



**Office of Audits
Office of Inspector General
U.S. General Services Administration**

RECOVERY ACT REPORT -

**Southeast Sunbelt Region Construction Manager
as Constructor Contracts
Audit of PBS's Major Construction and
Modernization Projects Funded by the American
Recovery and Reinvestment Act of 2009**

*Report Number A090172/P/R/R12009
September 28, 2012*



**Office of Audits
Office of Inspector General
U.S. General Services Administration**

DATE: September 28, 2012

TO: Dorothy L. Robyn
Commissioner, Public Buildings Service (P)

FROM: Nicholas V. Painter
Regional Inspector General for Auditing
Southeast Sunbelt Region Field Audit Office (JA-4)

SUBJECT: Recovery Act Report – Southeast Sunbelt Region Construction
Manager as Constructor Contracts
Audit of PBS’s Major Construction and Modernization Projects
Funded by the American Recovery and Reinvestment Act of 2009
Audit Number A090172/P/R/R12009

As part of our oversight of the General Services Administration’s (GSA) American Recovery and Reinvestment Act projects, we noted several matters that warrant your attention. The Public Buildings Service (PBS) awarded construction service contracts for the Dr. A.H. McCoy (McCoy), Robert Smith Vance (Vance), and George C. Young (Young) building modernization projects without obtaining adequate price competition. In addition, PBS awarded and exercised the construction options for the Vance and Young projects before design work had commenced. As a result, the construction options were not enforceable when exercised, the obligations were invalid, and costs increased as the designs were developed.

PBS awarded construction services without adequate price competition.

PBS awarded the contracts for the McCoy, Vance, and Young modernization projects as Construction Manager as Constructor (CMc) contracts. This type of contract is initially awarded for design services¹ at a firm-fixed price with an option for construction phase services at a Guaranteed Maximum Price (GMP). The GMP should be submitted by the bidder as part of the bid proposal and is comprised of the Estimated Cost of Work, the Construction Contingency Allowance, and the contractor’s fee for construction. The GMP is supposed to act as a ceiling price for the construction option.

¹Design services include pre-construction activities such as ensuring the design complies with applicable regulations, codes, and standards as well as ensuring the constructability of the design.

GSA should evaluate pricing for both the design phase services and the construction phase options during the selection process.

However, for these projects, GSA provided the GMP to the bidders when the respective Requests for Proposal were sent out. The McCoy Request for Proposal stated, "The GMP for this project is \$60,000,000. The \$60,000,000 includes all work that will be required to construct the building and includes the fee for the design phase services." The Requests for Proposal for the Vance and Young projects used the same language to set the GMPs at \$32 million and \$35 million, respectively.

Because GSA provided the GMP for each project, the total proposed contract prices were identical. The only differences were the proposed allocations of costs among the GMP components². Consequently, the pricing for the construction contracts was not based on competition even though GSA received multiple bids for each project and used a competitive process based on the best value concept. Since price competition was effectively eliminated, both the Federal Acquisition Regulation (FAR) and Competition in Contracting Act were violated.

The price negotiation memoranda and/or source selection evaluation board reports for these contracts indicate that the technical proposals were given greater weight than price in making the award. However, achieving a fair and reasonable price is a constant requirement of government contracting. FAR Part 15, which governs contracting by negotiation, notes that "normally, price competition establishes price reasonableness." When offers are based on the maximum price set by GSA in the Request for Proposal rather than competition, price is effectively eliminated as an evaluation factor in the award process.

In addition, PBS exceeded FAR prohibitions regarding the type of pricing information that may be provided in a solicitation. FAR 36.204 states, "advanced notices and solicitations shall state the magnitude of the requirement in terms of physical characteristics and **estimated price range** (emphasis added)." In these procurements, PBS provided the exact GMPs for the CMc contracts.

PBS personnel assert that PBS did not violate competition requirements; that instead, the three projects' Requests for Proposals erroneously used the terms "project budget" and "Guaranteed Maximum Price" interchangeably, and that both terms reflected the maximum budget for construction services that the Government would accept. Further, PBS asserts that offerors had the option to propose any pricing for the GMP components. However, as discussed above, the Request for Proposals set the GMPs in each case and resulted in all offerors submitting bids at these respective amounts. Therefore, PBS did not obtain adequate price competition for these contracts.

² Region 4 included design phase services along with the Estimated Cost of Work, Contingency Allowance, and the contractor's fee in their GMP.

PBS awarded and exercised options for construction prior to design commencement.

According to PBS's "Policy and Procedures for using the Construction Manager as Constructor Project Delivery Method,"

The [Request for Proposals] is issued when design requirements have been developed to a sufficient degree of specificity to permit competing of offers with meaningful pricing for reliable differentiation, and also early enough in design to maximize the value of the CMC's Design Phase services. The CMC should be competed on the basis of a complete program and final design concepts.

While this guidance was issued subsequent to the Region 4 CMC procurements,³ it underscores the importance of the timing of CMC solicitations and the need for design requirements to be sufficiently developed *before* a solicitation is issued.

