



U.S. GENERAL SERVICES ADMINISTRATION
Office of Inspector General

July 29, 2011

MEMORANDUM FOR ROBERT A. PECK
COMMISSIONER, PUBLIC BUILDINGS SERVICE (P)

STEVEN J. KEMPF
COMMISSIONER, FEDERAL ACQUISITION SERVICE (Q)

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

SUBJECT Purchase of Photovoltaic Panels (Made in China) with
American Recovery and Reinvestment Act of 2009¹ Funds for
the Senator Paul Simon Federal Building in Carbondale, IL
Memorandum Number A090184-49

The purpose of this memorandum is to bring to your attention issues we identified during our review of task order number GSP0510SC0004² awarded to J.R. Conkey and Associates, Inc. (Conkey) for the replacement of the roof membrane and installation of photovoltaic panels on the Senator Paul Simon (Simon) Federal Building in Carbondale, Illinois. The photovoltaic panels installed in the Simon Federal Building were assembled in China.

Using these items violates provisions of the American Recovery and Reinvestment Act (ARRA) that funded the project. The fact that the panels were purchased through the Multiple Award Schedule (MAS) program does not alter this conclusion.

¹ The American Recovery and Reinvestment Act of 2009 (ARRA) provides the General Services Administration (GSA) with \$5.55 billion for the Federal Buildings Fund. In accordance with ARRA, the GSA Public Buildings Service (PBS) is using the funds to convert Federal buildings into High-Performance Green Buildings as well as to construct Federal buildings, courthouses, and land ports of entry. The ARRA 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 ARRA. One objective of this oversight is to determine if PBS is awarding and administering contracts for limited scope and small construction and modernization projects in accordance with prescribed criteria and ARRA mandates.

² This work was performed by J. R. Conkey and Associates, Inc. (Conkey) dba Solar Power Integrators under a \$1,800,000 task order (number GSP0510SC0004) awarded to Conkey under Multiple Award Schedule (MAS) contract GS07F0286V. Conkey was to provide all equipment, materials, labor, and supervision to replace the roof membrane and install photovoltaic panels

Materials Installed at the Simon Federal Building Violate the ARRA

Per Section 1605 of the ARRA, “None of the funds appropriated or otherwise made available by the Recovery Act may be used for a project for the construction, alteration, maintenance, or repair of a public building or public work unless [...] All of the iron, steel, and manufactured goods used as construction material in the project are produced or manufactured in the United States.” The photovoltaic panels installed by Conkey at the Simon Federal Building were assembled in and shipped from China. Under the ARRA, the Chinese-made panels cannot be purchased with ARRA funds.

According to the drawings submitted by Conkey, the solar array system installed at the Simon Federal Building includes 495 photovoltaic panels and an inverter. The inverter displays a “Made in the U.S.A.” logo; however, the panels do not. The specifications for the panels, which Conkey submitted with its proposal, say “manufactured, assembled and tested in our own ISO 9001 facility.”³

However, Solar Power Inc.,⁴ the manufacturer of the solar panels, has a website that says its ISO facility is located in Shenzhen, China.



Example of Solar Panel installed on Simon Federal Building roof

Upon inquiry, Conkey officials explained, “The photovoltaic module components are made of products manufactured in many countries including China, Europe and the US. The pieces are assembled in China and shipped directly to the jobsite.” Conkey initially questioned whether the photovoltaic panels, which were part of its MAS contract, could be used for this project. On February 16, 2010, prior to

installation, Conkey asked the contracting officer whether non-ARRA compliant solar panels could be used. The contracting officer directed Conkey to “proceed with the panels specified in the schedule contract since they have already been determined by the FSS Contracting Officer as satisfying all applicable contract clauses including the ARRA Buy American Act Requirement.”⁵

In our view, the contracting officer misinterpreted the relationship between the ARRA Buy American requirements and the schedule contract program, as, although items on schedule must comply with the Trade Agreements Act (TAA), they do not necessarily comply with the ARRA Buy American requirements. We reviewed Conkey’s FAS schedule and noted that the model number of the installed system was identified with an

