



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

Alert Report: Limited Scope Audit of Invalid  
Obligations and Contingency Funding for Recovery  
Act Projects

*Report Number A120174/P/R/W13001*

*October 24, 2012*




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

DATE: October 24, 2012

TO: Daniel M. Tangherlini  
Acting Administrator, General Services Administration (A)

Dorothy Robyn  
Commissioner, Public Buildings Service (P)

Gary Grippo  
Acting Chief Financial Officer, General Services Administration (B)

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

SUBJECT: Alert Report: Limited Scope Audit of Invalid Obligations and  
Contingency Funding for Recovery Act Projects  
*Report Number A120174/P/R/W13001*

As part of our oversight of the General Services Administration's (GSA) American Recovery and Reinvestment Act (Recovery Act) projects, we identified an issue that warrants your attention. With the potential rescission of Recovery Act funds during the fiscal year 2011 budget impasse, the GSA Public Buildings Service (PBS) issued contract modifications to preserve project contingency funds. However, these modifications did not definitize work to be performed, and, therefore, did not create valid obligations. To the extent that funds were not validly obligated prior to their expiration on September 30, 2011, GSA's Recovery Act reporting has been inaccurate. Further, the funds are scheduled to be rescinded on December 31, 2012.

**PBS created invalid obligations of Recovery Act funds to preserve funds for contingencies.**

Funding for construction projects typically includes contingency funds to cover unforeseen conditions, design deficiencies, and other changes during the life of the project. PBS construction funds are usually available to pay for these contingencies for the life of the project. However, the Recovery Act funding was time limited and had to be obligated by September 30, 2011.

During the fiscal year 2011 budget impasse, PBS was at risk of losing these project contingency funds due to the potential rescission of all unobligated Recovery Act funds. As a result, PBS management encouraged project teams to obligate all available Recovery Act funds. In response, some PBS project teams issued contract modifications that were insufficient to create valid obligations because the work was not properly definitized. In some of these cases, it is apparent that project teams issued invalid contract modifications to preserve the Recovery Act funding for future project contingencies, subsequently drawing funds as needed for activities often unrelated to those described in the modifications.

PBS's efforts to safeguard project funding are illustrated by an "Adjudication Fact Sheet"<sup>1</sup> template that was circulated in July 2011 by the PBS Office of Design and Construction. An excerpt from this template, which was disseminated to all Design and Construction Directors and Regional Recovery Executives,<sup>2</sup> is shown below. Similar documents were found in multiple project files.

*On February 28, 2011, the budget impasse of 2011 included a threat of rescission of all unobligated funds authorized under the American Recovery and Reinvestment Act of 2009 (ARRA). Though the rescission ultimately did not occur, the Office of Design and Construction considered the risk as high and would likely be added to one of the numerous Continuing Resolutions enacted to maintain operation of the federal government. As such contingency funds for unforeseen conditions and omissions would be rescinded, leaving projects...deficient in funds. In the face of rescinded funds, the project would either not be able to be completed or in violation of the Anti Deficiency Act.*

*At the direction of the Office of Design and Construction, with support of the Office of General Counsel, projects funded under ARRA were to be obligated in [total], leaving a project balance of zero. Project Contracting Officers consulted with Regional Counsel for guidance on proceeding while maintaining full compliance under applicable Federal Acquisition Regulations (FAR) and General Services Acquisition Manual (GSAM).*

*The guidance received from regional counsel required bona fide need work items to be identified, preparation of detailed government estimates, contractor proposals, pre-negotiation positions, negotiations and award of a contract modification. Notice to Proceed (NTP) would be withheld. Scope identified for contingency obligation includes planned scope revisions that were planned to be negotiated and awarded consistent with the planned value curve established for the project and reported through the Project Information Portal (PIP). Modifications to the construction contract were issued on April 2011 in scope items that will be de-obligated and re-obligated as additional changes occur.*

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<sup>1</sup> Adjudication Fact Sheets are used to request adjustments in project performance measures after the projects have been identified as over budget or behind schedule. In this case, projects appeared to be over budget because contingencies were obligated prior to the end of fiscal year 2011.

