GENERAL SERVICES ADMINISTRATION
OFFICE OF INSPECTOR GENERAL

**REVIEW OF THE
GREATER SOUTHWEST REGION
PUBLIC BUILDINGS SERVICE
ENERGY SAVINGS
PERFORMANCE CONTRACT
TASK ORDERS
REPORT NUMBER A100169/P/7/R11006**

January 20, 2011

U.S. General Services Administration
Office of Inspector General

Date: January 20, 2011

Reply to
Attn of: Regional Inspector General for Auditing
Greater Southwest Region (JA-7)

Subject: Review of the Greater Southwest Region
Public Buildings Service
Energy Savings Performance Contract
Task Orders
Report Number A100169/P/7/R11006

To: J. D. Salinas
Regional Administrator
Greater Southwest Region (7A)

Jim Weller
Regional Commissioner
Public Buildings Service (7P)

Background

This report presents the results of the Office of Inspector General's review of the Greater Southwest Region (Region 7) Public Buildings Service (PBS) Energy Savings Performance Contract (ESPC) task orders. On March 30, 2010, Region 7 awarded two ESPC task orders totaling $28.8 million. Task Order GS-P07-10-UY-0007 was awarded to Honeywell International, Inc. against Department of Energy (DOE) ESPC Number DE-AM36-09G029035, in the amount of $10,317,613. Task Order GS-P07-10-UY-0006 was awarded to Schneider Electric Buildings Americas, Inc. against DOE ESPC Number DE-AM36-09G029042, in the amount of $18,496,666. Region 7 partially funded these task orders using American Recovery and Reinvestment Act of 2009 (ARRA) funding of $7,029,557 and $16,288,821, respectively

The DOE established the Federal Energy Management Program (FEMP) to assist federal agencies in improving energy efficiency and reducing energy costs in their facilities. The FEMP helps federal agencies identify, obtain, and implement alternative financing for energy efficiency, renewable energy, and water efficiency projects. The Super ESPCs were created by FEMP to provide a financing vehicle that allows federal agencies to accomplish energy savings projects without upfront capital costs and without special appropriations from Congress. Under the Super ESPC program, DOE competitively awarded 16 indefinite delivery/indefinite quantity ESPCs to energy service companies (ESCOs). The ESPCs establish the general scope of work, terms, and conditions for firm-fixed price delivery/task orders for performance-based energy projects at federally-owned buildings and facilities. Agencies implement ESPC projects by issuing delivery/task orders against the ESPCs.

An ESPC project is a partnership between a federal agency and an ESCO. The ESCO conducts a complete energy audit and identifies improvements that will save energy and reduce utility bills at the facility. The ESCO designs and constructs a project that meets the agency's needs and arranges financing to pay for it. The ESCO guarantees the installed energy conservation measures will result in a specified level of cost savings to the federal agency, which will be sufficient to pay the ESCO for the project. The agency uses the guaranteed cost savings to pay for building improvements over the life of the contract. After the contract ends, all additional cost savings accrue to the agency.

Federal agencies are authorized and encouraged to use ESPCs through a series of legislation and executive orders. The Consolidated Omnibus Budget Reconciliation Act of 1985 amended the National Energy Conservation Policy Act (NECPA) by adding Title VIII, which gave federal agencies the authority to enter into shared-energy-savings contracts with private-sector ESCOs. The Energy Policy Act of 1992 (Public Law 102-486) further amended NECPA to authorize federal agencies to execute guaranteed-savings contracts, or ESPCs, with private sector ESCOs. For an overview of the legislation and executive orders relating to ESPCs, see Appendix A.

With the enactment of ARRA, GSA PBS received $5.55 billion to improve energy efficiency, create "green" renewable energy jobs, and rebuild the United States infrastructure. According to GSA's June 2009 ARRA implementation guidance, $5 billion of the funds were available for obligation until September 30, 2010, and any obligation related to the $5 billion must be liquidated by September 30, 2015. Funding of approximately $353 million was provided to Region 7 for use in designated buildings and projects.

In March 2009, Region 7 was tasked with identifying projects, and developing and implementing plans to use ARRA funds within the GSA-established timeframes. Region 7 determined ARRA expenditures for energy improvements and enhancements could be innovatively accomplished using the DOE ESPCs. As much of the work involved upgrading the existing Building Automation Systems (BAS), Region 7 determined the best approach would be to contract directly with the companies providing operational controls for the BAS.

In March 2010, Region 7 non-competitively awarded two task orders, partially funded by ARRA, against the DOE ESPCs. The first was awarded to Honeywell International, Inc. (Honeywell). Region 7 prepared a justification to limit fair opportunity citing the agency's urgent need for the supplies or services and claimed this was awarded as a logical follow-on task order.

The second task order was awarded to Schneider Electric Buildings Americas, Inc. (Schneider). Region 7 prepared a justification to limit fair opportunity by again citing an urgent need for supplies or services and that only one awardee was capable of providing the supplies or services.

