

#1 (Rev.1/93) SINGLE PAGE COMMUNICATION TO THE COMMON COUNCIL

TO: THE COMMON COUNCIL:   DATE: December 22, 2005

FROM:                   DEPARTMENT:    Audit and Control

DIVISION:             Audit

SUBJECT:    [: **Buffalo Sewer Authority**  
             [: **Single Source & Sole**  
             [: **Source Contracts**  
             [: **Audit update to July 2005**

PRIOR COUNCIL REFERENCE: (IF ANY)   [:

TEXT: (TYPE SINGLE SPACE BELOW)

**AUDIT SCOPE**

To review contracts submitted to the Board for approval.

To review the number and dollar amount of contracts approved by the Board.

**BACKGROUND SUMMARY**

The Board minutes for the BSA were reviewed from April 2000- July 2005 for purpose of determining single and sole source contract magnitude. In addition, New York State Open Meeting Law was used to review meeting accessibility.

**AUDIT FINDING**

**Contracts:**

The review of the Board minutes and approvals therein revealed that a large number and dollar amount of contracts were not bid. The Single Source or Sole Source contracts were approved in approximately 56% of the cases reviewed for the period 11/12/03-7/27/05. The previous audit for the period 4/19/00-10/1/03 reflected a 53% rate. There is no evidence that corrective action was taken to limit the number of these contracts, instead the effect was a deterioration of the process as evidenced from the percentage increase. There was not any additional information provided to the Board to substantiate the lack of bidding from the internal Evaluation Team. The Board was informed that this team had discussed the reasons and had support for their findings for not bidding prior to the submission of the agenda item. Due to time and manpower considerations, we were unable to audit the records to determine whether that process described was in fact followed.

The periods reviewed from 4/19/00-7/27/05 revealed that 168 of 302 contracts approved were not bid (approved as sole source or single source contracts). The dollar impact of these contracts, which were not bid, is in excess of \$12 million.

The Board of Directors was informed of the various reasons why a single or sole source was being requested or required, per the review of supporting documentation. Such reasons include specific

requirements by manufacturers, franchise requirements, limited availability of parts, inability to perform, timeliness etc.

This information was submitted to the Directors in advance of the meetings; the directors asked questions on the issues and voted on the item.

In addition the last audit was discussed as an agenda item at a regular Board Meeting, and the members were receptive to a closer supervisory role, evident from their questions of the BSA administration.

As noted above, the results reflect that 56% of the number of contracts approved by the Board were single or sole source contracts. This ratio is extraordinarily high for a contract process that presumes bidding under its enabling legislation (paragraph 1181).

The dollar value associated with these single source contracts is approximately \$12.1 million of the total contract value of \$55.5 million, or 22% of the contract value.

### **Change orders:**

There were two change orders since the last audit and these totaled \$165,000. The two were in excess of 15%, which we recommended as a reasonable level, and subsequently was reflected in their Board approved purchasing procedures. We also recommended to the BSA management and Board that change orders should include sufficient additional support for the Board approval. This has not taken place. One was on a previously sole bid contract.

The previous audit revealed that at least 12 vendors had change orders that were in excess of a maximum 15% guideline. These included: BFI Waste Systems (71%), C. Destro Development (96%), Malcolm Pirnie (54%), URS Greiner (75%), R&D Engineering (38%) and others. The largest dollar amount of change orders was \$3,177,976 (54%) from Malcolm Pirnie.

The basic assumption is that the awarded contract is for performance at a specified amount. Changes to the awarded contract bring into question whether the bid should have been accepted in the first place. We were unable to determine, due to the lack of supporting documentation, if the change order related to a subsequent change to the original contract. We did note, however, that the Board properly authorized all change orders.

### **Formal bids required.**

Under the specific New York State legislation creating the Buffalo Sewer Authority, there is a specific \$7,000 threshold for formal bidding procedures. The legislation can only be changed by the Legislature and an offer was made in the past to the BSA to assist in any proposal to the state of New York.

Under Title 8 of Public Authorities "Buffalo Sewer Authority":

1181. Construction contracts. If the project, or any portion thereof, or any addition, betterment or extension to the facilities, shall be constructed pursuant to a contract for which the estimated cost exceeds seven thousand dollars, such contract shall be awarded to the lowest responsible bidder after advertisement for bids.

The Public Works department of the City falls under the GML and their thresholds are higher.

### The General Municipal Law Section 103

1. Except as otherwise expressly provided by an act of the legislature or by a local law adopted prior to September first, nineteen hundred fifty-three, all contracts for public work involving an expenditure of more than twenty thousand dollars and all purchase contracts involving an expenditure of more than ten thousand dollars, shall be awarded by the appropriate officer, board or agency of a political subdivision or of any district therein including but not limited to a soil conservation district, to the lowest responsible bidder furnishing the required security after advertisement for sealed bids in the manner provided by this section.