<sup>2</sup> Regional Recovery Executives received the template via email on August 31, 2011.

While these contract modifications were supposed to meet FAR and GSAM documentation requirements, the above narrative indicates the intent was to preserve the funding so that it could later be deobligated and reobligated for use on contingency items, rather than to perform the work described in the contract modifications. To create a valid obligation, the Government must incur a legal liability to pay for goods or services ordered or received; or a legal duty that could mature into a legal liability without Government action. The contract modification must clearly establish the parties' rights and duties; it must include a specific, definite description of the goods and services to be provided. Although PBS can modify a contract for a bona fide need and not proceed until a later date or create a valid obligation with a unilateral modification, the evidence here shows that PBS did not create a legal liability. The Government was not obligated to pay for specific goods or services at any given price.

Below are four examples where PBS issued contract modifications that did not create valid obligations. In each case, PBS awarded the contract modification; however, the modifications were not definitized and additional contract modifications were needed to definitize the work and/or redistribute the funds for other work. Since these obligations were invalid, any unused funding expired on September 30, 2011. Expired funds have limited usage for proper upward adjustments. At this point, we have not evaluated whether the portion of the expired funds utilized to date were properly used for upward adjustments. Accordingly, each example below only addresses the amounts that have not been used to date.

- **Peter Rodino Federal Building Modernization**

On March 9, 2011, PBS Region 2 issued Modification PC16 to Contract Number GS02P09DTC0018 for abatement in the amount of \$654,827 as a unilateral change order to be negotiated at a later date. The contractor submitted its initial proposal for the work on October 3, 2011. On March 26, 2012, PBS Region 2 issued Modification PS71 that definitized Modification PC16 for \$296,243 and deobligated the remaining \$358,584.

Modification PC16 appears to be for a bona fide need; however, it did not create a valid obligation because contractor pricing was not established and, as shown by the year that passed before the work was definitized, there was no urgency to proceed. 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 Government.<sup>3</sup> Similarly, GSAM 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 proceeds before negotiation of an equitable adjustment is completed. However, in this case, project records indicate that as of August 2012, the work still had not begun, so there was no need for a PDL.

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<sup>3</sup> FAR 43.102 (b)

Modification PC16 did not result in an obligation of funds because there was no definitized agreement with the contractor at that time concerning the price and there would have been no adverse impact on the Government from not issuing the modification. As a result, all \$654,827 of Recovery Act funding expired on September 30, 2011, which includes the \$358,584 recorded as “deobligated.”

- **Lafayette (Phase 1) Modernization**

On March 17, 2011, PBS Region 11 issued Modification PC09 for \$5.4 million to Contract Number GS11P10MKC0061 for new building systems, hazardous material abatement, demolition of existing building systems, etc., on a PDL basis and future definitization through contract modifications. Between June 8, 2011, and October 1, 2011, PBS Region 11 issued 13 contract modifications totaling \$1,023,794 to definitize and price the work. Since October 1, 2011, PBS has definitized an additional \$822,852 through 51 modifications leaving \$3,553,354 of funding on the original modification.

As stated in the description above, the modification was not definitized at the time it was awarded and no pricing was established. As such, GSA’s obligation of these funds was invalid, both because of the lack of pricing and because of the lack of specificity regarding the work to be performed.

Modification PC09 resulted in an invalid obligation as it did not create a legal liability for GSA. As such, \$4,376,206 expired on September 30, 2011, and of that amount, \$3,553,354 remains unused and expired.

