



United States
CONSUMER PRODUCT SAFETY COMMISSION
Washington, DC 20814

OFFICE OF THE INSPECTOR GENERAL

Audit of Service Contracting

Date Completed: September 24, 2007




UNITED STATES
CONSUMER PRODUCT SAFETY COMMISSION
WASHINGTON, DC 20207

Memorandum

RESTRICTED

Date: September 24, 2007

TO : Nancy Nord
Chairman, Acting

FROM : 
Christopher W. Dentel
Inspector General

SUBJECT : Audit of Services Contract Program

The Office of the Inspector General (OIG) has completed its audit of the CPSC services contracting program. A copy of the audit report is attached.

Management (EXFM, and FMPS) has been briefed regarding the findings and recommendations of this audit and given an opportunity to respond to them. Management's response may be found as an appendix to the audit report. Management concurred with the findings of the audit and agreed to implement corrective actions to address the recommendations made.

Attachment:
Audit Report

**Consumer Product Safety Commission
Audit of Service Contracting 2007**

Table of Contents

Executive Summary	2
Introduction	4
Purpose	4
Background	4
Objective	5
Scope/Methodology	5
Findings and Recommendations	6
Management Response	14
Appendix	15
Distribution List	21

**Consumer Product Safety Commission
Audit of Service Contracting 2007**

Executive Summary

Background: Access to commercial products and services through the Government contracting process is often the most effective, and sometimes the only, way that Federal agencies can achieve their missions. Procurements of commercial goods and services by the Consumer Product Safety Commission (CPSC) totaled \$8.8 million in FY 06 and was the CPSC's second largest expenditure after payroll.

The CPSC's procurement processes are managed by the Division of Procurement Services (FMPS). FMPS's activities are governed by both internal policies and procedures (agency directives) and by various statutes and regulations that apply to Federal agencies in general (found primarily in the Federal Acquisition Regulation).

Like all Federal agencies, the legal environment in which the CPSC's procurement personnel must operate is shaped by often contradictory Federal policies and goals. Federal procurement law strives to take into account principles of economic and administrative efficiency by emulating successful commercial practices and using "simplified" acquisition procedures for low dollar value procurements. However, at the same time it seeks to promote social goals by promoting the use of small and disadvantaged businesses regardless of whether or not these businesses are in fact the lowest cost providers of goods or services.

Given the increasing reliance across the Federal Government on contractor personnel to carry out work vital to the Federal mission; the increasingly high percentage of the procurement budget being directed to service type contracts, and the operational complexities caused by having contractor personnel perform their duties "on-site" within the CPSC Headquarters building, this audit focused on contracts for services rather than products.

Objective: The objectives of this audit were to determine whether the CPSC complies with Government policies regarding the use of service contracts and to ascertain what improvements could be made in the service contracting process.

Results and Conclusions: On the whole, the audit found that FMPS generally documents its files well and works in conjunction with the Office of General Counsel to ensure that contracts for services are written and administered according to the Federal Acquisition Regulation (FAR) and the Commission's procurement directives. There is, however, room for improvement, FMPS needs to:

1. Strive for greater competition in the contracting process to reduce costs, improve contractor performance, and inhibit fraud.

2. Strengthen the distinctions between Government and contractor personnel to avoid the potential legal liability inherent in treating contractor personnel as Government employees.

3. Develop and employ standard contract clauses pertaining to contractor ethics, cooperation with Government audits and investigations, and the protection of Government information.

4. Improve market research practices in order to better utilize common commercial practices.

5. Better utilize performance-based acquisition principles to promote efficiency and innovation.

Consumer Product Safety Commission Audit of Service Contracting 2007

Purpose: To provide an overview of the results obtained during the audit of the Consumer Product Safety Commission's service contracting processes.

Background: The Federal Government is the single largest buyer in the world. Each year Federal agencies spend nearly \$400 billion a year for a range of goods and services. These contracts run the gamut from laptop computers and off-the-shelf software to information technology consulting services, software development, and engineering services.

Effective and efficient access to commercial products and services through the Government contracting process is often the most effective way and sometimes the only way, that Federal agencies can achieve their missions. Procurements of commercial goods and services by the Consumer Product Safety Commission (CPSC's) totaled \$8.8 million in FY 06 and was the second largest expenditure after payroll. Of the \$8.8 million expended, the largest percentage was spent on commercial services. This combined with the inherent difficulties caused by injecting contractor personnel; who in the contracts we reviewed generally performed their work "on-site" at the CPSC headquarters building, into the already complicated legal and regulatory atmosphere surrounding the use of civil service personnel shaped the decision to focus this audit on contracts for commercial services.

Like all Federal agencies, the regulatory environment in which the CPSC's procurement personnel must operate is shaped by often contradictory Federal goals and policies. Federal procurement personnel strive to take into account principles of economic and administrative efficiency by emulating successful commercial practices and using "simplified" acquisition procedures for low dollar value procurements. However, at the same time they are required to promote social goals by encouraging the use of small and disadvantaged businesses regardless of whether or not these businesses are in fact the lowest cost providers of goods or services.

