



U.S. Department of Agriculture
Office of Inspector General
Washington, D.C. 20250



DATE: March 11, 2010

REPLY TO
ATTN OF: 08703-06-SF

TO: Thomas L. Tidwell
Chief
Forest Service

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

SUBJECT: The Recovery Act – Forest Service Abandoned Mine Remediation (1)

The American Recovery and Reinvestment Act (Recovery Act) of 2009 included \$650 million for the Forest Service (FS) to implement capital improvement and maintenance (CIM) projects, of which \$22.7 million was approved for the remediation of abandoned mines on National Forest System land. FS' Northern region received \$4 million and is using contracts to competitively award these funds. In assessing the region's Recovery Act policies, procedures, and controls over Recovery Act-funded abandoned mine projects, we found that a number of necessary Recovery Act provisions were either not included or inadequately stated in the executed contracts. This occurred because FS did not have a standard template for the Recovery Act contracts, but instead allowed the Contracting Officers (CO) to determine for themselves which Recovery Act provisions to include in their contracts and the extent to which the provisions would be described. The FS Washington Office Branch Chief for Acquisition Management responsible for the development of the contract templates agreed that one specific to the Recovery Act was needed. If the Recovery Act provisions are not included, FS would not be able to enforce contractors' compliance with them. This issue, along with any others identified, will be compiled into a final report at the conclusion of our audit.

The Recovery Act requires changes to the normal way FS administers contracts, including the need to add special terms and provisions to enhance the accountability and transparency of Recovery Act funds. The Office of Management and Budget (OMB) directed Federal agencies to include in their contracts any terms and conditions needed to implement the Recovery Act provisions.¹

FS established four specialized Economic Recovery Operations Centers (EROCs) that are responsible for executing and managing FS' Recovery Act awards in a consistent manner

¹OMB Memorandum M-09-15, *Updated Implementing Guidance for the American Recovery and Reinvestment Act of 2009*, April 3, 2009.

agencywide; the Intermountain EROC manages and oversees the Northern Region's Recovery Act contract awards. As part of its standardization effort, EROC staff use standard contract templates from the Integrated Acquisition System (IAS) as the basis for preparing every FS Recovery Act contract.² We reviewed the contract templates from IAS that the Intermountain EROC uses and two of the region's executed contract awards (totaling over \$57,000) and found that the executed contract awards, and the template serving as their foundation, lacked a number of required or necessary Recovery Act provisions. Specifically, the contracts did not include language stating that:

- Contractors and their subcontractors are responsible for complying with all applicable Recovery Act requirements;
- Contractors and their subcontractors are required to comply with the Recovery Act's Buy American requirement;
- Contract recipients are responsible for complying with the Recovery Act's recipient reporting requirements;
- OIG has access to contractor and subcontractor records; and
- FS has the right to suspend or terminate a contract or debar a contractor for failure to comply with Recovery Act requirements.

According to the COs at the Intermountain EROC, there was no standard template in IAS specifically for the Recovery Act. For Recovery Act awards, the COs would generally attach whatever Recovery Act requirements they believed necessary to the standard template obtained from IAS. Specifically, for each contract they worked on, the COs would determine for themselves which Recovery Act provisions to include, and to what extent the provisions would be described in the contract, since there was no standard template in IAS containing the required Recovery Act provisions. This resulted in inconsistencies between contracts. Accordingly, the two contracts we reviewed did not contain all the necessary Recovery Act requirements.

Following are the missing Recovery Act provisions discussed in more detail.

Contractors' Compliance with Recovery Act Requirements

The contract template in IAS did not include provisions directing contractors to comply with all Recovery Act requirements. In addition, the contract template did not inform contractors of OMB guidance developed specifically to ensure consistent interpretation of Recovery Act requirements, such as OMB memorandum M-09-21, providing instructions on quantifying the jobs created and retained with Recovery Act funding, and OMB memorandum M-09-18, instructing recipients on the nature and limitation of reimbursable Recovery Act administrative costs. The template also did not contain provisions to control subcontractors' use of Recovery Act funds, since contractors may in turn contract out portions of the work to subcontractors. FS' contract template directed contractors to notify their subcontractors that they are also subject to the same terms and conditions stated in the primary contract; however, the template did not specifically require contractors to include Recovery Act terms in their contracts to subcontractors. In the absence of such pass-through language, subcontractors could receive substantial amounts of Recovery Act money without being

² IAS is a commercial off-the-shelf software application that FS uses to administer government contracts.

subject to the Recovery Act requirements. The award template needs to include a provision directing contractors to be aware of and comply with all Recovery Act requirements. Without such general provisions, Recovery Act contractors could be exempt from Recovery Act requirements.