This did not occur in the case of the Vance and Young projects. PBS awarded the CMC contracts and exercised the construction phase options before it had awarded these design contracts.⁴

Since the designs had yet to be developed, the construction options were not specific as to the services to be rendered and did not contain sufficient detail to be enforceable contracts. Therefore, the associated funding obligations were improper and invalid. An obligation is "a definite commitment which creates a legal liability of the Government for the payment of appropriated funds for goods and services ordered or received," and occurs when an agency enters into a *binding* agreement requiring the payment of funds. However, as in these instances, if the agreement is incomplete, it is not an enforceable contract and therefore a legal liability has not been created and an obligation has not been incurred. In these instances, PBS improperly obligated \$32 million for the Vance project and \$35 million for the Young project by exercising the respective construction options.

Further, if construction contracts are awarded before design has been sufficiently developed, scope changes that may result in considerable cost increases become increasingly likely. For both of these projects, cost increases resulted from modifications that became necessary as the scope became more defined. For the

³Issued February 8, 2011

⁴The Vance construction option was awarded and exercised on June 23, 2009, while the Architect/Engineering (A/E) contract was awarded on July 27, 2009. For the Young project, the construction option was awarded and exercised on July 27, 2009; the A/E contract was awarded on September 3, 2009.

Vance project, the GMP increased from \$32 million to nearly \$39 million. Similarly, the GMP for the Young project went from \$35 million to approximately \$47.6 million.

PBS personnel also disagreed with this finding and indicated that, despite the fact that no design contract was in place at the time the construction options were exercised for the Vance and Young projects, the Program Development Studies had been developed to a degree of specificity to permit competing of offers with meaningful pricing for reliable differentiation. However, without a design, the project scope lacked the specificity for a binding contract. This is emphasized by FedBizOpps postings for modifications to both projects, which state:

At the time of solicitation and award, the design had not yet commenced. The award of a GMP contract, without a design in place, was anticipated to be adjusted to reflect conditions that may occur after refinement of the design. Such a living award document is necessary during the refinement of the scope of work.

This indicates that the project did not have a binding scope and was at risk for increasing costs due to insufficient design development.

Conclusion

GSA did not take the steps necessary to ensure the CMc contracts for these three projects were properly procured. In all three cases, GSA effectively eliminated price competition and violated both FAR and Competition in Contracting Act contracting requirements by providing the GMP in the contract solicitation. In addition, on two of the projects, GSA exercised the options for construction prior to the award of the design contracts. As a result, the contracts were unenforceable, the obligations were invalid, and the costs increased.

Recommendation

We recommend that the PBS Commissioner:

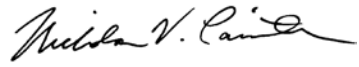
1. Obtain a legal review to address concerns created by the insufficient scopes of work in the base contracts for the Vance and Young projects and determine whether action is necessary to ensure the validity of these contracts.

Management Comments

In its comments, management acknowledged the audit findings and obtained a legal review as recommended in the report (see Appendix B).

We appreciate the support that has been provided throughout this audit. If you have any questions about this report, please contact me at (404) 331-5520.

Sincerely,

A handwritten signature in black ink, appearing to read "Nicholas V. Painter". The signature is fluid and cursive, with a prominent initial "N" and a long, sweeping underline.

Nicholas V. Painter
Regional Inspector General for Auditing (JA-4)

Appendix A – Purpose, Scope, and Methodology

Background

The American Recovery and Reinvestment Act (Recovery Act) provided GSA with \$5.55 billion for its Federal Buildings Fund. In accordance with the Recovery Act, the GSA Public Buildings Service (PBS) is using these 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 mandated that \$5 billion of the funds be obligated by September 30, 2010 and that the remaining funds be obligated by September 30, 2011. The GSA Office of Inspector General (OIG) is conducting oversight of the projects funded by the Recovery Act.

The Recovery Act is funding three major modernization projects in GSA's Southeast Sunbelt Region: The Dr. A.H. McCoy, Robert Smith Vance, and George C. Young federal buildings. PBS used the Construction Manager as Constructor (CMc) contract vehicle to award the construction contracts for each project. The initial CMc award for each project was \$60 million, \$32 million, and \$35 million, respectively.

Objective

The objective of the OIG'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.

Scope and Methodology

To accomplish the objective we conducted a site visit to the Southeast Sunbelt Region, reviewed the contract files and other pertinent project documents, met with project staff, and reviewed applicable guidance and regulations. Our audit fieldwork for this report was performed between March and June 2011.

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

Appendix A – Purpose, Scope, and Methodology (cont.)

Internal Controls

As this work was performed under the continuing oversight of all GSA Recovery Act projects, management controls have not been fully assessed. Only those management controls discussed in the report have been assessed.