The CPSC's procurement processes are managed by the Division of Procurement Services (FMPS). FMPS's activities are governed by both internal policies and procedures (Directives 1532.1 and 1522.1), and by various statutes and regulations that apply to Federal agencies in general (found primarily in the Federal Acquisition Regulation). A brief overview of these regulations follows.

CPSC Directive 1522.1, dated June 9, 2006, establishes CPSC policies and procedures for initiating procurements. The ultimate authority and responsibility to contract for authorized supplies and services is vested in the agency head as stated in the Federal Acquisition Regulation (FAR), Subpart 1.601. The Chairman of the CPSC has delegated this authority to certain procurement officials.

The CPSC's policy and procedures promoting full and open competition in the procurement process, as called for in the Competition in Contracting Act of 1984 (P.L. 98-369) and the FAR, are found in CPSC Directive 1532.1, dated May 12, 2004.

FAR Part 12 requires the Government to perform market research before buying commercial goods or services. This research is then supposed to be used to help determine if there are common commercial practices that the Government can adopt to improve efficiency and economy. As discussed in "Finding 5" below, the CPSC has not maximized the potential benefits of FAR Part 12.

The policy of the United States, as stated in the Small Business Act, is that each agency shall have an annual goal that represents, for that agency, the maximum practicable opportunity for small business concerns to participate in the performance of contracts led by that agency. The CPSC goal established for FY 2007 was 48%, which far exceeds the aggregate government-wide goal of 23%.

The Small Business Association's (SBA's) 8(a) business development program is one of the federal government's primary means for developing small business owned by socially and economically disadvantaged individuals.

The SBA 8(a) program authorizes the SBA to enter into contracts with other Federal agencies. The SBA then subcontracts the work they have contracted for to eligible small disadvantaged businesses. The advantage to the CPSC is that because of the SBA's role in the contracting process the CPSC does not have to go through the effort of competing the contract. However, traditionally the SBA has awarded these subcontracts in a noncompetitive manner. Additionally, as discussed in "Finding 2" below there appears to be some confusion by CPSC procurement personnel over whether or not the CPSC has the authority to cease participating in the SBA 8(a) program.

Given both the economic realities facing the Federal Government and a variety of policy decisions that have already been made, the trend toward a greater reliance on service contracts appears likely to continue. Given the reliance of the CPSC on contractor personnel to carry out work vital to the CPSC's mission as well as the increasingly high percentage of the procurement budget being directed to service type contracts, it is vital that the CPSC is as efficient as possible in its use of service contracts.

Objective: The objectives of this audit were to determine whether the CPSC complies with Government policies regarding the use of service contracts and to ascertain what improvements could be made in the contracting process.

Scope and Methodology: The audit was conducted from November 2006 through July 2007 in accordance with Government Auditing Standards, and included tests of internal controls as deemed necessary. Laws, regulations, policies, and procedures governing procurement were reviewed. Discussions were held with the Director of Procurement Services (FMPS), Contracting Officers (COs), Contracting Officer's Technical Representatives (COTRs), contractor employees, and various other personnel who provided information and documentation applicable to the audit.

The auditor reviewed eight CPSC contracts for services, each of which had a value of over \$100,000. The service contracts for the National Electronic Injury Surveillance System (NEISS) were reviewed but no areas of concern relevant to this audit were identified, and it was determined that there would be no further work performed in this area for this audit.

Findings and Recommendations:

Finding 1: CPSC procurement personnel should do more to promote competition.

The stated policy of the Federal Government has long been to promote economy, efficiency, and effectiveness in the procurement of supplies and services by requiring agencies to conduct acquisitions on the basis of full and open competition to the maximum extent practicable (See the Competition in Contracting Act, FAR Part 6, etc.).

The Acquisition Advisory Panel to the Office of Federal Procurement Policy has stated that a bedrock principle of commercial contracting is that you must have competition in order to ensure that prices are fair and reasonable.

Unfortunately, conducting competitive acquisitions is time intensive, complex, and if not done correctly can result in costly and embarrassing protests. (A protest is a formal allegation made by an unsuccessful competitor that the agency failed to follow the proper procedures in the holding of the competition.) All of these concerns are compounded by what FMPS personnel describe as a chronic failure by agency personnel to provide FMPS with adequate lead time to deal with these complexities. (FMPS reports needing a minimum of four months to prepare for a major requirement.) These concerns appear to have played a role in each of the situations described below.

Although the majority of contracts awarded by the Federal Government can not exceed one year in length, agencies are allowed to include “options” in their contracts. Options are basically opportunities for the Government to extend the length of a contract for one additional year per option exercised (ordinarily there can only be four options included with a contract.) The use of options allows agencies to compete requirements as infrequently as once every five years. As the Government has total control over whether or not to exercise an option, the Government theoretically can elect to “not” exercise an option and to instead compete the contract to take advantage of reduced prices, increased competition, or technological advances that have taken place since the original contract was awarded. In practice this seldom happens and did not occur in any of the contracts reviewed during the course of this audit.

