

GENERAL SERVICES ADMINISTRATION OFFICE OF INSPECTOR GENERAL

**Recovery Act Report:
Edith Green/Wendell Wyatt Modernization Project
Review of PBS's Major Construction and Modernization
Projects Funded by the American Recovery and
Reinvestment Act of 2009
Audit Number A090172/P/R/R11005**

January 21, 2011





Date: January 21, 2011

Reply to: R. Nicholas Goco
Attn of: Deputy Assistant Inspector General for Auditing
Real Property Audit Office (JA-R)

Subject: Recovery Act Report: Edith Green/Wendell Wyatt Modernization Project
Review of PBS's Major Construction and Modernization Projects Funded by the
American Recovery and Reinvestment Act of 2009
Audit Number A090172/P/R/R11005

To: Robert A. Peck
Commissioner, Public Buildings Service (P)

During our oversight of the Public Building Service's (PBS) American Recovery and Reinvestment Act projects, we identified several contracting and project management violations related to the modernization of the Edith Green/Wendell Wyatt Federal Building (Green-Wyatt) which we believe should be brought to your attention. Specifically:

- The construction option was exercised in a manner that violated competition requirements because Construction Phase Services were awarded as an unpriced option;
- The Guaranteed Maximum Price (GMP) was based on an insufficient price reasonableness determination;
- The initial obligation of construction funds was unwarranted; and
- The project management plan was out of date.

The Construction Option Violated Competition Requirements

Procurement of the Construction Phase Services did not meet competition requirements because the Construction Manager as Constructor (CMc) contracting approach was incorrectly executed. Construction Phase Services were awarded as an unpriced option; in effect becoming a sole source procurement. Exercising the construction option under these circumstances violated competition requirements.

The construction contract for the Green-Wyatt modernization project was to be awarded as a CMc contract with a GMP. This type of contract should be awarded for Design Phase Services¹ at a firm fixed price with an option for Construction Phase Services at a GMP established at contract award. The GMP acts as a ceiling price for the actual construction phase services. In order for the award to be made in

¹ Design Phase Services include activities such as identifying constructability issues, incorporating value engineering into the design, scheduling, performing systems analysis, cost estimating and performing market analysis.

accordance with Federal Acquisition Regulation 52.217-5², the proposed GMP must be evaluated along with the pricing for the design services.

When PBS awarded the contract on December 11, 2009, the Design Phase Services were awarded for a firm fixed price of \$1,117,242, but a GMP for the construction option was not established. In its proposal, the winning contractor submitted a GMP of \$108,217,338; however, according to the Source Selection Evaluation Board report, PBS evaluated less than 10 percent of the construction phase costs.³ The contract award document specified that only the Design Phase Services had been accepted and the line item for GMP had been scratched out. Since PBS did not establish a GMP at contract award, Construction Phase Services represent an unpriced option and effectively were negotiated as a sole source procurement.⁴

On March 29, 2010, PBS set the GMP at \$122,034,411, but did not exercise the construction option. During a meeting held on July 13, 2010, regarding the issues identified in this report, we notified PBS that the construction option was unpriced and that if it were exercised, it would violate competition requirements.

However, on July 22, 2010, PBS exercised the construction option and increased the GMP to \$123,500,000. The General Services Acquisition Manual 536.270 specifies that, before an unpriced option can be exercised, the agency must cite the statutory authority permitting the use of other than full and open competition. To date, PBS has not provided this justification.

The contracting officer indicated that this was not a sole source procurement because most of the contract costs had been competed or evaluated. Yet, as noted above, only a small portion of the construction costs were reviewed prior to the contract award. The option for the Construction Phase Services was unpriced at contract award and PBS negotiated only with the CMc contractor.

Exercising the option for Construction Phase Services under these circumstances violated the competition requirements of both the Federal Acquisition Regulation and the Competition in Contracting Act. In the future, PBS must ensure that the CMc with a GMP approach is properly executed and complies with all applicable laws, regulations, and policies.

