STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

In the Matter of the Bid Protest filed by CCI Companies, Inc., with respect to the Procurement for Construction of the Empire State Trail Extension including Bicycle Lanes and Sidewalks in the Town of Dewitt and City of Syracuse conducted by the New York State Department of Transportation.

Determination of Bid Protest

SF–20190191

December 20, 2019

Contract Number – D264077

The Office of the State Comptroller (OSC) has reviewed the above referenced procurement conducted by the New York State Department of Transportation (DOT) for construction of an extension to the Empire State Trail in the Town of Dewitt and the City of Syracuse (Project).[1] We have determined the grounds advanced by CCI Companies, Inc. (CCI) are insufficient to merit the overturning of the contract award made by DOT and, therefore, we deny the Protest. As a result, we are today approving the DOT contract with Crane Hogan Structural Systems, Inc. (Crane Hogan) to provide the construction work for the Project.

BACKGROUND

Facts

On August 9, 2019, DOT announced Contract D264077 seeking bids to construct the Project.[2] Thereafter, DOT released bid documents and on August 27, 2019, DOT amended the specifications to add a Project Labor Agreement (PLA). In response to a bidder's question, DOT clarified on September 10, 2019, that bidder acceptance of the PLA was a requirement of the contract.

Consistent with the requirements of Highway Law §38, the DOT bid documents provide for a contract to be awarded to the lowest responsible bidder as will best promote the public interest (*see* DOT Standard Specifications, Construction and Materials, dated January 1, 2019, at pg. 70). The lowest bid must state the lowest gross sum for which the entire work will be performed, including all the items specified in the estimate, and the resultant award is determined

[1] The Empire State Trail is a 750-mile multi-use trail proposed in January 2017, which will connect and join several existing trail segments throughout New York State. The envisioned trail would run from Manhattan to the northern tip of Lake Champlain and from Buffalo to Albany. The extension work for the Project consists of a 3.1 mile stretch of bike lanes and sidewalks in Syracuse and the Town of Dewitt.

[2] In May 2019, DOT conducted an earlier procurement for the project (Contract D264000) in which CCI was the apparent low bidder. However, on June 28, 2019, DOT announced that all bids for Contract D264000 had been rejected.

by the DOT Commissioner on that basis (*Id.*). DOT received three bids by the due date of September 12, 2019, and awarded the contract to Crane Hogan, the lowest responsible bidder with a proposed total project cost of $18,999,949. CCI did not submit a bid for Contract D264077.

CCI filed a protest with OSC by letter dated September 24, 2019, and supplemented this filing on October 8, 2019 (collectively referred to as Protest).[3] DOT filed an answer to the Protest by letter dated October 11, 2019 (Answer) and CCI replied to the Answer by letter dated October 18, 2019 (Reply).

Comptroller's Authority and Procedures

Under State Finance Law (SFL) § 112(2), with certain limited exceptions, before any contract made for or by a state agency which exceeds fifty thousand dollars becomes effective, it must be approved by the Comptroller.

In carrying out this contract approval responsibility, OSC has promulgated a Contract Award Protest Procedure (OSC Protest Procedure) governing the process to be used by an interested party seeking to challenge a contract award by a State agency.[4] This procedure governs initial protests to this Office of agency contract awards and appeals of agency protest determinations. Because there was no protest process engaged in at the department level, the Protest is governed by section 24.4 of the OSC Protest Procedure.

In the determination of the Protest, this Office considered:

1. the documentation contained in the procurement record forwarded to this Office by DOT with the DOT/Crane Hogan contract;

2. the correspondence between this Office and DOT arising out of our review of the proposed DOT/Crane Hogan contract; and

3. the following correspondence/submissions from the parties (including the attachments thereto):

    a. CCI's Protest dated September 24, 2019, as supplemented by CCI's October 8, 2019 filing;
    b. DOT's Answer to the Protest dated October 11, 2019; and
    c. CCI's Reply dated October 18, 2019.

