

GENERAL SERVICES ADMINISTRATION OFFICE OF INSPECTOR GENERAL

**Recovery Act Report –
Improper Obligation of Construction Contingency Funds
Review of PBS’s Major Construction and Modernization
Projects Funded by the American Recovery and
Reinvestment Act of 2009
Audit Number A090172/P/R/R11016**

September 30, 2011





U.S. GENERAL SERVICES ADMINISTRATION
Office of Inspector General

Date: September 30, 2011

Reply to: R. Nicholas Goco
Attn of: Deputy Assistant Inspector General
For Real Property Audits (JA-R)

Subject: Recovery Act Report – Improper Obligation of Construction Contingency Funds
Audit of GSA’s Major Construction and Modernization Projects Funded by the
American Recovery and Reinvestment Act of 2009
Audit Number A090172/P/R/R11016

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

During our oversight of the General Services Administration’s American Recovery and Reinvestment Act (Recovery Act) projects, we identified two contract modifications for the Department of Commerce Building modernization project in the National Capital Region that resulted in the improper obligation of construction funds. These modifications did not satisfy the specificity requirements of the Recording Statute; therefore no obligations were incurred. In addition, the modifications were not fully priced prior to execution, violating the Federal Acquisition Regulation (FAR).

Contract Modifications Violated the Recording Statute Requirement for Specificity

On March 1, 2011, GSA issued two modifications to the Construction Manager as Constructor (CMc) contract for the Department of Commerce Building modernization project to award a “Current Needs Fund” (CNF). These modifications, which totaled \$12,575,000¹, established the CNF as a vehicle to obligate project contingency funds. However, GSA’s obligation of these funds was improper because the obligations did not meet the specificity requirements of the Recording Statute.

Recovery Act funds are available for obligation provided they meet Recording Statute² requirements for Government obligations. To incur an obligation, an agency must have documentary evidence of a binding agreement between the agency and a vendor for *specific* goods or work services to be provided. GSA issued these CNF modifications to cover five broad categories of work³; however, no specific scope of work was identified.

¹ PC81 awarded \$7,525,000 for Phase 2 work; PC82 awarded \$5,050,000 for Phase 3.

² 31 U.S.C. 1501(a)(1)

³ Design revisions and/or remediation to correct differing site conditions; utility phasing revisions to transition current utilities and new utilities; design revisions to incorporate GSA facilities standards updates; design revisions

According to GSA officials, the CNF was set up to fund work on previously unknown, existing building conditions encountered during ongoing or prior phases that are expected to be replicated throughout the building. When these conditions are encountered, the contractor is to provide fully detailed proposals for each work item that is to be charged against the CNF. Once an agreement for scope or pricing is established for each work item, the work item will be fully definitized by contract modification to establish the cost of the work. In effect, these CNF modifications constitute contingencies and outline services that the contractor *may* provide. As such, the associated obligations do not satisfy the Recording Statute.

GSA Did Not Establish Modification Pricing Prior to Execution

The FAR requires that all contract modifications, including change orders, be priced before they are executed unless doing so would adversely affect the interests of the Government⁴. Similarly, the GSA Acquisition Manual states that the government can order a contractor to proceed with work on a price to be determined later (PDL) basis if the Contracting Officer determines that it is in the best interests of the Government that the contractor proceed before negotiation of an equitable adjustment is completed. The CNF modifications did not establish pricing, but do not warrant a FAR exception or pricing on a PDL basis.

The justification provided in the Statement of Work for the CNF modifications indicates that the fund is needed to provide a finished, fully functioning project that complies with Recovery Act provisions and ancillary program requirements. However, the need to produce a fully functioning facility for federal agencies is a requirement of all GSA construction projects and is not unique to projects funded by the Recovery Act. Therefore, the stated justification does not warrant an exception to the above-mentioned FAR and GSAM requirements.

It appears that concerns over the possible revocation of Recovery Act funding may have been the impetus for using the CNF. In early 2011, Congress considered legislation⁵ that would have rescinded all unobligated Recovery Act funds. In preparation for this possibility, GSA sought to obligate all remaining contingency funds that could be substantiated and justified prior to any Congressional action. The Project Management Office discussed with project managers a process to do so, and provided guidance that all obligations should be for a bona fide need and have a defined scope, estimate, and pricing. However, PBS staff circulated a template of the CNF modification for use on projects in other regions.

