

A REPORT BY THE NEW YORK STATE OFFICE OF THE STATE COMPTROLLER

**Alan G. Hevesi
COMPTROLLER**



DEPARTMENT OF TRANSPORTATION

WESTSIDE HIGHWAY

BSE-2003-003

DIVISION OF STATE SERVICES

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Alan G. Hevesi
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Report BSE-2003-003

Mr. Joseph H. Boardman
Commissioner of Transportation
Department of Transportation
Building 5, State Campus
Albany, NY 12232

Dear Commissioner Boardman:

The following is our report addressing the results of our review of New York State Department of Transportation construction contract D257543, Grace Industries Inc., construction of segment six of the West Side Highway Route 9A project. The primary focus of this review was payments made for additional overhead costs and other costs associated with a delay in the project.

We did this review according to the State Comptroller's authority as set forth in Article V, Section 1 of the State Constitution and Article 2, Section 8 of the State Finance Law. We list major contributors to this report in Appendix A.

Office of the State Comptroller
Division of State Services

January 24, 2005

EXECUTIVE SUMMARY

DEPARTMENT OF TRANSPORTATION WESTSIDE HIGHWAY

SCOPE OF REVIEW

The scope of this review was payments made against New York State Department of Transportation (DOT) construction contract D257543, awarded to Grace Industries Inc. (Grace) for \$43,744,312 for construction of segment six of the West Side Highway Route 9A project. The primary focus of this review was payments made for additional overhead costs and other costs associated with a delay in the project.

REVIEW OBSERVATIONS AND CONCLUSIONS

Unexpected delays in this project occurred as a result of problems that Grace and DOT discovered once the project was in progress. Due to these delays, Grace was to complete part of the project as a “time and materials” project. At this point, Grace and DOT engineers monitoring the project were to track all labor, materials, and equipment used on the project. Time and material work has inherent risks, and our review discovered several areas where Grace over billed for their work and the DOT Engineer-in-Charge (EIC) of the project did not detect the billing errors.

The most significant area where this occurred was the unemployment insurance and workers’ compensation insurance that Grace charged for their labor on certain portions of the project. Grace incorrectly calculated these insurances, thereby overbilling DOT by an estimated \$1.8 million. Grace also overbilled their labor charges by misclassifying normal line workers as overhead, misrepresenting main office personnel as field overhead and billing for unsupported hours.

Grace also overbilled DOT for their equipment by over \$540,000. Grace used incorrect rates to calculate billable operating costs, charged equipment to this job that they already accounted for in their main office overhead, and charged excessive hours for equipment use.

Additionally, agency managers have not established sufficient controls over their payment and record keeping processes for their construction division. We

identified two instances, totaling over \$1.1 million, where the EIC submitted false certifications to process payment requests for temporary timber sheeting at times when no temporary timber sheeting was used. We also identified an additional five instances of suspect certifications; two for temporary timber totaling \$516,600 and three for rodent control totaling \$13,000. In these cases, DOT officials have been unable to explain or support the payments. DOT officials are continuing their investigation of these irregularities.

In total we questioned or proposed disallowing nearly \$3.3 million in costs claimed by Grace in their claims. See Appendix E for a summary of these items.

In addition, we determined that one DOT Assistant Office Engineer falsely certified reports. He signed reports of the laborers, materials, and equipment used on the job without actually monitoring the work. Required daily reports describing what work Grace accomplished did not exist. Finally, the unforeseen problems and unexpected delays that occurred on this project resulted in a formal dispute between DOT and Grace. This situation required that Grace officials certify that the data supporting the dispute is accurate and complete. DOT did not have this required documentation.

Because claims are still being submitted for this contract, we will continue to review the claims from and payments made to the contractor under this contract and may extend our review to other Grace contracts with DOT. We will review whether similar instances of overbilling occurred and assess compliance with the applicable contract terms and conditions.

COMMENTS FROM THE DEPARTMENT OF TRANSPORTATION

The New York State Department of Transportation agreed with our recommendations. Department officials advised they have assembled a team to review the allegations of suspect certifications and determine what action should be taken.

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INTRODUCTION

Background

The mission of the New York State Department of Transportation (DOT) is to ensure a safe, efficient, balanced, and environmentally sound transportation system for the people who live, work, and travel in New York State. To accomplish this, DOT spends over \$1.5 billion each year on construction to build, repair, and maintain New York State's highways and bridges. Private construction companies bid on DOT construction projects. The role of DOT construction engineers is to monitor and inspect the work of these companies.