Applicable Statutes

The requirements applicable to this procurement are set forth in Highway Law §38. Specifically, Highway Law §38(3) provides that "[t]he contract for the construction or

[3] In its supplemental filing, CCI does not raise any new protest grounds; rather, CCI further expounds on the arguments contained in the September 24, 2019 filing.
4 2 NYCRR Part 24.

improvement of such highway or section thereof shall be awarded to the lowest responsible bidder, as will best promote the public interest."[5] Highway Law § 38(3) further provides that the lowest bid:

> shall be deemed to be that which specifically states the lowest gross sum for which the entire work will be performed, including all the items specified in the estimate thereof. The lowest bid shall be determined by the commissioner of transportation on the basis of the gross sum for which the entire work will be performed, arrived at by a correct computation of all the items specified in the estimate therefor at the unit prices contained in the bid.

ANALYSIS OF THE PROTEST

Protest to this Office

In its Protest, CCI challenges the procurement conducted by DOT on the following grounds:

1. DOT's decision to use a PLA is not supported by the record. Moreover, DOT's determination to incorporate a PLA based on a consultant report that did not evaluate the actual terms of a negotiated PLA is defective, discriminatory, arbitrary and capricious.
2. The fact that the bids received for Contract D264000, where no PLA was required, were lower than the bids received for Contract D264077 demonstrates that the PLA fails to achieve savings, does not meet the standards set forth in Labor Law § 222, and thus, is not in the best interest of the public.
3. The PLA may not legally modify a prevailing wage or supplement. Therefore, the deviations from the prevailing wage schedules contained in the PLA are unenforceable and incapable of providing savings.
4. DOT's negotiation of the PLA with union representatives during the restricted period violates State Finance Law § 139-j and Legislative Law § 1-n(1).

DOT Response to the Protest

In its Answer, DOT contends the Protest should be rejected and the award upheld on the following grounds:

1. CCI is not an "interested party" under the OSC Protest Procedure because CCI did not bid and was not significantly involved in the procurement process. Additionally, CCI was not foreclosed from bidding on Contract D264077.
2. DOT's determination to use a PLA was proper and Labor Law § 222 does not require a PLA be negotiated *prior* to consideration of a PLA's potential benefits.

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[5] The Empire State Trail is a multi-use path for pedestrians and bicyclists (*see* Empire State Trail Plan, Final - June 2018, at pg. 3). Highway Law § 22 authorizes DOT to construct such multi-use areas "and the expense of such work may be a proper charge against funds available for the construction, reconstruction, improvement or maintenance of state highways."

3. The PLA does not achieve any of its anticipated savings from violations of the prevailing wage laws.
4. PLA negotiations between DOT and trade representatives did not violate the Procurement Lobbying Law because trade representatives are not considered 'offerors' under the law, and therefore there were no illegal or improper communications during the restricted period.
5. The increase in costs from the prior solicitation, Contract D264000, is attributable to economic factors such as scope, time and schedule, rather than the addition of a PLA.

CCI Reply to the Answer

In its Reply, CCI reiterates the arguments contained in the Protest and further argues that:

1. Although CCI did not submit a bid for Contract D264077, CCI had significant involvement in the early stages of the procurement. Further, the PLA requirement had an anticompetitive impact on the bidding process and deterred CCI from submitting a bid. Thus, CCI is an "interested party" under the OSC Protest Procedure.

DISCUSSION

CCI's Status as an Interested Party

DOT asserts CCI is not an "interested party" under the OSC Protest Procedure because CCI did not bid on Contract D264077 and, therefore, was not a participant in the procurement process (*see* Answer, at pg. 2). DOT further asserts CCI was not significantly involved in the procurement nor was CCI foreclosed from bidding on Contract D264077 (*Id.*). CCI avers it participated in the procurement process by submitting the low bid on DOT's earlier letting of the Project (Contract D264000) and "being a plan holder, attending meetings, working to prepare a bid and asking a question with regard to the PLA requirement" for Contract D264077 (*see* Protest, at pg. 4). CCI also alleges the PLA requirement is "discriminatory to open-shop contractors, such as CCI" and, as a result, deterred CCI from submitting a bid (*see* Reply, at pgs. 4-5).

OSC Protest Procedure defines an "interested party" as "a participant in the procurement process, and those who can establish that their participation in the procurement process was foreclosed by the actions of the public contracting entity and have suffered harm as a result of the manner in which the procurement was conducted."[6] Initially, we note that this Office is not bound by a court's determination of "standing" for purposes of a judicial challenge, in our consideration of whether an entity is an "interested party" under the OSC Protest Procedure (*see* OSC Bid Protest Determination SF-20140300, at pg. 5). Rather "[t]o determine whether a party qualifies as an 'interested party,' we examine a number of factors on a case-by-case basis and assess whether the party has a significant involvement in the procurement and a demonstrable potential harm as a result of the manner in which the procurement was conducted" (*Id.*, at pg. 6).

