

AGENCY RESPONSE TO THE DRAFT REPORT

U.S. Department of Labor

Office of the Assistant Secretary
for Administration and Management
Washington, D.C. 20210



SEP 29 2008

MEMORANDUM FOR ELLIOT P. LEWIS
Assistant Inspector General for Audit

FROM: EDWARD C. HUGLER
Deputy Assistant Secretary for Operations,
Senior Procurement Official

SUBJECT: Audit of Sole Source Awards by DOL
Draft Report No. 03-08-002-07-711

This responds to the Office of Inspector General (OIG) September 24, 2008, draft audit report of the Department's sole source procurement practices in Fiscal Year (FY) 2007. The scope of the audit included the Office of the Assistant Secretary for Administration and Management (OASAM), Mine Safety and Health Administration (MSHA), Employment and Training Administration (ETA) and the Bureau of Labor Statistics (BLS). The following management responses reflect input from the respective DOL agencies.

Overall, we are concerned that the draft report gives a misimpression of the Department's procurement practices. While there is always room for improvement, the Department's procurement practices, we believe, are sound.

For example, to provide context the draft report should reflect that DOL has a very strong track record of competitively awarding contracts. In FY 2007, DOL awarded a total of \$1.6 billion competitively. According to a government-wide report issued by the Office of Management and Budget's (OMB) Office of Procurement Policy (OFPP), DOL ranked *second* in FY 2007 among Federal agencies by awarding 84 percent of the Department's contract funds available for competitive awards. The top performing agency (Department of Energy) awarded 85 percent, only 1 percent more than the Department of Labor. In FY 2005 and FY 2006, the Department was ranked *first* among the 18 Cabinet-level federal agencies, competing 86 percent of DOL's contract funds available for competitive awards for both fiscal years.

In addition, the draft report lacks perspective, focusing solely on "what's wrong" and nothing about "what's right." As noted in the draft report, DOL awarded 809 sole source contracts in FY 2007 totaling over \$47.8 million. In addition to being a small sample set, the discrepancies found in the audit comprise a small fraction (less than 8 percent) of all the requirements that comprise the Federal acquisition process.

For completeness and balance, the draft audit report should also acknowledge the work the Department has done to strengthen the DOL procurement program. For example:

- In FY 2008, improvements to DOL procurement policies and practices, including a DLMS change to add new provisions for approval of contracts exceeding five years; two DLMS changes to require increased training for contracting officers and contracting officer's

technical representatives; and monitoring of sensitive areas, such as advisory an assistant services.

- In addition, OASAM has reinvigorated its Office of Acquisition Management Services (OAMS) with attention to refining procurement policies and evaluating compliance with DOL and Federal requirements. Activities of this office include—
 - Reviews of DOL agency procurement activities, beginning with BLS (report issued October 11, 2007) and ETA (report issued September 19, 2008). Both reports included corrective actions to improve agency compliance with appropriate procurement laws and regulation and DOL policies;
 - A regular process of checking the GSA-operated Federal Procurement Data Systems (FPDS) to reconcile contract awards over \$100,000 recorded in this system with the actions approved by the Department’s Procurement Review Board; and
- OASAM has likewise been active in providing guidance to DOL agencies—
 - By memorandum of April 15, 2008, the Assistant Secretary for Administration and Management (ASAM) provided guidance to the Office of Job Corps, the largest single entity acquiring goods and services at the DOL - \$1.3 billion in fiscal year 2007 - relating to PRB review requirements.
 - By memorandum of November 19, 2007, the ASAM provided an update to agency heads on PRB activities and specifically requested that agencies continue to prepare their requirements to facilitate competitive awards and, when that is not feasible, to provide the PRB with adequate documentation to make timely recommendations for award.
 - In April 2006 and October 2007 the Management Review Board was also briefed on the PRB activities as part of a DOL Procurement Update.
 - In November 2006 the DOL Procurement Executive issued a widely distributed e-mail notice relating to the use of the DOL Simplified Acquisition Checklists.

With the foregoing overarching comments in mind, management offers the following responses to the draft report’s findings and recommendations:

Finding 1—DOL did not always appropriately justify sole source procurements and follow the FAR and DOL requirements.

A. Justifications to Award Sole Source Contracts Were Missing, Not Adequate, or Did Not Have the Required Reviews and Approvals.

1. Sole Source Contracts Did Not Have The Required Justification.

Management’s Response: The report states that “*there were 10 sole source contracts awarded without a justification as required by FAR.*” For accuracy and completeness, the report should also state that 84 percent of the files were compliant with this requirement.

As corrective action, during the first quarter of FY 2009 OASAM will issue appropriate guidance to DOL contracting officers reminding them to ensure appropriate justifications are included in the files.