- **Grand Junction Federal Building - Courthouse**

On March 9, 2011, PBS Region 8 issued Modification PC04 to Contract Number GS08P10JBC0032, which included \$462,247 for all work to design and construct additional Photovoltaic (PV) canopy and panels under Item Number 20. Subsequently, on May 24, 2011, PBS Region 8 issued Modification PS05 to definitize Modification PC04 and increased the cost for the PV work to \$581,739. Then prior to October 1, 2011, PBS Region 8 issued a contract modification to reduce \$17,231 in funding from the PV work and used it for the replacement of sprinkler heads and installation of conduit runs. Additionally, since October 1, 2011, PBS Region 8 issued two modifications that reduced the funds for the PV work by an additional \$140,461 for other work including design concepts of a lobby and bathrooms and the design and installation of a fire alarm system, leaving \$424,047 of funding on the PV work.<sup>4</sup>

The contract modification for the PV work includes a scope of work, an independent government estimate, and a negotiation memorandum. However, the specifications in the scope of work were deficient, essentially stating that the contractor is to design and construct a canopy and PV panels to increase the output by 14kw. Additionally, the scope of work included a requirement to

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<sup>4</sup> During fieldwork, another modification to reduce the PV funding by \$125,931 for terrazzo patching, light fixtures, and other work was pending.

complete the work within 120 days; however, according to project records, the contractor has not performed any of the PV work on the modification and all of the PV work, from design through installation, has been scheduled to be performed in a single day. The work was not adequately definitized and hence did not create a valid obligation. In addition, the project used an Adjudication Fact Sheet with wording similar to that shown above. These factors, along with the incremental use of the funding for other purposes, indicate that this is actually a contingency fund.

Because Modification PC04 lacked specificity, it did not create a legal liability and therefore constitutes an invalid obligation. The \$564,508 that was unspent as of October 1, 2011, expired at that time. Of that amount, \$424,047 remains unused and expired.

- **Yuma U.S. Courthouse**

On April 8, 2011, PBS Region 9 issued Modification PS06 to Contract Number GS09P10KTC0045 for \$915,575 for 221 additional PV panels under Item Number 0017. From October 2011 through June 2012, PBS Region 9 has issued 10 modifications that reduced the funds for the PV work by \$374,251 and transferred the funding to other modifications for additional work including boulders and a “ram wall,” webcam software, relocation of a power pole, and a construction easement. In March 2012, PBS Region 9 did use \$116,623 for additional PV panels; however, it was due to an upgrade to the PV panels called for in the base contract because the original panels were no longer manufactured. After deducting this amount, \$424,701 remains of the funding for the original PV work.

The contract modification for the PV work includes an independent government estimate, a contractor proposal, and a negotiation memorandum; however the modification was not definitized. In addition, the contract modification restricted the contractor from moving forward on the work. The project also used an Adjudication Fact Sheet with wording similar to that discussed above. Additionally, the incremental deobligation of the funding for the PV canopy for other purposes indicates that this modification was to provide for contingency funding.

The modification amounts to an invalid obligation because it was not definitized and did not create a legal liability for GSA. Accordingly, all \$915,575 of funds expired on September 30, 2011. Of that amount, \$424,701 remains unused and expired.

## Conclusion

We previously identified the issue of contingency funding as an implementation challenge for GSA management in 2009 after the Recovery Act was enacted.<sup>5</sup> In September 2011, upon finding invalid obligations where the modifications were not definitized and GSA was in effect creating contingency funds, we recommended that PBS review contract modifications to identify similar instances in which project contingency funds were invalidly obligated.<sup>6</sup> However, PBS's efforts appear to have been ineffective in addressing the issue.

At this point, the full extent of the problem is unknown; however, as a result of the invalid obligations, GSA's reporting on the use of its Recovery Act funds to the Office of Management and Budget (OMB) is inaccurate. For example, PBS reported the \$5.4 million contract modification for the Lafayette project to OMB as an obligation when it was awarded and has included the amount in its total funds obligated calculations. However, since the funds were never validly obligated and a significant amount expired on September 30, 2011, these reports are inaccurate and OMB should be notified.

Further, any intent to use the invalid obligations to preserve funding for future contingencies is a misuse of the deobligation and reobligation authorities provided by the Recovery Act.

As a result of PBS's actions in issuing these contract modifications, the associated Recovery Act funding was invalidly obligated and has now expired and should be rescinded on December 31, 2012. If no action is taken, PBS risks using the rescinded funding and violating applicable federal laws and regulations.