[6] 2 NYCRR section 24.2(e).

Since CCI did not submit a bid on Contract D264077, we must determine whether CCI had significant involvement in the procurement and suffered a demonstrable potential harm as a result of the manner in which DOT conducted the procurement.[7] DOT characterizes CCI's involvement with the procurement as minimal (*see* Answer, at pg. 2). However, CCI was the apparent low bidder on the earlier letting of the Project, and states that it was a plan holder and was preparing its bid at the time DOT issued Amendment 1 adding the PLA requirement to the Project (*see* Protest, at pg. 2; Reply, at pg. 4). CCI also participated in the question and answer period for the procurement (*see* Protest, at pg. 3; Reply, at pg. 4). Based on the foregoing, in our view, CCI had significant involvement in the procurement.

As to whether CCI suffered a demonstrable potential harm, we note that CCI was the apparent low bidder on the earlier letting of the Project, Contract D264000, which did not require a PLA, and CCI claims the inclusion of a PLA specification restricted competition on Contract D264077 by precluding the participation of open shop contractors like CCI (*see* Protest, at pg. 5; Reply, at pg. 4). To support its claims, CCI states "the four open-shop contractors representing 80% of the bids for the first letting (D264000) declined to bid on the second letting (D264077)" (Reply, at pg. 6). CCI further notes that all three bidders for the current procurement are union contractors (*see* Protest, at pg. 5). In our view, CCI, as the apparent low bidder for DOT's earlier procurement for the Project, and based on its claims that DOT's improper inclusion of a PLA on the current letting of the Project deterred open-shop contractors such as CCI from bidding, has demonstrated potential harm from the actions of DOT.

For the factors discussed above, we find CCI is an interested party and will address the issues raised in the Protest.

DOT's Determination to Use a PLA – Labor Law § 222

CCI asserts DOT's determination to use a PLA is not supported by the record, and DOT's reliance on a consultant report that did not evaluate the actual terms of a negotiated PLA is improper (*see* Protest, at pg. 7).[8] DOT counters that its determination to use a PLA was proper and Labor Law § 222 does not require that a PLA be negotiated prior to consideration of a PLA's potential benefits (*see* Answer, at pg. 3).

Labor Law § 222 provides that a State agency having jurisdiction over a public work may require the awarded contractor to enter into a PLA during and for the work involved in the

[7] DOT relies on *Lancaster Dev., Inc. v. McDonald*, 112 A.D.3d 1260 (3rd Dept 2013), *lv. denied* 22 N.Y.3d 866 (2014) ("*Lancaster*") to support its position that, as a matter of law, a PLA does not preclude a nonunion bidder like CCI from bidding and, therefore CCI is not an "interested party." In *Lancaster*, the Appellate Division denied a nonunion contractor standing to maintain an Article 78 proceeding and declaratory judgment action challenging DOT's inclusion of a PLA because the contractor failed to submit a bid (*Id.*). The court held that "the PLA itself did not preclude [a nonunion shop] from bidding altogether" (*Lancaster*, at pg. 1263). However, as discussed in further detail in the text of the Determination, an entity need not submit a bid to be considered an interested party for purposes of the OSC Protest Procedure.

[8] For purposes of Labor Law § 222, a PLA is defined as "a pre-hire collective bargaining agreement between a contractor and a bona fide building and construction trade labor organization establishing the labor organization as the collective bargaining representative for all persons who will perform work on a public work project, and which provides that only contractors and subcontractors who sign a pre-negotiated agreement with the labor organization can perform project work" (Labor Law § 222[1]).

project when such requirement is part of the solicitation issued by the State agency for the project and when the State agency "determines that its interest in obtaining the best work at the lowest possible price, preventing favoritism, fraud and corruption, and other considerations such as the impact of delay, the possibility of cost savings advantages, and any local history of labor unrest, are best met by requiring a project labor agreement."

