



U.S. Department of Agriculture

Office of Inspector General



**General Procurement Oversight Audit of
Beltsville's Agricultural Research Service
National Agricultural Library Bricks Repair
Contract Awarded to Vigil Contracting, Inc.**

**Audit Report 02703-03-HQ
May 2011**



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



DATE: May 6, 2011

AUDIT
NUMBER: 02703-03-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: General Procurement Oversight Audit of Beltsville's Agricultural Research Service's National Agricultural Library Bricks Repair Contract Awarded to Vigil Contracting, Inc.

This report presents the results of the General Procurement Oversight Audit of Beltsville's Agricultural Research Service's National Agricultural Library Bricks Repair Contract awarded to Vigil Contracting, Inc. Your response to the official draft is included in its entirety as an exhibit to this report.

Regis & Associates, PC, was engaged to conduct the audit to ensure that the transparency and accountability requirements of the Recovery Act are met and to ensure that Agricultural Research Service's Recovery Act procurement activities are performed in accordance with Federal Acquisition Regulations (FAR), Office of Management and Budget guidance, and Recovery Act requirements. During our oversight of the contract, we reviewed Regis & Associates, PC's report and related documentation. Our review, as differentiated from an audit, in accordance with Government Auditing Standards (issued by the Comptroller General of the United States), disclosed no instances where Regis & Associates, PC's audit did not comply, in all material respects, with Government Auditing Standards.

Based on your response, we are able to reach management decision on Recommendations 3 and 4 contained in this report. Please follow your agency's internal procedures in forwarding documentation for final action to the Office of the Chief Financial Officer.

Management decision has not been reached for Recommendations 1 and 2. ARS stated that the guidance in AGAR 48, Chapter 4, part 407.103, only contains one sentence which is not sufficient for Heads of Contracting Activities (HCA) to comply with FAR 7.103. ARS believes that the Department needs to issue the guidance required by FAR 7.103. According to AGAR part 402.101, the “Head of the 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.” Therefore, we still feel the responsibility for developing the procedures, as stated in FAR 7.103, is with the HCA or designated individual and we consider the recommendation valid. The OIG will meet with the Office of Procurement and Property Management (OPPM) to discuss the Department and USDA Agencies’ implementation of FAR 7.103 and AGAR 48, Chapter 4, part 407.103. We will inform ARS of the results of our discussions with OPPM in order for you to take the necessary actions to reach a management decision for these two recommendations.

In accordance with Departmental Regulation 1720-1, please furnish a reply within 60 days, describing the corrective actions taken or planned, and timeframes for implementing the recommendations for which management decisions have not been reached. Please note that the regulation requires management decision to be reached on all recommendations within 6 months from report issuance, and final action to be taken within 1 year of each management decision to prevent being listed in the Department’s annual Performance and Accountability Report.

We appreciate the courtesies and cooperation extended to us by members of your staff during our audit fieldwork and subsequent discussions.

DATE: April 29, 2011

AUDIT
NUMBER: 02703-03-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 National Agricultural Library's Brick
Repair Contract - Awarded by Agricultural Research Service to Vigil
Contracting, Inc.

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 October 6, 2009, ARS awarded a sole-source, negotiated, firm fixed price construction contract under the 8(a) Business Development Program¹ for \$1,357,177 to Vigil Contracting, Inc., to repair the brick façade of the National Agricultural Library (NAL), located in Beltsville, Maryland. The contract was completed, and the contractor paid in full, as of the end of November 2010. 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.

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

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

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.

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 Regulations (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 department 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.

During the course of our review, we noted that ARS' Facilities Division did not document the acquisition planning performed or request a legal review for this contract. Also, the rationale for awarding the contract on a sole source, non-competitive basis was not publicized on the Federal Business Opportunities (FedBizOpps) website as required. We noted during the course of our review that ARS developed and documented its policies and procedures to ensure agency and recipient Recovery Act reporting was properly and consistently performed.³ We also noted that ARS' contracting staff, including the contracting officer, contract specialist, and contracting officer's technical representative, were experienced and qualified to award and monitor the contract.

Finding 1: ARS' Acquisition Planning Process Should be Formalized

During our audit, we reviewed Vigil Contracting, Inc.'s contract file to assess the existence and adequacy of acquisition planning for the NAL brick façade repair project. We noted there was

³ We communicated this issue in a previous report (02703-01-HQ).

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.

In addition, we noted that the required⁴ contract file checklist indicates one of the key phases in a procurement is acquisition planning, and this contract file did not contain a completed contract file checklist of its contents.

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)⁵ states that the Head of Contracting Activity⁶ (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 needed to be developed at the departmental (USDA) level. Based on departmental policy guidance, ARS’ HCA would issue acquisition planning procedures for use in ARS. However, we determined that ARS’ HCA should have issued acquisition planning procedural guidance to ARS Facilities Division, with or without a 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

⁴ Procurement and Property Division Policy Memorandum, number: 4-02.

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

⁶ 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.

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.

Recommendation 1

ARS' Head of Contracting Activity should issue procedural guidance on the implementation of the provisions of FAR part 7, *Acquisition Planning*; as mandated by AGAR 48 CFR Chapter 4, part 407(1)(103).

Recommendation 2

ARS' Facilities Division should implement the procedural guidance issued by ARS' Head of Contracting Activity, as noted in Recommendation 1. The resulting acquisition planning process should be formalized, documented, and communicated to appropriate staff.

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 Plan⁷ for the Research, Education, and Economics (REE)⁸ 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. DR 5000-4 further requires that contracting officers document a brief statement, in a memorandum, detailing their decision not to obtain legal review.