## Recommendations

We recommend that the Acting Administrator, PBS Commissioner, and Acting Chief Financial Officer:

1. Take corrective action to identify all invalid obligations, deobligations, and reobligations of Recovery Act funding and ensure that those funds are used appropriately.
2. Notify the Office of Management and Budget that Recovery Act funds have been invalidly obligated and that past reporting of obligations has been inaccurate.
3. Notify Congressional committees with jurisdiction as appropriate.

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<sup>5</sup> Oversight of the American Recovery and Reinvestment Act of 2009: GSA's Implementation Challenges, dated August 6, 2009.

<sup>6</sup> *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 Report Number A090172/P/R/R11016 dated September 30, 2011.

## **Management Comments**

In its response dated October 12, 2012, GSA disagreed with the report's findings and conclusions for all but one example. GSA did agree to treat the funding for all four examples as expired funds and to perform a review to identify modifications with funding concerns, reserving the right to reach a contrary conclusion in cases similar to the examples in this report. See Appendix B.

## **OIG Response**

The OIG reaffirms its conclusions and findings. The contract modifications cited in the report did not result in valid obligations and subsequently the funding expired on September 30, 2011. GSA needs to take corrective action to identify its invalid obligations and ensure the funds are used appropriately. We have addressed specific comments made by GSA in Appendix C.



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## **Appendix A – Purpose, Scope, and Methodology**

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### **Background**

The American Recovery and Reinvestment Act of 2009 (Recovery Act) provided the General Services Administration (GSA) with \$5.55 billion 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. Additionally, the Recovery Act gave GSA the ability to deobligate project “savings” or funds that could not be used for the activity for which originally obligated. GSA may reobligate these funds for use on other Recovery Act projects with appropriate notice to Congress.

During the budget impasse of 2011, Congress considered repealing the Recovery Act. The House of Representatives passed H.R.1 on February 19, 2011, which would have rescinded all unobligated balances remaining under the Recovery Act. Since the rescission did not pass, any unobligated Recovery Act funds expired on September 30, 2011, and are scheduled for rescission on December 31, 2012.<sup>1</sup> Between the expiration and rescission of the funds, GSA may have limited use of these funds for proper upward adjustments for costs due to unforeseen site conditions and other contingencies related to the performance of existing project scope.

### **Purpose**

We initiated this audit to alert GSA management that Recovery Act funds were being invalidly obligated on multiple projects through contract modifications being used for contingency and, as a result, Recovery Act reporting has been inaccurate and the invalidly obligated funds have expired and will be rescinded.

### **Scope**

The audit scope included a limited examination of contract modifications on Recovery Act funded projects.

### **Methodology**

To accomplish our objectives, we:

- Reviewed prior audit work related to invalid obligations of Recovery Act funding;
- Reviewed and examined contract modifications and supporting documentation as well as other project records; and
- Held discussions with PBS personnel.

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<sup>1</sup> Public Law 111-203, Dodd-Frank Wall Street Reform and Consumer Protection Act, Section 1306.

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

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Except as noted below, we conducted the audit between August 2012 and September 2012 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.

This is a limited audit based on the information contained in this report. This audit was initiated because we identified a specific issue needing management attention on multiple projects under a separate audit. As a result, the planning for this audit was limited to the steps necessary to assess the identified issue.

### **Internal Controls**

Tests of internal controls were limited to ensuring the validity of specific contract modifications.

## Appendix B – Management Comments



GSA Public Buildings Service

October 12, 2012

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

FROM DOROTHY ROBYN *Doro M. Robyn*  
COMMISSIONER  
PUBLIC BUILDINGS SERVICE (P)

GARY GRIPPO *Gary Grippo*  
CHIEF FINANCIAL OFFICER (B)

SUBJECT Management Response to Alert Report: Limited Scope Audit of  
Invalid Obligations and Contingency Funding for Recovery Act  
Projects, Report Number A120174/P/R, September 14, 2012

GSA appreciates the opportunity to comment on the above-referenced draft Alert Report. The audit suggested that PBS may have created certain invalid obligations by issuing contract modifications to preserve American Recovery and Reinvestment Act (Recovery Act) project funds. We appreciate your bringing this to our attention so that, where necessary, corrective action can be taken before unobligated Recovery Act funds are scheduled to be rescinded on January 1, 2013.