In deciding whether to adopt a PLA for the Project, DOT hired an independent consultant experienced in the development and implementation of PLAs to study and evaluate the appropriateness of a PLA for the Project (Report – Project Labor Agreement - Benefit Analysis, hereinafter Study). The Study included: (i) an assessment of the economic and non-economic considerations of a PLA, including an analysis of the existing applicable area collective bargaining agreements of nine labor craft unions (with ten agreements) to identify areas of improvement that may be realized through the use of a PLA to achieve potential labor cost reductions; and (ii) a review of the general labor climate, labor unrest and labor employment statistics.

The Study identified potential cost savings in multiple areas based upon projected craft labor hours, wage rates currently in effect, and contractual provisions routinely negotiated into PLAs in the region. The Study estimated that a PLA could result in an aggregate cost savings of $133,700 (three percent of the project labor costs for the Project estimated to be $4,393,714).[9] The Study also identified other economic savings attributable to a PLA, including the use of strong management rights language which could provide additional value given the need to coordinate the efforts of multiple labor crafts in an efficient manner at an estimated additional savings of $18,300. As a result, the Study projected that the total savings from use of a PLA could exceed $152,000 (approximately 3.5 percent of the total labor costs). The Study also found that the use of a PLA may offer additional non-economic benefits that, while difficult to precisely quantify in monetary terms, could nonetheless be significant factors in the overall success of the Project, including labor stability and enhanced workforce diversity and training objectives.[10]

In sum, the Study concluded that, based on the size and scope of the Project, the proposed schedule and the anticipated mix of craft labor, a PLA could provide DOT with measurable economic benefit equal to a total projected savings in excess of $152,000, as well as non-quantifiable benefits including: avoiding costly delays and promoting labor harmony; standardizing the terms and conditions governing employment; providing a comprehensive and standardized mechanism for settling work disputes; ensuring a reliable source of skilled and experienced labor; and enhancing Minority/Women Business Enterprise Participation.

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[9] Projected labor costs savings were estimated as follows: $43,900 for a four-day 10-hour work schedule; $39,900 for standardizing holidays; $900 for eliminating Industry Fund payments; $11,400 for use of apprentices; $6,100 for eliminating guaranteed pay and replacing with travel allowance; $17,700 for eliminating premiums for night shift work; $2,100 for reduction of foreman rate premiums; $1,000 for off-site fabrication; and $10,700 for work-break time reductions.

[10] The Study found that during the Project's anticipated 16-month construction period two of the local labor contracts will be renewed and any significant disruption during the contract renewal negotiations, or job actions over the use of non-union or non-local labor, could disrupt the Project and jeopardize the timely completion of all Project components. The Study notes, however, given the current state of the labor market in the Central New York area, the likelihood of any disruption to the Project is minimal.

Based on its assessment of the Study, the DOT Commissioner determined "the inclusion of a PLA is appropriate because of, among other things, the timeline of the Project, the composition of the workforce in both the public and private contracting history, the high level of ongoing and projected construction in the area, the need for securing a skilled labor pool, and the number of trades and contractors involved" (Answer, Exhibit A, at pg. 4). In addition to the estimated cost savings from a PLA, DOT specifically references the benefits of a "No Strike" provision that would prevent delays, and provide a guaranteed supply of skilled labor for the duration of the Project (*Id.*, at pg. 5). Accordingly, the DOT Commissioner directed that a PLA be drafted and executed between the Design-Builder and the Building Construction Trades Council of Greater New York, and included in the bid specifications for the Project (*Id.*).[11]

A. Timing of DOT's Determination

CCI alleges DOT's determination to adopt an "as-yet-unnegotiated" PLA was contrary to law (*see* Protest, at pg. 7). More specifically, CCI argues that since the Study predated the negotiation of the PLA with the trade unions, the Study could not have assessed negotiated concessions (*Id.*). As a result, CCI contends DOT determined to incorporate a PLA without evaluating whether the PLA achieved the savings identified in the Study (*Id.*). DOT responds that CCI's position (requiring that a PLA be negotiated and executed before a public entity could consider whether a PLA would be beneficial) is a "cart-before-the-horse" approach that has no basis in law or logic (*see* Answer, at pg. 3). DOT further states that the process suggested by CCI would lead to unnecessary delays and expenditure of resources regardless of whether a PLA were to be used on a project (*see* Answer, at pgs. 3-4).