Buy American Requirement

A section of the U.S. Code³ explains Congress' expectation that recipients of financial assistance or contracts buy American-made products and equipment, and that each Federal agency is responsible for providing the recipients notice of this requirement when providing financial assistance or awarding contracts. However, the contract template we reviewed at the Intermountain EROC used for Recovery Act projects did not include the Buy American Act provision. The CO believed that the provision was not necessary for service type contracts and removed the clause from the contract template. However, another CO at the Intermountain EROC we interviewed stated that some service contracts may require the purchase of equipment or materials to perform the contracted service and in those cases, the Buy American Act provision would be warranted. Subpart 25.1 of the Federal Acquisition Regulations (FAR) requires that items purchased through service contracts also include the provision that purchase of equipment and supplies exceeding a certain micro-purchase threshold⁴ be made in America. Because it is likely that many of the service contracts under the Recovery Act administered by the EROCs may require the purchase of equipment and supplies exceeding the micro-purchase threshold, we believe that all service type contracts should contain the Buy American Act provision to ensure that all contractors are fully aware of the requirement.

Recipient Reporting Requirement

The standard contract template did not adequately disclose the contract recipient reporting requirements. The Recovery Act requires that contract recipients periodically report certain information about their Recovery Act-funded projects, such as the amount of Recovery Act funds invoiced for the reporting period, significant services performed or supplies delivered, and the contractor's progress towards the completion of the project. According to FS' Recovery Act Program Direction,⁵ FS must appropriately inform recipients of the reporting requirements through contract clauses or provisions. The contracts we reviewed only referenced the FAR Section (52.204-11) on Recipient Reporting. Although the contracts included a FAR reference, contractors would have to research the FAR reference to know what was actually required. Therefore, a mere reference to this pertinent Recovery Act provision was insufficient to adequately inform contractors of their reporting responsibilities. Furthermore, FS Recovery Act-related contracts did not specify that the contractor had reporting responsibilities to report data on the www.federalreporting.gov website and that prior registration is necessary. To ensure that contractors comply with the reporting requirement and that they consistently and accurately report the necessary information, the Recovery Act reporting requirement should be fully described in the contract.

³ 7 U.S.C. §7012, Purchase of American-Made Equipment and Products.

⁴ Currently \$2,500 for equipment and supplies and \$2,000 for construction materials.

⁵ FS Program Direction titled, "American Recovery and Reinvestment Act", Chapter 5, Grants, Agreements, and Contracts, October 2, 2009.

OIG's Right to Access Recovery Act-Related Records

The contract template did not specify OIG's rights to access Recovery Act-related records. Section 1515 of the Recovery Act provides authority for representatives of the Inspector General (IG) to examine each contract awarded involving Recovery Act funds. This includes any records of the contractor and its subcontractors or any State or local agencies administering such contracts. IG representatives may also interview any officer or employee of the contractor or subcontractors regarding such transactions. Notifying contractors of OIG's right to access records is an important control over the accountability of Recovery Act funds because it informs contractors and subcontractors that their use of Recovery Act funds is subject to a Federal audit, which serves as a deterrent to fraud, waste, and abuse.

Penalties for Non-Performance

The contract template did not adequately state the remedies FS has against those contractors who fail to perform or do not comply with the Recovery Act and other contract terms. The FAR requires Federal agencies to exercise appropriate contractual remedies if Recovery Act recipients fail to comply with the Recovery Act and other contract requirements.⁶ The FAR states that there are two types of standard termination provisions: a termination for the Government's convenience and a termination for default.⁷ Termination for the Government's convenience reserves the Government's right to terminate the contract when in the Government's best interest. A termination for default allows the Government to terminate the contract due to a default or breach of contract by the contractor. In the event of a termination, the contractor would be liable to the Government for any and all rights and remedies, as provided by the law. According to the FAR, these remedies also include suspension and debarment.⁸ Although the contract template included the two standard termination provisions discussed above, it did not specify the enforcement actions FS could ultimately take in response to the contractor's failure to comply with the Recovery Act provisions. FS should specifically state in the contract that the contract could be suspended or terminated or the contractor debarred if the contractor failed to comply with the terms of the Recovery Act. This would further ensure FS' legal rights to initiate enforcement actions when necessary.