Price Reasonableness Was Not Adequately Established

The basis for establishing price reasonableness for the award of the construction phase was entirely dependent on estimates from the CMc contractor. This approach is inconsistent with acquisition regulations and agency policy which require that an independent government estimate and/or competition be the basis for establishing price reasonableness.

The GMP for Construction Phase Services was originally established at \$122,034,411 on March 29, 2010, through a contract modification. However, a price reasonableness determination was not performed at

² FAR 52.217-5 states, "Except when it is determined in accordance with FAR 17.206(b) not to be in the Government's best interests, the Government will evaluate offers for award purposes by adding the total price for all options to the total price for the basic requirement. Evaluation of options will not obligate the Government to exercise the option(s)."

³ According to the Source Selection Evaluation Board report, PBS evaluated the proposed labor costs, but the majority of the construction phase costs, including subcontractor costs, were not evaluated.

⁴ FAR 2.101 defines a sole source acquisition as "a contract for the purchase of supplies or services that is entered into or proposed to be entered into by an agency after soliciting and negotiating with only one source."

that time. Instead, the GMP was based on an estimate prepared by the CMc contractor on March 22, 2010. PBS did not settle on this amount since the contracting officer anticipated it would be decreased during negotiations prior to exercising the option for Construction Phase Services (we note that the contract modification establishing the GMP included a requirement that it be renegotiated at or below the original construction budget of \$117,512,494).

However, on July 22, 2010, a contract modification was issued that increased the GMP to \$123,500,000⁵ and exercised the construction option. While the Pre-Negotiation and Price Negotiation Memorandum for this modification provide an evaluation of the GMP and a price reasonableness determination, these assessments were insufficient. The assessments primarily consisted of comparing the contractor's original proposal for specific elements of the GMP to the negotiated results and explaining the cost changes. They were not based on an independent government estimate.

Both the Federal Acquisition Regulation and the General Services Acquisition Manual⁶ require that an independent government estimate be prepared and used to evaluate contractor proposals for construction. In this case, an estimate was prepared by the Architect-Engineer firm designing the project and was cited as the independent government estimate. However, PBS policy⁷ requires the independent government estimate be prepared by an estimator that is not affiliated with either the design firm (the Architect/Engineer) or the CMc contractor.

In addition, the price determination fully relies on the CMc contractor's cost estimates and its subcontracting process for establishing price reasonableness. Over \$100 million of the GMP is based on subcontractor costs. According to the evaluation and price reasonableness determination, PBS used the CMc contractor's subcontractor cost estimates as part of the independent government estimate. Further, PBS cites reliance on the future oversight of the contractor's subcontracting process and verification of the CMc subcontract costs as part of the price evaluation.

In essence, rather than negotiating the price upfront using price competition or an independent government estimate, PBS used the contractor's costs as the basis for establishing contract pricing. As a result, the pricing for the GMP starts to resemble a cost contract. This approach deviates from the tenets of a CMc contract which uses the GMP to set a fixed price ceiling and shifts the financial risk to the contractor.

The March 2010 Obligation of Funding for Construction Phase Services Was Unwarranted and Led to Improper Contracting

At the time the CMc contract was modified to set the GMP on March 29, 2010, PBS obligated funding to cover this cost. The obligation was unwarranted and should not have occurred.

The Government Accountability Office defines an obligation as "a definite commitment that creates a legal liability for the government for the payment of goods and services ordered or received."⁸ On a CMc contract, this usually occurs when the base contract is awarded and when the construction option is exercised. However, since only the GMP was established, no liability was created and there was no legitimate reason to obligate funding. According to the contracting officer, the \$122 million was

⁵ According to the contracting officer, the GMP increased due to the addition of a photovoltaic canopy roof.

⁶ Federal Acquisition Regulation 36.214 and General Services Acquisition Manual 536.203.

⁷ P-120 – Project Estimating Requirements for the Public Buildings Service.

⁸ GAO-05-734SP A Glossary of Terms Used in the Federal Budget Process dated September 2005.

obligated primarily to help meet the General Service Administration's (GSA) objective of obligating \$4 billion in Recovery Act funds by March 31, 2010.