New York State Department of Transportation contract D257543 is for reconstruction of the West Side Highway from West 25th St. to West 40th St. in New York City. DOT let this contract on March 26, 1998, and awarded the contract for over \$43 million to the low bidder, Grace Industries. Due to additional change orders totaling more than \$10 million, the current amended contract amount is over \$53 million. Grace, a construction company that has been in existence for over five decades, is one of the largest heavy construction companies in the New York Metropolitan area. They are a diversified company, specializing in asphalt manufacturing and paving, concrete paving, airport, highway, and bridge construction, as well as other areas of construction.

The New York State Department of Transportation is headquartered in Albany, and includes eleven regional offices throughout the state. The Main Office in Albany and each of the eleven regions has a construction division. Each region is responsible for overseeing all the construction projects in its area. DOT assigns each project an Engineer-in-Charge (EIC) to supervise and oversee that specific project.

For each construction project, the project EIC supervises a staff of DOT engineers. These engineers monitor, inspect and report on the work performed by the construction vendor. The EIC uses these reports to create payment requests. He certifies the payment request by signing a form called a "Certificate of Contract Work Progressed and Recommendation for Payment" which he submits with the payment request to DOT's finance

office in Albany. The EIC needs to submit accurate payment requests that are for actual, legitimate and valid charges owed to the contractor since the backup documentation for these payment requests stays at the project site. The payment request goes directly to Albany's finance office; neither the regional supervisor nor the Albany DOT Construction Division reviews the payment request.

West Side Highway Project:

DOT construction project D257543 is for reconstruction of the West Side Highway from West 25th St. to West 40th St. in New York City. About six months into the project, there were delays for several months due to the discovery of an underground elliptical pipe measuring 1.22 meters by 1.83 meters that was not included in the original plans. This pipe was a sewer pipe that connected to the Hudson River at the location of a proposed new tide gate that was part of the project plans. DOT directed Grace to re-route the pipe to accommodate the proposed tidegate. Though work on the project did not stop, Grace and DOT had to alter original project schedules to accommodate working around the pipe until they could research the origins of the pipe and determine the best way to handle construction in the pipe area. After much negotiation, DOT amended the contract with a change order to pay Grace up to an additional \$4,245,715 for actual, reasonable and verifiable field overhead costs incurred due to the delay of the project and an additional \$2,480,770 for costs associated with changing the sequence of the work stages of the project. DOT and Grace called this resequencing of work "restaging", and used this term anytime they referred to delays caused by resequencing the work due to the changed site conditions.

DOT has processed estimated payments for these costs. However, before DOT processes the final payment against this project, they must review their records to determine the actual costs of the work, and reconcile these two figures. Most of this reconciliation is the responsibility of the project EIC. At the time of our review, the EIC had not finished this reconciliation.

For the overhead portion of this project, DOT contract specifications required Grace to keep detailed "time and materials" records. These consist of daily records of labor, equipment and materials used, as well as a record of work accomplished. Time and materials change orders are inherently

a high-risk area, with many areas where vendors may attempt to overcharge or bill for items or services they never provided. The vendor may misclassify expenses, or charge items directly to the project that are main office overhead.

Review Scope, Objective and Methodology

We reviewed selected payments made against this contract, along with supporting backup documentation. We focused our efforts on two main areas. One was reviewing claims submitted by Grace for additional overhead costs and restaging costs associated with a delay in the project. The other was the accuracy of certifications and documents supporting selected payments.

Our objective was to determine whether payments against this contract were made consistent with all applicable laws, rules, regulations and contract specifications and that the payments were for goods and services actually received.

To accomplish our objective, we met with DOT construction personnel at DOT's Main Office, at the regional level and at the project level to understand their role in the project and to obtain further information about the processing of construction payments. We also met with Grace employees to understand their role in the process.

We reviewed the contract, several payment requests and related documentation from DOT. This documentation included inspectors' reports, change orders (contract amendments) and file records. We reviewed Grace's records, including payroll records, job cost records and documentation of payments to subcontractors.

Response of Department Officials to Review

We provided a draft of this report to The Commissioner of the New York State Department of Transportation for review and comment. The Department's comments were considered in preparing this report, and are included in Appendix B and C.

The Department agreed with our recommendations and has implemented some of them.

We also request that Department of Transportation officials provide comments to the State Comptroller within 90 days after the issuance of this report advising what steps were taken to implement the recommendations contained herein and where recommendations were not implemented the reasons why.

RESTAGING CLAIM – OVERBILLED LABOR COSTS

Unemployment and Workers' Compensation Rates Overbilled

Due to the discovery of a large underground elliptical pipe that was not present in the original plans, there were extensive delays in the course of this project. The project EIC and Grace's main engineer on this project had to work together to reschedule or "restage" much of this project. DOT and Grace could not follow the original sequencing of work and the original timeline for the project. DOT processed a change order to amend the contract for additional costs associated with this "restaging" of the project. These additional costs represent Grace's costs for labor, materials and equipment, less the payments Grace had already received for their work.