To ensure consistent and sufficient accountability over Recovery Act-awarded funds, FS should immediately modify its contract templates in IAS to include the necessary Recovery Act provisions discussed above. On January 26, 2010, we discussed our concerns with the FS Washington Office Branch Chief for Acquisition Management responsible for the development of the contract templates. She agreed to take immediate action to create standard contract templates for the Recovery Act-funded projects.

Please provide a written response within 5 days that outlines your corrective action on this matter. If you have any questions, please contact me at (202) 720-6945, or have a member of your staff contact Steve Rickrode, Audit Director, Rural Development and Natural Resources Division, at (202) 690-4483.

⁶FAR 4.1501, 25.607, and 52.212-4

⁷FAR 49.402, 49.502, 52.249-2, and 52.249-8

⁸FAR 9.406 and 9.407



Forest
Service

Washington
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1400 Independence Avenue, SW
Washington, DC 20250

File Code: 1430-1

Date: March 25, 2010

Route To:

Subject: The Recovery Act Forest Service Abandoned Mine Remediation (1); OIG Report # 08703-6-SF

To: Robert W. Young, Assistant Inspector General For Audit

This letter is in response to the subject Office of Inspector General (OIG) report dated March 11, 2010. The OIG report cites that the FS contract templates used for ARRA awards lacked required or necessary American Recovery and Reinvestment Act of 2009 (Recovery Act) provisions. The FS created a template in IAS with all of the FAR recovery act clauses and provisions and distributed a notice regarding the template to the EROC Leads on January 26, 2010 (see attached). This template can be added to other standard contract templates, as deemed necessary by the Contracting Officer. Contracting Officers will continue to utilize the FAR in determining the applicability of specific clauses since not all recovery clauses are applicable for all recovery contracts. However, the finding recommends that additional language be put into all recovery contracts over and above the FAR clauses and provisions.

The Agency's Acquisition Management Staff followed OMB direction to ensure that the contract templates included the standard provisions of FAR, AGAR and FSAR clauses that are sufficient to protect the government's interests regarding Recovery Act contracts. Any contract clause language which is not included in the FAR, AGAR, or FSAR must be approved by USDA and submitted to the Federal Register for public comment. The Agency has accordingly, added wording in the award letters that include the OIG recommended provisions in addition to existing disclosures and that notifies 1) contractors of the Inspector General's rights to access records and 2) states that the Government has the right to take actions as it deems necessary for contractor's failure to perform or who do not comply with Recovery Act and other contract terms.

Regarding the report's recommendations, the FS has addressed the OIG recommendations and considers the corrective actions completed and is therefore requesting closure of the recommendations. Enclosed is the additional reference to be included in each contract template under the Recovery Act.

If you have any questions, please contact me at 202- 205-1321 or dcarmical@fs.fed.us.

/s/ <Karren Y. Alexander> (for): Donna M. Carmical
DONNA M. CARMICAL
Chief Financial Officer

cc: Donna M Carmical



Dave Dillard
Ronald Hooper
Laurie Lewandowski



Forest
Service

Washington
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1400 Independence Avenue, SW
Washington, DC 20250

File Code: 6300

Date: March 17, 2010

Route To:

Subject: Office of Inspector General Report

To: EROC Leads

We received a report issued by the Office of Inspector General concerning various perceived deficiencies in our contract templates. As a reminder:

1. All contracts shall use the ARRA mini and construction templates described in the attached email sent to you in January.
2. FAR Clause 52.204-11 American Recovery and Reinvestment Act-Reporting Requirements must be included in full text. (all ARRA clauses in the above templates are in full text)
3. If purchasing supplies or equipment in a service contract, include the applicable Buy American Act clause (see FAR 25.002 for guidance)
4. Effective immediately, include the following language in all award letters:

“As authorized by Section 1515 of the American Recovery and Reinvestment Act, representatives of the Inspector General are authorized to examine each contract awarded involving Recovery funds. This includes any records of the contractor and its subcontractors. IG representatives may also interview any officer or employee of the contractor or subcontractors regarding such transactions.”

“The Government has the right to take actions it deems necessary for contractor’s failure to perform or who do not comply with Recovery Act and other contract terms included in this contract.”

/s/ *H. Laurie Lewandowski*

H. LAURIE LEWANDOWSKI

Assistant Director, Policy and AQM Systems

cc: Sue Prentiss

Dave Dillard