On July 13, 2010, we notified PBS of this situation. As noted above, on July 22, 2010, PBS issued a modification that exercised the construction option and increased the GMP to \$123,500,000 creating a definitive commitment for the funding obligation.

The unwarranted obligation of funds led to improper contracting. According to the contractor's invoice, prior to the July 22, 2010 contract modification,⁹ \$326,840 for construction phase work had been completed¹⁰ even though the construction option had not been exercised and funds for construction had not been properly obligated. Apparently, the contracting officer gave the contractor a limited notice to proceed on construction phase work and funded this work using the unwarranted obligation. This was done informally with no documentation, so the actual scope, cost, and dates for the work could not be confirmed. In addition, the decision to enter into this work prior to setting the actual GMP reduces the Government's negotiating leverage as it guarantees the exercise of the option.

Comprehensive Project Plan Not Updated at Project Initiation

The Green-Wyatt modernization project did not have an updated project management plan in place until August 2010 despite the fact that major elements of the project plan had changed since the original plan was developed.

The original project plan for the Green-Wyatt project was developed in 2006. At that time, the initial redesign of Green-Wyatt was planned with the expectation of using a traditional Design/Bid/Build project delivery methodology. At approximately 50 percent design completion, PBS chose not to proceed with the project due to a funding shortage.

When Recovery Act funds became available, the project was re-scoped, and the project delivery methodology was changed to CMc. However, the 2006 project plan was never revised. On July 13, 2010, we notified PBS that the project management plan had not been updated since 2006. The project management plan was eventually updated and approved on August 9, 2010.

The project management plan is an integral part of project planning and execution. According to the GSA Office of the Chief Architect's June 2009 revision of the "Project Management Guide for the Public Buildings Service," project plans present the project goals and objectives and establish the complete project scope, schedule, budget, and implementation strategy as well as the roles and responsibilities of the project team. The Office of Inspector General has previously identified the lack of updated or fully developed project plans in its September 29, 2009, audit memorandum on project plans. In response, PBS agreed that plans would be required for new construction and major modernizations and that it would request project managers to prepare the plans.

⁹ The invoice is dated June 30, 2010.

¹⁰ According to the Pre-Negotiation and Price Negotiation Memoranda dated September 29, 2010, the cost for these services is \$476,443.

Recommendations

We recommend that the Commissioner of the Public Buildings Service

1. Develop and implement a system of management controls to ensure that contracts using the Construction Manager as Constructor methodology meet competition requirements and adequately incentivize the procurement;
2. Perform a review of the cost of construction to ensure that it is fair and reasonable based on information that is current, accurate, and complete;
3. Ensure that project teams have proper guidance and training to properly obligate funding for future construction contract actions; and
4. Ensure that the project plans for all Recovery Act projects have been developed and are up-to-date including the project objectives, implementation and risk mitigation strategies, and team roles and responsibilities, as well as any decisions or changes affecting scope, budget and scheduling.

We appreciate the support that has been provided throughout this review. If you have any questions about this memorandum, please contact me at (202) 219-0088.

Sincerely,



R. Nicholas Goco
Deputy Assistant Inspector General for Auditing
Real Property Audit Office (JA-R)

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Management Comments



JAN 10 2011

GSA Public Buildings Service

MEMORANDUM FOR R. NICHOLAS GOCO
DEPUTY ASSISTANT INSPECTOR GENERAL FOR REAL
PROPERTY (JA-R)

FROM: ROBERT A. PECK *Peck*
COMMISSIONER
PUBLIC BUILDINGS SERVICE (P)

SUBJECT: Recovery Act Report: Edith Green/Wendell Wyatt Modernization
Project Construction Contract
Review of PBS's Major Construction and Modernization Projects
Funded by the American Recovery and Reinvestment Act of 2009
Audit Number A090172

The Public Buildings Service (PBS) appreciates the opportunity to comment on the subject draft audit report. The Edith Green/Wendell Wyatt modernization project was awarded under the American Recovery and Reinvestment Act (Recovery Act) and is meeting the intent of the Recovery Act by putting people back to work, strengthening the economy, and meeting energy conservation goals.