The New York State Labor Law requires Grace to pay unemployment insurance and workers' compensation insurance on its employees' payroll. The rates for these insurances are calculated as a percentage of wages, and vary for each company. The law requires each company to pay unemployment insurance only on the first \$8,500 of each employee's salary. Due to the complexities faced by construction companies in calculating these insurances on their employees' salaries, a common and acceptable practice is to determine an "effective rate" for these insurances.

Grace did not use the correct unemployment insurance and workers' compensation insurance rates when billing over \$8 million in labor costs. We estimate that Grace overestimated these insurances by \$1.5 million. As a result, when Grace billed DOT for the labor portion of the restaging claim, these billings were inflated.

Using records supplied to us by Grace's CPA firm, we determined what Grace paid for unemployment insurance and workers' compensation insurance. We used these figures to compute effective rates for these insurances. We then compared this to what Grace was billing DOT. When we

calculated the effective rate for unemployment insurance, we arrived at a rate of 2.17%, but Grace charged DOT at a rate of 7.25%. Similarly, we calculated an effective rate for workers' compensation insurance of 2.65%, while Grace charged DOT 23.88%.

DOT has processed estimated payments for these costs. However, before DOT processes the final payment against this project, they must review their records to determine the actual costs of the work, and reconcile these two figures. Most of this reconciliation is the responsibility of the project EIC. At the time of our review, DOT had not finished this reconciliation.

Recommendations

1. The project EIC should process and finalize the restaging claim with the correct unemployment and workers' compensation insurance rates.
2. Agency management should implement policies and procedures to ensure that insurance rates are accurate on claims before the EIC submits them for payment.

FIELD OVERHEAD CLAIM – OVERBILLED LABOR COSTS

Also due to the delays caused by the discovery of the elliptical pipe, DOT amended the contract to add \$4,245,715 for additional field overhead costs related to this project. The EIC was to use DOT Specification 109-5D, called “Extra Work, Force Account Work, Dispute Compensation and Recordkeeping” to process these payments. This specification provides that DOT should compensate the vendor for actual, reasonable and verifiable costs. It also requires the vendor to keep detailed “time and materials” records, which are daily records of labor, equipment and materials used, as well as daily records of work accomplished.

We determined that DOT did not apply the provisions of this specification in making payments against contractor submissions. As a result, Grace overbilled or claimed questionable costs for labor in several areas of this overhead claim, and the project EIC authorized payments for the amounts Grace requested. Grace overstated insurance rates, misclassified normal line workers as overhead, misrepresented main office personnel as field overhead and billed for unsupported hours.

Unemployment Insurance and Workers’ Compensation Insurance

As in the restaging claim, Grace used incorrect unemployment insurance and workers’ compensation insurance rate calculations. This resulted in DOT overpaying Grace more than \$300,000.

Normal Line Workers Claimed as Field Overhead

When DOT officials originally processed the change order to amend the contract for the cost of the additional project overhead, they included a list of job titles of workers they believed were necessary to complete the work. However, once Grace started filling out the daily time and material sheets to track the daily work, Grace added additional workers, including

flagmen, surveyors, laborers, and a construction chauffeur. We questioned DOT's paying in excess of \$350,000 for these workers as overhead because these types of workers are not normally charged as field overhead. Usually, they are included in the various line items of work in the contract. The EIC could not tell us why these workers were included and paid as field overhead.

We particularly questioned the reasonableness of the charges DOT paid for the surveyors and their trucks, \$198,809, because the original contract had an item set up for \$329,600 to pay for this service, and the amount paid in the overhead claim does not compare reasonably with what DOT paid Grace for these services in the original contract item. We also question the reasonableness of separate charges of \$34,342 for the surveyors' equipment.

Main Office Personnel Misrepresented as Field Overhead

Grace overbilled DOT by more than \$60,000 by including hours worked by a main office supervisor in their billings. The labor portion of the overhead claim should only include those field workers specific to this project, and should not include main office personnel. Grace misrepresented their office supervisor as field overhead, when in fact he is a main office supervisor and is on Grace's records as main office overhead. Each week, Grace charged several of his hours directly to this project, thereby overbilling DOT for these payroll payments.

Unsupported Hours

Grace also overbilled their main engineer on this project by over \$15,000. Grace's time and materials sheets charged DOT for 2 hours each day, or 10 hours each week, for the engineer's services. However, Grace's payroll records show that each week the engineer only billed 8 hours on a single day to this job. This time discrepancy of two hours each week resulted in Grace overbilling DOT for the engineer's hours which DOT paid. DOT should only pay for those hours actually worked by Grace's employees on this project. This inconsistency calls into question the overall accuracy of the time and materials records.