### Open Meetings Law violations

There is an official meeting of the Buffalo Sewer Authority when there is notice of a meeting and at least three of the five members (a majority) of the Board members are present.

Prior to the "official" start of the monthly meetings, there is a pre-conference of Board members and some employees of the authority. This constitutes a violation of the Open Meetings Law. The instances are regular practice. The Board members may not be aware of this yet.

As explained in the Law, any matters that are eligible for "Executive Session" discussion would require a break from the formal session, and a subsequent statement for the official minutes after the executive session was held. Any decisions on such matters would then need to be voted on in the Board meeting. This has occurred on only a few instances, and the explanation centered on possible lawsuits or personnel matters.

### **OPEN MEETINGS LAW - PUBLIC OFFICERS LAW, ARTICLE 7**

#### **§100. Legislative declaration.**

It is essential to the maintenance of a democratic society that the public business be performed in an open and public manner and that the citizens of this state be fully aware of and able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy. The people must be able to remain informed if they are to retain control over those who are their public servants. It is the only climate under which the commonwealth will prosper and enable the governmental process to operate for the benefit of those who created it.

"Public body" means any entity, for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction law, or committee or subcommittee or other similar body of such public body.

"Executive session" means that portion of a meeting not open to the general public.

### **New York State Authorities Law – Public Authorities – Title 8 Buffalo Sewer Authority**

**§ 1177. Buffalo Sewer Authority.**

A board, to be known as "Buffalo Sewer Authority," is hereby created. Such board shall be a body corporate and politic constituting a public benefit corporation.

Such board shall consist of five members, each of whom shall be a resident of the city of Buffalo and who shall be appointed by the mayor of the city.

The powers of the board shall be vested in and exercised by a majority of the members thereof then in office.

## RECOMMENDATIONS

1. Notification to the Board of our results, with annual updates.
2. BSA should create a specific form for the use of the Board in approving contract bids, including RFP requirements and a written statement by the responsible official that there is no other source available. Lacking this information, the Board should not approve such contracts until there is bid submitted and evaluated. We further recommend that the bid process, which has been described, to the Board as an Evaluation Panel produces documentation for review by this office or in conjunction with the Annual Audit performed by their external auditors.
3. Support for change orders greater than 15% should be presented to the Board for approval. This should take the form of the same Panel(s) to facilitate the decision-making process for the Board.
4. The Board may consider consultation with an outside firm with the required technical expertise not available to the board or the Auditors to review some of the bids.
5. Change the requirements for formal bid approvals at the BSA Board meetings to \$7,000, and consider reviewing those approved under that threshold to report to the Board. In addition, the Authority may seek to amend the language in the Buffalo Sewer Authority state legislation to raise the limits. We would repeat our offer of assistance in this endeavor. We have contacted a State legislator's office but have not received a reply.
6. Change orders need to be controlled at the Board level at the 15% level or below. The large dollar amount of change orders and the sizable percentage changes require a better policy. An "unofficial" policy and procedures manual prepared by BSA staff included this as a reasonable level to attain.
7. The meetings prior to the "official" Board Meeting must be open to the public, which should include those who are not currently present at the pre-meeting. The media has not been able to attend this "open" meeting despite the fact that a majority of members are present.

TYPE DEPARTMENT HEAD NAME: ANDREW SANFILIPPO

TYPE TITLE: COMPTROLLER

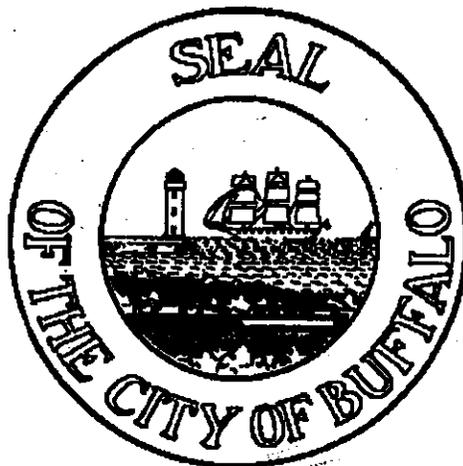
SIGNATURE OF DEPARTMENT HEAD

*Frank A. Bellotti*  
Deputy Comptroller

Encl: prior BFSAs Audit

**CITY OF BUFFALO**  
**PERFORMANCE AUDIT REPORT**  
**SINGLE SOURCE & SOLE SOURCE CONTRACTS**  
**BUFFALO SEWER AUTHORITY**

**Audit Report**



**For the Period**

**2000 - 2004**

# **City of Buffalo**

DEPARTMENT OF  
AUDIT AND CONTROL  
COMPTROLLER'S OFFICE  
1230 City Hall  
Buffalo, NY 14202

ANDREW A. SANFILIPPO  
DEPUTY COMPTROLLER

FRANK BELLIOTTI  
CITY AUDITOR

September 2, 2004

## **The Honorable Common Council of the City of Buffalo**

We have performed an examination of contracts from the Buffalo Sewer Authority for the period April, 2000 to October, 2003, and present herewith our findings for the period then ended.