2. Sole Source Justifications Did Not Adequately Support the Reasons for Deciding to Award the Contract Without Competition.

Management's Response: The report states that "7 sole source justifications did not contain an adequate explanation for limiting competition." For accuracy and completeness, the report should also state that 89 percent of the files were compliant with this requirement.

As corrective action, during the first quarter of FY 2009 OASAM will issue appropriate guidance to DOL contracting officers reminding them adequately to justify sole source requirements.

3. Sole Source Justifications Were Not Reviewed and/or Approved.

Management's Response: The report states that "There were 4 sole source contracts totaling more than \$4.2 million that included justifications without one or more of the required reviews and approvals." For accuracy and completeness, the report should also state that 94 percent of the files were compliant with this requirement.

The draft report also contains inaccuracies. For example, the draft report states, "In one instance, ETA awarded a \$1 million sole source contract to a university in which the justification required by FAR 6.303 was not approved and signed by the contracting officer nor the Competition Advocate." The report fails to appreciate that the action was submitted to the PRB—of which the Competition Advocate is a member—and was approved by the Chief Acquisition Officer (CAO) whose approval level is higher than the Competition Advocate. The CAO approval in this example complies with the FAR, which requires a Competition Advocate approval *unless there is a higher level approval required by the agency.*

As corrective action, during the first quarter of FY 2009 OASAM will issue appropriate guidance to DOL contracting officers reminding them to include the appropriate approvals in contract files.

B. Documentation of the Fair and Reasonable Price Determination for Sole Source Contracts Was Not Sufficient.

Management's Response: For accuracy and completeness, the draft report should make it clear that no instances were found of unfair or unreasonable pricing.

While there were instances where the documentation of the fair and reasonable price determination for sole source contracts was not fully satisfactory, the report fails to appreciate that contracting officers are required to determine that prices are fair and reasonable, but are also cautioned against obtaining more information than is necessary. FAR 15.402 (Pricing policy) states: "Contracting officers must purchase supplies and services from responsible sources at fair and reasonable prices. In establishing the reasonableness of the offered prices, the contracting officer must not obtain more information than is necessary." In practice, this means

that contracting officers can—and should—be able to use their knowledge of the market place, as appropriate, and not be expected to confirm each and every judgment with independent documentation when they are aware of current fair and reasonable pricing.

As corrective action, during the first quarter of FY 2009 OASAM will issue appropriate guidance to DOL contracting officers reminding them of the appropriate measures to document the file with fair and reasonable price determinations.

C. Program Officials Requesting the Sole Source Contract Did Not Provide Conflict of Interest Certifications.

Management's Response: The report states, "*The required conflict of interest certifications were not obtained from the program officials requesting the sole source contract for all 62 of the contracts we audited.*"

What the report fails to appreciate is that Paragraph 8 of DOL Form DL 1-490, "Request for Recommendation by Procurement Review Board," contains the required conflict of interest certification required by program officials. The form specifically notes that the conflict of interest certification must be completed for each action. For all actions reviewed by the Procurement Review Board, the required certifications were obtained and are maintained in PRB files. The draft report needs to be corrected to reflect these facts.

As corrective action, during the first quarter of FY 2009 OASAM will issue appropriate guidance to remind contracting officials about conflict of interest certifications.

D. No Evidence That the Contracting Officer Submitted the Offering Notice to the SBA for an SBA 8(a) Sole Source Award.

Management's Response: The report states that "*One SBA 8(a) sole source award by OASAM for \$100,328 did not have evidence that the contracting officer submitted the offering notice to the SBA.*"

The contracting officer has been counseled by management and this finding should be considered closed.

E. There Was No Evidence DOL Agencies Searched the EPLS and the CCR List Prior to Awarding the Contract.

Management's Response: The report states "*There Was No Evidence DOL Agencies Searched the EPLS and the CCR List Prior to Awarding the Contract.*" The draft report fails to convey the facts with precision. In fact, 81 percent of the files audited were compliant with the CCR review requirement and 66 percent of the files reviewed were compliant with the requirement for EPLS searches.

It should also be understood that there is no regulatory requirement to document the file with this information. DOL does add a policy requirement that when completing a DOL Simplified Acquisition Checklist for actions under \$100,000 the checklist box be checked. As such, the audit finding should be conformed to the regulatory requirements and DOL policy.

As corrective action, during the first quarter of FY 2009 OASAM will issue appropriate guidance to remind contracting officials to complete the DOL Simplified Acquisition Checklist as required.