Recommendations

3. The project EIC should process and finalize the overhead claim with the following adjustments:
 - correct unemployment and workers' compensation insurance rates;
 - remove Grace employees that should not be billed as field overhead or justify keeping them in the claim; and
 - correct hours worked by Grace employees.
4. Agency management should put in place a system to adequately review payments for force account work to ensure that payments are for actual, reasonable and verifiable work.

EQUIPMENT OVERBILLED

In the Overhead Claim

Change order number eight provides additional money to pay Grace for overhead costs, including equipment costs, caused by project delays. This change order specifies, “The provisions of Section 109-05D (of the standard specifications) will be utilized here, as this is a time related dispute.” Section 109-05D of DOT’s standard specifications explains DOT’s rules for handling time related disputes.

We found the following problems with Grace’s equipment billings:

- Grace billed over \$200,000 for SUVs. According to Grace’s CPA firm, these SUVs were included in the main office overhead. Grace should not have billed for them in this field office overhead claim.
- Grace billed operating costs for their office and storage trailers twenty-four hours a day, seven days a week. They should have only billed for one eight-hour shift each workday.
- The project EIC didn’t analyze idle equipment to determine if any was fully depreciated. According to DOT specifications, DOT is to pay only up to actual ownership costs for fully depreciated idle equipment.

In the Restaging Claim

The specifications for equipment under time related disputes (Section 109-05D) state, “The Contractor shall be reimbursed for its operating costs for self-owned equipment based on actual cost data.” It also states that if “actual operating costs are not ascertainable, then the Contractor will be compensated utilizing not more than 50% of the operating costs set forth in the ‘Rental Rate Blue Book’.” The “Blue Book” is an industry guide used to determine rental rate for construction equipment. Grace overbilled DOT by charging 100 percent, not 50 percent, of the Blue Book rate operating costs. Even though the EIC processed the change order and should

have been aware of the details of the specification, the project EIC authorized payments based on Grace's billings at 100 percent of the Blue Book rate for operating costs. We estimate that Grace overbilled equipment by over \$340,000 in the restaging claim.

After we brought this matter to the attention of DOT officials, the director sent a reminder to all Regional Construction Engineers that equipment operating costs reimbursed under the time related dispute section of DOT's specifications should be reimbursed at 50 percent of the operating costs set forth in the Blue Book.

DOT has processed some estimated payments for these costs. However, before DOT processes the final payment against this project, they must review their records to determine the actual costs of the work, and reconcile these two figures. Most of this reconciliation is the responsibility of the project EIC. At the time of our audit, DOT had not finished this reconciliation.

Recommendations

5. The project EIC should process and finalize the overhead and restaging claims using the correct rates to reimburse the vendor for equipment.
6. Agency management should put in place a system to verify that payment requests for equipment in time related disputes are calculated correctly, and that agency specifications are being applied.

FALSE AND SUSPECT CERTIFICATIONS

For each construction project, the project EIC supervises a staff of DOT engineers. These engineers monitor, inspect and report on the work performed by the construction vendor. The EIC uses these reports to create payment requests. He certifies each payment request by signing a form called a "Certificate of Contract Work Progressed and Recommendation for Payment". In this certification, the EIC states:

...that the amount of work done and...the material incorporated...was necessary and has been established from estimates and actual measurements and inspections which (he) made or were made under (his) supervision...and to the best of (his) knowledge and belief, the said information is correct and in strict compliance with the terms of the said contract.

The EIC submits this certification with the payment request to DOT's finance office in Albany. The project EIC sends these payment requests directly to DOT's finance office in Albany without further review by his supervisor, the regional construction director or Albany's construction area. This absence of additional review creates a situation where project EICs are able to falsify certifications and submit payment requests for materials or services not actually provided by the contractor.

Our review of payments on this contract identified two instances, totaling over \$1.1 million, where the EIC submitted false certifications to process payment requests for temporary timber sheeting at times when no temporary timber sheeting was used. This overpayment has been recovered.

We identified an additional five instances of suspect certifications; two for temporary timber totaling \$516,610 and three for rodent control totaling \$13,000. In these cases, DOT officials have been unable to explain or support the payments. We will recover these moneys by withholding payment for other items billed or to be billed. DOT officials are continuing their investigation of these irregularities.

