



U.S. GENERAL SERVICES ADMINISTRATION  
Office of Inspector General

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November 01, 2013

MEMORANDUM FOR: ANN KALAYIL  
REGIONAL ADMINISTRATOR  
GREAT LAKES REGION (5A)

FROM: ADAM R. GOOCH *Adam Gooch*  
REGIONAL INSPECTOR GENERAL FOR AUDITING  
GREAT LAKES REGION (JA-5)

SUBJECT: Award and Administration of Task Order GS-P-05-10-SC-0004  
for Renovations at the Senator Paul Simon Federal Building,  
Carbondale, Illinois Recovery Act Project  
Audit Memorandum Number A090184-19

As part of our oversight of the General Services Administration's (GSA's) American Recovery and Reinvestment Act (Recovery Act) projects<sup>1</sup>, we identified two areas of concern related to the award and administration of the subject task order. First, price reasonableness for the project is not assured because of the improper use of a Multiple Award Schedule contract. Second, subcontractor employees did not receive required security clearances.

On October 15, 2009, the Public Buildings Service (PBS) awarded a \$1.8 million task order (GS-P-05-10-SC-0004) to J.R. Conkey and Associates, Inc. (Conkey) under Multiple Award Schedule (schedule) Contract Number GS-07F-0286V. According to the solicitation, the scope of services is to provide "design, shop drawings, manufacturing and installation services including but not limited to existing field investigations, design and installation services necessary to accomplish" a flexible building integrated photovoltaic system at the Senator Paul Simon Federal Building in Carbondale, Illinois (Carbondale). This consisted of a new roof system, solar array modules<sup>2</sup>, and a roof membrane replacement.

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<sup>1</sup> The American Recovery and Reinvestment Act of 2009 provides GSA with \$5.55 billion for the Federal Buildings Fund. In accordance with the Recovery Act, PBS 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 be obligated by September 30, 2010 and the remaining funds be obligated by September 30, 2011. One objective of the GSA Office of Inspector General oversight is to determine if PBS is awarding and administering contracts for limited scope and small construction and modernization projects in accordance with prescribed criteria and Recovery Act mandates.

<sup>2</sup> A photovoltaic system typically includes an array of solar panels, an inverter, and sometimes a battery and/or solar tracker and interconnection wiring. Photovoltaic is a method of generating electrical power by converting solar radiation into direct current electricity.

**PBS cannot be assured of price reasonableness because it improperly used a Multiple Award Schedule contract for the project.**

PBS cannot be assured of price reasonableness because a schedule contract was not the appropriate contract vehicle for the project. In addition, use of the schedule contract potentially limited competition and the lump sum pricing obtained was not supported by the schedule contract.

***A schedule contract was not appropriate for this procurement.***

In a 2003 memorandum, the Office of Federal Procurement Policy (OFPP) stated that Federal Acquisition Regulation (FAR) Part 12, which addresses the acquisition of commercial items (including schedule contracts), should rarely, if ever, be used for new construction acquisitions or non-routine alteration and repair services. In accordance with long-standing practice, agencies should apply the policies of FAR Part 36 to these acquisitions. Part 36 incorporates provisions and clauses that are generally consistent with customary commercial practices in the construction industry. New construction projects and complex alteration and repair, in particular, involve a high degree of variability, including innumerable combinations of site requirements, weather and physical conditions, labor availability, and schedules. Part 12 fails to allocate risk in a manner that takes into account the nature of these activities.

The Carbondale project required the contractor to add a new roof membrane and a photovoltaic rack system to a sloped roof. In addition, the scope of work specified that the contractor was to submit manufacturer's shop drawings, including plans, elevations, sections, and details, indicating dimensions, tolerances, profiles, electrical connections, provisions for interconnection, disconnects, and attachments to other work. In our opinion, these requirements make this a complex, rather than routine, alteration and repair project.

Accordingly, we believe the project fits the OFPP definition of new construction and complex alteration and repairs covered by FAR Part 36. FAR Part 36 states that "Contracting officers shall acquire construction using sealed bid procedures, if the conditions ... apply." Therefore, a schedule contract should not have been used to procure these services. OFPP states in its 2003 memorandum that contracting for new construction or complex alterations and repair work without the protections of the Part 36 provisions and clauses would likely force contractors to include contingencies in their offers that would unnecessarily drive up construction costs borne by the taxpayer.

