



STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

August 30, 2011

Mr. Lee Occhino
President Occhino Corporation
2650 Seneca St.
West Seneca, NY 14224

RE: D261657 Route 950A Overlay Project

Dear Mr. Occhino;

The Office of the State Comptroller (OSC) has reviewed the protest letter it received from you on June 13, 2011, challenging the decision by Department of Transportation (DOT) to reject your bid on the Route 950A overlay project as informal, and award the contract to the next lowest bidder, Sicar Management & Construction, Inc. The DOT's decision to consider your bid informal was based upon your failure to include item 636.02000005 in your bid as required by Amendment No. 1, which required bidders to add \$6,750 for monitoring services on Native American land.

In your protest, you assert that your failure to include this item was the result of the failure of DOT to provide you with notice of Amendment No. 1. You further assert that DOT stated in its Notice of Highway Lettings that DOT would provide notice of any amendments via e-mail to each person or firm purchasing CDs from NYSDOT, and that DOT failed to provide you with such notice with respect to Amendment No. 1.

The DOT in its response asserts that "[a]lthough the Department does advise bidders that it will send notification of amendments to all firms purchasing CDs, this reference is obviously for amendments issued after the CDs are purchased." Further, DOT states that "[u]ltimately, all the bidding documents place the responsibility on the Contractor to check the Department's website and 'ensure' that all amendments are incorporated into its bid. This Occhino did not do."

The language in the Notice of Highway Lettings, as it appears there, is as follows:

No amendments are included on the CD. Amendments are posted on the NYSDOT and Bid Express Web Sites. The Contractor is responsible for

ensuring that all Amendments have been incorporated into its bid. Notification on Amendments will be sent via e-mail to each person or firm purchasing CDs from the NYSDOT as e-mail addresses are obtained.

NOTE: Amendments may have been issued prior to CD purchase. Contractors purchasing CDs must also check the NYSDOT Web Site:

<http://www.nysdot.gov/doing-business/opportunities/const-notice>) for a list of all Amendments.

This language is, in our view, not clear as to the notifications that DOT will provide bidders who purchase the CD. Because the sentence following the statement concerning such notifications advises bidders that amendments could have been issued prior to CD purchase, the statement concerning notification could be read, as suggested by DOT, to relate only to amendments issued after the purchase of the CD (and the provision of the bidder's e-mail address). It could, however, also be read to relate to any amendments, including those previously issued.

Nonetheless, we believe that DOT is correct in its assertion that the bid documents make it clear that ultimately a contractor is obligated to check the website to ensure that all amendments are included in its bid before submission. The Contract Reporter Advertisement, the Times Herald newspaper advertisement, DOT's Notice of Highway Lettings, the order form for the CD, and the CD itself all state that amendments are NOT included on the CD. These documents further clarify that a contractor is responsible for ensuring that all amendments are incorporated into its bid, and provide a link to where the amendments can be located on the DOT's website. Particularly, we draw your attention to the language of the Disclaimer, included in the bid materials, which states:

Please note that **this CD does not include any amendments**. Bidders and plan buyers must check the NYSDOT website at <http://www.nysdot.gov/doing-business/opportunities/const-notice>, periodically and before submitting a bid, to download and incorporate any amendments that have been issued for this contract. Bidders are solely responsible for checking for amendments and incorporating them into their bids. The recipient of these electronic Contract Bid Documents shall make no claim for, and NYSDOT accepts no responsibility for, any costs, damages or other adverse consequences, whether direct or indirect, that may occur to the recipient or subsequent users of the information, due to failure to check for amendments and incorporate them into bids.

While we believe that DOT could have more clearly stated that their e-mail notification to bidders of amendments would pertain only to amendments issued after purchase of CDs, the bid documents make it clear that ultimate responsibility to ensure that all amendments are incorporated into the final submission rests with the contractor and that the definitive source of information on amendments is the website. If you had checked the website, you would have learned of Amendment I, and could have complied with its requirements. Therefore, we accept

DOT's decision to reject your bid as being informal, and have approved the contract with the lowest responsive bidder, Sicar Management & Construction, Inc.

Sincerely,

A handwritten signature in cursive script, appearing to read "Charlotte Breear".

Charlotte Breear
Director, Bureau of Contracts

CEB:arr

cc: Sicar Management and Construction Inc.
Suzanne Charles, NYS Department of Transportation