False Certifications – Monies Recovered

In the first instance, the project EIC processed a payment to Grace for \$960,000 through a falsified payment request. He certified payment for 8,000 square meters of temporary timber sheeting when no timber was used. When we interviewed the EIC, he told us that he processed this payment to pay the contractor for completed work, but admitted that the 8,000 square meters of timber was not used. He said that at the time he could not process the work through the correct item until the pending change order was processed and approved. He also told us that he knew that making a false certification was wrong and against DOT policy.

The second instance of improper timber sheeting payments involves a payment request in the amount of \$160,560 for 1,338 square meters of timber. The EIC needed to pay Grace for “trench and culvert excavation” but there was not enough money available in the funding source for this item to process this payment. Instead, he falsely certified timber was used and processed the payment through the timber item and then reversed the entry at a later date when the funding for the excavation item became available.

Field records indicate that at the time the EIC processed these payment requests he intended to adjust these entries at a later date to reflect items actually purchased. Supporting documentation shows that he did adjust these timber entries when funding for the correct items became available. Nonetheless, these are two instances where the project EIC made false certifications that timber had been used to cause payments to be made.

After we brought this matter to the attention of DOT officials, the Director of DOT’s Construction Division issued a memo to DOT regional construction engineers advising them that falsification of contract documents will not be condoned. The memo advises regional personnel to communicate with the Construction Division in Albany in instances where making timely contract payments for completed work is an issue.

Suspect Certifications – Timber Sheeting

Our review identified two additional instances, totaling over \$516,610, where the EIC submitted suspect certifications to process payment requests for temporary timber sheeting at times when no temporary timber sheeting was used.

The EIC supervises a staff of field engineers. These engineers monitor, inspect, and report on the work performed by the contractor. They use a form called the Inspector's Daily Report (IR) to report the daily progress of the work. Normally, the EIC uses these IRs as supporting documentation in authorizing the payment to the contractor. However, on the two IRs we reviewed that were used as the basis for payment requests for the temporary timber sheeting, the office manager, not a field inspector, prepared and signed the IRs. The office manager wrote the notation 'AOBE' on the IRs. When asked, the EIC told us that this means 'as ordered by engineer', and he admitted that this meant that he had ordered these reports to be prepared.

Although both IRs mention that the contractor used the timber sheeting in the watermain work, they do not contain standard information regarding the date or specific location of the work performed. In addition, there were no calculations or additional documentation on these IRs to support how the exact square meters of the item were determined.

Three independent sources contradicted the EIC's basis for payment as they told us that no temporary timber sheeting was used in this area. We interviewed several people to verify whether temporary timber sheeting had, in fact, been used in the watermain area. We interviewed two New York City engineers who were inspectors for the watermain area of this project. Both said no temporary timber sheeting was used in the watermain area. One mentioned that a steel safety box was used. For safety reasons, either a steel box or temporary timber sheeting is used when work has to be done in trenches that are more than five feet deep.

We also interviewed the subcontractor who laid the watermain pipe. He told us that no temporary timber sheeting was used at that location. Like the inspector, he also mentioned the use of a steel safety box in the watermain area.

In addition, we reviewed some of the IRs for the watermain item. Some of these reports mentioned steel sheeting, but none mentioned temporary timber sheeting.

We interviewed the EIC. He said that because we were asking about work that had been done years ago, he couldn't remember whether timber or a steel box had been used for safety in the watermain area on this project. He said that he was not the original EIC on the project, and that there were some problems that occurred because he replaced the EIC on a job that was already started. He said that he, alone, was responsible for ordering the temporary timber sheeting IRs that caused \$516,610 to be paid to the contractor. We told him we talked to inspectors who told us that no timber had been used in the watermain area. He had no explanation for these IRs, and he said he would reverse out these payments.

Suspect Certifications – Rodent Control

In addition to the two timber sheeting IRs, we also questioned an IR that was used to process payment of \$11,000 for rodent control services on this project. Unlike other IRs that were used to process payment for this service for one month at a time, this IR was used as the basis for a payment for 11 months of this service. Also unlike other rodent control IRs, this IR did not have the supporting forms required by DOT's Standard Specifications. We found two other IRs used to process two other \$1,000 payments for rodent control service that also lacked the required supporting forms. Therefore, DOT paid at least \$13,000 for rodent control service without the required supporting documentation.

We asked the EIC how he knew that the contractor had provided 11 months of this service before he signed the IR and processed it for payment. He said, again, that he was not the EIC on this project from the beginning, and that when he started on the job, someone must have told him that this item hadn't been paid in some time and required updating. Again, we pointed out that this IR also has the 'AOBE' notation. He again said that on this IR, he alone is responsible.