The draft report includes recommendations that GSA notify other parties, as appropriate, that past reporting of Recovery Act obligations may have been inaccurate, and that GSA take corrective action to identify problems with obligations, deobligations, and reobligations.

### General Response

As a general response, we would like to highlight the distinction between our business decisions and intentions on the one hand, and the execution of those decisions and intentions, as reflected in contract modification documents, on the other hand. To the extent the draft report suggests that it was our decision or intention to improperly obligate funds, or to establish general contingency funds with contractors, we must disagree. PBS's intent was to deal prudently with the prospect of a government-wide funding rescission that would have jeopardized construction projects in mid-course, and to do so in accordance with the Recovery Act statutory authority to obligate, deobligate, and reobligate funds. However, to the extent the report identifies potential problems with the accuracy or completeness of the contract modification documents created to execute our

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## ***Appendix B – Management Comments, (cont.)***

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business decisions; we very much welcome the findings and recommendations. As you know, these Recovery Act projects have unique management and funding requirements that depart from PBS's longstanding model, and as a result, different regional offices may have created insufficient documents to properly obligate funds.

### Adjudication Fact Sheets

The draft report references Adjudication Fact Sheets issued by the PBS Office of Design and Construction in support of findings that certain contract modifications were issued to preserve project contingency funding. We disagree that the Fact Sheet referenced in the draft report evidences such intent. The Adjudication Fact Sheet template was not issued as guidance to the regional offices on how to obligate funds. Rather, this document was drafted to facilitate the process by which PBS evaluated project performance and made decisions regarding allocation of additional funding toward projects.

The guidance issued indicates PBS's intent to accelerate the obligation of remaining project funding for fear that such funds could be rescinded. However, at all times, PBS's guidance to the regions was – and remains – that contract modifications may only be entered into for *bona fide* needs and done in full compliance with FAR and GSAM requirements. We disagree with suggestions that program guidance was to enter into improper obligations with intent to later deobligate and reobligate funding for later-defined needs.

### Peter Rodino Federal Building Modernization Project

With specific respect to the draft report's findings regarding the Peter Rodino Federal Building Modernization project, PBS believes that PC16 to Contract Number GS02P09DTC0018 created a valid obligation. This contract modification was issued to address the abatement of asbestos in the building which had not been previously identified. When asbestos was identified on the first floors on which work was being performed, PBS reasonably extrapolated the existence of asbestos on the other remaining floors which would need to be removed. The modification was issued on March 9, 2011 under authority of the Changes clause included in the contract, and was priced based on an independent government estimate (IGE). We continue to believe this contract modification was properly issued for a then-current *bona fide* need (namely, removal of asbestos in the building not previously identified regardless of when the abatement work was to occur), using a long-standing and recognized contracting approach (Price-to-be-Determined-Later), with a sufficiently defined scope, and with pricing supported by an IGE.

Regardless, notwithstanding our disagreement with the findings, we are prepared to treat the funding for PC16 as expired, use a portion of those funds for an upward adjustment covering the on-going asbestos abatement work on the project, and have any remaining expired funding related to PC16 available for other potential upward adjustments for this or other projects prior to the end of calendar year 2012.

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## ***Appendix B – Management Comments, (cont.)***

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### Lafayette (Phase I) Modernization

We appreciate your concerns regarding PC09 to Contract Number GS11P10MKC0061. Our review of that modification leads us to agree with your conclusion that it was not properly issued. We agree that the contract modification lacked sufficient scope and pricing detail, when issued, to have been considered a proper obligation. As a result, we intend to record and report the work, when it was definitized, as an upward adjustment of expired Recovery Act funds. Any funding remaining out of the \$5.4 million originally obligated that has not been so definitized at this point will be carried forward as expired funding subject to use only for proper upward adjustments, which would be reflected on subsequent reporting.

