



U.S. Department of Agriculture
Office of Inspector General



**Procurement Oversight Audit of Construction
Contract Awarded by Agricultural Research
Service to Veterans Construction, LLC**

Audit Report 02703-06-HQ
August 2011



United States Department of Agriculture
Office of Inspector General
Washington, D.C. 20250



DATE: August 22, 2011

AUDIT
NUMBER: 02703-06-HQ

TO: Ed Knipling
Administrator
Agricultural Research Service

ATTN: Michelle Garner
Acting Director
Financial Management Division

FROM: Gil H. Harden /s/
Assistant Inspector General
for Audit

SUBJECT: Procurement Oversight Audit of Construction Contract Awarded by
Agricultural Research Service to Veterans Construction, LLC.

Attached is a copy of the final report on the subject audit. On August 17, 2011, we were notified by ARS that an exit conference was not necessary to discuss the subject draft audit report. The findings noted in this report have been previously reported; therefore, no recommendations were made. No further response for this audit is necessary.

If you have any questions, please contact me at (202) 720-6945 or have a member of your staff contact Jane Bannon, Audit Director, IT Audit Operations and Departmental Management, at (202) 720-7845.

Attachment

cc: (w/attachment)
Director, Planning and Accountability Division, OCFO

DATE: August 19, 2011

REPLY TO

ATTN OF: 02703-06-HQ

TO: Jane A. Bannon
Audit Director
IT Audit Operations and Departmental Management
Department of Agriculture, Office of Inspector General

FROM: Regis & Associates, PC /s/

SUBJECT: Procurement Oversight Audit of Construction Contract Awarded by Agricultural Research Service to Veterans Construction, LLC.

The American Recovery and Reinvestment Act of 2009 (the Recovery Act), provided the Department of Agriculture's (USDA) Agricultural Research Service (ARS) with \$176 million to reduce the backlog of facilities critical deferred maintenance projects. On January 8, 2010, ARS awarded a sole-source, negotiated, firm fixed price construction contract under the 8(a) Business Development Program¹ for \$2,485,000 to Veterans Construction, LLC, to replace the chiller, generator, and underground storage tank at the USDA Jean Mayer Human Nutrition Research Center for Aging (HNRCA), located in Boston, Massachusetts. In addition to the initial contract award, subsequent contract modifications were made that totaled \$215,426, and increased the contract amount to \$2,700,426. ARS' Facilities Division in Beltsville performed the procurement activities and contract management functions including contract award, contractor payment approval, and monitoring the contractor's Recovery Act reporting. ARS' Financial Management Division (FMD) reported agency Recovery Act fund statistics on Recovery.gov through SharePoint.²

In enacting the law, Congress emphasized the need for the Recovery Act to provide for unprecedented levels of transparency and accountability, so that taxpayers know how, when, and where tax dollars are being spent. To accomplish this objective, the Office of Management and Budget (OMB) issued various implementing guidelines that require Federal agencies receiving Recovery Act funds to post key information on Recovery.gov. In addition, agencies must submit weekly updates, monthly financial status reports, award transaction data feeds, and an agency Recovery Act plan to OMB and to the Recovery page of the agency's website.

The Recovery Act also provided USDA's Office of Inspector General (OIG) funding for oversight and audits of USDA programs, grants, and activities funded by the Recovery Act. OMB guidance states that OIGs will perform audits and inspections of their respective agencies' processes for awarding, disbursing, and monitoring Recovery Act funds, to determine whether safeguards exist for ensuring funds are used for their intended purposes.

¹ The Small Business Administration 8(a) Business Development Program was created to assist eligible small disadvantaged business owners compete in the American economy through business development.

² SharePoint is an electronic database for USDA's Recovery Act data collection.

To ensure that the transparency and accountability requirements of the Recovery Act are met, USDA/OIG contracted with Regis & Associates, PC, to assist it in ensuring that ARS' Recovery Act procurement activities are performed in accordance with Federal Acquisition Regulation (FAR), OMB guidance, and Recovery Act requirements. This audit was performed in accordance with generally accepted government auditing standards, and standards established by the American Institute of Certified Public Accountants.

During this audit, we reviewed applicable laws and regulations pertaining to procurement activities, contract oversight, and Recovery Act reporting. We also obtained and reviewed ARS' organizational documents relating to management controls, policies, and procedures for the procurement and contracting functions, financial management system, and other processes that would ensure compliance with the Recovery Act.