Recommendations

7. DOT should implement a better system for ensuring that all payment requests are for actual goods and services received.
8. Agency management should develop a strategy for dealing with employees who falsify certifications and should make all applicable employees aware of the consequences of making false certifications.
9. Recover the \$516,610 that was paid for temporary timber sheeting without supporting backup documentation.
10. Recover the \$13,000 that was paid for rodent control services without supporting backup documentation.

RECORD KEEPING

Related to the discovery of the underground elliptical pipe, DOT was to pay additional costs to Grace. DOT used their specification 109-5, called “Extra Work, Force Account Work, Dispute Compensation and Recordkeeping”, in processing payments for these additional costs. This specification details how the contractor is to keep records when a project goes to a “force account” (FA) situation, which is where the vendor and the EIC of the project must track all labor, equipment, and materials used on the project. The contractor is to deliver to the EIC daily reports, including a list of materials used and their quantities, a list of equipment used including hours and type of equipment, and a list of personnel by name including hours worked and labor classification. The DOT Specification for the force account portion of this project also states that daily reports should include a statement of work accomplished for each day. Although Grace and DOT kept the required material, equipment, and labor reports, we found none of the reports summarizing the daily work. If Grace and DOT followed this specification, these reports would exist.

The contractor is to fill out these daily reports and submit them to the DOT office engineer by the end of the following day. The Assistant Office Engineer, the DOT employee responsible for certifying these reports, told us that he was given the first three months worth of reports all at once. He then falsely certified them, dating them as if he had certified them the day following when the work was done. He certified these first three months worth of reports and subsequent daily reports which he received on time, without actually monitoring the laborers, materials, and equipment on a daily basis in such a way that he could certify as to the accuracy of the hours claimed or as to what work was done. DOT officials explained, “It wasn’t until three months after the delay period commenced that the Department decided to reimburse Field Overhead costs as they occurred by using the FA process.” However, the Assistant Office Engineer still should have dated the paperwork accurately instead of backdating the documents to make it appear that he had been verifying the work from the first day.

Also, when DOT officials originally submitted the change order paperwork to OSC for the field overhead, they included a list of job titles of workers they believed were necessary to complete the work. However, once Grace started filling out the daily time and material sheets to track the daily work, Grace added additional workers, including flagmen, surveyors, laborers, and a construction chauffer. The DOT Assistant Office Engineer who certified the time for these workers could not tell us what work these workers did on a daily basis. Since DOT eventually used these certified documents as the basis for making payments to the vendor, it concerns us that the Assistant Office Engineer certified materials and labor without adequate knowledge of what he was certifying.

Recommendations

11. The agency should continue to train its construction personnel in record keeping, emphasizing the importance of having knowledge of what they are processing for payment.
12. The agency should also stress to its construction personnel the importance of following contract specifications, especially in the area of record keeping.

CERTIFICATION

DOT Specification 109-05F states that any vendor submitting a dispute for over \$50,000 must also submit certification that, “The supporting data (for the dispute) is accurate and complete to the Contractor’s best knowledge and belief” and that, “The amount of the dispute itself accurately reflects what the Contractor in good faith believes to be (DOT’s) responsibility.” In reviewing the restaging claim, we found that Grace had not submitted this certification to DOT. When we asked about this certification, DOT obtained it from Grace.

Recommendation

- | |
|--|
| 13. DOT should obtain this certification for any dispute for over \$50,000 on a contract that includes this specification. |
|--|

MAJOR CONTRIBUTORS TO THIS REPORT

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April 27, 2004

Mr. John Brennan, Audit Manager
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Re: Draft Report BSE-2003-003
Contract D257543, Grace Industries

Dear Mr. Brennan:

Below is the Department of Transportation's (Department) comments and response to the subject report.

REPORT COMMENTS

Executive Summary

The Executive Summary states that due to unexpected delays in this project, "... Grace was to complete part of the project as a 'time and materials' project." We want to clarify that only the work that was required to be restaged and the associated extended field overhead were reimbursed on a time and materials basis. Other remaining contract work was reimbursed at existing contract unit prices.

Introduction

This contract was one of seven independent contract segments let to rebuild Route 9A, also known as the West Side Highway. All of the Route 9A contracts were let using the A+B bidding method (a bidding method where the low bidder is selected based on a combination of cost and work duration) in an attempt to expedite construction activities. Historically, the Department addressed delay and extended field overhead disputes as a close-out issue after completion of construction. However, as a result of several such disputes on the Route 9A projects, the Department elected to begin reimbursing contractors for their added field overhead expenses as they were incurred using the Force Account estimate method. At the conclusion of

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the project, the Force Account estimate would be closed out with a Force Account actual, accounting for the actual cost incurred. On Contract D257543, the Department determined that project delay began three months prior; hence, there was a three-month lump submittal of Force Account documentation. The Force Account actual, or final accounting, of the field overhead costs is still pending final review at the Department's Regional Office.

