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DATE: August 13, 2009

REPLY TO
ATTN OF HY-0813-0001

TO: Tom Tidwell
Chief
USDA Forest Service
Washington, D.C.

FROM: BRIAN L. HAASER
Special Agent-in-Charge
for Investigations

SUBJECT: Contract Compliance Review - Toilet Structures Upgrade Projects, Spokane, WA
American Recovery and Reinvestment Act of 2009

We conducted a contract compliance review based on referrals (RATB-R-0002, RATB-R-0005) from the Recovery Accountability and Transparency Board (RATB), of two contracts let by the United States Department of Agriculture's (USDA) Forest Service and funded by the American Recovery and Reinvestment Act of 2009 (Recovery Act). We were specifically asked to look at the contractor's possible lack of registration and that the contract award was not entered in the Federal Procurement Data System (FPDS). We were also asked to look at whether the Forest Service requirements had been split into two contracts to avoid special reporting requirements for Recovery Act contracts exceeding \$500,000.

This review is one of a series of contract compliance reviews we are conducting as a result of referrals from the RATB. In each, we reviewed relevant documentation and talked to contracting personnel. We reviewed the specific areas of concern raised by the RATB, checked for compliance with the Contract Checklist provided by the RATB, and verified the contract type used.

Project Summary

The Forest Service entered into two contracts with CXT, Inc., Spokane, Washington: AG-4419-K-09-0002 (March 13, 2009) for the purchase, delivery and installation of twenty-three (23)¹ concrete vault toilet structures (award amount \$462,912.30) and AG-4419-K-09-0003 (March 23, 2009) for the purchase, delivery and installation of two (2) additional concrete vault

¹ Due to an error in the description, this contract was reported as the purchase of 22 toilet structures.

toilet structures (award amount \$43,270.30) for placement within the Mark Twain National Forest. The contracts were funded with Recovery Act funds designated for “Capital Improvement and Maintenance,” for priority road, bridge and trail maintenance and decommissioning including related watershed restoration and ecosystem enhancement projects; facilities improvement, maintenance and renovation; remediation of abandoned mine sites; and support costs necessary to carry out this work. These two contracts were among the projects that were identified by the Forest Service as ones that could be acted upon within seven (7) days of the enactment of the Recovery Act.

The contracts in question were firm fixed price delivery orders under blanket purchase agreement (BPA) AG-82X9-B-08-0010. The BPA with CXT for toilet structures had been established by the Forest Service under CXT’s Federal Supply Schedule contract (GS-07F-0602N) prior to the Recovery Act as Forest Service had already planned on purchasing toilet structures. BPAs entered into under Federal Supply Schedule contracts are considered to be issued using full and open competition. See Federal Acquisition Regulation (FAR) 8.404(a).

The toilet structures purchased from CXT, Inc., are precast concrete, have special technology to dissipate odors, are resistant to vandals, require low maintenance, and are handicap accessible as required by the Americans with Disabilities Act.

Results of Review

The following are the results of our review of the issues raised by the RATB:

1. **Registration and FPDS usage:** We found that CXT, Inc. has a Central Contractor Registration (CCR) number and a Data Universal Numbering System (DUNS) number. We also found that the Forest Service completed FPDS award notices for both AG-4419-K-09-0002 and AG-4419-K-09-0003.
2. **Contract Splitting:** The OMB guidance issued on February 18, 2009, required agencies to provide a summary of contracts or orders over \$500,000, including a description of the required products and services, which would be made publicly available and linked to Recovery.gov (OMB Initial Implementing Guidance (M-09-10) at 6.2 (4)).² Although CXT entered into two contracts for the same items that together was over \$500,000, we did not find there was any effort to split requirements into two contracts to avoid this OMB requirement. We found that Forest Service initially bought only 23 concrete toilet structures, because it did not think it had more money available; other requirements, however, turned out to cost less than originally anticipated, so the Forest Service used the extra money to order two additional toilet structures.

² As of March 31, 2009, the FAR, 5.705(a), requires agencies to publicize the award notices for contracts and orders over the same amount and ensure the description includes a narrative of the products and services that is clear and unambiguous to the general public 74 Fed. Reg. 14633, 14638.

In addition, we found other issues related to the procurements:

1. **Excluded Parties List:** We noted in our review that the Excluded Parties List was not initially checked prior to award as is required in FAR Part 9.405. We reviewed the Excluded Parties List and found that CXT, Inc. is not an excluded party. We understand that the Contracting Officer (CO) did not check the Excluded Parties List because the CO assumed the contractor was not on the List as the BPA had recently been negotiated and if an issue had arisen during the course of the BPA the CO would normally be notified by the Forest Service headquarters. An Affirmative Responsibility Determination was made and there was a finding that the contractor was qualified.
2. **Environmental Clauses:** We noted that the contracts both omitted FAR 23.8 – Ozone Depletion Substances. This clause is applicable to both contracts as certain products required in the manufacture of toilet structures may contain ozone-depleting substances such as concrete color additives, caulks, sealants, grouts, epoxy concrete adhesives, and concrete paint and pigment sealers. The Forest Service is modifying the contracts to add this clause.

This compliance review determined, in the areas reviewed, that the contracts substantially complied with the FAR and the new Recovery Act requirements, with the few noted exceptions. The Forest Service is modifying the contracts to address the issues identified during our review. As a result, we are closing our file.

If you or your staff has any questions regarding the above, please contact William Squires, Assistant Special Agent-in-Charge, at (212) 264-8400 [REDACTED] or me at 301-504-2000.

cc:

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