The scope of this audit included a review of the justification for a sole-source acquisition; processes for preparing and issuing the solicitation, contractor selection, contract price determination, contract award, performance monitoring, and invoice processing and payments to determine whether ARS followed departmental and agency policies and procedures, FAR, and Recovery Act requirements. We performed procedures, as necessary, to determine whether the procurement was based on fair and reasonable price estimates, that the contract was awarded to a contractor with appropriate qualifications, and that processes were in place to ensure that the contractor provided services/products in accordance with contract terms. We found that, ARS' contracting staff, including the contracting officer, contracting specialist, and contracting officer's technical representative, were experienced and qualified to award and monitor the contract and no issues were noted in these areas that would warrant reporting.

However, we identified four issues that were previously reported to ARS. We noted that ARS' Facilities Division did not document the acquisition planning performed, request a legal review of the solicitation, or properly publicize the rationale for awarding the contract on a sole-source, non-competitive basis. During the course of our review of this contract, we also noted that ARS was assessed a late payment fee due to a prompt payment issue.³

Finding 1: ARS' Acquisition Planning Process Should be Formalized

During our audit, we reviewed the contract file for Veterans Construction, LLC to assess the existence and adequacy of acquisition planning for the HNRCA contract. We noted there was no formal, structured, and clearly communicated acquisition planning process developed, which includes the establishment of thresholds for when a formal acquisition plan should be prepared. We also noted that the contract file contained incomplete acquisition planning documentation. Specifically, there was no evidence of any acquisition planning meetings that were conducted prior to the release of the solicitation depicting how the overall approach for awarding the procurement was established.

³ These issues were previously reported to ARS in audit reports 02703-03-HQ and 02703-04-HQ.

FAR part 7, *Acquisition Planning*, requires agencies to perform acquisition planning in order to ensure that the government meets its needs in the most effective, economical, and timely manner. FAR 7.103, *Agency Head Responsibilities*, states that the agency head or designee shall prescribe procedures for “establishing criteria and thresholds at which increasingly greater detail and formality in the planning process is required as the acquisition becomes more complex and costly, specifying those cases in which a written plan shall be prepared.” Additionally, Agriculture’s Acquisition Regulation (AGAR)⁴ states that the Head of Contracting Activity⁵ (HCA) shall develop procedures to comply with FAR part 7.103.

The conditions noted above resulted because acquisition planning guidance was not provided to, or implemented in, ARS’ procurement function. Specifically, it was noted that ARS’ Head of Contracting Activity had not issued procedural guidance on how to implement FAR part 7, *Acquisition Planning*; as mandated by AGAR 48 CFR Chapter 4, part 407(1)(103). ARS’ HCA stated that ARS’ HCA’s office had not prescribed the required procedure because he felt that the guidance first needs to be developed at the departmental (USDA) level. ARS’ HCA would issue acquisition planning procedures for use in ARS based on departmental policy guidance. However, we determined that ARS’ HCA should have issued acquisition planning procedural guidance to ARS Facilities Division, with or without departmental (USDA) policy guidance. AGAR part 402.101 defines the HCA who has the responsibility for issuing the acquisition planning guidance; it states that, “the Head of Contracting Activity means the official who has overall responsibility for the contracting activity (i.e., Chief, Forest Service; Administrator, Agricultural Research Service; etc), or the individual designated by such an official to carry out the functions of the HCA.”

As a result of not utilizing a formal, structured, and clearly communicated acquisition planning process, which includes the establishment of thresholds defining when a formal acquisition plan should be prepared, there is an increased risk that ARS may not meet its procurement needs in the most effective, economical, and timely manner. There is also the risk that decisions and actions may not reflect sound business judgment that protects the government’s interests. Furthermore, there is the risk that in the absence of a structured and clearly communicated acquisition planning process, appropriate agency oversight may not occur at critical decision points, such as approval of decisions taken at the initial planning meeting, major changes to the acquisition strategy during the procurement process, and the development of government estimates.

We are not making any new recommendations at this time because this issue was noted in a previous contract review. We recommended that ARS’ HCA issue procedural guidance regarding acquisition planning and ARS’ Facilities Division should implement the procedural guidance issued by ARS’ HCA. ARS officials took exception to our recommendations regarding issuance and implementation of acquisition planning guidance. ARS believed that the

⁴ 48 CFR Chapter 4, part 407 (1) (103).

⁵ AGAR part 402.101 states that the Head of Contracting Activity means the official who has overall responsibility for managing the contracting activity (i.e. Chief, Forest Service; Administrator, Agricultural Research Service; etc) or the individual designated by such an official to carry out the functions of the HCA.

Department should issue the procedural guidance. We are working with ARS to reach agreement on the corrective actions needed to address our recommendations.

Finding 2: Legal Review Procedures for Contract Actions Were Not Performed

USDA's Departmental Regulation, DR 5000-4, *Legal Review of Contractual Actions*, establishes procedures for determining when to request a legal review of contractual actions. The regulation requires the legal review of solicitations for negotiated contracts that are expected to exceed \$500,000. Also, the Internal Control Plan⁶ for the Research, Education, and Economics (REE)⁷ Acquisition Program states that legal reviews are required for all actions identified in DR 5000-4 to ensure legal sufficiency of the solicitation and contract award documents.

