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To: Waste, Fraud & Abuse Tip Line File # 121

**Cc: Erie County Legislature
Erie County Executive
Erie County Fiscal Stability Authority**

From: Erie Co. Comptroller, Division of Audit & Control

Date: March 4, 2009

Re: Results of Tip Line Investigation into awarding of electrical motor repair service contract

ISSUES:

- Was the lowest responsible bidder awarded the contract for servicing Sewer electric motors?
- Was the proper procedure followed for this contract?
- Was any undue influence exercised by the County Executive?

APPLICABLE LAW AND RULES:

- New York General Municipal Law § 103 (attached hereto as "Exhibit A").
- New York General Municipal Law § 104-b (attached hereto as "Exhibit B").
- Erie County Charter Article 27, § 2702 (attached hereto as "Exhibit C").
- Erie County Administrative Code, Article 19, § 19.07 (attached hereto as "Exhibit D").
- Erie County Administrative Code, Article 19, § 19.08 (attached hereto as "Exhibit E").

BACKGROUND

Erie County's Sewer Districts ("Sewer") contract out the service and repair of electric motors. They do so because they do not have the technical staff or specialized equipment to repair these devices. The motors range in size from small 10 horsepower motors (or less) to larger motors of over 200 horsepower and vary in cost from several hundred dollars to the tens of thousands of dollars. Repairs on the motors can also vary from the hundreds of dollars to a cost exceeding the value of the motor itself. The motors are used to run various pumps throughout Sewer.

Armor Electric Motor and Crane ("Armor") was awarded the most recent service contract to repair electric motors for Sewer in January of 2006 for a term of one (1) year with two (2) one year extensions ("2006 Contract"). The 2006 Contract expired at the end of 2006, but was

extended by Sewer for an additional two years as per the terms of the original contract. We have not been notified of any complaints on the quality of work performed by Armor.

Pursuant to the terms of the 2006 Contract and the matter in question, there is no guaranteed amount paid to the vendor under this type of service contract. If, in the unusual circumstance that Sewer had no motor problems in any given year, the County is not obligated to make any payments to the winning bidder. For example, Erie County paid Armor \$24,765.01 in 2006, \$70,511.19 in 2007, and \$56,411.37 in 2008 under the 2006 Contract.

Because the contract with Armor was about to expire in December of 2008, Erie County's Department of Purchase ("Purchase") solicited bids for a new service contract on November 20, 2008. A copy of the bid solicitation is attached hereto as "Exhibit F." Nineteen bidders were solicited, but only six responded by the closing date of December 8, 2008. Volland Electric ("Volland") was determined to be the lowest responsible bidder and was provisionally awarded the contract by Purchase, subject to further required approvals, in an amount of \$90,000. A copy of Volland's response is attached hereto as "Exhibit G."

The January 2006 bid paperwork for this contract shows that Volland did not bid. The January 2006 bid for Armor, which was the winning bid, was identical to Armor's bid in 2008 (both bids contained a math error). The second place bid in 2006 differed from Armor's winning total bid price by more than \$146,000.

On February 25, 2009, the Office of the Erie County Comptroller received an anonymous tip through the waste, fraud and abuse tip line alleging that Volland had been awarded a contract to repair electric motors, that County Executive Christopher C. Collins was an owner of Volland, and that the contract may have been awarded to Volland based on the County Executive's relationship with Volland. Upon receipt of the tip the Division of Audit and Control commenced an investigation into the matter.

On the same day that the Office of the Erie County Comptroller received the tip, it is our understanding that the Erie County Fiscal Stability Authority ("ECFSA") informed the Erie County Legislature ("Legislature") that it has been asked by the Erie County Executive's Office to approve a service contract with Volland for the repair of electrical motors and that it appeared that the Legislature had not approved the contract. In fact, the Legislature did not approve a contract as no contract had ever been presented to it.

Additionally, based on the information reviewed, it appears that no written contract has been entered into by Erie County, on behalf of Sewer, with Volland, nor does it appear that even a draft contract exists. It appears that the County Executive's Office, in a letter signed by the Deputy County executive, submitted to the ECFSA an approval form requesting approval of a contract with Volland. That form included limited specifics of the alleged contract. No contract or a draft form of contract was submitted to the ECFSA.