Before including a specification requiring the use of a PLA for the Project, Labor Law § 222 required DOT to make a determination consistent with the factors set forth in the statute. However, nothing in the language of Labor Law § 222 can be read to require that DOT negotiate a "proposed PLA" prior to making such a determination. Nor has CCI cited any legal support for this position. Furthermore, as pointed out by DOT, the court decisions addressing the use of PLAs have not suggested such a requirement (*see* Answer, at pg. 3).

B. Cost Savings Under the PLA

CCI asserts that the use of a PLA will cost the State and its taxpayers over $1.6 million in additional costs (*see* Protest, at pg. 10; Reply, at pg. 12). CCI supports this assertion by comparing its apparent low bid submitted under Contract D264000, which did not contain a PLA requirement ($17,311,989.17), to the low bid submitted by Crane Hogan under Contract D264077, which did contain a PLA requirement ($18,999,949.49) (*see* Protest, at pgs. 3-5, as supplemented, at pgs. 2-3).[12] More specifically, CCI posits that Contract D264077 is a reletting of the earlier contract and, therefore, the higher bid price is attributable to the PLA (*see* Protest,

[11] We note that the DOT Commissioner incorrectly refers to a "Design-Builder." However, as previously stated, the contract was awarded to the low bidder pursuant to Highway Law § 38.

[12] With regard to CCI's bid under Contract D264000, DOT states "[w]hile the Department rejected all bids for unrelated matters, at the time of the rejection CCI's bid was considerably more than the Department's estimate, and CCI's commitments on MWBE utilization did not meet the required goals or good faith effort requirements" (Answer, at pg. 1).

at pgs. 2 and 10). In response, DOT states that while some of the estimated quantities may have been lower in the subsequent letting, DOT decided to keep the project completion date the same which could have increased the Project costs (*see* Answer, at pg. 2).

As discussed in the preceding section, Labor Law § 222 required DOT to make a determination that the PLA was in its best interest for the reasons set forth in the statute before including a specification for a PLA on the Project. Based on our review of the procurement record, DOT satisfied this statutory requirement when it made its determination based, among other things, on the $152,000 in projected labor cost savings identified in the Study.[13]

Alleged Violation of Article 8 of Labor Law – Prevailing Wage Law

CCI asserts a PLA may not legally modify prevailing wage or supplements for public work projects established by the Department of Labor (DOL) under Article 8 of the Labor Law (*see* Protest, at pgs. 8-9; Reply, at pgs. 8-9). CCI further asserts it is not permissible for a union agreement with a contractor to deviate from prevailing wage requirements and any such deviations in the PLA are "unenforceable and incapable of providing legal savings" (*see* Protest, at pg. 8). CCI states "[t]he bottom line is that the [Study's] reported analysis of purported 'cost savings' is seriously flawed in that it is premised, at least in part, on violations of state law" (Reply, at pg. 9). To support its position, CCI relies on a 1987 DOL opinion letter[14] wherein DOL stated "the law will always take precedence . . . Article 8 [of the Labor Law] establishes the minimum requirements for compliance, less stringent terms contained in a union agreement cannot be enforced" (*see* Protest, at pg. 8; Reply, at pg. 9).

DOT counters that none of the anticipated savings from the PLA would come from a change to prevailing wages and, therefore, CCI's claims of violation of the prevailing wage law have no basis in fact (*see* Answer, at pg. 4). DOT states that the 1987 DOL opinion predates the 1996 Court of Appeals decision in *Thruway Authority*[15] (which established the legality of PLAs on public works projects in New York), and the 2008 adoption of Labor Law § 222. DOT asserts that a later November 14, 2005 opinion letter from DOL is directly on point and supports its position (*Id.*)[16]

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[13] CCI also questions the significance of the anticipated savings attributed to the use of a PLA (*see* Reply, at pgs. 11-12). While this Office exercises independent judgment in reviewing contracts under SFL § 112, this Office generally gives significant deference to agency determinations regarding factual issues which are within the agency's expertise (*see* OSC Bid Protest Determination SF-20110086, at pg. 6). The factual issues regarding DOT's determination to require a PLA for the Project, including evaluating the sufficiency of potential cost savings, are within DOT's expertise *(Id.)*. Giving appropriate deference to DOT's expertise, this Office reviewed the procurement record to determine whether it reasonably supports DOT's determination.

[14] *See* Protest, Exhibit G; Letter dated December 24, 1987, from Barbara C. Deinhardt, Deputy Commissioner of Labor for Legal Affairs, N.Y.S. Department of Labor, to Stephen L. Schaurer, Executive Director, Associated Builders and Contractors, Inc. Empire State Chapter, responding to a request for clarification of certain issues regarding Labor Law § 220.