Conclusion

After being notified of these findings, GSA de-obligated \$9.8 million of unused funds on these two modifications. However, given the urgency that GSA demonstrated in obligating the Recovery Act funding and circulating the template for Current Needs Fund modification, we

to incorporate fire, safety, and accessibility updates; and utility reimbursements to cover work performed by local utilities that was not covered by the Guaranteed Maximum Price set by GSA.

⁴ FAR Part 43.102 (b)

⁵ The House of Representatives passed H.R.1 on February 19, 2011, but the bill failed in the Senate on March 9, 2011.

have a concern that similar situations may arise. If any such funds are not properly re-obligated prior to October 1, 2011, the Recovery Act funds may expire. Accordingly, GSA should develop and implement a methodology to review contract modifications to ensure that funding obligations are in accordance with federal laws and regulations.

Recommendations

We recommend that the Commissioner of the Public Buildings Service develop and implement a methodology to review GSA contract modifications to ensure that obligations are valid. In performing the review, GSA should:

- Document the review methodology/process;
- Track which actions were reviewed and by whom; and
- Record any improper obligations found, de-obligate unspent funds, and report the findings to the independent public accountant.

Management Comments

In its comments, management acknowledged the audit findings and concurred with the recommendations (see Appendix A). We made non-substantive changes to the report in response to management's comments.

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

Sincerely,



R. Nicholas Goco
Deputy Assistant Inspector General for Real Property Audits (JA-R)

**Recovery Act Report –
Improper Obligation of Construction Contingency Funds
Audit of GSA’s Major Construction and Modernization
Projects Funded by the American Recovery and
Reinvestment Act of 2009
Audit Number A090172/P/R/R11016**

Management Comments



GSA Public Buildings Service

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

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

SUBJECT: Recovery Act Report – Improper Obligation of Construction
Contingency Funds Audit of GSA’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 audit report which raises questions regarding improper obligations related to the “Current Needs Fund” (CNF) for the Department of Commerce Building modernization project. These funds were awarded under the American Recovery and Reinvestment Act (Recovery Act) and are meeting the intent of the Recovery Act by putting people back to work, strengthening the economy, and meeting energy conservation goals.

We agree the Commerce CNF monies were for “potential” versus “known” requirements and may have lacked the necessary scope sufficient to fully satisfy the specificity of the Recording Statute; however, we are concerned about the implied constraints on Price to be Determined Later (PDL) contract actions. The Commerce Recovery Act contingency modification was not problematic because a PDL was utilized, but rather because it was not for a specific or known requirement. The Recording Statute applies to any obligation including PDLs.

The draft report states that the “FAR requires that all contract modifications, including change orders, be priced before they are executed unless delays would adversely affect the interests of the Government” and in the same paragraph states contractors can use PDLs “if the necessity to proceed does not allow time to reach an agreement on a contractor’s proposal.” Time and delays are not the only criteria that allow use of a PDL, and we request that you revise the draft report to not place limits on the use of PDLs which the FAR allows.

PDLs provide flexibility in dealing with variations in quantity of work related to unforeseen conditions or the impact of changes on other work under the contract. This type of change is usually authorized under FAR 52.236-2, Differing Site Conditions, or FAR

U.S. General Services Administration
1800 F Street, NW
Washington, DC 20405-0002
www.gsa.gov

**Recovery Act Report –
Improper Obligation of Construction Contingency Funds
Audit of GSA’s Major Construction and Modernization
Projects Funded by the American Recovery and
Reinvestment Act of 2009
Audit Number A090172/P/R/R11016**

Management Comments (cont’d)

- 2 -

52.243-4, Changes. A classic example of when PDLs may be used is the discovery of a hazardous material on site during construction that was previously not identified in the drawings or specifications. To avoid delay claims and to mitigate the affect to other work on the contract, the contracting officer will issue a unilateral modification for the removal of the hazardous material with a not to exceed (NTE) amount and direct the contractor to proceed with the remediation of the hazardous material and submit a proposal. The NTE amount is for a “known” issue and based upon a percentage of the independent government estimate of quantity and price. The modification with detailed pricing is negotiated once the contractor’s proposal is received. If a PDL modification is issued after receipt of a contractor’s proposal, the NTE value is based on the proposal from the contractor in accordance with GSAM 552.243-71, Equitable Adjustments (if original contract was solicited after January 2009).