ANALYSIS

Issue No. 1: Was the lowest responsible bidder awarded the contract for maintaining Sewer electric motors?

According to established practice, once bids are received by Purchase they are time/date stamped and placed in a safe until they are opened. Bids are opened in the presence of two persons. Once the bids are opened, the bid sheets are examined by the staff in Purchase. They run adding machine tape totals on the bid sheets, aware that sometimes bidders make mistakes and the totals on the various bid sheets are not correct.

In the current matter, Erie County opened the bids for the contract for motor repair on December 8, 2008. A representative of Volland was present during the bid opening process, which is allowed. The Volland representative was the only bidder to witness the bid opening. Purchase discovered there was a math error on the bid submitted by Armor. This error was not material. The error was for four dollars (\$4.00). Upon the review of the 2006 Contract by our office it appears that the same error was contained in Armor's 2006 bid.

Although the bid requests a labor rate per hour, the winner of the bid is decided solely upon the prices listed on bid sheets 2E and 2D on each bid. These bid sheets list out the charges of repairing different horsepower motors that suffer from various standard problems. The prices quoted include labor in every case.

The low-cost bidder was Volland by less than two thousand dollars. Because Volland met all other criteria under the terms of the bid request it was awarded the contract as the lowest responsible bidder.

| Total Bid Price | |
|-----------------|------------------|
| Armor | \$182,924 |
| Volland | <u>\$180,997</u> |
| Difference | \$ 1,927 |

The "total bid price" has no connection to the actual value of the contract. The total bid price is the sum of all the various tasks that can be performed on all the various types of motors. It would be extremely unlikely that the actual payments made under the contract would equal to the total bid price.

CONCLUSIONS TO ISSUE NO. 1:

Volland was the lowest responsible bidder according to the bid covenants as established by Purchase and Sewer. However, this office believes that the specifications used within the bid process should be revised. Under the current process, a set of fixed tasks is determined by Sewer, and then the bidders are asked to quote the cost to perform those repairs. As a result, the final winning bidder is in part determined by cost estimates to perform tasks that may never

actually be performed. A better way to cost this contract may be to use a mixture of cost per labor hour and the cost of parts. If a method similar to that was used the lowest responsible bidder might be another responding bidder. Regardless of that fact, under the current bid specifications, Volland is the lowest responsible bidder.

Issue No. 2: Was the proper procedure followed for this contract?

Erie County's purchase and procurement of goods and services is governed by New York General Municipal Law, Erie County's Charter, and the Erie County Administrative Code. New York General Municipal Law describes the process for advertising bids, letting of contracts and other basic procurement policies. Specifically, New York General Municipal Law § 103 (1) states, in part:

... all contracts for public work involving an expenditure of more than twenty thousand dollars and all purchase contracts involving an expenditure of more than ten thousand dollars, shall be awarded by the appropriate officer, board or agency of a political subdivision or of any district therein including but not limited to a soil conservation district, to the lowest responsible bidder furnishing the required security after advertisement for sealed bids in the manner provided by this section.

Thus, New York General Municipal Law § 103 does not specifically state what is the appropriate party that awards a contract, only that it could be an "officer, board or agency."

New York General Municipal Law § 104-b also describes the applicable process to be taken by a New York political subdivision in procuring goods or services, but it does not state what party has the power to award contracts. Therefore, a review of applicable Erie County Law is required to determine the appropriate "officer, board or agency."

Article 27, Section 2702 of Erie County's Charter states:

Approval of contracts. Except as otherwise provided in this charter, or the administrative code, any contract to which the county is a party shall require approval by the county legislature, if said contract is for: (a) the sale or purchase of real property; (b) the erection, alteration or demolition of a building or other structure; (c) professional, technical or other consultant services; or (d) the provision of facilities or the rendering of services by or for any other unit of government. Contracts for professional, technical or other consultant services under this section shall be subject to the informal requirements as provided in the administrative code.