Objectives, Scope, and Methodology

Our audit objectives were to determine if Region 7:

(1) Awarded task orders in compliance with the regulations and guidance for ESPCs; and

(2) Has an effective process in place to verify the energy savings calculated by the Energy Service Company are accurate.

To accomplish our objectives, we:

- Reviewed the two ESPC task orders awarded in March 2010;
- Reviewed the process used by Region 7 in awarding the task orders and validating the ESCOs measurement and verification (M&V) plan;
- Reviewed training certificates and applicable licenses to ensure personnel assigned to M&V validation had the technical expertise (training and experience) to oversee the projects;
- Verified: (1) utility rates used in the cost savings calculations to ensure the rates per location were accurate, and (2) proposed energy savings calculated by the ESCO were accurate;
- Assessed the risk that illegal acts, material noncompliance, or abuse could occur with the issuance of the task orders;
- Assessed Region 7's internal controls related to our audit objectives;
- Reviewed prior ESPC task orders awarded by Region 7 to identify any findings or issues related to our audit objectives; and
- Met with the Region 7 Energy Team and the project manager for the reviewed task orders.

Audit work was conducted in the Region 7 field audit office, and site visits were made to several federal buildings and facilities included in the task orders.

We conducted the audit from June 2010 through September 2010 in accordance with generally accepted government auditing standards. These standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

Results of Audit

Region 7 was innovative in using ESPCs to optimize ARRA funds and make federal facilities more energy efficient. However, the Honeywell task order was not awarded in compliance with the competition requirements of the United States Code (USC), Federal Acquisition Regulation (FAR), and ESPC guidance because the justification for limiting fair opportunity was not valid. Region 7 inappropriately cited an urgent need for the supplies and services and logical follow-on exceptions. While the justification for the Schneider task order was also inappropriately based in part on urgency, we take no exception to that award because Region 7 also justified limiting fair opportunity on the basis that only a single source was capable of providing the required supplies or services. Further, we take no exception to the process Region 7 has in place to verify the energy savings calculated by the ESCO are accurate.

Compliance with Regulations and Guidance

The Honeywell task order (GS-P07-10-UY-0007) was not awarded in compliance with competition requirements of the USC, FAR, and ESPC guidance. In accordance with 41 USC § 253(a)(1), executive agencies shall obtain full and open competition through the use of competitive procedures and use the competitive procedure or combination of competitive procedures that is best suited under the circumstances of the procurement. Further, FAR 16.505(b)(1)(i) states that the contracting officer must provide each awardee a fair opportunity to be considered for each order exceeding $3,000 issued under multiple delivery order contracts or multiple task order contracts.

However, in accordance with 41 USC § 253(c) and FAR 16.505(b)(2), agencies may award task orders without fair opportunity under certain circumstances. Specifically, DOE ESPC Section H.3, Procedures for Awarding Task Orders, states that the agency contracting officer must provide each contractor a fair opportunity to be considered for any task order award unless one of the following exceptions applies:

A. The agency need for the supplies or services is so urgent that providing a fair opportunity would result in unacceptable delays;

B. Only one awardee is capable of providing the supplies or services required at the level of quality required because the supplies or services ordered are unique or highly specialized;

C. The order must be issued on a sole source basis in the interest of economy and efficiency as a logical follow-on to an order already issued under the contract, provided that all awardees were given a fair opportunity to be considered for the original task order; or

D. It is necessary to place an order to satisfy a minimum guarantee.

While Region 7 provided justification for limiting fair opportunity, this justification is not valid because Region 7 could not demonstrate an urgent need for the supplies or services. If any urgency existed, it was the need to award the task order within 30 days so that ARRA funds could be used.

The award justification cited DOE ESPC Section H.3.2 (A) which states “The agency need for the supplies or services is so urgent that providing a fair opportunity would result in unacceptable delays.” It also states:

> Based on the tight time frames to get this work awarded and completed, this contract needs to be awarded within the next 30 days...To meet the required schedules for award and completion, the contracts must be awarded immediately. To allow fair consideration to all contractors and to review all proposals received, would create an unacceptable risk for GSA to obtain this funding and making awards in a timely manner to meet the stimulus goals and requirements...

However, this basis is not viable. According to 41USC § 253(f)(4)(A):

> In no case may an executive agency…enter into a contract for property or services using procedures other than competitive procedures on the basis of the lack of advance planning or concerns related to the amount of funds available to the agency for procurement functions.

Further, OMB guidance dated February 18, 2009, stipulates the need to commence ARRA expenditures quickly, which does not in itself constitute sufficient justification to award contracts without competition.

In addition, in discussions about the task order, PBS personnel also cited the logical follow-on exception as a basis for not providing fair opportunity. Although Region 7 did not specifically cite ESPC Section H.3.2 that provides for a logical follow-on exception, the justification stated the following:

> We are seeking Honeywell to perform these services due to the fact they have already provided a building commissioning audit for the Oklahoma buildings. In addition, a building commissioning audit was performed by Central Office on the Laredo building… To avoid duplication of costs, efforts and delay, it is in the best interest of the Government to have Honeywell use the work they have already completed, as a logical follow on to the projects listed in this document.