A relatively recent innovation in Government contracting is the use of award term contracts. Although contracts may not generally exceed five years in length (a one year base and four one year options) the “award term” contract authorizes the use of additional one year options in certain limited circumstances. Award term contracts were intended to promote the quality of performance provided to the Government by giving an incentive to the contractor to provide exceptional performance. Performance that goes above and beyond the minimum requirements of the contract. In return for the improved performance the Government would reward the

contractor with additional years of performance on the contract. Implementation of this program has left something to be desired. On the one occasion to date in which the opportunity to exercise an award option has arisen no detailed records were kept regarding what exceptional service merited the additional year of performance being awarded. It appears that the additional term of service was awarded based on adequate, but not award worthy service. The charts used to monitor the performance of contractors on contracts with award term provisions do not contain sufficient details of performance to fully justify a finding to exercise the award term. Additionally, they rely on only the input of one individual, the contracting officer's technical representative. It would be a better practice to use an award term board and to include a narrative justification of the scores used to determine whether or not an award term should be granted.

For the reasons set out above, most requirements for service contracts at the CPSC are competed only once every five to seven years (CPSC policy has been to allow only two award terms). The infrequent nature of competitions for contracts only serves to emphasize the deficiencies in the quality of the competitions that do occur.

Of the eight contracts reviewed, none had been competed within the past year. Five of the eight had been awarded under the 8(a) program described above, i.e. not competitively. In some cases, when the original company selected to receive a contract from the CPSC grew too large to qualify for the 8(a) program, the CPSC requested, and received permission from the SBA, to noncompetitively handpick their successor (a former subcontractor of the old contractor).

Even in those cases where competition was attempted there were problems in achieving it. In one acquisition, the CPSC decided against publicly advertising the competition and instead contacted three potential companies directly (one of whom was the incumbent) and requested that they provide quotations on what they would charge the CPSC to provide the services in question. At the time, this approach did meet the minimum legal requirements set forth in the FAR. Of the three companies contacted, the only one to ultimately submit an offer to perform the services was the incumbent. Given these circumstances the incumbent was awarded the contract to continue to provide services.

Rather than embracing competition and change, the CPSC all too frequently chooses to utilize only the minimum amount of competition required by law. Rather than attempting to take advantage of the potential cost savings and improved efficiencies possible through competition and change, it too often favors providing contracts to incumbent contractors on the basis that the incumbents already have a working knowledge of the CPSC's existing processes and procedures. Policies and procedures which the CPSC is often loath to change. (See "Finding 6" below which discusses the advantages of adopting performance based contracting principles and the resulting potential advantages of allowing contractor to determine the best way for work to be performed). Overuse of the SBA 8(a) program (as discussed in Finding 1) and continuing to contract with the same companies for numerous years could lead to overspending, promote inefficient processes, tolerate poor contractor work performance, and increase chances for contractor fraud. At a minimum, the CPSC is not promoting full and open competition if it continues to contract with the same firms on a continuous basis for a great number of years, thus denying other companies the ability to compete for the contract. As noted in the FAR and more recently by the

Acquisition Advisory Panel to the Office of Federal Procurement Policy, increased competition could bring down costs, enhance contractor work performance, and deter the potential for contractor fraud.

Recommendation 1: The CPSC needs to promote competition in order to reap its benefits.

a. The CPSC should make an effort to develop a broader base of contractors to choose from during full and open competition. The effort could take the form of both advertising CPSC requirements and doing greater outreach during the survey phase of acquisitions.

b. The CPSC needs to be willing to do more than the legally mandated minimum to promote competition. Although they may meet the legal requirements to promote competition, as the example given above clearly indicates, solicitations that result in only one contractor offering to perform the contract do not truly promote competition. As noted in Recommendation 2 below, even when the type of contractors from whom a requisition will be made has been narrowed by the law (such as when the determination has been made that a contract must be granted to a small business), it is still possible to retain control over the acquisition and compete the contract amongst small businesses rather than simply turn the acquisition over to the SBA.

c. Award Term contracts should in fact promote the quality of service provided by contractors. They should not create the appearance that they exist only as a tool to put off having to hold competitions. In order both to accomplish this goal and to survive potential protests, the rationale for exercising an award term should be well documented in the contract file and appropriate to the purpose of promoting quality. The current system could be improved by utilizing surveys, adding a narrative section to the chart currently used to measure performance, and by utilizing award panels rather than simply relying on the perceptions of the contracting officer's technical representative as the sole and subjective arbiter of the quality of the service performed. The process should not only accurately reflect a legally defensible rationale for the exercise of the award term, it should also educate the contractor about what types of performance we are trying to promote.

