

State of New Jersey

**Schools Construction Corporation
Office of the Inspector General**

**Allegation of False Certification
for East Orange School Project
*October 22, 2008***

**Mary Jane Cooper
Inspector General**



State of New Jersey

OFFICE OF THE INSPECTOR GENERAL
PO Box 208
TRENTON NJ 08625-0208

JON S. CORZINE
Governor

MARY JANE COOPER
Inspector General

October 22, 2008

Honorable Jon S. Corzine
Governor, State of New Jersey
State House
P.O. Box 001
Trenton, NJ 08625

Re: Investigation of false certifications by general contractor to the
New Jersey Schools Development Authority

Dear Governor Corzine:

Enclosed is a copy of the report the Schools Development Authority Office of the Inspector General (SDA OIG) has prepared in response to a request for investigation from the New Jersey Schools Development Authority (SDA).

As required under statute, a copy of this report has been sent to Senate President Richard J. Codey, Assembly Speaker Joseph J. Roberts and SDA CEO Scott Weiner. As this report involves possible criminal conduct by the general contractor, the identity of that contractor has been excluded from the report and will instead be revealed to the Division of Criminal Justice in a separate and confidential letter.

The SDA OIG's investigation of this matter is now complete. I am available to discuss this report with you at any time.

Respectfully,

Mary Jane Cooper
Inspector General of New Jersey

cc Richard J. Codey, President, New Jersey Senate
Joseph J. Roberts, Speaker, New Jersey State Assembly
Scott Weiner, CEO, New Jersey Schools Development Authority
James Carey, Director of Governor's Authorities Unit
Edward McBride, Chief Counsel to the Governor
Boris Moczula, Acting Director, Division of Criminal Justice

**State of New Jersey Office of the Inspector General
New Jersey Schools Development Authority
Allegation of False Certification for
East Orange School project**

I. INTRODUCTION

The New Jersey Schools Development Authority (SDA) forwarded this matter on February 1, 2008 to the SDA Office of the Inspector General (SDA OIG) to investigate an allegation that the general contractor had made false certifications to the SDA regarding payments the contractor had made or would soon make to one of the subcontractors for a school project located in East Orange, NJ.

The names of the general contractor and the subcontractor will not be identified in this report, as this matter may progress to criminal proceedings. SDA management, of course, is already aware of the names of these entities. The SDA OIG will disclose these names and will likewise forward all relevant documents to the Division of Criminal Justice.

II. SUMMARY OF CONCLUSIONS

The evidence gathered during the SDA OIG's investigation indicates that the general contractor may have made false certifications to the SDA regarding the status of payments from the general contractor to its sub-contractor.

III. STANDARDS

Several New Jersey statutes may be applicable to the conduct at issue in this matter.

“A person commits a crime of the fourth degree if he makes a written false statement which he does not believe to be true, on or pursuant to a form bearing notice, authorized by law, to the effect that false statements made therein are punishable.” See, N.J.S.A. § 2C:28-3(a).

“A person commits a disorderly persons offense if, with purpose to mislead a public servant in performing his function, he: (1) makes any written false statement which he does not believe to be true.” See, N.J.S.A. § 2C:28-3(b).

“A person commits a crime if the person knowingly submits to the government any claim for payment for performance of a government contract knowing such claim to be false, fictitious, or fraudulent.” N.J.S.A. § 2C:21-34(a).

“A person commits a crime if the person knowingly makes a material representation that is false in connection with the negotiation, award or performance of a government contract.” N.J.S.A. § 2C:21-34(b).

Thus, each statute requires both a false statement (or a material misrepresentation) and actual knowledge or belief that the statement is false by the person making the statement.