[15] *In the Matter of New York State Chapter, Inc., Associated General Contractors, v. N.Y. State Thruway Authority,* 88 N.Y. 2d 56 (1996).

[16] *See* Answer, Exhibit B; Letter dated November 14, 2005, from Jerome Tracy, Associate Attorney, N.Y.S. Department of Labor, to Joel Howard, Esq. of Couch White, LLP, regarding Clifton Park Library Project Labor Agreement (2005 DOL opinion letter).

Initially we note that of the approximately $152,000 in projected cost savings identified by the Study, approximately $94,400 in savings are attributable to productivity gains, and/or other adjustments to the terms of certain collective bargaining agreements (CBAs) with the nine labor unions that do not implicate the prevailing wage law: (i) employing four 10-hour days - $43,900; (ii) eliminating CBA-required industry fund payments - $900; (iii) access to non-union apprentices - $11,400; (iv) replacing guaranteed pay with travel allowance - $6,100; (v) foreman rate adjustments - $2,100; (vi) off-site fabrication - $1,000; (vii) work break time reduction - $10,700; and (viii) a strong Management Rights clause - $18,300.

In its Reply, CCI refers to two specific areas of projected cost savings which CCI claims deviate from the prevailing wage and supplement schedule: (i) holiday pay, and (ii) night work differential (*see* Reply, at pg. 9). These two areas are referenced in the wage/supplement schedules for certain worker classifications and are adjusted under the PLA to achieve additional savings. Projected savings by eliminating the requirement of certain paid holidays for five of the labor trade/worker classifications (so as to standardize all the trades/workers to six unpaid holidays) are estimated to be $39,900.[17] The estimated cost savings for eliminating the hourly premium for night work for two of the labor trade/worker classifications are estimated to be $17,700.[18]

As stated earlier, in support of DOT's position that a cost savings identified in the Study does not run afoul of the prevailing wage law, DOT relies on a 2005 DOL opinion letter wherein DOL was asked "whether a properly supported PLA supersedes certain provisions of the State's prevailing wage law or a prevailing wage schedule issued thereunder." In response, DOL found:

> When, in the context of a PLA, employee representatives contractually agree to rates and benefits on behalf of their workers, they usually do so as part of a business decision in which the workers gain in terms of the acquisition of additional work or other benefits. When such terms are incorporated into a PLA for a public work project, they become 'prevailing' for the life of that project. . . Project Labor Agreements which meet [legal standards] negotiated between labor organizations and public authorities, are in the public interest, represent the public policy of this State and by their very purpose satisfy the requirements of Article 8 of the Labor Law. To the extent that there may appear to be a conflict, the PLA represents a collective bargaining agreement upon which the Commissioner bases the wage and rate schedules. In this sense, the PLA becomes the collective bargaining agreement by which the specific project is governed. The affected parties have chosen to waive any rights that they may have acquired under the prevailing wage law for purposes of obtaining other benefits which they believe to be more beneficial to themselves. There is, therefore, no conflict between an authorized PLA and the prevailing wage law (2005 DOL opinion letter, at pgs. 1-2, emphasis added).

[17] Carpenters, Electrical Linemen, Laborers, Operating Engineers and Teamsters.
[18] Laborers and Operating Engineers.

Our review of this issue has not uncovered any current guidance from DOL (or elsewhere) that would lead us to question the findings contained in the 2005 DOL opinion letter. In fact, Executive Order No. 49 (dated February 12, 1997) requires a State agency that enters into a project labor agreement and enters into one or more contracts for work to be performed under such agreement, to submit the project labor agreement to the Commissioner of Labor who "shall determine the interaction, if any, between Article 8 of the Labor Law and the agreement."[19]

Based on the foregoing, we find no basis to conclude that the cost savings identified in the Study result from violations of the prevailing wage law.