Page 2, Paragraph 4

It should be noted that for conventional accounts of added work, the Contractor would submit an accounting of the labor, equipment and materials used, and a record of the work accomplished. The Department's inspection staff would monitor the work effort and track the quantities of work accomplished. However, in the case of field overhead, the costs represent the added effort to manage a project for a longer period (e.g. field supervisors are assigned to a project for additional time). While these costs can be accounted for, there are no separate records of work accomplished that specifically relate to field overhead.

RESPONSES TO RECOMMENDATIONS

Recommendation 1: The project EIC should process and finalize the restaging claim with the correct unemployment and workers' compensation insurance rates.

Response: We agree. The correct rates should be based on the submission of the insurance declarations by the Contractor, which specify the actual insurance rates paid. However, since the Contractor has not responded to the Department's requests to date for such documentation, we intend to reimburse the Contractor in accordance with the effective rates established by the Office of the State Comptroller. Should the Contractor submit to the Department sufficient evidence of actual insurance rates, the Department will consider reimbursement based on this information.

Recommendation 2: Agency management should implement policies and procedures to ensure that insurance rates are accurate on claims before the EIC submits them for payment.

Response: In response to this audit finding, the Department issued a memorandum in December 2003 instructing EICs to obtain a copy of the Contractor's workers' compensation insurance policy declaration page indicating the insurance rates paid by the Contractor in those instances in which contract payments are being made via Force Account. This memorandum also noted that similar limits and rates exist for other insurances and taxes, and provided such information for Social Security, Medicare, Federal Unemployment Tax and NY State Unemployment Tax. This guidance will be incorporated into the next update of the Construction Administration Manual. In addition, we intend to implement a risk-based audit method to review a sample of our largest Force Accounts to assure that appropriate reimbursements are made.

Mr. John Brennan
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Recommendation 3: The project EIC should process and finalize the overhead claim with the following adjustments:

- correct unemployment and workers' compensation insurance rates;
- remove Grace employees that should not be billed as field overhead or justify keeping them in the claim; and
- correct hours worked by Grace employees.

Response: We agree. Appropriate adjustments will be made when finalizing the overhead claim.

Recommendation 4: Agency management should put in place a system to adequately review payments for force account work to ensure that payments are for actual, reasonable and verifiable work.

Response: The Department has long had a system in place to review Force Accounts. Force Accounts are prepared and reviewed at the project level and are further reviewed both in the Region and at the Construction Division. The Department is confident that Force Accounts used to document the cost of additional or new physical work items are reviewed and reflect the actual cost and effort to complete the work. However, due to the complexity of some time-related disputes and the associated accounting of field overhead costs, the Construction Division has begun to provide additional quality assurance checks of such Force Accounts to ensure compliance with the Department's Standard Specifications. In addition, as noted above, the Department's Contract Audit Bureau intends to audit field overhead force accounts on a sample basis.

Recommendation 5: The project EIC should process and finalize the overhead and restaging claims using the correct rates to reimburse the vendor for equipment.

Response: We agree that the overhead and restaging disputes should be reimbursed using correct equipment rates. Section 109-05D.2.d. of the Standard Specifications requires a depreciation analysis for use in determining the reimbursement rate for idle or stand-by equipment. We will seek the assistance of the Department's Contract Audit Bureau in performing this analysis before finalizing the Force Account Actual.

Recommendation 6: Agency management should put in place a system to verify that payment requests for equipment in time related disputes are calculated correctly, and that agency specifications are being applied.

Response: The Department already has a system in place. Unfortunately, the 50% equipment operating rate was not appropriately applied. Guidance has been issued to remind project staff of this provision. Additional quality assurance efforts will be undertaken by the Construction Division to review any time-related dispute compensation

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Orders-On-Contract to assure that these provisions are applied appropriately. In such situations where a depreciation analysis is warranted, we will seek the assistance of the Department's Contract Audit Bureau.

Recommendation 7: DOT should implement a better system for ensuring that all payment requests are for actual goods and services received.

Response: To improve the effectiveness of the Department's existing system, the Construction Division issued guidance strongly reminding Regional staff to only reimburse Contractors for work items completed, and admonishing staff for any improper payment practices. This subject was a topic included in the Construction Division's annual presentation at each of the 11 Regional EIC meetings which are attended by EICs statewide. This topic was also included in other training sessions and discussed at statewide Construction Supervisor and Regional Construction Engineer meetings.

Recommendation 8: Agency management should develop a strategy for dealing with employees who falsify certifications and should make all applicable employees aware of the consequences of making false certifications.