Finding 2: FMPS needs to do more to promote competition amongst contracts that have been awarded under the Small Business Administrations 8(a) Program.

It appears that FMPS personnel have an erroneous belief concerning who has the authority to determine whether or not a procurement is to be competed. Although it is true that acquisitions above the micropurchase threshold of \$2,500 and below \$100,000 generally must be set aside for small businesses (FAR 19.502-2(a)) and acquisitions above \$100,000 must be considered for small business, it does not follow that those procurements may not be competitively awarded.

A procurement action that has been set aside for small business may, in general, be awarded in one of two ways. The agency may award the contract directly (in which case the standard competitive processes are followed with the exception that the competitive field is limited to small businesses, see FAR 19.502-4). In the alternative, the agency may participate in the SBA 8(a) program described above.

Of the eight service contracts reviewed during this audit, five (63%) are 8(a) set aside contracts with the SBA. FMPS personnel have expressed the opinion that once a service has been contracted using the SBA 8(a) program, it must always be contracted in that manner. This opinion appears to be based on an incident which occurred in 2002. At that time FMPS attempted to use competition between 8(a) companies to obtain a better value for the agency. FMPS was informed by the SBA that the CPSC no longer had the authority to compete the requirement in question because it had ceded that authority to the SBA, who was denying the CPSC's request to compete the contract. Because of the denial, the CPSC has not recently attempted to compete any of its 8(a) procurements. Because of the number of 8(a) contracts and the lack of competition, the CPSC may not be getting the best value for its contracting dollars and is certainly not using competition to promote quality of service or value.

Despite what FMPS was told in 2002, even when the agency has started using the 8(a) process, for good and sufficient reason it may still elect to utilize competition. FAR regulation 19.805-1 states that "the SBA Associate Administrator for 8(a) Business Development may approve an agency request for a competitive 8(a) award below the competitive thresholds. Such requests will be approved only on a limited basis and will be primarily granted where technical competitions are appropriate or where a large number of responsible 8(a) firms are available for competition". The Washington DC metro area contains a large number of responsible 8(a) firms which would allow for competitive use of the 8(a) program.

If the SBA proves to be unable or unwilling to assist the CPSC in promoting competition, it should not be forgotten that the decision regarding whether or not to make an award under the SBA's 8(a) program ultimately rests with the CPSC contracting officers, not the SBA. (FAR 19.800).

Finally, even in cases where the initial decision has been made to utilize the 8(a) program, the CPSC's contracting officer may still reject a SBA recommendation or withdraw a set-aside before award (FAR 19.505 and 19.810). The FAR sets out notice and appeal procedures for resolving disagreements between the agency and the SBA. If the contracting agency (CPSC) and the SBA disagree, the head of the contracting agency has the final word on set-aside or withdrawal decisions.

Recommendation 2: The CPSC should follow more competitive processes in its procurement activities involving small businesses. This may be done by holding traditional competitions while limiting the participants to either small businesses or small disadvantaged businesses, as the agency deems appropriate; or by continuing to participate in the 8(a) program. If the CPSC chooses to continue participating in the SBA 8(a) program, an attempt should be made to promote competition by requesting that the SBA allow the procurement to be competitive using only 8(a) eligibles. Competition could save money, improve contractor performance, curb fraud, and promote accountability for results.

Finding 3: The CPSC needs to strengthen the distinctions between Government and contractor personnel in order to avoid the potential legal liability inherent in creating an employer-employee relationship.

Various statutes and regulations prohibit the Government from treating contractor personnel as Government employees. Beyond the simple prohibition set out in these laws and regulations there are very pragmatic reasons for the Government to refrain from treating contractor employees as Government personnel.

One of the advantages of utilizing contractors is their potential cost savings to the Government. Unlike Government employees, the Government has no obligation to contractor employees once their services are no longer required. Similarly, a variety of forms of potential legal liability that are present with Government employees (workman's compensation claims, unemployment insurance claims, liability under the Federal Tort Claims Act and various other statutes), do not exist with contractor personnel. At least they do not exist so long as the Government refrains from creating an "employer-employee" relationship with the contractor employee. This type of relationship is generally found by the courts to exist when contractor personnel are subject to the relatively continuous supervision and control of a Government officer or employee.

For example, if a CPSC employee operating a CPSC owned or leased vehicle caused an accident and injured a number of civilian personnel the Government would be liable under the Federal Tort Claims Act for the actions of its employee. However, if the CPSC vehicle in question were being operated by a contractor employee, the employee as an individual or the company for whom the employee worked would be liable for the injuries caused, the CPSC would not. Unless the CPSC had created an "employer-employee" type relationship with the contractor employee in question. In that case, the CPSC would face liability. This same analysis would apply in situations where the contractor employee in question sexually harassed someone or filed an unemployment insurance claim. So long as the distinction between Government and contractor personnel is maintained and an employer-employee relationship is not created, the Government is immune to liability from the actions of contractor employees. As soon as an employer-employee relationship is created the Government is faced with liability.