F. The Contract Period of Performance Was Prior to the Contract Award Date.

Management's Response: The report states that *"In 18 of the 62 (29 percent) contracts audited totaling \$3.1 million, the performance start date was prior to the contract award date."* Management acknowledges that there were instances of contracts which contained periods of performance that appeared to occur before the date the contract was signed by the contracting officer.

However, the draft report fails to account for legitimate explanations, such as valid awards made by a contracting officer where the award documentation is executed after a "verbal award." For example, the report states that *"...OASAM awarded a \$1,240,150 contract for technical support with DOL's web site. The contract period of performance was February 1, 2007, and the end date was March 31, 2007. The contracting officer signed the contract on May 16, 2007, more than three months after the performance start date. The contract cover form stated the award was for the final bridge contract with this contractor. An undated memo in the contract file showed that OASAM gave verbal authorization to the contractor to continue its services."* A contracting officer is authorized to commit the government based on a verbal award. Due to administrative error, the verbal award memorandum was undated. The absence of the memorandum's date, however, does not support the assumption that the contract period of performance was prior to the contract award date.

In addition, there are instances where the auditor assumed that the contractor began performance prior to the contract being signed where the program offices requested start date contained in the statement of work preceded the date the contract was signed by the contracting officer. Prior to concluding that the contractor's performance began before contract award, the actual start of the contractor's performance must be established to support the audit report's conclusion.

As corrective action, during the first quarter of FY 2009 OASAM will issue appropriate guidance to remind contracting officials to check all contract dates for consistency, fully document verbal awards, and ensure that contractors do not begin performance prior to contract award.

G. There Was No Evidence that DOL Agencies Publicized Contract Award Notices in FedBizOpps.

Management's Response: The report states, that *"Of the 38 contracts awarded for more than \$25,000, 7 (18 percent) contained no evidence that the agencies publicized the award in the FedBizOpps."* Once again, the audit report fails to acknowledge that 71 percent of the actions reviewed had no such issue.

As corrective action, during the first quarter of FY 2009 OASAM will issue appropriate guidance to remind contracting officials to include the appropriate FedBizOpps announcements in the contract file.

H. The Amount of One Contract Exceeded the Warrant Authority of the Contracting Officer Who Signed It.

Management's Response: Management concurs with this finding. MSHA has taken the appropriate corrective action. The contracting officer has been counseled and the award was reissued by a contracting officer having the appropriate warrant authority.

Finding 2—OASAM Did Not Have Effective Internal Controls to Account for Contract Files

Management's Response: The report states that "*OASAM could not locate 6 of the 40 (15 percent) contract files at the time we requested the files for the audit. OASAM located 1 of the 6 contract files 13 weeks after our initial request, while the other 5 files were not located during our fieldwork.*"

As corrective action, during the first quarter of FY 2009 OASAM will take appropriate steps and issue guidance to ensure all contract files are accounted for, as more fully described in response to the draft report's recommendations. The contract files at issue have been reconstituted.

Recommendations

We recommended the Assistant Secretary for Administration and Management:

1. Implement policies and procedures requiring:

- **appropriate higher level reviews be performed and documented for sole source contracting actions with emphasis on the issues identified in this audit report;**
- **agency internal quality control procedures be established and performed to identify instances of non-compliance with the FAR and DOL requirements so that corrective action can be taken to reduce such incidents; and**
- **OASAM to develop and implement an oversight plan for performing comprehensive DOL-wide monitoring reviews.**

Management's Response: During the second quarter of FY 2009, OASAM will issue appropriate guidance to ensure:

- Appropriate higher review levels are established to ensure contract files contained appropriate documentation to address the issues identified in this audit report;
- DOL procurement officers are provided guidance on establishing internal quality control procedures to preclude instances of non-compliance with the FAR and DOL requirements; and
- OASAM will formalize its current practice of conducting procurement management reviews of all procurement offices on a three-year cycle.

2. Implement an effective inventory control system to account for all procurement files at all times.

Management's Response: During the first quarter of FY 2009, OASAM will implement an appropriate inventory control system to account for all contract files.

3. Perform an inventory of contract files using the E-Procurement System (EPS) and the contract tracking sheet as a basis for identifying missing files, and take action to locate them.

Management's Response: OASAM will conduct an inventory of all active contract files maintained by the Office of Procurement Services and take action to locate or reconstitute those that are missing.

cc: Patrick Pizzella, OASAM
Daniel Lacey, BLS
David Meyer, MSHA
Daphne Jefferson, ETA
Al Stewart, OASAM
Valerie Veatch, OASAM
Sandra Foster, OASAM

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Address: Office of Inspector General
U.S. Department of Labor
200 Constitution Avenue, N.W.
Room S-5506
Washington, D.C. 20210