April 27, 2011

MEMORANDUM FOR SHAPOUR EBADI
DEPUTY REGIONAL COMMISSIONER (WP)

FROM: PAUL MALATINO P. Malat
DIRECTOR, OFFICE OF SPECIAL PROJECTS (JA-P)

SUBJECT: Questionable Use of Budget Activity PG61 to fund aspects of the Department of Homeland Security (DHS) St. Elizabeths Campus construction project
Memorandum Number A090168-04

This memo discusses two contract actions with project development costs inappropriately funded from the annual operations and maintenance budget, budget activity PG61. The costs in question represented: i) $4.96 million for master planning activities under a contract with Leo A Daly; and ii) $1.3 million for historic structure reports covering existing buildings located on the West Campus under a contract with Perkins+Will. Project-specific appropriations covering these activities were previously allocated and available under budget activity PG51 (new construction and acquisition). Use of PG61 to fund project-related development costs after receiving a designated appropriation exposes the Agency to the risk of an unauthorized augmentation of its appropriation, a violation of appropriation law. Further, treating project-related expenditures as annual operating expenses violates generally accepted accounting principles and PBS financial accounting policy, overstates operating expenses, understates construction costs, and could impact the calculation of rent. We suggest that these actions be re-evaluated from both an appropriations law as well as a financial accounting perspective. The results of this evaluation should be documented, and if necessary, funding adjustments should be made.

Actions in Question

(1) Contract GSP1109MK0043 awarded to Leo A Daly

This is a fixed price task order for a master plan amendment and related services. Initial award amount was $3 million, modified to a current obligated value of $4,959,264. The effective award date was July 21, 2009, with an estimated completion date of March 31,

2011. PBS budgetary policy[1] permits funding project planning activities out of the building operations budget activity account only if incurred prior to receiving a related line-item appropriation. PBS accounting policy[2] indicates that studies and related planning activities are properly expensed only if management believes the underlying project will not meet the capitalization threshold. In this instance, the master plan amendment costs alone exceed not only the capitalization threshold but the prospectus threshold[3] as well. Had policy guidance been followed, the task would have been funded out of PG51, not PG61; and the costs would have been recorded as construction-in-process and carried as an asset, not expensed in the year incurred. Correctly accounted for, these costs would also appear in the shell investment base used to calculate return on investment rent.

In its December 31, 2008, action granting conditional approval of the final master plan, the National Capital Planning Commission (NCPC) requested several specific actions, two of which necessitated amendments to the master plan. One required that GSA submit an amendment for the development on the District-owned East Campus of Saint Elizabeths. Development density limits on the West Campus necessitated this additional space on the adjoining East Campus, space intended to house the Federal Emergency Management Agency (FEMA). The other required an amendment to update plans for an expressway interchange and campus access road improvements. Phase 1 construction could not commence before the NCPC had determined that these conditions were substantially met. The contract with Leo A Daly is to produce these required amendments.

Viewed in context, the amendment covering transportation matters was a planned and necessary update to the original master planning effort. To the extent the original effort was both authorized and funded, which it was, this related effort is also authorized and funded. Even if the project fund balance were temporarily depleted, or the cost unanticipated, use of the more general funding source (PG61) when a specific line-item appropriation already exists is not permitted. This tenet of appropriations law is well established.[4]

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[1] *See* PBS's Financial Budgeting and Reporting Division's "Policy on Budget Activity Use for Federal Buildings Fund" (June 2009) at 2. PBS InSite: http://pbsportal.pbs.gsa.gov:7777/portal/page?_pageid=81,448362&_dad=portal&_schema=PORTAL

[2] *See* PBS's Financial Operations Division's "Real Property Accounting Handbook, Issue 02" (Sept 2007) at 20. PBS InSite: http://pbsportal.pbs.gsa.gov:7777/portal/page?_pageid=81,104818&_dad=portal&_schema=PORTAL

[3] The prospectus threshold is the inflation adjusted estimated dollar value of a proposed construction project above which congressional authorization is sought. For FY09 the amount was $2.66M as referenced in section 102-72.35 of the Financial Management Regulation (FMR).

[4] Principles of Federal Appropriations Law: Third Edition, Volume I, GAO-04-261SP, (Jan 1, 2004), at p 4-8. "A specific appropriation must be used to the exclusion of a more general appropriation that might otherwise have been viewed as available for the particular item…. It follows that deliberately charging the wrong appropriation for purposes of expediency or administrative convenience, with the expectation of rectifying the situation by a

In contrast to the current action, costs incurred for the original master planning effort were appropriately capitalized and charged against the project budget (PG51). The record provides no justification for the current budgetary and accounting treatment.