Our examination was conducted in accordance with the International Standards for the Professional Practice of Internal Auditing and, accordingly, included such procedures as we considered necessary under the circumstances.

In our opinion the accompanying financial statements and related comments present fairly the operations of Buffalo Sewer Authority for the period then ended in conformity with generally accepted municipal accounting principles applied on a basis consistent with that of the preceding period.

**ANDREW A. SANFILIPPO  
COMPTROLLER**

## **DESCRIPTION AND HISTORY**

General Municipal Law, §103 requires that, except as otherwise provided by an act of the Legislature or by local law adopted prior to September 1, 1953, all contracts for public work involving an expenditure in excess of \$20,000, and all purchase contracts involving an expenditure in excess of \$10,000, must be awarded to the lowest responsible bidder after public advertisement for sealed bids in the manner provided by section 103. There does not necessarily need to be a cash expenditure in order for the bidding monetary thresholds to be exceeded. The bidding statute applies both to direct expenditures, and indirect expenditures such as trade-in allowances.

The Buffalo Sewer Authority was specifically created by the State of New York under its consolidated laws for Public Authorities in Title 8 of that section of the law.

Under TITLE 8 BUFFALO SEWER AUTHORITY section S 1181. Construction contracts, if the project, or any portion thereof, or any addition, betterment or extension to the facilities, shall be constructed pursuant to a contract for which the estimated cost exceeds seven thousand dollars, such contract shall be awarded to the lowest responsible bidder after advertisement for bids.

The City Charter, Municipal law, State Finance Law and finally Federal regulations not only recommend bidding practices but require it ("lowest responsible bidder").

State Finance Law defines the terms "sole source" and "single source" as these apply to contracts.

"Sole source" means a procurement in which only one offerer is capable of supplying the required commodities or services.

"Single source" means a procurement in which although two or more offerers can supply the required commodities or services, the commissioner or state agency, upon written findings setting forth the material and substantial reasons therefor, may award the contract to one offerer over the other. The commissioner or state agency shall document in the procurement record the circumstances leading to the selection of the vendor, including the alternatives considered, the rationale for selecting the specific vendor and the basis upon which it determined the cost was reasonable."

The exceptions to this Policy are few, but include ones for "professional fees" (not precluded from bidding these also), and single source for arrangements such as franchise requirements.

The accounting community supports responsible bidding in contractual negotiations. It usually results in a more reasonable fair market value than any single source contracting practice would provide.

Recent public discussion on this issue includes instances of a lack of bidding which leaves questionable results.

## **BUFFALO SEWER AUTHORITY (BSA) CONTRACT REVIEW**

The BSA is a separate independent authority created under New York State legislation. It is governed by a Board of Directors (five in all) appointed by the Mayor of the City of Buffalo. The budget for BSA stands at \$50,000,000. The capital budget stands at \$6,800,000.

The Comptroller, as Chief Fiscal Officer of the Authority performed an audit of contracts approved by the BSA Board over the period 2000-2004.

The review included the results from pre-audit reviews of contracts, approvals by the Board, and the specific invoices.

## **AUDIT OBJECTIVES**

To review Board minutes for compliance with the general rules of bidding.  
To analyze the results, and obtain reasonable explanations for deviations.

## **AUDIT SCOPE**

To review contracts submitted to the Board for approval.

To review the number and dollar amount of contracts approved by the Board.

## **METHODOLOGY**

Prepare worksheet of Board Actions:

- Bid or alternative
- Amount
- Term
- Change orders
- Consecutive change orders
- Explanations

Analyze results

## **AUDIT FINDING**

### **Contracts:**

The review of the Board minutes and approvals therein revealed that a large number and dollar amount of contracts were not bid. The Single Source or Sole Source contracts were approved in approximately 53% of the cases reviewed.

The Board of Directors was informed of the various reasons why a single or sole source was being requested or required, per the review of supporting documentation. Such reasons include specific requirements by manufacturers, franchise requirements, limited availability of parts, inability to perform, timeliness etc.

This information was submitted to the Directors in advance of the meetings; the directors asked questions on the issues and voted on the item.

As noted above, the results reflect that 53.1% of the number of contracts approved by the Board were single source. This 53.1% ratio is extraordinarily high for a contract process that presumes bidding.

