

THOMAS P. DINAPOLI  
STATE COMPTROLLER



STATE OF NEW YORK  
OFFICE OF THE STATE COMPTROLLER  
110 STATE STREET  
ALBANY, NEW YORK 12236

December 14, 2012

William J. White  
Brennan & White, LLP  
163 Haviland Road  
Queensbury, NY 12804

Re: Contract D262083 for Asphalt  
Pavement Crack Sealing  
SF-20120280

Dear Mr. White:

I am writing in response to your letter to this Office dated September 18, 2012, on behalf of your client VJP Enterprises Inc. ("VJP"), protesting the decision by the Department of Transportation ("DOT") to award the above referenced contract to Con Star, Inc. ("Con Star"). In your protest, you assert that since VJP was determined to be lowest bidder at the initial bid opening, and the bid submitted by Con Star was opened subsequent to and separately from the public opening of the other bids, the contract should be awarded to VJP, or in the alternative, the award to Con Star should be vacated and a new bid process should be commenced.

Based on the record before us, DOT advertised for the letting of an IFB for asphalt pavement crack sealing on August 9, 2012. Bids were required to be delivered to DOT by 10:30 am on September 6, 2012. On September 5, 2012 a bid from Con Star was received and signed for in DOT's mailroom.<sup>1</sup> The Con Star bid, however, was misplaced by DOT and not delivered to the DOT Contract Management Bureau. On September 6, 2012, DOT opened bids that had been delivered to its Contract Management Bureau and made the initial announcement that VJP was the apparent low bidder. Within one hour of the initial bid opening, DOT discovered the Con Star bid and reopened the letting and publicly read Con Star's bid which was \$77,387 lower than the bid submitted by VJP.

In this instance, Con Star's bid was received by DOT on September 5, 2012 and, therefore, Con Star's bid was timely. The reason that Con Star's bid was not opened at the initial public opening was the result of an administrative oversight by DOT staff. This bid, which was delivered timely to the procuring agency, cannot be rendered untimely as a result of the

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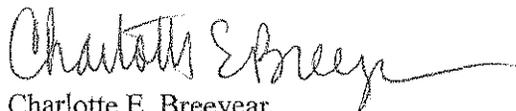
<sup>1</sup> The procurement record contains FedEx tracking information confirming DOT's receipt of Con Star's bid on September 5, 2012 at 8:07 a.m.

administrative error of the procuring agency. Accordingly, DOT acted properly when it reopened the public bid opening and accepted Con Star's bid.

We note that our determination here is consistent with a previous determination rendered by this Office on very similar facts (see SF-20050234, a copy of which is attached). In SF-20050234 we reviewed a protest alleging, in part, that the bid submitted by the winning vendor was not timely submitted. In that case, the procurement record established that while the bid was sent to the agency's Post Office Box (as identified in the solicitation issued by the agency), the agency failed to retrieve the bid prior to the bid opening date. This Office held that since the bid was received by the agency at its official address for mail delivery prior to the bid opening date, the bid was timely and the agency's failure to retrieve the bid from the postal facility did not render the bid late. In our prior determination, we also noted that even if the bid was deemed to be late, we were satisfied that the agency could, under the circumstances of the case, waive such late delivery (citing *Hamlin Construction Co. v. County of Ulster*, 301 AD2d 848 (3d Dept. 2003)).<sup>2</sup>

Based on the foregoing, we are satisfied that the bid submitted by Con Star was timely received by DOT and that DOT properly awarded the contract to Con Star as the lowest responsible bidder. Therefore, we hereby reject your protest, and will be approving the DOT/Con Star contract.

Sincerely yours,



Charlotte E. Breeyear  
Director, Bureau of Contracts

cc: W. Howe, Department of Transportation  
G. Sharp, Con Star, Inc.

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<sup>2 2</sup> In *Hamlin, supra*, the low bid was delivered after the date of bid opening. The bid had remained in the exclusive possession of Federal Express from the time of pickup, which was two days prior to the scheduled bid opening, to the time of delivery of the bid to the County, two days past the submission date. The County became aware that the bid was in transit after the original bid opening. The Court held that where the bid was timely delivered to Federal Express, remained in the exclusive possession and control of Federal Express and there was no opportunity to gain a competitive advantage over the other bidders, the County properly could elect to waive the late delivery of the bid, and award the contract to the low bidder.