### Grand Junction Federal Building and Courthouse

The draft report concludes that PC04 to Contract Number GS08P10JBC0032 was improper based on an Adjudication Fact Sheet, limited specifications describing the work to be performed, that the work has not yet been performed, discrepancies regarding how long it would require to complete the work, and the incremental deobligation of funding for other purposes. The draft report made this finding notwithstanding its recognition that the contract modification at issue was supported by a scope of work, an IGE, and a negotiation memorandum.

While we understand how your office may have reached its conclusion based on the collective information cited, we believe one could reach a contrary conclusion from the same information. For example, we do not believe that incremental deobligation of funding related to a contract modification represents, *per se*, evidence of an improper obligation. In this regard, PBS has continually executed its Recovery Act program with the understanding that as priorities for projects, and work to be performed on those projects, evolved over time, PBS has the authority pursuant to the deobligation / reobligation authority provided in the Recovery Act to respond to those changing needs. Nevertheless, we understand the basis upon which the draft report's conclusions for this modification were reached, and intend to defer to your office's conclusion by treating the funding related to that modification as expired, subject to use only for proper upward adjustments, which would be reflected on subsequent reporting.

### Yuma U.S. Courthouse

Similar to the Grand Junction Federal Building and Courthouse modification discussed immediately above, the draft report concludes that PS06 to Contract Number GS09P10KTC0045 was improper based on an Adjudication Fact Sheet and incremental deobligation of funding related to the modification. As with the Grand Junction modification, the draft report made this finding despite its acknowledgment of an IGE, a contractor estimate, and a negotiation memorandum.

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## ***Appendix B – Management Comments, (cont.)***

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Once again, we disagree that the issues identified in the draft report necessarily lead to your conclusion, and we disagree with the draft report's suggestion that PS06 failed to create a legal liability for GSA. To the contrary, we believe that PS06, when issued, represented a proper modification for a *bona fide* project need that obligated the Government by its terms. Again, the mere fact that subsequent deobligations occurred related to PS06 does not mean that the modification was improperly issued. Subsequent modifications to that work, as well as reprioritization of other project needs, supported the deobligation and reobligation of those funds. Regardless, and again in deference to your office's findings, we intend to treat the funding for PS06 as expired, subject to use only for proper upward adjustments, which would be reflected on subsequent reporting.

### Conclusion

The draft audit report concludes, among other things, by stating that PBS's efforts to address similar invalid obligation concerns raised by your office in September 2011 appear to have been ineffective in addressing the issue. As noted above, all guidance issued by PBS has emphasized the need for all contract obligations to be properly entered into in accordance with all applicable laws, rules and regulations. Given the additional concerns raised in the draft audit report, together with the impending fund rescission date, PBS has tasked PricewaterhouseCoopers to conduct an independent review of selected Recovery Act projects to identify potential funding concerns. This review will be expanded in the coming weeks to cover all Recovery Act projects for which work will be performed after December 31, 2012. The review will initially concentrate on Recovery Act program contracts with projected unexpended balances on January 1, 2013. To date, approximately 60 projects have been so identified.

Once the review is completed, appropriate action will be taken for any modifications found to have been invalid. In this regard, notwithstanding our agreement to take certain actions in response to your draft audit report where we considered the underlying contract actions to be proper, we reserve the agency's right for other similar cases to reach a contrary conclusion regarding any action that may be required, based on the unique facts and circumstances of each case.

Thank you once again for bringing these issues to our attention so that corrective action can be taken prior to December 31, 2012. Should you or your staff have any further questions, please contact William J. Guerin, Assistant Commissioner, PBS Office of Design and Construction, at (202) 208-0445.

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## Appendix C – OIG Response

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In its comments, GSA disagreed with most of the OIG's conclusions and findings, reserving the right to reach a contrary conclusion in cases similar to the examples in this report. The OIG reaffirms its conclusions and findings as stated in the report. In response to GSA management's comments, however, the OIG modified the report to make it clearer that the findings of invalid obligations are based on the lack of adequate documentation to justify the modifications, and that the other evidence – such as use of the funds for contingencies – signals the intent and simply reinforces the conclusion.