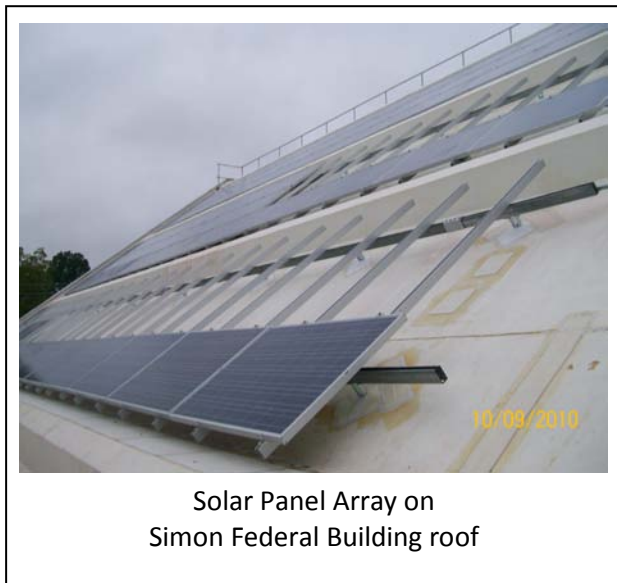
³ The proposal refers to Solar Power Inc.’s facility.

⁴ Solar Power Inc. provided a letter of supply to Conkey stating that it will provide sufficient quantities of the photovoltaic modules

⁵ The Federal Supply Service (FSS) no longer exists. It has been reorganized into the Federal Acquisition Service (FAS).

ARRA icon (ARRA), which appears to indicate that the system is compliant with ARRA requirements. The explanation of the ARRA icon states, “the contractor has accepted the terms, conditions, and reporting requirements of the American Recovery and Reinvestment Act (ARRA), and is eligible to fulfill ARRA orders.” We obtained clarification from the FAS contracting officer for the schedule contract regarding which provisions of the ARRA the icon indicates that the contractor accepted. The schedule contract modification that incorporated the ARRA clauses into schedule contracts did not include the Buy American requirements. Accordingly, the fact that an item is on schedule and has the ARRA icon does not mean that it complies with the ARRA Buy American requirements.

Moreover, the fact that the panels were considered under the schedule to be part of a “system” rather than an individual product is irrelevant to the ARRA analysis. The ARRA Buy American clauses were included in the task order awarded by the PBS contracting officer for the work done at the Simon Federal Building. As stated above, the ARRA restricts the origin of manufactured goods used as construction material for projects funded by ARRA appropriations. The Chinese-made panels, even if part of a “system” offered on the schedule contract that might be TAA compliant, cannot be purchased with ARRA funding.



We recommend the following actions:

1. PBS should take the necessary corrective measures to address the non-compliant solar panels.
2. PBS officials should ensure that none of the current ARRA projects involving solar panels are using non-compliant panels.
3. If it determines that similar situations exist, PBS should train contracting personnel, specifically those involved in ARRA projects, regarding the restrictions under the ARRA and TAA regulations.
4. FAS officials should clarify the meaning of the ARRA icon, since items purchased through the schedule may not meet the ARRA Buy American requirements.

Management Comments

We received comments from both PBS and FAS which we have included as Attachments A and B. PBS has initiated corrective actions to “address the allegations of non-compliant solar panels.” FAS disagreed with the draft memorandum in its response to us. FAS asserted that, while the solar panels may be foreign in origin, they are integrated as part of an overall system and only the Bureau of Customs can make a determination of TAA compliance. We modified our memorandum to address this point. FAS also stated that,

In regard to the ARRA and BAA issues, it is in accordance with existing policy that the BAA does not apply to schedules. For purchases of systems such as the one in question, the TAA applies, not BAA.

In our view, PBS used Schedule 56 appropriately, and that no corrective action is required. We reach this conclusion for two reasons:

One, PBS bought an item under a schedule contract. It is reasonable and appropriate for PBS to rely on the FAS determination on items which belong on schedule.

Two, existing FAS policy tells federal agencies, including PBS, that the Buy America Act is not applicable when schedules are used. PBS appropriately relied on FAS policy and guidance.

FAS did not consider, in its statements, that the ARRA Buy American requirements determine whether an item may be purchased with ARRA funding, regardless of whether or not it is part of a system that may be TAA compliant. As illustrated in this memorandum, it is possible to have items offered through the schedules that do not meet ARRA requirements, because those requirements are more restrictive than those in the TAA.

As this is a memorandum, the recommendations are advisory only. The memorandum is not subject to the agency's audit resolution process. If you have any questions about this memorandum, please contact John Langeland or me at (312) 353-6691 or (312) 353-0500.