DOT's negotiation of the PLA with Union Representatives

CCI asserts DOT's negotiation of the PLA with union representatives during the restricted period violates SFL § 139-j and Legislative Law § 1-n(1) (*see* Protest, at pg. 10). Specifically, CCI alleges the trade signatories to the PLA, some of whom may have been registered lobbyists, are "offerers" and, as a result, such discussions with DOT relating to the PLA were prohibited (*Id.*).[20] DOT contends those trade representatives that engaged in PLA negotiations are not "offerers" since SFL § 139-j "is intended to capture the universe of potential bidders and those advocating on their behalf" (*see* Answer, at pg. 5). CCI responds that "offerer" is not limited to those individuals and entities intending to submit a bid (*see* Reply, at pg. 12).

SFL § 139-j(1)(h) provides that an "offerer" means an "individual or entity, or any employee, agent or consultant or person acting on behalf of such individual or entity, that contacts a governmental entity about a governmental procurement during the restricted period of such governmental procurement whether or not the caller has a financial interest in the outcome of the procurement." SFL § 139-j(1)(f) establishes the "restricted period" as "the period of time commencing with the earliest posting...of written notice, advertisement or solicitation of ...for soliciting a response from offerers intending to result in a procurement contract with a governmental entity and ending with the final contract award and approval by the governmental entity and, where applicable, the state comptroller." An offerer that "contacts" a governmental entity about a procurement during the restricted period may only make permissible contacts which are defined in SFL § 139-j(3). Finally, SFL § 139-j(1)(c) defines "contacts" as "any oral, written or electronic communication with a governmental entity under circumstances where a reasonable person would infer that the communication was intended to influence the governmental entity's conduct or decision regarding the governmental procurement."

The definition of "offerer" in SFL§ 139-j is comprehensive and applies regardless of whether the individual or entity has a financial stake in the procurement's outcome.

[19] *See* 9 NYCRR § 5.49 Governor Pataki Executive Order No. 49, 2/12/97; continued by Governor Spitzer Executive Order No. 5, 1/1/2007; continued by Governor Paterson Executive Order No. 9, 6/18/2008; continued by Governor Cuomo Executive Order No. 2, 1/1/2011.

[20] CCI suggests that "[s]ome of the signatories [of the PLA] may also be registered lobbyists, which would make any contacts during the 'restricted period' also in violation of Legislative Law § 1-n(1)" (Protest, at pg. 10, emphasis added). Since CCI did not provide further support for this allegation, our discussion of this issue is limited to alleged violations of SFL § 139-j.

Accordingly, we are not constrained to agree with DOT's assertion that trade representatives are not "offerers" for purposes of the restrictions on communications in SFL§ 139-j. Neither are we persuaded, however, by CCI's argument that DOT's negotiations with union representatives in respect of the PLA per se violate SFL § 139-j. While it is indisputable that such negotiations took place during the "restricted period" of this procurement, it is not clear whether these communications were "contacts" (i.e., intended to influence DOT) for purposes of SFL § 139-j.

Guidance issued by the Advisory Council on Procurement Lobbying provides that a communication is "intended to influence" when "a reasonable person would believe that the activity, regardless of the form, is intended to make the Governmental Entity take or not take affirmative action with respect to the Governmental Procurement" (Advisory Council on Procurement Lobbying FAQ 8.10, last updated 6/14/2010). On July 12, 2019, DOT's Commissioner directed that a PLA be included in the bid specifications for the Project and further authorized the drafting and executing of the PLA (*see* Answer, at Exhibit A). Therefore, by the time Contract D264077 was first advertised on August 9, 2019, DOT had already determined to use a PLA for the Project. Consistent with the foregoing guidance, a reasonable person could conclude that DOT's negotiations with union representatives were not intended to influence DOT's determination with respect to the use of a PLA (since this determination had already been made), and thus, did not result in a violation of SFL § 139-j.

Nevertheless, this issue need not be settled for purposes of resolving the Protest or approving DOT's contract award to Crane Hogan. Pursuant to SFL § 139-j(10-b), a finding (which would be made by the procuring governmental entity, in this instance DOT) that an offerer has knowingly and willfully violated the provisions of SFL § 139-j related to permissible contacts would result in a determination of non-responsibility of such offerer and the offerer would not be awarded the procurement contract. Here, the alleged violations concern communications with union representatives and would not impact the validity of the award to Crane Hogan (*see* OSC Bid Protest Determination SF-20110086, at pg. 5).

CONCLUSION

For the reasons outlined above, we have determined the issues raised in the Protest are not of sufficient merit to overturn the contract award by DOT. As a result, the Protest is denied and we are today approving the DOT/Crane-Hogan contract to provide the construction work.