November 2, 2021

Joanne M. Mahoney, Esq.
Chair
New York State Thruway Authority
200 Southern Boulevard
Albany, New York 12209

Re: NYS IG 0166-041-2019

Dear Chair Mahoney:

In a letter dated January 3, 2019, Hinman, Howard & Kattell, LLP, on behalf of Binghamton Precast & Supply Corp., a precast concrete manufacturer, filed a complaint with the Offices of the New York State Inspector General alleging “potentially improper favoritism involving [a] supplier” on New York State Thruway Authority projects. Specifically, the complaint alleged that the Thruway Authority violated its procurement policies by unfairly awarding work to a Binghamton Precast competitor, The Fort Miller Company, Inc., as a “sole source” supplier, thereby circumventing a competitive bidding process and permitting Fort Miller to supply precast concrete barriers on the New Rochelle and Yonkers cashless toll booth conversion projects. Additionally, Binghamton Precast’s attorney advised that both that the New York State Office of the State Comptroller (OSC) and the Thruway Authority provided insufficient and confusing responses to Binghamton Precast when it inquired about the contracts in question. Further, Binghamton Precast claimed that the Thruway Authority retaliated against it by rejecting approximately $400,000 worth of concrete slabs supplied by Binghamton Precast on a separate Thruway Authority project.

The Inspector General investigated these allegations and found that the Thruway Authority relied on broad language within its “On-Demand” contracts to justify forgoing a competitive procurement process to obtain Fort Miller’s prefabricated concrete barriers, and thereby meet the project completion deadline. The investigation also found that inconsistent responses from the Thruway Authority and OSC contributed to Binghamton Precast’s confusion regarding Fort Miller’s selection as a supplier for the New Rochelle and Yonkers projects. Lastly, the investigation did not substantiate any claim of retaliation by the Thruway Authority against Binghamton Precast.
Cashless Tolling

In August and September 2018, as part of a statewide initiative to implement a cashless tolling system, the Thruway Authority awarded competitively-bid contracts to Grace Industries to convert toll plazas located in New Rochelle and Yonkers. This effort was part of the Thruway Authority’s conversion of the State’s seven fixed-price toll plazas, including Yonkers and New Rochelle, through individual contracts. In November and December 2018, the Yonkers and New Rochelle toll plazas were among the last fixed-price locations to be completed, respectively. The remaining 52 ticketed toll plazas were converted using a design-build project delivery method and completed in December 2020.

Thruway Authority Procurement Contracts

According to the Thruway Authority’s Procurement Contracts policy¹, the Thruway Authority must generally use competitive procurement methods when acquiring goods, such as precast concrete slabs and barriers. Also per policy, the Thruway Authority Board may waive this requirement for reasons including but not limited to “a need to respond to an Emergency” or if “there is a specific contractor selection that is necessary or convenient to the operations of the Authority.” The policy defines emergency as “an unanticipated, sudden or unexpected event or escalation of an event beyond the control of the Authority which, if not immediately corrected, would endanger: a) the life, health, safety or welfare of any person, or b) the continued public use or function of a transportation or other facility or property of the Authority or the State of New York.”

On-Demand contracts are competitively bid for emergency highway maintenance, repair, and construction services located in a particular region (New York City, Buffalo, Albany, and Syracuse Divisions). During the period covered by this investigation, the Thruway Authority had active On-Demand contracts in the Albany Division with contractors Harrison & Burrowes and D.A. Collins. The scope of work to be completed under these contracts includes a list of general repairs to damaged and deteriorated thruway infrastructure and “other emergency repairs.” The contracts note that this scope is a “general description” and “not a complete listing of all work to be done.”

The Thruway Authority Directed On-Demand Contractors to Purchase Concrete Barriers from Fort Miller

The Thruway Authority’s [redacted] testified to the Inspector General that the New Rochelle and Yonkers projects were scheduled to be completed by the end of 2018. However, [redacted] testified, for Grace Industries to meet that deadline, the Thruway Authority had to expedite the purchase of concrete barriers for those locations.

¹ NYSTA Policy No. 25-5-01; Dated: June 6, 2016.
To expedite the purchases, the Thruway Authority directed its Albany Division\(^2\) On-Demand contractors to purchase concrete barriers from Fort Miller for the Yonkers and New Rochelle toll projects. According to John Fort Miller was chosen to supply the concrete barriers because it was the only supplier they knew that could provide the required barriers in the time allotted. Both Harrison Burrowses and D.A. Collins issued purchase orders to Fort Miller and, as instructed by [Redacted], billed the Thruway Authority for the purchases through their On-Demand contracts.

According to [Redacted] who had proposed the idea to use the On-Demand contracts in this manner, the Thruway Authority relied upon the "other emergency repairs" category in the On-Demand contracts' scope of work to justify the purchases. [Redacted] testified he understood that the use of the On-Demand contracts for these purchases was tenuous, but it was the only way to get the job done on time. [Redacted] noted that although OSC had questioned the Thruway Authority's use of On-Demand contracts on another project in 2018—the State Welcome Center project—OSC had ultimately approved the use of On-Demand contracts on that project. OSC advised that it approved the use of an On-Demand contract on this project because of the contract's broad language and the fact that the project had already been completed prior to OSC's review.

**Binghamton Precast Protested to OSC**

On October 15, 2018, Binghamton Precast wrote to OSC protesting the contract awards to Grace Industries and claiming that Fort Miller was unfairly awarded work on the New Rochelle and Yonkers projects. On October 19, 2018, OSC denied the contract awards to Grace Industries citing "out of scope use of On-Demand repair contracts" and Binghamton Precast's protest.

