ". . . The County will not pay any interest charges, nor refund discount amounts taken after the discount period." However, DC charged the County finance and late charges. Based upon the vendor invoices, finance and late charges of \$89,675.26 should be disallowed.

Disallowed Charges

<u>Invoice</u>	<u>Date</u>	<u>Description</u>	<u>Amount</u>
107781	11/18/2008	Late charges	\$47,037.56
fin0811	11/30/2008	Finance charges for 11/30/08	\$ 8,526.28
fin0812	12/31/2008	Finance charges for 12/31/08	\$10,109.65
fin0901	1/31/2009	Finance charges for 11/30/08	\$11,072.83
fin0902	2/28/2009	Finance charges for 11/30/08	\$11,907.34
106267	10/20/2008	Duplicate of Invoice 106259	\$ 1,021.60
Total			<u>\$89,675.26</u>

Summary of Scenarios

DC has charged different rates for machines, copies and has used different figures to calculate the number of free impressions the County can incur. We have been provided no contract supporting these charges or contract changes. Because we were unable to identify a source document fully describing MFD charges and impression charges, we considered various scenarios in our calculations. All our scenarios include two components: (1) what the County paid to the vendor for 2006 and 2007 and (2) the amount the County was charged for 2008 and January and February 2009. The County stopped paying the vendor in 2008.

We prepared a series of scenarios projecting what the County should have paid, and should have been charged. These scenarios are detailed below. The scenarios are presented as Exhibits "K" through "Q."

Exhibit K Our calculations were based upon allowing payment for all MFD's installed at the bid specification rate of \$141.66. All machines in place whether black and white ("B&W") or color were deemed to be B&W. Therefore, the base monthly billing cost of all installed MFD's was calculated using the B&W cost of \$141.66. Costs for B&W enhancements (upgrades) or color machines were not allowed. The adjustment noted in this scenario indicates an overpayment of invoices previously paid.

Exhibit L The base monthly billing costs were determined utilizing the bid specification rate of \$141.66 for B&W machines and the color rate of \$228.26 as per the affidavit of John Rocchio of DC. Because we were unable to identify the exact costs for upgrades or enhancements, these costs were not allowed. The adjustment noted in this scenario indicates an overpayment of invoices previously paid.

Exhibit M Our calculations here mirrored those in Exhibit K. Costs for B&W enhancements (upgrades) or color machines were not allowed. The base monthly billing cost of all installed MFD's was calculated using the B&W rate of \$141.66. Thus color machines were counted and costed at the B&W rate. The adjustment noted in this scenario indicates an overcharge on the invoices submitted by the vendor but not yet paid.

Exhibit N Our methodology for determining the base monthly billing costs was identical to Exhibit L. Again, because we were unable to identify the exact costs for upgrades or enhancements, the invoiced costs for these machines were not allowed. The adjustment noted in this scenario indicates an overcharge on the invoices submitted by the vendor but not yet paid.

Exhibit P This scenario identifies adjustments to both paid and unpaid invoices based on clicks produced totals (copies made). Using Mr. Rocchio's affidavit, our calculations were based on 7,154 allotted clicks per machine. The overall click total increased incrementally as additional machines were installed. No color copies were included as a separate charge, but we included all color copies in our total of B&W copies produced. The adjustments resulted in both an overpayment of invoices already paid and an overcharge on the invoices submitted but not yet paid.

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Exhibit Q This scenario identifies adjustments to both paid and unpaid invoices based on the total maximum clicks allowable (per month) for all individual billing groups taken as a whole. Color copies were included as invoiced and pool adjustments were for B&W copies only. The adjustments resulted in both an overpayment of invoices already paid and an overcharge on the invoices submitted but not yet paid.

When determining the costs to the County, we charged the County the entire monthly fee amount regardless of the day in which the MFD was placed in service. As an example, if a black and white MFD was placed in service on the 2nd of the month, the County was charged \$141.66. If the same MFD was placed in service on the 30th of the month, the same fee was charged. No proration of the fee is discussed in the bid.

Although a change order or new contract discussing color MFD's or color impressions has not been provided to us, a letter from Kenneth Beam, DISS' then-Director of Data Processing, has been provided to us (Exhibit "H"). This letter implies that permission was given to DC to install new MFD's above the 247 figure. We used these new machines, new rates and new pool allowances in certain scenarios. The letter does not discuss new rates, a new average monthly volume or color capability in any way. We make no assertion that Mr. Beam had the authority to bind the County to this modification of the contract and cannot opine on whether he was an authorized County official who could make any such agreements.

CONCLUSIONS TO ISSUE 2:

In the scenario where all MFD's are paid for at the contract rate of \$141.66, and there are no payments for enhancements, the County overpaid \$60,924.71 for MFD's and was overcharged \$61,746.13.

In the scenario where black and white machines are billed at the rate of \$141.66 and color MFD's are billed at the rate of \$228.26, the County overpaid \$24,206.31 for MFD's and was overcharged \$21,130.73.

In the scenario where color copies are billed out at the B&W rate, the County has overpaid \$59,653.69 and been overcharged \$89,731.30 for a total of \$149,384.99.