The courts are more likely to find an employer-employee relationship exists when the terms of the contract in question require contractor employees to report directly to government employees or detail the conditions of employment of the contractor employees (hours worked, compensation, etc). During the course of this audit contract terms were found that detailed the conditions of employment of contractor employees by specifying the compensation contractor employees should receive (requiring overtime pay if the employee had to work on a weekend), the length of lunch hour they should receive, etc.

Although it is not legally conclusive, it is interesting to note that during this audit, a survey was sent to twenty-five (25) contract employees asking them to name their direct supervisor. Of seventeen (17) responses, four (24%) named a Government employee as their direct supervisor. Whether this is technically correct or just a reflection of the beliefs of the contractor employees, it certainly gives the impression that these contractor employees are subject to the relatively continuous supervision and control of a Government employee.

Allowing the contract employees to continue to believe that they are supervised by Government employees could lead to legal liability in situations where the contractor's employee feels that he/she is not being treated fairly. When contractor employees are treated as government

employees, courts have found that they may be entitled to the same protections and remedies as Government employees. This could lead to the creation of liability under state unemployment insurance laws, EEO actions, and through FTCA liability.

Recommendation 3: FMPS needs to ensure that inappropriate employer-employee relationships are not formed between Government and contractor personnel.

a. CPSC supervisors need to be trained in the proper way to interact with contractor employees. This training must emphasize that it is not appropriate for them to supervise contract employees directly (FAR 52.236-6). Contractor employees should have an on-site supervisor or someone delegated by the contractor to supervise them. All issues involving the performance of the contract should go through FMPS and the contractor or his/her agent. If a CPSC employee takes issue with the performance or conduct of a contractor employee, this issue needs to go through FMPS and the contractor and/or his agent and not be handled directly by federal government employees.

b. FMPS must ensure that contract terms do not require contractor employees to report to CPSC supervisors or inappropriately stipulate conditions of employment.

Finding 4: Contract terms need to be drafted, adopted, and used by the CPSC to deal with issues arising from the use of service contracts to perform functions that were in the past performed by Government employees.

The growth in the use of contractors to perform functions that in the past were performed by Federal employees has led to a situation where “facts on the ground” have far outpaced the issuance of guidance on how to deal with those facts. For example, Government employees face criminal penalties for not acting impartially in their official duties in exchange for personal gain. However, contractor personnel, who frequently are performing the same functions, are not covered by these laws.

Although the CPSC does not have the authority to change the laws in question. It does have the authority to include clauses in the contracts it issues to address these concerns.

CPSC contracts are lacking much needed clauses pertaining to contract employee rules on ethics, cooperation with Government audits and investigations, and disclosure of privileged information. Both Congress and the Office of Management and Budget have recently stressed the importance of using contract provisions to ensure that contractor personnel follow the same procedures when handling Federal information as do Federal employees (e.g., FISMA, the Privacy Act, the E-Gov Act, OMB security and privacy policy, and NIST standards and guidance, etc.). The CPSC has already begun taking steps to implement some but not all of these requirements.

The lack of inclusion of contract clauses concerning these issues may result in contractor employees displaying unethical behavior which will negatively affect the CPSC, refusing to cooperate with Government audits and investigations, and failing to safeguard information.

Recommendation 4: The FMPS should develop and employ standard contract clauses that would include language that makes contractor employees responsible for upholding a code of conduct compatible with performing their duties “on-site” at a Federal Agency (a streamlined version could be developed for dealing with contractors who perform off-site). These clauses would include cooperating with Government audits and investigations as well as safeguarding Government information.

Finding 5: The CPSC is failing to perform adequate market research to allow it to properly take advantage of commercial practices.

FAR Part 12 requires that the CPSC perform market research before buying commercial goods or services. FAR 12.202 states that “Market research is an essential element of building an effective strategy for the acquisition of commercial items and establishes the foundation for the agency description of need, the solicitation, and resulting contract.” This research is then to be used to help determine if there are common commercial practices that the Government can adopt to improve efficiency and economy. Common commercial practices can and should be taken into account by the agency when it makes determinations regarding quality assurance systems, price reasonableness (speed of deliver, length and extend of warranty, limitations of seller’s liability, etc. all impact price reasonableness), and the inclusion of any other common commercial practice that is advantageous to the government. (See FAR 12.208, 12.209, and 12.213). The CPSC has not maximized the potential benefits of FAR Part 12. None of the contracts reviewed adopted common commercial practices. From the records available it does not appear that adequate market research was performed to determine what common commercial practices were or whether or not the CPSC would benefit from adopting them.

Separate and apart from its use in buying commercial goods and services, market research is also required by FAR Part 10.0 to ensure that agencies arrive at the most suitable approach to acquiring, distributing, and supporting supplies and services. Market research should be used to determine if sources capable of meeting the agencies’ needs exist and whether or not they can be obtained commercially. Also, FAR 10.02 states that agencies should document the results of market research in a manner appropriate to the size and complexity of the acquisition.