Appendix B – Management Comments



AUG 10 2012

GSA Public Buildings Service

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

FROM: *for* LINDA CHERO *Big J*
ACTING COMMISSIONER (P)
PUBLIC BUILDINGS SERVICE

SUBJECT: Recovery Act Report – Southeast Sunbelt Region Construction
Manager as Constructor Contracts Audit of PBS's Major
Construction and Modernization Projects Funded by the
American Recovery and Reinvestment Act of 2009
Audit Number A090172/P/R/XXXXX

The Public Buildings Service (PBS) appreciates the opportunity to comment on the draft audit report. The subject audit report raises questions regarding PBS implementation of Construction Manager as Constructor (CMc) contracts and the manner in which the pricing was evaluated for the contracts awarded and the whether the scope of the contract was sufficient for a binding contract. The draft report recommends that the PBS Commissioner:

Obtain a legal review to address concerns created by the insufficient scopes of work in the base contracts for the Vance and Young projects and determine whether action is necessary to ensure the validity of these contracts.

This recommendation is based on other findings in the report.

The draft report stated that PBS set the Guaranteed Maximum Price (GMP) at the \$60 million budget for McCoy, the \$32 million for Vance and the \$35 million for Young (respectively) in the Request for Proposals, and thereby precluded effective price competition. The draft report also opined that the vagueness of the scopes of work for the Vance and Young projects rendered invalid PBS obligation of funds with the exercise of the construction options for those contracts.

GSA is in agreement that the Government should not make public nor set a GMP. PBS's current CMc policy prohibits the government from setting the GMP or establishing a price for the construction option, but it does allow the government to disclose a ceiling budget for bidding purposes. . Disclosing the budget allows vendors to get a sense of the size of the requirements and secure adequate bonding needed to submit a competitive price proposal. This information is essential for realistic and

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Appendix B – Management Comments (cont.)

competitive pricing. Setting the GMP establishes a fixed price for construction that all vendors must agree to and we agree that this limits price competition.

Furthermore, FAR 36.204 requires that the government state the magnitude of the requirements, but does not prescribe how that must be done. Using a maximum budget is one method of disclosing the estimated price range when the government will not entertain offers over a budget amount. In some instances, providing a cost ceiling or limitation may be more informative to bidders than what the FAR suggests in stating an infinite range of, for example, "more than \$10,000,000". FAR 36.204 also prohibits the disclosure of the government estimate, but that was not done in any of the three procurements.

The draft audit also faults PBS's award and option exercise prior to the commencement of design. To ensure adequate price competition, there must be sufficient scope to allow offerors to submit price proposals. There are numerous ways in which a project team can provide adequate scope information. In recognition of this, the current PBS policy, issued after the award of these contracts, requires approval of a deviation if the CMc price is being solicited and competed on something other than the complete program and the final design concept. In the cases of McCoy, Vance and Young, all the projects were for modernizations and the information provided in the solicitations included prospectus development studies and other programmatic documents. Regardless, PBS remains committed to remedying the deficiencies cited by OIG audits concerning these as well as other CMc projects, and our current CMc policies and procedures were specifically developed to do so. We, of course, are open to discussions that further this cause.

The audit recommends that PBS obtain a legal review to address concerns created by insufficient scope of work and to determine whether action is necessary to ensure the validity of these contracts. In particular, OIG asserts that the scope of work for these projects was so indeterminate as to render invalid the obligation of funds at the time of option exercise. As requested, we consulted with the Office of General Counsel (OGC). Their advice has continued to be in favor of maximizing the specificity of scopes of work in a way that preserves the benefits of the CMc delivery method; not as a means of validating obligations, but rather for the purpose of avoiding the risk of GMP increases that OIG has cited on this and other projects as deficiencies. Notwithstanding the absence of completed design information, the volume of information and specificity on GSA's requirements for these projects was quite extensively stated in the solicitation documents.

Regarding the validity of the obligations at the time of option exercise, OGC has advised that this is an intensely factual question that would necessarily entail review of the voluminous solicitation materials and the facts as of the date the options were exercised. As in both the Vance and Young projects, design was completed and pricing finalized based upon final designs well within the time limits on GSA's obligational authority under the American Recovery and Reinvestment Act (ARRA). Counsel has advised that ARRA funds for these projects were validly obligated within their period of

Appendix B – Management Comments (cont.)

availability. As a result, we are satisfied that no further action is necessary to confirm the validity of these contracts.

We look forward to the opportunity to discuss the CMc process with OIG in an effort to strengthen our specification language to make sure we receive maximum pricing competition and mitigate program risks in the future. In the meantime, if you or your staff has any additional questions, please contact Christine Kelly at (202) 501-9081.

Appendix C – Report Distribution

Acting Commissioner, PBS (P)

Acting Deputy Commissioner, PBS (P)

Acting PBS Chief of Staff (PB)

Regional Administrator (4A)

Regional Commissioner (4P)

Regional Counsel (LD4)

Regional Recovery Executive (4PN)

Division Director, GAO/IG Audit Response Division (H1C)

Audit Liaison (BCP)

Assistant IG for Auditing (JA)

Deputy Assistant IG for Investigations (JID)

Director, Audit Planning, Policy, and Operations Staff (JAO)

Director, Office of Internal Operations (JI-I)

Investigator, Office of Internal Operations (JI-I)