Response: The Department's disciplinary process, outlined in various Department procedures and employee union contracts, serves to address employee performance which is inconsistent with Department policies or otherwise deemed inappropriate. To help prevent re-occurrence of the issues noted in this section of the report, we will remind employees of potential consequences as part of future construction staff training sessions.

Recommendation 9: The agency should continue to train its construction personnel in record keeping, emphasizing the importance of having knowledge of what they are processing for payment.

Recommendation 10: The agency should also stress to its construction personnel the importance of following contract specifications, especially in the area of record keeping.

Response (to Recommendations 9 and 10): The Department will continue to provide training in the area of record keeping procedures. This topic has been, or will be, part of the following training events.

- The Construction Division's annual presentation to all EICs.
- The Construction Division's annual 5-day training course for new EICs.
- The Construction Division new multi-day training program for project Office Engineers, to be initiated in the Fall of 2004.

In addition, the Department will issue a reminder to the Regional MURK (Manual of Uniform Record Keeping) Coordinators to address this issue in their on-site visits to

Mr. John Brennan
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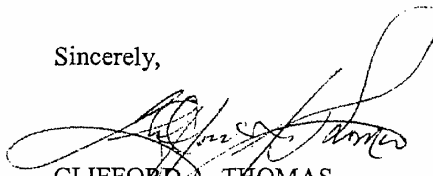
review project record keeping practices, and this issue will be addressed at future statewide meetings of the Regional MURK Coordinators.

Recommendation 11: DOT should obtain this certification for any dispute for over \$50,000 on a contract that includes this specification.

Response: The Department has begun to obtain written certifications from contractors for any dispute over \$50,000.

Thank you for the opportunity to review and comment on the draft audit report.

Sincerely,

A handwritten signature in black ink, appearing to read "Clifford A. Thomas", written over a faint, illegible background.

CLIFFORD A. THOMAS,
Assistant Commissioner
Office of Operations

cc: D. Taylor, Division of the Budget



State of New York
Department of Transportation
Albany, N.Y. 12232
<http://www.dot.state.ny.us>

Joseph H. Boardman
Commissioner

George E. Pataki
Governor

June 23, 2004

Mr. John Brennan, Audit Manager
Office of the State Comptroller
Division of State Services
Bureau of State Expenditures
110 State Street – 10th Floor
Albany, New York 12236

Re: Addendum to Draft Report BSE-2003-003
Contract D257543, Grace Industries

Dear Mr. Brennan:

We have reviewed the subject report and are concerned with the additional findings identified therein. Accordingly, the Department has assembled an ad hoc review team comprised of representatives from the Department's Main Office Construction Division, the Office of Internal Audit and Investigations, and a Regional Construction Group, to further review these issues and determine what action, if any, should be taken.

*
Note
1

Some preliminary work has been accomplished such as a detailed review of the Department's Standard Specifications which apply to the payments in question and preliminary discussions with Regional staff responsible for overseeing the project. However, in the coming weeks our review team will be delving deeper into these issues. We will continue to work with your office to resolve these audit issues.

Sincerely,

A handwritten signature in black ink, appearing to read 'Clifford A. Thomas', written over a large, stylized flourish.

CLIFFORD A. THOMAS,
Assistant Commissioner for Office of Operations

cc: D. Taylor, Division of the Budget
J. Tynan, Construction Division, Wolf Rd, Pod 52
J. Grady, Construction Division, Wolf Rd, Pod 52
J. McLachlan, Office of Legal Affairs, 5-509
J. Samaniuk, Office of Internal Audit & Investigations, 7A-725
J. Stuhlman, Office of Internal Audit & Investigations, 7A-725
L. Zinzow, Contract Audit Bureau, Wolf Rd, 1st Floor

State Comptroller's Notes

1. The Department states; "While these costs can be accounted for, there are no separate records of work accomplished that specifically relate to field overhead." The Department's specifications require that detail records including work accomplished be maintained for Time Related Dispute Compensation if the contractor and the Department have not agreed on the price before the work is undertaken. The specifications do not distinguish between field overhead and other elements leading to Time Related damages.

Appendix E

Summary of Proposed Disallowances or Questioned Items	
Restaging Claim	
Overbilled Labor Costs	\$1,500,000
Field Overhead Claim	
UI and Workers Compensation	300,000
Line Workers Claimed as Field Overhead	350,000
Main Office Personnel Misrepresented as Field Overhead	60,000
Unsupported Hours	15,000
Equipment Overbilled	
In the Overhead Claim	200,000
In the Restaging Claim	340,000
Possible False Certifications	
Timber Sheeting	516,600
Rodent Control	13,000
Total	\$3,294,600