The only ambiguity then pertains to the FEMA-related master planning and whether congress has appropriated funds for this purpose. Use of PG61 to fund studies and preplanning efforts is permitted for projects under consideration, but once approved and funded, project costs are charged against the relevant capital budget activity.[5] Further, while it is true that congress has not yet funded Phase 2 construction, GSA had in fact requested and received funding for this planning effort. Its FY 2009 prospectus submitted to the relevant oversight committees, reads in part:

> *"…GSA also requests funding for Design and Review to begin Development Phase 2 which includes a national headquarters for DHS, the Federal Management Agency, (FEMA), and the national Operations Center (NOC). Furthermore, GSA seeks authorization for all aspects of acquisition and development."*

The full request was appropriated on March 11, 2009 under Public Law 111-8. As such, there is no apparent justification for the current budgetary and accounting treatment.

As a postscript, Public Law 111-5, The American Recovery and Reinvestment Act of 2009 (ARRA), provided the project with an additional $450 million (an amount approximately equivalent to the FY 2010 prospectus request) outside the prospectus approval channel. This money has been used, in part, to award design contracts for both Phase 2 and Phase 3. Successful completion of the master planning effort is a prerequisite for this design work. Even if the use of PG61 funds had been originally justified, the cost would be transferred from budget activity PG61 to PG01 (ARRA) once the project received ARRA funding. The previously booked expenses would be reversed and capitalized as a project cost. In either case, whether funding is generated from PG51 or PG01, the cost associated with FEMA master planning should be capitalized and booked as construction-in-process.

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subsequent transfer from the right appropriation, violates 31 U.S.C. § 1301(a). 36 Comp. Gen. 386 (1956); 26 Comp. Gen. 902, 906 (1947); 19 Comp. Gen. 395 (1939); 14 Comp. Gen. 103 (1934); B-248284.2, Sept. 1, 1992; B-104135, Aug. 2, 1951; B-97772, May 18, 1951. The fact that the expenditure would be authorized under some other appropriation is irrelevant. Charging the "wrong" appropriation, unless authorized by some statute such as 31 U.S.C. § 1534, violates the purpose statute. …An unauthorized transfer violates 31 U.S.C. § 1301(a) because the transferred funds would be used for a purpose other than that for which they were originally appropriated. B-279886, Apr. 28, 1998; B-278121, Nov. 7, 1997; B-248284.2, Sept. 1, 1992. If the receiving appropriation is exceeded, the Antideficiency Act is also violated. "

[5] *See* PBS's Financial Budgeting and Reporting Division's "Policy on Budget Activity Use for Federal Buildings Fund" (June 2009) at 2. PBS InSite: *http://pbsportal.pbs.gsa.gov:7777/portal/page?_pageid=81,448362&_dad=portal&_schema=PORTAL*

(2) Modification under Contract GS11P05MKC0045 awarded to Perkins+Will

The second action in question is a $1.3 million contract modification for Historic Structure Reports (HSRs) or Building Preservation Plans (BPPs) covering all buildings on the west campus that contribute to Saint Elizabeths' National Historic Landmark status. These reports are required by the Programmatic Agreement that governs the consultation process mandated under the National Historic Preservation Act. The need to complete HSRs or BPPs can also arise outside of a project or as an element of pre-planning. In those instances, use of PG61 to fund the effort and accounting for the cost as a current period expense would be appropriate. In this instance, however, the project was already authorized, initial design funds had been appropriated, and design work was well underway. Under these circumstances, and because the cost involved exceeds the capitalization threshold, the cost incurred should have been charged against the project budget (PG51) and capitalized as an element of construction-in-process.

The action in question, Modification #PS06, was effective September 26, 2008, near the close of the fiscal year. It was comprised of a base amount of $700,000 covering Phase 1 buildings and two options for $300,000 each covering Phase 2 and Phase 3 buildings. The entire $1.3 million was obligated upon award and charged against PG61.

The underlying contract, held by Perkins+Will, was initially intended to provide architect-engineer services for Saint Elizabeths Phase 1, primarily new construction to house the United States Coast Guard headquarters and to provide parking. Final design of those facilities has been transferred to a separate design-build firm. Perkins+Will retained design tasks associated with campus infrastructure, security perimeter and some adaptive reuse. The HSR/BPP requirements, subcontracted by Perkins+Will to Wiss, Janney, Elstner Associates, Inc., were a known prerequisite to campus development and a continuation of historical documentation and analysis completed under separate, previous contract actions. All of the previous work was funded out of PG51 and capitalized as an element of construction-in-process. The record provides no apparent justification for the current budgetary and accounting treatment of these costs.

These observations were not made as part of an ongoing audit. Accordingly, we are making no formal recommendations. However, this memo will be made available to the independent public accountant, and may trigger additional testing as part of its annual audit of GSA's financial statements. We hope these observations will assist you in evaluating and mitigating the risk of unauthorized augmentation of your project appropriations and in ensuring that all project costs are captured and accurately reported. If we can be of further assistance, please contact me at 202-208-0021.