IV. BACKGROUND

To be paid for its work, a general contractor must submit to the SDA a construction contractor invoice (Form 803) and a certification of prime contractor (Form 811). In the certification of prime contractor, the general contractor must check-off one of three paragraphs to certify that either: (A) no subcontractor was used on the project, or (B) that each subcontractor has been paid all amounts due from any previous progress payments and will be paid within 10 days after receipt by the contractor of payment by the SDA

for work included in the current invoice, or (C) that certain identified subcontractors will not be paid because a valid reason exists to withhold payment, but all other subcontractors will be paid in accordance with paragraph B.¹

The Form 811 certification of prime contractor contains a paragraph in bold-face type immediately above the signature of the general contractor's representative in which the representative certifies that the foregoing statements are true and that he is aware that if any statement is willfully false or fraudulent, he is subject to punishment.

The SDA posts on its web site all payments it makes on each school project, including payments to general contractors. The subcontractor on this project discovered from the SDA web site that this general contractor had been paid by the SDA for work on this school project that the subcontractor had performed.² The subcontractor then complained to the SDA that the general contractor had not paid the subcontractor for this work performed.

SDA Vice President and Chief Counsel John Clark referred this matter to the SDA OIG on February 1, 2008. Clark asked the SDA OIG to

¹ The general contractor must also identify the valid reasons for non-payment to the subcontractor(s).

² The subcontractor does not bill the SDA for work performed, but rather the subcontractor bills the general contractor, who in turn bills the SDA for this work. Although the SDA is aware of the subcontractor, the SDA only contracts with the general contractor, who in turn has contracts with several subcontractors. The SDA thus has privity of contract only with the general contractor.

determine whether the general contractor had falsely certified to the SDA that the general contractor had paid the subcontractor for demolition and asbestos abatement work performed by the subcontractor.

V. ANALYSIS OF EVIDENCE

The SDA OIG obtained from the SDA relevant documents, including invoices that the general contractor had submitted for this project. The SDA OIG also obtained proof that the subcontractor had performed the work and proof that the SDA had paid the general contractor for the work that the subcontractor had performed.

The subcontractor had performed abatement services and demolition of six structures to prepare the site for the construction of the school. The subcontractor had agreed to charge \$494,990 for this work. Although the subcontract did not describe the work with specificity, the subcontract stated that it incorporated by reference the prime contract between the SDA and the general contractor as well as all modifications to the prime contract. The prime contract identified by address the six properties where the asbestos abatement would be performed and identified the source and the square footage of the asbestos to be removed. All properties had asbestos in the

plaster and in the roof, but only one property (at 476 S. Clinton Street) also required removal of 26,000 square feet of exterior asbestos-containing siding, called transite.³

During the performance of this asbestos abatement, it was discovered that a second property (508 S. Clinton Street) had this same asbestos-containing siding. The subcontractor submitted a proposal for removal of this siding, and the general contractor forwarded this proposal to the SDA after the general contractor added costs for insurance, bonding and overhead/profit. The proposal was based upon an estimate of 26,500 square feet of siding. After the work was performed, the proposal was substantially modified downward. The subcontractor submitted a request for a change order in the amount of \$33,959.86 for removal of 6,012 square feet of transite. The cost was calculated upon the actual time and materials expended.

Also during the performance of the asbestos abatement, it was discovered that the original contract specifications had misidentified the location of the transite. It was not at 476 S. Clinton Street (as reflected in the specifications) but in actuality was at 472 S. Clinton Street. Moreover,

³ This asbestos-containing siding is described in various documents as transite or transite siding.

the quantity of transite was not 26,000 square feet as stated in the specifications but rather only 5,000 square feet.

The Project Management Firm (PMF), with the support of the environmental consultant, recommended that the SDA receive a credit from the general contractor for the extent to which the prime contract had overstated the amount of transite removal and thus had over-valued the price for this removal. The PMF sent a proposal request on August 2, 2007 to the general contractor on SDA Form 500 seeking a credit for 21,000 square feet of transite that the general contractor and the subcontractor did not remove. The request did not calculate a dollar value for the credit.

The general contractor submitted five invoices to the SDA to obtain payment for the abatement and the demolition of the six structures. Each invoice covered a one-month period. In each invoice, the general contractor certified that each subcontractor had been paid all amounts due and will be paid within 10 days of receipt of payment from the SDA for work included in the current invoice.