Additionally, we wish to clarify the national guidance provided regarding the obligation of contingency funds and subsequent oversight activities. In early 2011, PBS met with its Regional Procurement Officers and Regional Recovery Executives to discuss the obligation of expiring Recovery Act contingency funding. A key element of those discussions was the need for specificity and defined scope for “known” issues. A copy of the guidance that was used is attached. Please note that the Recovery Program Management Office did not include a template with this guidance as noted in the draft report.

Upon notification of the IG’s findings, PBS de-obligated “CNF” monies on the Commerce Building project and disseminated lessons learned regarding the specificity requirements of the Recording Statute with its Regional Procurement Officers, Regional Recovery Executives, and Regional Counsel. As a result of these conversations, additional clarifications were made on two Region 10 procurements. Conversation regarding the specificity of recordation is continuing with the regions. PBS is targeting those projects and regions which may be at greatest risk should obligations have not been properly carried out.

As part of the corrective action plan, the Office of Design and Construction will work with the Office of Acquisition Policy to further develop our approach to meeting the specificity requirements of the Recording Statute, particularly as it applies to the use of PDLs. This will not only provide a ready reference for our workforce, but also allow for incorporation in regional pre and post award procurement reviews. If additional improper obligations come to light, we will develop training for contracting officers and project managers. We believe this plan of action will satisfy the points under the recommendation.

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

**Recovery Act Report –
Improper Obligation of Construction Contingency Funds
Audit of GSA’s Major Construction and Modernization
Projects Funded by the American Recovery and
Reinvestment Act of 2009
Audit Number A090172/P/R/R11016**

Management Comments (Attachment)

Subject: ARRA Unobligated Balances
Date: 02/23/2011 11:48 AM

Following up on our conference call last week, Regions should continue looking at their unobligated ARRA funds and to immediately obligate items for current bona fide needs and known change orders. Project Managers, Contracting Officers and Legal Counsel should work closely together on their projects.

Remember that you must think about unobligated balances for all of the contracts on your project including the AE, CM, etc.

If exact estimates are not known, consider use of line item pricing and allowances. It is very important that in so doing, that you can demonstrate a bona fide need, you have a defined scope, an estimate, and contractor pricing.

Time to take action is very limited.

Many regions have asked for guidance from Central Office. This is difficult to do as every project is different and whether a current bona fide need exists depends on the circumstances of each project. For some projects, it may not be possible to obligate any funds if there are no current bona fide needs. What has been helpful to some regions is a national call with the RRE, RPO, Regional Counsel along with central office AMD and D&C representatives to discuss individual projects. It is when you discuss the details, that the opportunities for action arise. If interested, please contact Jennifer Smith, 202- 501-4994. Director, Office of Acquisition Management and she will set it up.

There are unfortunately no additional updates to our obligation and deobligation of funds situation once they expire.

Bill Guerin
Office of Design and Construction

Liliana DelBonifro
Office of Acquisition Management

**Recovery Act Report –
Improper Obligation of Construction Contingency Funds
Audit of GSA’s Major Construction and Modernization
Projects Funded by the American Recovery and
Reinvestment Act of 2009
Audit Number A090172/P/R/R11016**

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 is using 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 mandated that \$5 billion of the funds must 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 Department of Commerce modernization project will be completed in eight phases, at a total estimated construction cost of over \$750 million. Phase 1 received \$71.4 million for construction and reached substantial completion in October 2009. The project received Recovery Act funding in 2009 for Phases 2 and 3 in the amount of \$225,638,000⁶. Phases 2 and 3 are expected to be completed in June 2012, and the project is expected to be completed in its entirety in 2021.

Objectives

The objective of the OIG’s Recovery Act oversight is to determine if GSA 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 modifications to the Department of Commerce Building construction project.

Scope and Methodology

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

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

⁶ The amount was later reduced to \$185,167,000

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 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 GSA Recovery Act projects, management controls are currently under assessment. Only those management controls discussed in the report have been assessed.

**Recovery Act Report –
Improper Obligation of Construction Contingency Funds
Audit of GSA’s Major Construction and Modernization
Projects Funded by the American Recovery and
Reinvestment Act of 2009
Audit Number A090172/P/R/R11016**

Report Distribution

Commissioner, Public Buildings Service (P)

Regional Commissioner, Public Buildings Service (WP)

Director, Internal Control and Audit Division (BEI)

Assistant Inspector General for Auditing (JA, JAO)

Regional Inspector General for Investigations (JI-W)

Assistant Inspector General for Investigations (JI)