In its comments, PBS stated:

With regard to issue (1), we do not concur that price reasonableness was not assured because of improper use of a multiple award schedule contract for the Carbondale project. Please note that FAR Part 8 was used and not FAR Part 12, which is indicated in the draft report.

In accordance with the 2003 OMB memorandum on applicability of FAR Part 12 to construction acquisitions, the Contracting Officer determined the particular circumstance of the project and determined the roof replacement and installation of PV panels to be a routine, noncomplex repair and alteration projects [sic]. The likelihood of differing site conditions was low even if PBS would have used Part 12. A schedule contract was the appropriate vehicle for the procurement. The project replaced an existing solar powered system and roof with a commonly available commercial off-the-shelf product, which is a commercial item by definition, [in] accordance with FAR 2.101. Submittals of manufacturer's shops drawings, including plans, elevations, sections, and details indicating dimensions, tolerances, profiles, electrical connections are part of the normal process for routine, noncomplex repair and alteration projects. The Carbondale project was below the prospectus limitation and was considered a limited scope and noncomplex alteration project.

PBS utilized FAR Part 8 as the procurement vehicle and determined the services to be commercial items. FAR Part 8, "Required Sources of Supplies and Services," requires government ordering officials to utilize Federal Supply Schedules over open and market methods. Market research showed these supplies services were available through Schedule 56. The schedule ordering procedures were followed and included ensuring that FAR Part 36 construction contract clauses were included in the Request for Quote (RFQ) and delivery order packages.

#### Audit Response:

We maintain that this project should have been procured using FAR Part 36 given the complex and complicated nature of the project. Management's assertion that the project was a routine alteration and repair project does not conform to the 2003 OFPP memorandum. The memorandum provides examples of services that are commercial in nature and would be appropriate for purchase outside of FAR Part 36. These examples include "routine painting or carpeting, simple hanging of drywall, everyday electrical or plumbing work, and similar noncomplex services, as well as for purchases of commercial construction material and associated ancillary services." This project, the design and installation of a new roof, roof membrane, and solar array modules, is far more complex and complicated than the routine repair and alteration services contemplated by the memo as being commercial in nature.

Further, GSA schedules are procured in accordance with FAR Part 12 as commercial products and services. FAR Part 8 provides for the ordering procedures while using the GSA schedule. FAR "Part 12 could be used in limited circumstances involving construction contracting -- primarily for routine alteration and repair services as well as for acquisitions of commercial construction materials and associated ancillary services."

***PBS potentially limited bidding opportunities and changed requirements without re-competing the procurement.***

By improperly using the schedule contract, PBS limited bidding opportunities on the project and further restricted competition by changing requirements without re-competing.

Generally, solicitations should be distributed to reach as many schedule contractors as practicable to reasonably ensure quotes will be received from at least three contractors that can fulfill the requirements.<sup>3</sup> For the Carbondale project, PBS distributed the solicitation to four Schedule 56 (Buildings and Building Materials) contractors offering Alternative and Renewable Energy Solutions, including Solar Energy Systems and Solar Lighting, under Special Item Number (SIN) 206-3.<sup>4</sup> A fifth contractor, Tecta America Corporation (Tecta), expressed interest in the project; however, its schedule contract did not include SIN 206-3. After some discussion, PBS provided the contractor with a copy of the solicitation. Tecta then argued that by using SIN 563-4 (Roofing Materials, Products, and Services), the company would be able to satisfy the solicitation's requirements. Competition was limited to five potential bidders. However, only two bids were received (including one from Tecta). Eventually, Conkey was awarded the task order for \$1.8 million and Tecta, although a competing bidder, was used as a subcontractor.