Of the eight contracts reviewed during this audit, none contained a detailed record of market research. While five of the eight contracts reviewed are 8(a) contracts, there should still be sufficient evidence in the permanent contract files to support the decision that the use of the 8(a) program was the most beneficial way to proceed with the procurement. FMPS personnel are, in some instances, including a general note in the permanent files stating that, “Market research was performed”, but they are failing to provide any details regarding the specific information gathered or the type of analysis being conducted.

This lack of adequate documentation to support the decisions made during the acquisition process would adversely affect the CPSC’s ability to defend itself against a protest.

Recommendation 5: The CPSC needs to better utilize market research.

- a. Adequate market research must be done to determine what common commercial practices exist and are appropriate for use by the CPSC. Common commercial practices that are determined to be beneficial to the CPSC should then be incorporated into the contract in accordance with FAR Part 12.
- b. The CPSC should require a detailed record of all market research conducted, including, at the very least, what companies were contacted, who the contact person was for each company, details on prices and/or services resulting from specific questions asked by contracting personnel, and what common commercial practices were found to exist in the market in question.

Finding 6: The CPSC needs to better utilize performance-based acquisition principles.

Performance-based acquisition is an approach to obtaining greater innovation and increased efficiency of solutions by focusing on mission outcomes rather than dictating the manner in which the contractors work is to be done. Those outcomes are then measured and the contractor compensated on the basis of whether or not the outcomes are achieved. This concept is set-out in FAR 37.602-1 which states that, “when preparing statements of work, agencies shall, to the maximum extent practicable-describe the work in terms of “what” is to be the required output rather than either “how” the work is to be accomplished or the number of hours to be provided.”

In large part, the theory behind performance-based acquisition is the admission that contractors who perform a task for a living generally know more about that task than does the Federal Government. Thus, they are better situated to know the best way to perform that task. For example, if you were hiring someone to cut the grass at your home once a week, you wouldn't care if the contractor used one worker working four hours or four workers each working one hour. You wouldn't care if the contractor hired two exceptionally talented grass cutters who worked very quickly or one exceptionally slow individual who worked very slowly. Finally, you wouldn't be overly concerned about whether the contractor used powered lawnmowers or manual ones. All you would care about is that the work you requested was done and how much you were charged for it.

This may seem simplistic, but historically the Federal Government has done a horrific job of putting this principle into practice. For example, the CPSC is currently paying contractors based on the number of hours worked by various “classes” of contractor employees instead of paying a lump sum for the work that we wish to have performed. The number and type of employees used by the contractor are “suggested” by the CPSC. As this suggestion is directly tied to the format of compensation for the contract, this suggestion effectively suppresses innovation by the contractors. The better practice would be letting the contractor decide how many and what type of employees he needs and how his employees are paid and scheduled. Although improvements have been made in this area, the CPSC is still employing contracts that fail to employ performance-based acquisition principles. When a contractor receives his compensation based on an hourly rate, there is no incentive for the contractor to have his employees work harder or faster to get the job done, as they will get paid whether the job is done or not. In point of fact, at least theoretically they would have a disincentive to complete the work ahead of schedule.

Several of the contracts reviewed based payments to the contractor on the number of hours his employees worked. None of the records reviewed indicated that the CPSC has ever “sent a contractor employee home early” as a result of their work having been performed ahead of schedule.

Recommendation 6:

FMPS should ensure that contracts are being written and administered so as to comply with performance based acquisition principles. This should include ensuring that payment to contractors is based on their work performed rather than the number of hours it takes their employees to perform the work. Contracts should not specify the number or types of workers required to perform a job. Under no circumstances should contracts specify the wages that contractor employees must be paid or duty schedules they must maintain.

Management Response: In commenting on a draft of this report (see appendix 1), FMPS management generally concurred with the facts and conclusions cited in this report.

APPENDIX

Management's Response



UNITED STATES
CONSUMER PRODUCT SAFETY COMMISSION
BETHESDA, MD 20814

Memorandum

Date: October 4, 2007

TO : Christopher W. Dentel
Inspector General

THROUGH: Edward E Quist *eeq*
Director, Office of Financial Management, Planning and Evaluation

FROM : Donna Hutton *DH*
Director, Division of Procurement Services

SUBJECT : Response to CPSC Audit of Service Contracting 2007

The CPSC Division of Procurement Services (FMPS) appreciates the work of the Office of the Inspector General in conducting this audit. A review of service contracts is considered to be timely and a subject that is at the forefront of procurement issues. Although injection of contractor personnel on-site at Federal facilities creates management difficulties and a critical need for distinction between contractor-provided and Government personnel, it is a reality that must be dealt with at most Federal agencies.