The NAL Brick Repairs project was a sole source, negotiated contract, awarded at a contract price of \$1,357,177 and legal review procedures should have been performed. ARS' Facilities Division did not request a legal review of the solicitation, and did not document the decision and reasons for not seeking a legal review in the contract file. We noted that ARS had sent a solicitation boilerplate, which did not contain contract specific data, to the Office of the General Counsel (OGC) for review in February 2009, and OGC did not send any review comments or

⁷ 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.

⁸ 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.

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.

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.

Recommendation 3

ARS should request a legal review of solicitations for negotiated contracts that are expected to exceed \$500,000, and follow-up with OGC if there is no response. The solicitation sent to OGC for legal review should contain project specific data, such as solicitation number, description, location of project, scope of services required, cost range and limitations, type of contract, estimated start and completion dates, relevant FAR clauses, and any significant evaluation factors.

Finding 3: The Rationale for Awarding the Contract on a Sole Source Basis Was Not Included in the Award Notice

ARS publicized the contract post-award notice on FedBizOpps.gov, indicating that a contract funded by the Recovery Act was awarded to an 8(a) Business Development Program contractor, on a sole-source basis. However, it did not include the rationale for awarding the contract on a sole-source basis in the post-award publication on FedBizOpps.gov.

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 in the description, the rationale for using other than a fixed-priced and/or competitive approach. 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 were 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).

Recommendation 4

ARS' management should comply with FAR part 5.7, to ensure that Contracting Officers report the rationale for awarding contracts in the post-award notice on FedBizOpps.gov; this includes contracts awarded under the SBA 8(a) Business Development Program on a sole source basis.

USDA'S

AGRICULTURAL RESEARCH SERVICE

RESPONSE TO AUDIT REPORT

April 26, 2011

SUBJECT: Management's Response to Recommendations in Audit 02703-03-HQ – General Procurement Oversight Audit of Beltsville's Agricultural Research Service National Agricultural Library Bricks Repair Contract Awarded to Vigil Contracting, Inc.

TO: Jon M. Holladay
Acting Chief Financial Officer
Office of the Chief Financial Officer

Gil H. Harden
Assistant Inspector General for Audit
Office of the Inspector General

FROM: Michelle D. Garner /s/
Acting Director, Financial Management Division

The Agricultural Research Service (ARS) provides the following responses to audit Recommendations 1 through 4 in Audit 02703-03-HQ General Procurement Oversight Audit of Beltsville's Agricultural Research Service National Agricultural Library Bricks Repair Contract Awarded to Vigil Contracting, Inc.

Finding 1: ARS' Acquisition Planning Process Should be Formalized

Recommendation 1

ARS's Head of Contracting Activity (HCA) should issue procedural guidance on the implementation of the provisions of FAR Part 7, *Acquisition Planning*; as mandated by AGAR 48 CFR Chapter 4, part 407(1)(103).

Agency Response

ARS takes exception to Recommendation 1 & 2. AGAR 48 Chapter 4, Part 407.103 only contains one sentence stating, "HCA's shall develop procedures to comply with FAR 7.103." This is not sufficient guidance for Department of Agriculture (USDA) HCA's to follow. FAR 7.103(d) & (f) states Agencies (meaning USDA) shall "establish criteria and thresholds at which increasing greater detail and formality in the planning process is required... specifying those cases in which a written plan shall be prepared."

It further goes on to say, “ensuring that the principles of this subpart are used, as appropriate, for those acquisitions that do not require a written plan as well as those that do.” This particular acquisition did follow all the principles of FAR 7.103 and the Contracting Officer determined a written formal plan was not needed, which was reasonable in this case.

Once the Department issues the guidance required by the FAR 7.103, which will need to be vetted through the Procurement Council, ARS will comply with any new additional guidance.

Recommendation 2

ARS's Facilities Division should implement the procedural guidance issued by ARS' HCA, as noted in Recommendation 1. The resulting acquisition planning process should be formalized, documented, and communicated to appropriate staff.

Agency Response

See Response to Recommendation 1.

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

Recommendation 3

ARS should request a legal review of solicitations for negotiated contracts that are expected to exceed \$500,000 and follow-up with Office of General Council (OGC) if there is no response. The solicitation sent to OGC for legal review should contain project specific data, such as solicitation number, description, location of project, scope of services required, cost range and limitations, type of contract, estimated start and completion dates, relevant FAR clauses, and any significant evaluation factors.

Agency Response

ARS concurs with this recommendation. Since the previous review, ARS has been requesting OGC review all solicitations for negotiated contracts that exceed \$500,000.

Finding 3: The Rationale for Awarding the Contract on a Sole Source Basis Was Not Included in the Award Notice

Recommendation 4

ARS' management should comply with FAR part 5.7 to ensure that Contracting Officers report the rationale for awarding contracts in the post-award notice on FedBizOpps.gov; this includes contracts awarded under the SBA 8(a) Business Development Program on a sole source basis.

Agency Response

ARS concurs with this recommendation. ARS is now including in the FedBizOpps post-award notice the rationale for the award of contracts on a sole source basis to firms under the SBA 8(a) Program.

The Agency issued guidance in June 2010 (APD Alert No. 2010-08) outlining the reporting requirements in FPDS-NG for the American Recovery and Reinvestment Act of 2009. ARS will update this guidance to require the posting of each sole source rationale.

Questions regarding this memorandum can be directed to Robert H. Magill, Assistant Director, Financial Management Division at 301-504-1257 or via email at Robert.Magill@ars.usda.gov.

cc:

L. Cullumber, APD

R. Herchak, FD