The draft report includes four recommendations:

- 1) Develop and implement a system of management controls to ensure that contracts using the construction manager as constructor methodology meet competition requirements and adequately incentivize the procurement;
- 2) Perform a review of the cost of construction to ensure that it is fair and reasonable based on information that is current, accurate, and complete;
- 3) Ensure that project teams have proper guidance and training to properly obligate funding for future construction contracts; and
- 4) Ensure that the project plans for all Recovery Act projects have been developed and are up-to-date including the project objectives, implementation and risk mitigation strategies, and team roles and responsibilities, as well as any decisions or changes affecting scope, budget and scheduling.

In response to Recommendation 1, PBS has developed and is currently implementing a corrective action plan to improve management controls. This corrective action plan, as designed by PBS management and approved by your office, is intended to strengthen

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the system of internal control surrounding the CMC delivery method so that actions noted in these audit reports are not repeated. Accordingly, we believe the actions set forth in this plan will satisfy Recommendation 1.

With respect to Recommendation 2, we will perform a review of the cost of construction to ensure that the cost is fair and reasonable based on information that is current, accurate, and complete, and we will document the findings via a memorandum to the file.

Regarding Recommendation 3, the region will ensure all project teams are provided guidance on how to properly obligate funding.

Finally, for Recommendation 4, the project management plan for the Edith Green/Wendell Wyatt project has been updated to include all required elements. In addition, all other Recovery Act project management plans for large new construction and modernization projects will be reviewed to ensure they include all required elements and are up-to-date.

Please note that a more comprehensive response may follow upon issuance of the final audit report or as further information comes to our attention. Should you or your staff have any questions, please contact Jennifer Smith on (202) 501-4994.

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Background, Objectives, Scope, and Methodology

Background

The American Recovery and Reinvestment Act of 2009 (Recovery Act) provides the General Services Administration (GSA) with \$5.55 billion for the Federal Buildings Fund. In accordance with the Recovery Act, the GSA Public Buildings Service (PBS) is to use the funds to convert federal buildings into High-Performance Green Buildings as well as to construct federal buildings, courthouses, and land ports of entry. The Recovery Act mandates that \$5 billion of the funds were to be obligated by September 30, 2010, and that the remaining funds were to be obligated by September 30, 2011. The GSA Office of Inspector General is conducting oversight of the projects funded by the Recovery Act.

The initial redesign of the Edith Green/Wendell Wyatt Federal Building began in 2006 with the expectation of a traditional Design/Bid/Build project delivery method. At approximately 50 percent design completion, PBS chose not to proceed with the project due to a funding shortage. When Recovery Act funds became available, the project was re-scoped and designated by PBS to become an economically and operationally efficient high-performance green building. PBS ultimately awarded a Construction Manager as Constructor (CMc) contract for the project in December 2009 and set a Guaranteed Maximum Price in March 2010. In July 2010, the audit team discussed the issues identified in this report with PBS management and project personnel. PBS subsequently exercised the construction option of the contract.

Objectives

The objective of the Office of Inspector General's Recovery Act oversight is to determine if PBS is planning, awarding, and administering contracts for major construction and modernization projects in accordance with prescribed criteria and Recovery Act mandates. The work for this report was performed while evaluating the award for the construction of the Edith Green/Wendell Wyatt modernization project.

Scope

Our audit work for this report was performed between January 2010 and October 2010.

Methodology

To accomplish the objective we conducted fieldwork in the Northwest/Arctic Region, reviewed the contract file and other pertinent project documents, met with project staff, and reviewed applicable guidance and regulations.

Except as noted below, we conducted this performance audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

The planning for this review is based on the audit plan for oversight of the Recovery Act projects as well as review guidance being applied to all Recovery Act projects. A separate guide was not prepared for this project.

As this work was performed under the continuing oversight of all PBS Recovery Act projects, management controls are currently under assessment. Only those management controls discussed in the report have been assessed.

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Report Distribution

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