Distribution List

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PBS Response to Memorandum A090184-49⁶

The Public Buildings Service (PBS) appreciates the opportunity to comment on the subject draft audit memorandum. The draft memorandum includes three recommendations for PBS:

1. PBS should take the necessary corrective measures to address the non-compliant solar panels.
2. PBS officials should ensure that none of the current Recovery Act projects involving solar panels are using non-compliant panels.
3. If it determines that similar situations exist, PBS should train contracting personnel, specifically those involved in Recovery Act projects, regarding the restrictions under the Recovery Act and Trade Agreements Act regulations.

In response to Recommendation 1, PBS will take measures to address the allegations of non-compliant solar panels in accordance with the guidance provided in FAR Subpart 25.607.

With respect to Recommendation 2, PBS has initiated a review to determine whether non-compliant photovoltaic panels were used in other Recovery Act projects. To date, we have found that the manufacturing plants for the photovoltaic panels installed for each of these projects were located in the continental United States. We will continue our review efforts in order to determine whether further corrective actions are necessary.

It is our understanding that the Federal Acquisition Service has provided additional information to you regarding the findings presented in this memorandum. Should you have any questions specific to PBS, please contact Matt Radford on (202) 219-0906.

⁶ The PBS response was provided via e-mail on June 22, 2011 from Brian Gibson, PBS Financial Operations Division (PFF).

FAS Response to Memorandum A090184-49⁷

June 21, 2011

Subject: General Services Administration (GSA) Inspector General (IG) Memorandum Number A090184-49 (Draft), Senator Paul Simon Federal Building in Carbondale, IL

This memorandum is in response to the subject memorandum, which references the GSA Multiple Award Schedule (MAS) Contract, GS-07F-0286V, awarded to J.R. Conkey and Associates, Inc., for solar energy systems under Special Item Number (SIN) 206 3. The system proposed and installed at the Senator Paul Simon Federal Building is the SM150-480 system, which was awarded as a complex roof mounted electrical grid system consists of a variety of components. The photo-voltaic panel in question, SP205 is one component of this overall system. The photo-voltaic panel cannot be ordered under the contract.

The GSA IG memorandum identifies two issues. First, GSA IG states that the contractor sold Chinese made photovoltaic panels to a GSA Public Building Service (PBS) customer and the panels did not belong on schedule because this would be a violation of the Trade Agreements Act (TAA). Second, the GSA IG states that PBS violated the American Recovery and Reinvestment Act (ARRA) and those portions of ARRA relating to the Buy America Act (BAA) when purchasing this system.

With regard to the declarative statement that the electrical system sold to PBS violates the TAA, FAS notes that J.R. Conkey and Associates certified that the overall solar energy system was TAA compliant. Conkey did not specifically certify the SP205 panel, as it was not a contract item. Established GSA policy calls for the FAS contracting officer to rely upon the contractor certification.

This draft memorandum represents a significant shift in GSA policy, because the memorandum amounts to a determination that the system was not TAA compliant based upon the SP205 panel. In previous TAA investigations performed by the Office of the Inspector General, the audit addressed an actual contract item. Here, the panels themselves are not a contract item. Rather, they are an important part of a solar system, but are integrated along with an inverter, tubes, and other components into a system. It is our view that only the Bureau of Customs can make such a TAA determination.

In regard to the ARRA and BAA issues, it is in accordance with existing policy that the BAA does not apply to schedules. For purchases of systems such as the one in question, the TAA applies, not BAA.

⁷ FAS provided its response via e-mail on June 21, 2011 from Jeffrey Koses, FAS Director, Office of Acquisition Operations. In the e-mail, FAS anticipated providing a formal response, but as of the date of the memorandum, we have not received it.

ATTACHMENT B

In our view, PBS used Schedule 56 appropriately, and that no corrective action is required. We reach this conclusion for two reasons:

One, PBS bought an item under a schedule contract. It is reasonable and appropriate for PBS to rely on the FAS determination on items which belong on schedule.

Two, existing FAS policy tells federal agencies, including PBS, that the Buy America Act is not applicable when schedules are used. PBS appropriately relied on FAS policy and guidance.

Finally, it is our recommendation that the declarative statements regarding TAA compliance and ARRA violations be reworded. If the GSA IG suspects that the system in question may be in violation of the TAA, the Bureau of Customs may need to be notified in order to determine whether or not the system in question is in compliance with TAA.