The HNRCA repairs project was a sole source, negotiated contract, awarded at an initial contract price of \$2,485,000, and legal review procedures should have been performed. ARS' Facilities Division did not request a legal review of the solicitation. We noted that ARS had sent a solicitation boilerplate, which did not contain contract specific data, to the Office of General Counsel (OGC) for review in February 2009, and OGC did not send any review comments or recommendations. ARS concluded that a legal review was not necessary because no review comments were received from OGC regarding the boilerplate. However, we determined even if a legal review was done on the boilerplate solicitation, ARS should have had a legal review of the solicitation, which contained the contract specific data. Also, ARS should follow up with OGC if no response is received to ensure there are no legal issues.

An ARS' Facilities Division Contracting Officer stated that prior to awarding the contract, a determination was made that a legal review was not necessary. The Contracting Officer further stated that the determination not to seek legal review was based on the solicitation document's format and language presented to OGC in February 2009. No response was received from OGC. Also, the Contracting Officer believes that the contract requirements for this project were typical of the construction work repetitively procured by the Facilities Contracts Branch, and that there were no complex legal issues to be considered.

As a result of not performing a legal review of the solicitation, ARS could be exposed to unintended legal consequences related to the contract. Also, ARS is not in compliance with the Department's regulation and its own guidance, which is designed to protect it from legal risks.

We are not making a recommendation at this time, because this issue was noted in a previous contract review. We recommended that ARS should request and obtain a legal review of solicitations, with project specific data, for negotiated contracts that are expected to exceed \$500,000. ARS officials agreed with our recommendation.

⁶ The Internal Control Plan specifies procedures that are to be followed at each step of the procurement process, assuring that procurement policy objectives are being met and that quality standards are being upheld.

⁷ REE is the USDA mission area that provides oversight and guidance to its agencies which include ARS, the National Institute of Food and Agriculture, the Economic Research Service, and the National Agricultural Statistics Service.

Finding 3: The Rationale for a Non-Competitive Contract Award Was Not Included in Contract Award Publication on FedBizOpps.gov

ARS publicized the contract post-award notice on FedBizOpps.gov. However, it did not indicate that the contract was awarded on a sole-source basis, and it did not include the rationale for using a non-competitive approach in awarding the contract.

According to FAR 5.705(b), *Publicizing Post-Award*, if a contract action is not both fixed-priced and competitively awarded, the agency is required to publicize the award notice and include the rationale for using other than a fixed-priced and/or competitive approach in the description. These guidelines further state that when a contract or order is awarded pursuant to a small business contracting authority (e.g., 8(a) Business Development Program), the rationale for not using competition must be included in the award notice.

The Contracting Officer stated that he thought the documentation of the rationale was not required for contracts awarded under the SBA 8(a) Business Development Program, since the non-competitive approach was authorized by statute, for contracts under \$3.5 million. However, we determined that the Contracting Officer should have included the rationale for awarding the contract on a sole-source basis in the post-award publication, as required by FAR 5.705(b).

By excluding the rationale for not using competition for this contract, awarded pursuant to SBA's 8(a) Business Development Program, the Recovery Act's requirements for enhanced transparency in the contracting process to the public was impaired. ARS' rationale for awarding the contract as sole source was justified. However, they should have stated the reason for not using competition on FedBizOpps.gov as required by FAR 5.705(b).

We are not making a new recommendation at this time, because this issue was noted in a previous contract review. We recommended that ARS' management should take the necessary action to provide complete and timely reporting for Recovery Act contracts posted on FedBizOpps.gov.

Finding 4: Contractor's Invoice Was Not Paid Timely

At the completion of audit fieldwork, ARS' Facilities Division had processed six contractor invoices for payment totaling \$2,700,426. However, we noted that one invoice, in the amount of \$60,610.50, was paid 20 days after the due date.

FAR Part 32.904(d)(i) states that, for construction contracts, the due date for progress payments based on Contracting Officer's approval of the estimated amount and value of work or services performed, including payments for reaching milestones in any project, is 14 days after the designated billing office receives a proper payment request.

A Financial Management Division official stated that the late payment was due to technical difficulties that ARS experienced in payment processing, when it changed its accounting system

from the Foundation Financial Information System (FFIS) to the Financial Management Modernization Initiative (FMMI).

As a result of not paying the vendor in a timely manner, ARS incurred and paid a late payment interest penalty of \$147.74.

We are not making a recommendation since ARS has resolved the technical difficulties it had in payment processing by successfully changing its accounting system from FFIS to FMMI. We reviewed subsequent contractor invoices and noted that they were all paid in a timely manner.