

GENERAL SERVICES ADMINISTRATION OFFICE OF INSPECTOR GENERAL

**Recovery Act Report –
50 UN Plaza Renovation Project Construction Contract
Review of PBS’s Major Construction and Modernization
Projects Funded by the American Recovery and
Reinvestment Act of 2009
Audit Number A090172/P/R/R10005**

May 27, 2010





U.S. GENERAL SERVICES ADMINISTRATION
Office of Inspector General

Date: May 27, 2010

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

Subject: Recovery Act Report –
50 UN Plaza Renovation Project Construction Contract
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American Recovery and Reinvestment Act of 2009
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To: Robert A. Peck
Commissioner, Public Buildings Service (P)

As part of our oversight of the General Services Administration's American Recovery and Reinvestment Act projects, we identified an issue related to the 50 United Nations (UN) Plaza renovation project which we believe warrants your attention. Our review found that the Construction Manager as Constructor (CMc) contracting approach was incorrectly executed. Because the pricing for the construction portion of the contract was not evaluated as part of the original award, a Guaranteed Maximum Price was not established. As a result, the Construction Phase Services of the contract became an unpriced option which cannot be exercised without proper statutory authority permitting the use of other than full and open competition.

We initially reported this matter to you in a draft report issued March 15, 2010. We recommended that PBS:

- 1) Consider holding a competition for the Construction Phase Services of this project rather than using sole source procurement.
- 2) If a competition is not held, ensure that all policies, rules, and regulations for sole source contracts are followed.

Subsequently, PBS exercised the contract's construction option on March 23, 2010, and established a Guaranteed Maximum Price of \$92,600,650. The Management Comments to the draft report (see Appendix A) acknowledged the findings, but did not address the recommendations. If the recommendations were not followed, the procurement potentially violates the competition requirements as prescribed in the Federal Acquisition Regulation (FAR). The comments also state that PBS is planning to prepare a determination and findings (D&F) to document its decision; however, this may be deficient as the FAR states that a D&F is to justify a contract action based on the appropriate statute or regulation prior to award rather than after the fact.

Background

The American Recovery and Reinvestment Act of 2009 (Recovery Act) provides the General Services Administration (GSA) with \$5.55 billion for the Federal Buildings Fund. In accordance with the Recovery Act, the GSA Public Buildings Service (PBS) is 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 mandates 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 work on the 50 UN Plaza renovation project began prior to the passage of the Recovery Act. However, after the Recovery Act was enacted, the agency selected this project as part of the High Performance Green Building Modernization projects under the Recovery Act and allocated \$121,033,000 of funds to the project. As of February 10, 2010, PBS had awarded contracts totaling \$17,959,816 and had \$103,073,184 in Recovery Act funds remaining.

Construction Phases Services Are an Unpriced Option

According to the original solicitation for the 50 UN Plaza renovation project dated September 23, 2009, the contract was awarded as a CMc contract with a Guaranteed Maximum Price. Generally, this type of contract is initially awarded for design phase services¹ at a firm fixed price with an option for Construction Phase Services at a Guaranteed Maximum Price that is established at contract award. The Guaranteed Maximum Price acts as a ceiling price for the actual construction phase services. The proposed Guaranteed Maximum Price should be evaluated along with the pricing for the design services in order for the award to be made.

However, on November 6, 2009, PBS issued an amendment to the solicitation that stated, "The Option for Construction Phase Work will be negotiated at a later time and is not part of the price evaluation." As such, the Design Phase Services and the Preliminary Demolition and Hazardous Materials Abatement were awarded on December 17, 2009, for a firm fixed price of \$3,372,661, but the Construction Phase Services were not evaluated and a Guaranteed Maximum Price was not established.

As a result, the Construction Phase Services became an unpriced option. According to the General Services Acquisition Manual 536.270, before an unpriced option can be exercised, the agency must cite the statutory authority permitting the use of other than full and open competition (i.e. such as unusual and compelling urgency or one responsible offeror).

Awarding the CMc contract in this manner not only deviates from PBS's prescribed methodology for CMc procurements, but is contrary to the Recovery Act guidance issued by the

¹ Design Phase Services include activities such as ensuring the design complies with applicable regulations, codes, and standards as well as ensuring the constructability of the design.

Office of Management and Budget². This guidance states, “To the maximum extent practicable, contracts using Recovery Act funds shall be awarded as fixed-price contracts (See FAR Subpart 16.2) using competitive procedures.”

This is the second time that we have reported that CMc contracts have been awarded without establishing a Guaranteed Maximum Price. Without a Guaranteed Maximum Price, the government loses the benefits of establishing a price based on competition and establishing a fixed amount limiting the Government’s financial obligation for Construction Phase Work.

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

Sincerely,

A handwritten signature in red ink that reads "R. Nicholas Goco". The signature is written in a cursive, flowing style.

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

² OMB Memo M-09-15, entitled “Updated Implementing Guidance for the American Recovery and Reinvestment Act of 2009” dated April 3, 2009.

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Management Comments



GSA Public Buildings Service

APR 09 2010

MEMORANDUM FOR R. NICHOLAS GOCO
DEPUTY ASSISTANT INSPECTOR GENERAL

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

SUBJECT: Recovery Act Report - 50 UN Plaza Renovation Project:
Construction Contract Review of PBS's Major
Construction and Modernization Projects Funded by the
American Reinvestment and Recovery Act of 2009
Audit Number A090172

The Public Buildings Service (PBS) appreciates the opportunity to review and comment on the subject draft audit report. We acknowledge the findings identified in the report. The choice to amend the solicitation and forgo the pricing of the construction phase was a business decision and PBS has subsequently awarded the construction phase of the contract. We are preparing a determination and findings (D&F) to document this decision.

PBS has issued guidance to ensure that future Construction Manager as Constructor (CMc) contracts are awarded in accordance with applicable requirements. In recognition of recent audit findings regarding the use of CMc contracts, particularly with respect to the establishment of a guaranteed maximum price for the construction phase services awarded under these contracts, PBS will review current practices and work with regional offices to determine whether additional guidance is necessary. Updated guidance sufficient to clarify the requirements surrounding the CMc contract vehicle will be issued as appropriate.

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

U.S. General Services Administration
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Washington, DC 20405-0002
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Objectives, Scope, and Methodology

Objectives:

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. The work for this report was performed while evaluating the award for the construction of the 50 UN Plaza renovation project.

Scope:

The work for this report was performed between February 2010 and March 2010.

Methodology

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

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

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

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

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