Response to Finding 1:

Attempts are consistently made, within the procurement lead time allowed, to maximize competition. As indicated by the auditor, we concur that the use of award term contracts is indeed intended to "promote the quality of performance provided to the Government by giving an incentive to the contractor to provide exceptional performance." There is no evidence that we are not succeeding with this at CPSC. It is too early in the award term process to determine whether or not this program has been successful. Only one contract has been eligible to earn an award term, and that award term just began October 1, 2007. However, we will carefully monitor award term decisions and document all decisions thoroughly.

Emphasis regarding competition focused on concerns in two areas of procurement: options and award term contracts. Both of these procedures allow for additional years of service without seeking further competition if justifiable. The FAR outlines specific criteria that must be met to exercise options or earn incentives such as award terms. And as a result, prior to exercising either regular contract options or award term options, the contract file should be thoroughly documented to substantiate the government's decision for not re-competing a requirement. Where exercise of one of these options is appropriately justified, there is nothing inherently deficient about a contract for which options are exercised repeatedly. Indeed, there are many benefits of a long-term relationship with a contractor, including improved familiarity with agency procedures and enhanced performance. The inclusion of options generally results in a

higher level of commitment from contractors due to this long-term relationship. There is also a cost-savings for the Government, as mentioned by the IG report. The purpose of including award terms is to appropriately award the contractor for the level of performance outlined in the contract. I believe it is important to emphasize that the length of the contract and the act of exercising options does not indicate weaknesses in the contracting process. However, FMPS concurs that the decision-making processes for these actions must be based on thorough research and analysis, and must be completely documented.

In addition, acquisition planning is essential to support this decision process. Unfortunately, the Division of Procurement Services is commonly put in the position to work with limited time, and this may lead to meeting minimum legal requirements but not enhancing competition to the maximum extent practicable. Therefore, our office will be working with CPSC organizations to promote early acquisition planning and earlier receipt of requisitions for upcoming procurements.

Response to Recommendation 1: FMPS concurs with these recommendations. Although we have met the legally mandated requirements for competition, every effort must be made to receive increased competition. Therefore, through both advertising and inclusion of a variety of sources, we will make extensive use of the competitive process. As indicated above, award term contracts and option contracts will be monitored and all decisions regarding exercise of both award terms and options thoroughly documented in contract files. The finding is agreed to and these recommendations will be implemented. Regarding the specific recommendations:

- a. FMPS will make efforts to include more contractors during full and open competition, and also for any limited competition such as small-business set-asides, through advertising and greater outreach through FedBizOpps notices and inclusion of a larger number of contractors on the Bidder's Mailing Lists.
- b. FMPS will make every effort to identify potential contractors eligible to submit proposals so that more than one proposal is received.
- c. All decisions regarding award of award terms will be thoroughly documented to ensure that the contractor has met or exceeded the performance goals required to earn an award term.

Response to Finding 2:

FMPS personnel have been under a belief that once a "requirement" was set aside for the 8(a) program, it was required, even upon recompetition, to be set-aside for 8(a) procurement. We were advised verbally that this was the case by SBA representatives. Recent research, that is, specific correspondence with Stanley Y. Fujii, Washington DC SBA Assistant District Director for Business Development, reveals that SBA is unable to support this position. Mr. Fujii states that although there was "nothing that says once 8(a) always 8(a), but I believe there is language that states they must request the SBA to release an 8(a) contract from the 8(a) Program." Yet he could not locate a statute to support this position. And when questioned repeatedly about this, he said that he intended to propose language to make this position clear, but there was nothing statutory that he could quote that formally stated this requirement. Therefore, when 8(a)

requirements come up for renewal, FMPS no longer intends to assume that they must be processed as 8(a) set-asides, unless this is formally mandated in the future.

However, there was never any erroneous belief that small business set-asides should not be competed. Whether a small business set-aside or not, competition is addressed for all procurements above the micropurchase threshold. A rare exception to this would be procurements specifically offered to the SBA's 8(a) program, in which case the SBA makes a determination as to whether or not the requirement would be competed. Once offered, it is very difficult to extract a requirement from the program, and the Head of the Agency must advise SBA as to the reason for removal of the requirement from the program.

Response to Recommendation 2: FMPS concurs with these recommendations. We will seek additional competition in the 8(a) program and will request that the SBA offices allow us to compete requirements, even at dollars below the specifically designated threshold for 8(a) competition. At some point the two goals of reduced length of performance (and anticipated dollar value) and competition clash. If a procurement had enough option periods and award terms, it would raise the dollar threshold to a point where the SBA would be required to allow us to conduct a competitive procurement, so these issues will be considered. Even if the SBA rejects our request for a competitive procurement, we can seek alternatives. One is to review area businesses and engage in a type of pre-competition among multiple 8(a) sources, where we review capabilities and document our basis for selection, and then proceed with the sole source required by the SBA. And another approach will be to remove follow-on requirements from the 8(a) program when they come up for renewal, and compete them instead as small business set-asides advertised in FedBizOpps.