In addition, PBS accepted lowered performance requirements without re-bidding the task order. The solicitation asked for a preliminary solar array size of 300 kilowatt per hour plus. The three contractors who did not bid stated they could not achieve that level of electrical generation, did not possess the required technology, or did not wish to bid because of the location of the project. Conkey's offer did not meet this requirement either. Its system could provide only 100 kilowatts of electricity. PBS asserted that the performance level in the solicitation was only a "preliminary estimate" to see what contractors would offer. Failing to clarify this effectively limited competition because other potential bidders were unaware PBS would accept a lower level of performance.

PBS potentially impaired competition by failing to update the kilowatt requirements and limiting the bidding opportunities. This may have resulted in the Government paying more for the roof replacement and photovoltaic system.

In its comments, PBS responded that it:

...did not limit competition by limiting bidding opportunities and did not change the requirements without re-competing the procurement. RFQs were sent to five potential bidders. In accordance with FAR 8.404(a), "orders placed against a MAS contract, using the procedures in this subpart, are considered to be issued

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<sup>3</sup> FAR Part 36.211.

<sup>4</sup> Each GSA schedule is composed of Special Item Numbers (SINs). SINs provide a categorization method that groups similar products, services, and solutions together to aid in the acquisition process.

using full and open competition.” All requirements to distribute the RFQ met the minimum set forth in this section. The requirements, at that time as referenced in FAR 8.405-2(c)(3)(i), were to send the RFQ to more than three schedule contractors. The RFQ was sent to a total of five schedule contractors.

In addition, the RFQ states a preliminary 300 KWh requirement, which was used as reference and was clearly labeled as preliminary. Bidders were free to ask questions during the bidding process. Other factors, such as the location of the project, were considered for not submitting a formal bid. Therefore, the requirements did not change and no amendment or cancellation was warranted.

#### Audit Response:

We maintain that by using a schedule contract, PBS limited bidding opportunities on the project and further restricted competition by changing requirements without re-competing. First, as discussed in the prior section, the schedule was not the appropriate contracting vehicle for this project, so the competition requirements of FAR 36 were not used.

Second, PBS did not meet the ordering procedures of the FAR to ensure competition when placing orders against a schedule contract. FAR 8.405-2(c)(3)(iii)(B) specifically requires that ordering activities provide the RFQ to:

as many schedule contractors as practicable, consistent with market research appropriate to the circumstances, to reasonably ensure that quotes will be received from at least three contractors that can fulfill the requirements. When fewer than three quotes are received from schedule contractors that can fulfill the requirements, the contracting officer shall prepare a written determination to explain that no additional contractors capable of fulfilling the requirements could be identified despite reasonable efforts to do so. The determination must clearly explain efforts made to obtain quotes from at least three schedule contractors.”

PBS initially distributed the solicitation to only four contractors and, even with the additional bid from Tecta, did not receive the required three bids. We found no evidence in the contract file that PBS prepared a written determination to justify less than three quotes or made an effort to determine that no other contractor was capable of fulfilling the contract requirements.

Third, competition was further limited because PBS did not clarify the kilowatt requirements of the contract. Without modification, the preliminary requirement is the specified contract requirement until clarified to all potential bidders. Furthermore, PBS knew that its requirements were not valid prior to the solicitation having commissioned a study from the U.S. Department of Energy, which evaluated photovoltaics for the Carbondale Federal Building. The study noted that a 111 kilowatt array would cover the sloped roof. Our review of the Carbondale file and communications with PBS officials showed that the work was based on a 111 kilowatt array, not a 300 kilowatt array. We

did not find anything in the file that explained the difference between the kilowatt arrays used on the government cost estimate and the Department of Energy's study. Given that the study was performed prior to acceptance of Conkey's bid, PBS could have obtained more proposals by sharing the change in requirement with potential bidders.

***Project pricing is not supported by the schedule contract.***

Schedule contracts are awarded for supplies and services using fixed pricing determined to be fair and reasonable. Orders placed against a schedule contract shall include the quantities and prices for the supplies and services ordered. PBS awarded the contract using lump sum pricing that could not be verified to the contractor's schedule price list. In attempting to reconcile the pricing information to the schedule, we reviewed the government cost estimate, the price list, and also requested assistance from the PBS contracting officer. The contracting officer explained that the \$1.8 million award amount reflected the schedule's line item pricing for the base system. The solar portion of the system was estimated at \$600,000, and the roof membrane replacement at \$1.2 million. However, we could find no documentation supporting this breakdown or tying these amounts to the schedule price list. Conkey's price on the task order for the solar panel system was \$274,801 and the roofing products were provided by Tecta. None of the pricing could be tied to either Conkey's or Tecta's schedule pricelists.