The SDA processed the invoices and after holding a small retainage, issued wire transfers to the general contractor approximately one month after

receiving the invoice. The invoices and the wire transfers are summarized in the chart below⁴:

Invoice	Submitted	Net of retainage	Wire transfer
1	04/23/07	\$578,327.81	05/15/07
2	05/11/07	\$171,437.86	06/18/07
3	06/13/07	\$152,962.35	08/07/07
4	08/01/07	\$295,906.32	08/22/07
5	08/14/07	\$246,425.08	09/20/07

The general contractor provided a letter to the SDA OIG stating that it had made the following payments to the subcontractor:

\$120,000	check dated 4/21/07
80,000	check dated 5/9/07
80,000	check dated 6/6/07
<u>65,000</u>	check dated 7/9/07
\$345,000	

In that same letter, the general contractor states that it had also paid \$128,000 to a company hired by the subcontractor to perform some of the demolition work. Thus, in total, the general contractor states that it has paid \$473,000 of the original contract amount of \$494,990. This leaves a balance owed by the general contractor to the subcontractor of \$21,990.

In the same letter, the general contractor asserts that the PMF for this project has demanded a credit of \$40,000 because the contract had over-

⁴ The invoices include work performed by other subcontractors on the project and thus total to more than merely the amount of the asbestos abatement subcontractor's \$494,990.

stated the actual square footage for removal of transite. The general contractor seems to imply that the subcontractor's contract amount should be reduced by this \$40,000 and that as a result, instead of the subcontractor being owed a balance of \$21,990 the subcontractor instead would need to refund a net of \$18,010 to the SDA.⁵ The general contractor does not explain how this \$40,000 credit was calculated.

Even accepting as true the general contractor's assertion that the subcontractor owes a refund to the SDA⁶ (and the general contractor would owe an even greater refund as it was paid for the entire demolition and abatement process), this does not negate the fact that the general contractor had falsely stated in each invoice that it had paid the subcontractor all amounts due and would pay the subcontractor within ten days of the contractor's receipt of payment from the SDA for all work included in the current invoice. The general contractor was paid in full for all work performed by the subcontractor, but contrary to his certification, the general contractor did not pay the subcontractor within ten days for all work included in the invoice. Instead, the general contractor continues to hold \$21,990 it had received from the SDA.

⁵ In the same letter, the general contractor also contends that the subcontractor owes \$23,462 to the union for unpaid union dues and also owes \$300,000 for a federal tax lien.

⁶ The subcontractor denies that he owes a credit and/or refund for reduced quantity of transite removed at the one location; he contends that his contract was for a lump sum, not a unit-price contract. While his position seemingly lacks merit, it is irrelevant to the false certification issue.

Although the general contractor stated in each invoice that it had paid the subcontractor for all work performed and would pay the subcontractor within ten days for the work included in the invoice, such conduct would be a statutory violation only if these were statements made by the general contractor “which he does not believe to be true” or if the general contractor made the false statements “knowingly.”

Here, the statements by the general contractor were knowingly false. The general contractor asserts that he has not paid the \$29,990 to the subcontractor because the SDA asserts a credit for an over-estimate in the specifications of the amount of transite to be removed. But the general contractor was aware on August 2, 2007 that the SDA asserted a credit for that over-estimate, yet he submitted an invoice on August 14, 2007 certifying that he would pay the subcontractor within 10 days instead of certifying that the subcontractor would not be paid because a valid reason exists to withhold payment.

Moreover, the general contractor submitted an invoice for removal of 26,000 square feet of transite and made no adjustment on the fifth invoice (dated August 14, 2007) even he was aware by that date that this figure was excessive and thus he overcharged the SDA for more work than had been performed by his subcontractor.

VI. RECOMMENDATIONS

The SDA OIG will refer this matter to the Division of Criminal Justice to determine whether the conduct described herein amounts to criminal conduct warranting prosecution.