GSA stated that the Adjudication Fact Sheet template does not indicate the intention to preserve contingency funding. GSA maintains that program guidance was to comply with applicable regulations, not to enter into improper obligations with the intent to later deobligate and reobligate funding for later-defined needs. GSA further seems to acknowledge, however, that there were problems with the accuracy or completeness of some of the contract modification documents created to execute these business decisions. The OIG report simply points out the facts, including the statements in the Adjudication Fact Sheet. Those facts show that in the examples cited in the report the intent was to create contingency funds.

With regard to the Rodino project, GSA states that the contract modification was proper using the Price-to-be-Determined-Later approach with pricing supported by an independent government estimate. To incur an obligation, the Government must incur a legal liability to pay for specific goods or services to be provided. In this case, a legal liability was not created as the contractor did not provide pricing for negotiation and acceptance, nor was the work being performed as required for the Price-to-be-Determined-Later approach. As such, this modification was insufficient to establish a valid obligation.

With regard to the Grand Junction and Yuma projects, GSA maintains that these were valid modifications. Among other things, GSA seems to conclude that the existence of a scope of work, an IGE, and a negotiation memorandum by itself indicates the modification is valid. The OIG did not take the existence of these documents as conclusive evidence by itself, but rather looked at the content of those documents. GSA also states that it does not believe “incremental deobligation of funding related to a contract modification represents, *per se*, evidence of an improper obligation.” However, nowhere in the report does the OIG make such a conclusion solely on that information. Rather, the OIG uses the fact that the funding was used for other purposes as additional evidence that the intent was to preserve contingency funds. Additional project information not cited in the report provides further support to these conclusions. For example, on the Grand Junction project, historical preservation issues likely precluded adding another photovoltaic canopy to the roof and on the Yuma project, the Government Estimate/Justification memo uses a flawed cost effectiveness evaluation to justify the project.

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## ***Appendix C – OIG Response, (cont.)***

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While GSA generally disagreed with the report findings and conclusions, the response indicated that management would take corrective action and address the first report recommendation. Per the response, GSA will hire a contractor to conduct a review to identify additional funding concerns, but it reserves the right to reach contrary conclusions regarding projects with similar circumstances as those cited in the report. The OIG is concerned with both the extent of the review and the agency's conclusions during this review. The agency has identified only a portion of the review that is needed. GSA should be taking the steps to identify all invalid obligations to ensure that 1) expired funds used between October 1, 2011 and December 31, 2012, are used only for proper upward adjustments, and 2) no expired funds, including those reallocated from other projects, will be used after December 31, 2012. The OIG also has concerns regarding whether, in view of GSA's position that three of the four examples cited in the report were in fact valid obligations, GSA's evaluation will identify all expired funds. Therefore, the OIG intends to continue to review Recovery Act projects to identify any additional occurrences of these issues.

GSA's comments do not address the second or third report recommendations. We reaffirm the recommendations that the Acting Administrator, PBS Commissioner, and Acting Chief Financial Officer notify the Office of Management and Budget that Recovery Act funds have been invalidly obligated and that past reporting of obligations has been inaccurate; and notify Congressional committees with jurisdiction as appropriate.



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## ***Appendix D – Report Distribution***

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Acting Administrator, GSA (A)

Commissioner, PBS (P)

Deputy Commissioner, PBS (P)

Regional Administrator (2A)

Regional Administrator (8A)

Regional Administrator (9A)

Regional Administrator (WA)

Regional Commissioner (2P)

Acting Regional Commissioner (8P)

Acting Regional Commissioner (9P)

Acting Regional Commissioner (WP)

Acting PBS Chief of Staff (PB)

Acting Director, PBS Executive Response (PR)

Senior Accountable Official for Recovery Act Activities (P)

National Program Office ARRA Executive (PCB)

Regional Recovery Executive (2PC)

Regional Recovery Executive (8PC)

Regional Recovery Executive (9P2)

Regional Recovery Executive (WPC)

Chief of Staff, PBS Office of Construction Programs (PCB)

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

Audit Liaison (BCP)

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## ***Appendix D – Report Distribution***

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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)