PBS should not have accepted lump sum pricing under a schedule contract. Pricing in the Multiple Award Schedule program is based on the premise of placing item-by-item orders against an approved pricelist that has been approved as fair and reasonable. Lump sum pricing makes it difficult to verify that prices are fair and reasonable in accordance with the contract. Although PBS determined Conkey's price was fair and reasonable, this was based on the government cost estimate for the solicitation's original requirements and a single competing bid from its subcontractor for the work, Tecta. PBS did not use the contract pricing that was already deemed fair and reasonable. Consequently, the schedule contract was not used properly.

A schedule contract was not the appropriate vehicle for the project. In addition, misuse of the schedule potentially limited competition on the procurement and the lump sum pricing obtained was not supported by the schedule contract. Therefore, price reasonableness is not assured.

In its response, PBS states:

The pricing was supported by the FSS contract. We do concur that PBS accepted the lump sum pricing without comparing in detail its components to the Schedule price list. The major component of the project, which is the PV panel, was compared to the Government Cost Estimate and the price list. The minor component, which is the roofing materials, was not compared to the price list. The ordering activity evaluated the response using the evaluation criteria of past performance and price as contained in the RFQ package. The ordering activity is responsible for considering the level of effort and the mix of labor proposed to

perform the task, and for determining that the total price is reasonable. This was done, as price analysis involved comparing the quote to the Government Cost Estimate (GCE), to competition, and included a review of the FSS contract price list. ... While we determined the price to be reasonable, we must also compare the offered prices to the schedule in more detail to ensure contractor compliance to the price list. As a result, all future FSS RFQ packages will require that the submittal of a quote consists of a price list which clearly identifies the FSS approved pricing applicable to the delivery task order.

Audit Response:

FAR 8.402(b) requires schedule contractors to publish an authorized price list containing all supplies and services offered. For the Carbondale project, the price list published by Conkey did not contain the labor or detail necessary to verify the pricing; therefore, there is no guarantee that the purchase met all the requirements for competition.

We recognize that PBS is taking action to ensure future projects contracted through schedules are tied to pricelists. However, for the Carbondale project, there was no way for PBS to determine what price Conkey charged GSA for the photovoltaic panels, because of the use of lump sum pricing.

**Subcontractor employees were not cleared to work in the federal building.**

For the Carbondale project, three subcontractor employees who worked more than 10 business days on the project did not receive the required security clearance. Homeland Security Presidential Directive 12 establishes a common identification standard for federal employees and contractors. This directive requires all federal, executive departments and agencies to conduct personnel investigations, adjudicate results, and issue identity credentials to all employees and contractors requiring routine access to building facilities and information technology systems. Although a background investigation is not required, contractor employees who work more than 10 business days are required to undergo a law enforcement check and to submit a complete application. To track this process, the building manager maintains a clearance list of all contract employees allowed to work on the project.

In addition to Tecta, Conkey used other subcontractors on the project including Straight Up Solar and Iron Eagle. Documentation shows that one Tecta employee was not cleared even though he worked on the project from June to July of 2010. Moreover, one Straight Up Solar employee did not submit the appropriate security paperwork. Straight Up Solar worked from August to October of 2010. Finally, one Iron Eagle employee did not sign in or out, nor does his name appear on the clearance list. Payroll records show he worked on the Carbondale project intermittently from June to August of 2010. Altogether, three employees (one from Tecta, one from Straight Up Solar, and one from Iron Eagle) who worked more than 10 business days on the project did not receive the required security clearance.

PBS concurred in its response and stated that contractor security clearance training classes for the affected PBS employees took place in March and April of 2013.

We appreciate the support that has been provided throughout this review. If you have any questions about this memorandum, please contact me at (312) 353-0500 or Hilda Garcia at (415) 522-2740.



## **Distribution**

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