The dollar value associated with these single source contracts is approximately \$9.3 million of the total contract value of \$42.5 million, or 22% of the contract value.

### **Change orders:**

The Change orders account for sizable dollars and high percentages ( 93 change orders at \$8.6 million of \$72.4 million total).

The basic assumption is that the awarded contract is for performance at a specified amount. Changes to the awarded contract bring into question whether the bid should have been accepted in the first place. We were unable to determine, due to the lack of supporting documentation if the change order related to a subsequent change to the original contract. We did note, however, that all change orders were properly authorized by the Board.

We summarized 15 contractors with 40 change orders collectively. The dramatic size and percentage changes (e.g. Malcolm Pirnie's 9 contracts changes reflected a 54% increase over the \$5.9 million original contracts) are compounded by the life of the contract (from 2 months to over one year with changes). One contract was originally approved with a "not to exceed" \$300,00 limit which ultimately (after change orders) reached \$450,000.

### Change Orders BSA

Contractor	Original Contract Amount	Change Order Amount	Percent Change	Contract No. Length of Contract
BFI Waste Systems (three contracts)	\$383,596	\$274,000	71% increase	20100053 20200062
C. Destro Development (two contracts)	\$462,025	\$445,700	96% increase	84000008 84000021 4/01 & 9/01 9/01 & 10/01
C.O. Falter Construction (two contracts)	\$16,993,202	\$2,926,479	17% increase	84200015 84100018 12/03 & 1/04
Ferguson Electric (two contracts including SCADA)	\$3,779,400	\$848,373	22% increase	84000018 83710200 7/01 & 9/02
Goergen-Mackwirth	\$549,470	\$159,010	29% increase	84000011 1/01-2/01
J.A. Brundage (two contracts)	\$275,047	\$106,391	39% increase	84000017 84100020 9/01-1/02
Malcolm Pirnie (nine contracts)	\$5,934,787	\$3,177,976	54% increase	84000002 84100005 83900004 83900014 83607800 83900008-9- 14-15 5/02 & 3/04
Nicholson & Hall	\$278,000	\$34,900	13% increase	84000009 1/01 & 4/01
Quackenbush (six contracts)	\$3,188,340	\$209,928	7% increase	84200009 83900002 83900001 84100002 84100013 84200002 5/03 & 6/04
R & D Engineering	\$135,000	\$50,860	38% increase	84000015 7/01-1/02
Sterling Refractory	\$99,770	\$128,600	129% increase	84100019 6/02 -9/02
URS Corporation (two contracts)	\$281,083	\$198,901	71% increase	84200016 84400006 1/04 & 6/04
URS Greiner	\$929,000	\$700,000	75% increase	83900012
Utility Services Cont. (two contracts)	\$271,442	-\$67,092	25% decrease	84000022 84000023
Watts Engineers (three contracts)	\$77,500	\$13,050	17% increase	84100014 84100015 84100016

### **Formal bids required.**

Under the specific New York State legislation creating the Buffalo Sewer Authority, there is a specific \$7,000 threshold for formal bidding procedures .

Under Title 8 of Public Authorities "Buffalo Sewer Authority":

1181. Construction contracts. If the project, or any portion thereof, or any addition, betterment or extension to the facilities, shall be constructed pursuant to a contract for which the estimated cost exceeds seven thousand dollars, such contract shall be awarded to the lowest responsible bidder after advertisement for bids.

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### **The General Municipal Law Section 103**

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## **RECOMMENDATIONS**

1. Notification to the Board of our results, with annual updates.
2. BSA should create a specific form for the use of the Board in approving contract bids, including RFP requirements and a written statement by the responsible official that there is no other source available
3. The Board may consider consultation with an outside firm with the required technical expertise not available to the board or the Auditors to review some of the bids.
4. Change the requirements for formal bid approvals at the BSA Board meetings to \$7,000, and consider reviewing those approved under that threshold to report to the Board. In addition, the Authority may seek to amend the language in the Buffalo Sewer Authority state legislation to raise the limits.
5. Change orders need to be controlled at the Board level

## **WORKPAPERS, REFERENCES AND BIBLIOGRAPHY**

**BSA minutes**

**BSA Board Reports**

**MUNIS**

**New York State Law**

**Legislation specific to BSA**

**Relevant audits from various State and Municipal audit departments**

## **ATTACHMENTS**

**Detailed contract approvals from the BSA Board**

**Detailed contract change order approvals from the BSA Board**

**Buffalo Sewer Authority legislation under New York State**

**Buffalo Sewer Authority Reply to Audit Findings and Recommendations**

**Copy of letter from BSA to City Corporation Counsel for clarification**