Response to Finding and Recommendation 3: FMPS agrees with these findings and will implement the recommendations as follows:

- a. We have conducted on-site training for managers and Contracting Officer's Technical Representatives (COTRs) within the past two years during which the distinction between government and contractor personnel was emphasized. We intend to enhance this to ensure that government personnel dealing directly with contractor personnel, that is, the COTRs, understand that an employer-employee relationship will not occur between government employees and contractor employees through on-line training for the COTRs. All COTRs will participate in this mandatory COTR training, certificates certifying completion will be collected, and training documented in the ACMIS database. In addition, we will modify the local CPSC provision entitled "COTR/Project Officer Designation" to strengthen the provision by adding wording that addresses the distinctions between Government and contractor personnel.
- b. We will ensure that the contract terms in the statement of work require contractor employees to report to their own company for supervision and not to CPSC personnel. This distinction will be clarified by the language in the statement of work.

Response to Finding and Recommendation 4: We agree, and have discussed plans to implement a new clause regarding the conduct of contractor personnel with the Office of General Counsel. Although the specific Standards of Conduct promulgated by the Office of Government Ethics

apply only to government employees, very similar standards will be drafted in a clause (based on clause language found in the DFARS) regarding ethical contractor performance. This clause will formally state ethics requirements and will put the onus on the contractor to provide ethics standards and training for its employees. Once this clause is drafted and approved by OGC it will be included in the appropriate contracts for services.

Response to Finding 5: As described in FAR 12.101, the purpose of commercial market research is primarily to identify commercial sources to meet agency requirements, not to employ commercial practices. It is also the foundation for the agency description of need (FAR 12.202). Finally, per FAR 12.313, in addition to standard Government terms and conditions, other commercial practices may be appropriate and should be considered. But the cornerstone and primary purpose of this market research is to try to locate commercial sources, not to determine if there are commercial practices. Although FMPS Contracting Officers are willing to consider the inclusion of non-FAR, non-standard commercial practices, any such inclusion will be reviewed by the General Counsel for possible conflicts with statutory and regulatory requirements. When we incorporate FAR clauses 52.212-4 “Contract Terms and Conditions-Commercial Items” and 52.212-5 “Contract Terms and Conditions Required to Implement Statutes or Executive Orders-Commercial Items,” as we do in all commercial contracts, then we do apply commercial terms, i.e., inspection, warranty, and discount provisions. FAR 12.2 discusses “special requirements” for the acquisition of commercial items which when needed, may require special consideration and planning prior to soliciting. Conducting market research may help in discovering common practices that are acceptable in the commercial market place that may not be standard practice in the Government sector. Of the eight (8) large contracts that were reviewed within FMPS, none of them required special market conditions or considerations. Adequate information was available regarding these types of services and common known business practices were acceptable and applicable in the acquisition process. These services were basic in nature and did not require any uncommon commercial practices. The standard solicitation provisions and contract clauses that are available in the FAR generally provide the necessary customary commercial procedures applicable to our requirements. Common commercial practices for special requirements such as the contracting of research and development projects or development of software programs that are not available “off the shelf” may require a detailed market survey to analyze common commercial practices that may be applicable.

Response to Recommendation 5:

a. We agree that FMPS can better utilize market research, however the thrust of the research should be to identify commercial sources and improve the agency description of need, as explained above. In addition, if required by unique situations, we will also look for, and potentially incorporate, common commercial practices. If common commercial practices that are not already implemented by standard commercial terms and conditions through standard commercial FAR clauses are potentially applicable, then additional commercial practices may be legally reviewed and considered for incorporation into the resultant contract. However, it is very unusual for commercial practices, for example, pre-payment prior to receipt of deliverables, to be requested by contractors in situations that are not allowed to be pre-paid in the FAR for the types of products and services we procure.

b. FMPS agrees that we should keep a detailed record of all market research conducted. All files currently contain market research memos, but these will be more detailed and contain more documented specifics on research performed, commensurate with the dollar value of the procurement. Assistance from technical personnel will be employed, such as contacting other government facilities with similar needs, contacting the industry regarding market capabilities, reviewing results from other market research reports/papers, and query through the Internet for information, reviewing catalogs and product literature. The Procurement Office has basically been performing this market research without the aid of technical personnel. We will educate them to the need for this assistance during the procurement planning process, and their input and research will provide a valuable contribution to market research.

Response to Finding and Recommendation 6: We concur with this recommendation. FMPS has made efforts to convert as many service requirements as possible to performance-based contracts and will continue to do so. The CPSC security guard contract, which was not previously performance-based, is currently up for renewal and is being solicited as performance-based. It will not longer be paid on an hourly basis but at a monthly rate. The Source Staffing contract that was recently renewed is now performance-based, no longer paid on an hourly rate and is paid on a monthly basis. FMPS will continue to eliminate as many labor hour contracts as possible to maximize the performance-based concept.

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