The county executive shall execute all contracts on behalf of the county, except as otherwise provided in the administrative code.

Thus, pursuant to the above provision all contracts for "professional, technical or other consultant services" are not only subject to legislative approval but any other "informal

requirements” as provided in the administrative code. Additionally, Erie County’s Charter requires legislative approval when a contract is related to the “provision of facilities or the rendering of services by or for any other unit of government.” The alleged contract in question was to service electric motors for Sewer, a quasi-separate unit of government.

Erie County’s Administrative Code Article 19, Section 19.07 provides, in part, that “no contract shall be executed by the county executive on behalf of the county until the same has been approved as to form by the county attorney.” In the current matter it appears that no written contract existed, and therefore no contract could have been executed by the county executive nor approved as to form by the county attorney.

Erie County’s Administrative Code Article 19, Section 19.08 provides, in part, that:

When a professional, technical or other consultant service contract has a value in gross of ten thousand dollars (\$10,000) or more, the head of a department or administrative unit shall distribute to responsible persons able to provide the required special skill or service, (for the purposes of this section, persons, including the singular of that term, shall include individuals, firms, partnerships and corporations), a request for a proposal (RFP).

Section 19.08 of the Administrative Code further provides, in part:

Upon receipt of responses to the RFP, a three member committee shall be formed by the department head or administrative unit head, and the members of this committee shall preliminarily review and evaluate the responses. This committee shall prepare in writing and shall submit a comparison of all the persons who responded showing (a) what special skill or service will be provided; (b) the qualifications of the person; (c) the expertise of the person and the quality of any past experience that person has had with the county; (d) the total estimated cost, or rate, for providing the special service or skill; and (e) the person shall disclose the name, title and department of any employee or officer of his who was a county employee or officer one year prior to the date of his response. The head of the department or administrative unit shall submit such evaluation with his recommendation to the Erie county legislature.

Thus, assuming the alleged contract in question was for the provision of “professional, technical or other consultant services,” pursuant to Erie County’s Charter, the Erie County Legislature was required to approve the contract and the additional procurement policies of sections 19.07 and 19.08 of Erie County’s Administrative Code should have been followed. Once again, this depends on the interpretation of what exactly is a “professional, technical or other consultant services” because there does not appear to be a definition of those terms in either Erie County’s Charter or Administrative Code.

While neither Erie County’s Charter nor Code address the matter, New York courts have. For example, in determining whether a particular service is professional in nature, and therefore could be exempt from competitive bidding procedures, one must determine if the service “calls

for not only specialized skills and expertise, but also such intangibles as judgment and discretion, the prudent exercise of which is very often the difference between success and failure.” Matter of Schulz v. Warren County Bd. of Supervisors, 179 A.D. 2d 118, 123, 581 N.Y.S.2d 885, 888 (1992) (marketing services are professional in nature). *See also* Schulz v Cobleskill-Richmondville Central School Dis. Bd. of Education, 197 A.D.2d 247, 610 N.Y.S.2d 694 (1994) (whether janitorial and maintenance services are professional in nature is a material question of fact requiring a trial); Gnostics Inc. v. County of Suffolk, 21 Misc.3d 944, 865 N.Y.S. 2d 504 (2008) (medical laboratory services are specialized and therefore professional in nature); and Hurd v. Erie County, 34 A.D.2d 289, 310 N.Y.S.2d 953 (1970) (management of domed stadium is specialized in nature and therefore exempt from competitive bidding rules).

Thus, under New York law, the question of whether the provision of a particular service is professional in nature requires the determination of whether the service calls for the use of specialized skills, expertise, independent judgment and discretion.

Under past and current practices, Erie County generally procures goods and services through two processes – a purchase order process (“PO”) and a service order process (“SO”). Under a PO, goods are specified by the department in need. Vendors submit bids to provide the goods, and the low-cost vendor is awarded the contract. PO contracts can be for a fixed item (ten police cars) or fixed price (vendor will charge so many dollars for each ream of paper) with the number of items ordered at the discretion of the County.