In the scenario where color copies are billed out at the rate of .08 cents per copy, the County has overpaid \$23,337.51 and been overcharged \$30,632.24 for a total of \$53,969.75.

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Owed to Duplicating Consultants

<u>DATE</u>	<u>AMOUNT</u>	<u>COMMENTS</u>
3/11/2009	\$ 955,014.66	Vendor Billing Statement for February, 2009
11/18/2008	\$ (47,037.56)	Late charges disallowed - County will not pay per item #16 of instructions to bidders
11/30/2008	\$ (8,526.28)	Finance charges disallowed - County will not pay per item #16 of instructions to bidders
12/31/2008	\$ (10,109.65)	Finance charges disallowed - County will not pay per item #16 of instructions to bidders
1/31/2009	\$ (11,072.83)	Finance charges disallowed - County will not pay per item #16 of instructions to bidders
2/28/2009	\$ (11,907.34)	Finance charges disallowed - County will not pay per item #16 of instructions to bidders
10/20/2008	\$ (1,021.60)	Disallowance of invoice #106267 which duplicates invoice #106259
	<u>\$ (89,675.26)</u>	Total of Disallowed Charges
	<u>\$ 865,339.40</u>	Vendor Billed Amount Less Disallowed Charges And Plus Invoice Not Billed In Error
		Less:
	\$ (60,924.71)	Exhibit K Overpaid
	\$ (61,746.13)	Exhibit M Overcharged
	\$ (59,653.69)	Exhibit P Overpaid
	<u>\$ (89,731.30)</u>	Exhibit P Overcharged
	<u>\$ 593,283.57</u>	Net Total Due The Vendor After Assumptions In the Above Exhibits
		Less:
	\$ (24,206.31)	Exhibit L Overpaid
	\$ (21,130.73)	Exhibit N Overcharged
	\$ (23,337.51)	Exhibit Q Overpaid
	<u>\$ (30,632.24)</u>	Exhibit Q Overcharged
	<u>\$ 766,032.61</u>	Net Total Due The Vendor After Assumptions In the Above Exhibits

The County was overcharged under both of the above series of scenarios. That said, based on the documents made available to our office, the County does owe the vendor either \$593,511.07 or \$766,260.11 depending on which scenario is utilized. *These are not the only possible scenarios.*

One other possible scenario includes breaking out machines with enhancements. We did not do this as charges for enhancements were not broken out by DC. Other possible scenarios include using different pooled rates for B & W copies and using different rates for MFD's at different points during the contract period. The August 2008 invoices use seven different rates for MFD's - \$151.56, \$228.26, \$148.16, \$141.65, \$227.65, \$171.95 and \$68.22. For several reasons, including the lack of information and the time involved, we chose not to develop these scenarios.

We wish to stress that the invoices received by the County did not specify what additional charges were incurred for enhancements such as high-speed capability, high-capacity adaptors, fax capability, the ability to act as a scanner and/or other specialized features. Without this data we were unable to develop any scenario that included this information.

Issue No. 3: Was the scope of the service provided by the vendor proper under the bid?

ANALYSIS:

The services that are charged under the contract are for the actual MFD's themselves, and for impressions that exceed the monthly allowance. Invoices received from the vendor include charges for color impressions and a higher monthly rate for color-capable MFD's and enhanced MFD's. These vendor invoices also include a higher monthly impression allowance than was originally contracted.

Erie County bid number A260051-004 did not discuss color-capable devices in any way. No specification was issued for color capability within the bid, and no separate pricing model was quoted by the winning bidder for color capability. The bid documentation is incorporated into the contract between the County and the vendor.

Section 3.3 of the bid specifications states:

The County will work with the awarded vendor to select and adjust the provision of features as appropriate. The County reserves the right to reject any downgrade of options for any unit or location. Upgrades of features will be by mutual consent of the awarded vendor and the County.

In 2006, MFD's with color capability were provided to the County by DC. Repeated efforts on our part to find any written agreement showing the County agreed to accept the new machines, or accepted a new fee structure has been unsuccessful. With no evidence to the contrary, including no provision of any such agreement on the part of DC in the course of its litigation against the County, it is highly likely that such a written agreement does not exist.

A July 20, 2007 letter from Mr. Beam (Exhibit H) stated the County "intends to purchase up to fifty (50) machines of various speeds and sizes during the next three (3) months." This letter does not discuss color capability or other pricing structures. Again, we are not asserting that Mr. Beam had the authority to bind the County to any modification of the contract.

Under the contract, the County has the right to increase the number of MFD's and to expand the features of MFD's. This expansion could include the addition of color capability or other enhancements to MFD's in use at the County. We have no evidence that the County agreed to any additional charges.

CONCLUSION TO ISSUE 3:

We do not believe that the vendor exceeded the scope of the services provided under the contract. The contract allows for expansion under Section 3.3. We do believe that the additional charges are outside the scope of the contract and as such, are not permissible.

**FOR SPACE PURPOSES, THE EXHIBITS HAVE NOT
BEEN SCANNED AND ARE NOT INCLUDED
ELECTRONICALLY**