On November 15, 2018, [Redacted] responded to OSC and defended the Thruway Authority's use of these On-Demand contractors as within the scope of work. He noted that the scope includes a list of general repairs to thruway infrastructure but provides that the list is "not a complete listing of all work to be done." [Redacted] further advised:

[The Thruway Authority] used On-Demand Contracts to purchase material that has long lead times and to complete work that is needed to be done in order to meet project's goals. To ensure that the Authority is receiving fair and reasonable pricing, the Authority reviewed estimates/quotes received from the On-Demand contractors and their subcontractors. While these contracts do not require our contractors to obtain multiple bids, in some instances we have asked them to obtain additional quotes when we believed the prices were not reasonable.

\(^2\) [Redacted] advised that although the New Rochelle and Yonkers projects are located in the Thruway Authority's New York City Division, he used the Albany Division On-Demand contracts because the Albany Division contracts had greater balances than those of other Divisions.
OSC subsequently approved the contracts awarded to Grace Industries and the use of the On-Demand contractors in this instance.

OSC informed the Inspector General that the language in the On-Demand contracts' scope of work was so broad that although the conversion of the toll plazas was not an emergency, the Thruway Authority's reliance on the contract language was understandable. According to OSC, it advised the Thruway Authority that for future projects, it should not use On-Demand contracts for non-emergency purposes or for regions not specified in the contract. OSC also confirmed it was working with the Thruway Authority to revise the language of its On-Demand contracts.

Notably, the Thruway Authority had other means to potentially achieve these same results. The investigation found that Thruway Authority procurement policy permits its Board to waive competitive procurement requirements according to a listed exception. Based upon the Thruway Authority employee testimony described above, its Board could have waived competitive procurement requirements in this instance if the Board found the use of Fort Miller was "necessary or convenient to the operations of the Authority."

Communications with Binghamton Precast

Binghamton Precast informed the Inspector General that it had received differing explanations from the Thruway Authority and OSC as to Fort Miller's participation on the New Rochelle and Yonkers projects. These communications reported variously that Fort Miller was a "sole source supplier," and was hired pursuant to a "backdrop contract" and/or an On-Demand contract. Undoubtedly, this lack of clarity in the several communications confused Binghamton Precast. Nonetheless, the investigation found that Fort Miller was hired as a supplier to both Albany region On-Demand contractors, Harrison & Burrowes and D.A. Collins, on the New Rochelle and Yonkers toll plaza conversion projects.

The New England Thruway Project and Binghamton Precast's Rejected Concrete Slabs

In August 2018, the Thruway Authority awarded a reconstruction project for the New England Thruway (I-95) to ECCO III Enterprises. For this project, ECCO purchased 360 concrete slabs from Binghamton Precast, which had recently developed the ability to manufacture such slabs. Notably, prior to this, Fort Miller was the only manufacturer of such slabs.

After Binghamton Precast delivered the precast slabs to the project site, a Thruway Authority inspection revealed hairline shrinkage cracks and 112 slabs were rejected. After Binghamton Precast made repair to the slabs, the Thruway Authority reinspected them, accepting 58 and rejecting 54 slabs, and demanding replacement of those that were defective. The replacement cost Binghamton Precast approximately $400,000. Binghamton Precast viewed this as a retaliatory measure for its inquiries into Fort Miller. The Inspector General was unable to substantiate this claim.
According to New York State Department of Transportation (DOT) Standard Specification 704.03 governing precast concrete materials, which is relied on by the Thruway Authority, cracks that go through a concrete slab section “or are greater than 0.01 inch in width” are considered major defects. Further, no major defect may be repaired without prior approval from the project owner. Accordingly, the Thruway Authority rejected those Binghamton Precast slabs with cracks greater than 0.01 inches.

In response, Binghamton Precast hired an outside firm, Delta Specialty Precast Concrete Engineers (Delta), to evaluate the defects in the rejected concrete slabs. A Delta engineer opined, “Although the cracks may be interpreted in accordance with NYSDOT Specification 704-03 as a ‘Major Defect’, it is my professional opinion the cracks do not rise to the level of a major defect, even if technically identified by 704-03 as such.”

By the engineer’s own acknowledgment, the slabs did not meet the required specification set forth in 704-03. The Inspector General therefore found that Delta’s report validated the Thruway Authority’s rejection of the slabs. No evidence was found that this was retaliatory in nature. Of note, Binghamton Precast is currently listed in good standing by DOT as a precast concrete approved manufacturer for all precast concrete products.

Findings and Recommendations

Despite the OSC’s subsequent approval of the contracts awarded to Grace Industries and the use of the On-Demand contracts in this manner, the Inspector General found that the Thruway Authority should not have relied on broad language within its “On-Demand” contracts to justify forgoing a competitive procurement process to obtain Fort Miller’s prefabricated concrete barriers. Additionally, the Inspector General found questionable the Thruway Authority’s direction to its On-Demand contractors to purchase concrete barriers from a particular vendor, Fort Miller, for these projects. The Thruway Authority conducted no research on other possible vendors and provided no records to the Inspector General justifying this direction.

Given these findings, I recommend that Thruway Authority accept OSC’s advisement and review the use of On-Demand contracts intended for emergency purposes within the specified region.

Please advise me of any action taken by Thruway Authority in response to these recommendations within 45 days of the date of this letter. If you require further information, please contact me at 518.474.1010.

Sincerely,

Robyn Adair
Acting Inspector General