As noted above, an SO is handled differently according to the provisions of New York’s General Municipal Law and Erie County’s Charter and Code. A Request for Proposal is usually prepared by the department in need of the service, and bids are ranked by cost. The County procures such services as diverse as this electric motor repair contract, to legal services and to its external auditor.

The Bureau of Purchase classified the contract for electric motor repair as a PO in 2006 and again in 2008. So classified, it was not forwarded to the Legislature for approval. It was sent to the ECFSA because the value of the contract was greater than \$50,000.

The Comptroller’s Division of Accounting (separate and independent from the Division of Audit and Control, who investigated this matter) has been in dispute with Purchase over the classification of various contracts as PO as opposed to SO for more than a year. In October of 2007 a meeting was held between Purchase and Accounting that highlighted the problems in classification and the subjective nature of determining how some contracts should be treated. For example, barber services for prisoners at the Erie County Holding Center were purchased under a PO (despite the clear nature of the professional service provided). Other examples of items purchased with a PO despite clearly being a professional, technical or other consultant service include training for the Health Department and data processing consultants for the Board of Elections.

The reverse is also true: an SO has been issued for items that are clearly a purchase.

There is room for individual discretion in determining whether to treat some contracts as either a PO or a SO. During our investigation of this matter we interviewed employees in both Purchase and the Comptroller's Division of Accounting. Some individuals in the Comptroller's Division of Accounting assigned to process payments believe this matter was correctly classified as a PO while others believe it should be classified as a SO as it appears to be a service contract for the provisions of technical services.

New York General Municipal Law § 104-b (4) provides that a "governing board shall annually review its policies and procedures." It does not appear that the Legislature has reviewed the policies and procedures as they pertain to the interpretation of what is a "professional, technical or other consultant services."

CONCLUSIONS TO ISSUE 2:

If the contract in question is classified as a PO, the proper procedure was followed. If the contract in question is classified as a SO, the proper procedure was not followed. Our office believes the contract in question was for the procurement of technical services. Additionally, under New York case law, considering that the service in question (electric motor repair) requires the use of specialized skills, expertise, independent judgment and discretion, the service might be classified as a professional service as well. As such, the proposed contract should have been submitted to the Legislature for its approval and the additional provisions of section 19.08 of Erie County's Administrative Code should have been used in this matter.

Additionally, Erie County's Charter provides that all contracts for the "rendering of services by or for any other unit of government" require legislative approval. While the sewer districts are not in themselves a separate unit of government, they are quasi-separate units of government with independent governing boards and fees that are paid by the rate payers that live in the applicable district. As such, we believe the contract should have been submitted to the Legislature for its approval.

Our office has no evidence to substantiate the claim that this contract was recorded as a PO solely to avoid oversight. As noted, the 2006 Contract was recorded as a PO, though our office believes that action was incorrect.

Internal Erie County guidelines for classifying contracts into purchase and service contract categories are vague and must be clarified. New York General Municipal Law § 104-b provides that a "governing board shall annually review its policies and procedures." We believe that the Legislature should review this issue at its next annual review and prepare revisions to Erie County's Charter and Code to eliminate this vagueness and provide clarity to the matter.

Issue No. 3: Was any undue influence exercised by the County Executive?

Once bids are time/date stamped, they are placed in a safe until they are opened. Bids are opened in the presence of two persons.

On December 8, 2008, Purchase opened the bids for the contract for motor repair. As noted above, a representative of Volland was present during the bid opening process, which is allowed. The Volland representative was the only bidder to witness the bid opening. We have no evidence that the bids for this auction were opened early or otherwise were tampered.

While it is true that Volland submitted its bid on the last day bids would be accepted, this is not an unusual practice. Many bidders for County contracts submit bids for contracts on the last day. It is also not unusual for bidders to submit bids at the last moment on the last day.

Note that Volland has performed work for Erie County previously. In 2006, Volland received \$46,422.44 from Erie County, while in 2007 Volland received \$11,533.83 and in 2008 Volland received \$9,159.25 all for services unrelated to the Sewer electric motor contract.

CONCLUSION TO ISSUE 3:

We have no evidence of any undue influence exercised by the County Executive or his staff in the awarding of this contract.