According to FAR 16.505(b)(2)(iii) and DOE ESPC Section H.3.2 (C), orders may be issued on a sole source basis in the interest of economy and efficiency as a logical follow-on to **an order already issued under the contract**, provided that all awardees were given a fair opportunity to be considered for the original order.

We found Honeywell had performed a preliminary assessment (PA) in 2008 under its prior DOE ESPC. However no task order was awarded because Honeywell’s ESPC had reached its maximum ordering level. While the PA was for two of the buildings included in task order GS-P07-10-UY-0007, the logical follow-on exception is not valid because an order had not been issued, and DOE's prior ESPC contract was no longer in existence. As such, the justification for limiting fair opportunity in awarding the Honeywell task order was not valid.

The justification for the Schneider task order was also partly based on urgent need in accordance with DOE ESPC Section H.3.2 (A). However the justification also cited DOE ESPC Section H.3.2 (B) which states:

> Only one awardee is capable of providing the supplies or services at the level of quality required because the supplies or services are unique or highly specialized.
>
> The use of the contractor who is the manufacturer of the Energy Management Control System (EMCS) allows for full compliance with the scope, full access including the licensing, the controls systems, and first hand knowledge and expertise of the programming of the proprietary EMCS systems. The use of a contractor that has full control and access to the EMCS systems is essential to the Government's requirements, thereby precluding consideration of a product manufactured by another company.

Our site visits confirmed components of the EMCS in selected buildings were indeed Schneider-unique or Schneider-owned equipment. Therefore the portion of the justification stating "Only one awardee is capable of providing the supplies or services at the level of quality required because the supplies or services are unique or highly specialized" appears to provide an adequate exception to fair opportunity.

It should be noted Region 7's operational practice is to have the same manufacturer/contractor install EMCS in geographically contiguous groups of buildings to match their current EMCS in each location. The Schneider task order was awarded in accordance with this practice. However, the EMCS control equipment on buildings included on the Honeywell task order were originally manufactured by companies other than Honeywell.

<u>Recommendations</u>

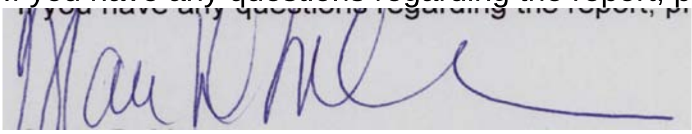
We recommend Region 7 ensures:

- Future justifications for other than full and open competition on all procurements are valid; and
- Region 7 personnel are aware of OMB guidance related to ARRA funds.

Management Comments

Based on discussions with management and their agreement to take corrective action (see Appendix B), we infer management concurs with our finding.

If you have any questions regarding the report, please contact me at 817-978-2571.



Grace D. McIver
Audit Manager
Greater Southwest Region (JA-7)

Attachments

REVIEW OF THE
GREATER SOUTHWEST REGION
PUBLIC BUILDINGS SERVICE
ENERGY SAVINGS
PERFORMANCE CONTRACTS
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APPENDIX A

Overview of Legislation and Executive Orders Relating to ESPC

The National Energy Conservation Policy Act (NECPA), by means of amendment to the Consolidated Omnibus Budget Reconciliation Act of 1985 (P.L. 99-272), gave federal agencies the authority to enter into shared-energy-savings contracts with private sector energy service companies (ESCOs), provided the: (1) contractor incurs all costs, and (2) term of the contract does not exceed 25 years. NECPA also requires annual measurement and verification energy audits and directs that aggregate annual payments not exceed what agencies would have paid for utilities otherwise.

The Energy Policy Act of 1992 (Public Law 102-486) further amended NECPA to authorize federal agencies to execute guaranteed-savings contracts, or energy savings performance contracts (ESPCs), with private sector ESCOs. It also directed the Department of Energy (DOE) to develop an ESPC regulation through a formal rulemaking process. The final ESPC rule was published on April 10, 1995, and implemented the DOE ESPC regulation at 10 CRF Part 436 Subpart B.

Executive Order 13123, June 3, 1999, defines requirements for agencies to meet specific energy goals, and strongly supports the use of alternative financing methods, including ESPCs, to achieve them.

The Ronald W. Reagan National Defense Authorization Act for FY 2005, P.L.108-375, Sec. 1090, Oct. 28, 2004, amended NECPA to extend ESPC authority through September 30, 2006, and revised the definition of energy savings to include water conservation measures.

Executive Order 13423, released in January 2007, requires federal facilities to reduce their energy use per square foot by 3 percent per year, 2006 –2015 relative to 2003. Also federal facilities must increase their use of renewable energy, and reduce water use by 2 percent per year, 2008 –2015 (or sixteen percent by end of 2015), relative to 2007.

Executive Order 13514, October 2009, issued by the Obama administration, builds and expands the energy reduction and environmental requirements of Executive Order 13423 by making reductions of greenhouse gas emissions a priority of the Federal Government, and by requiring agencies to develop sustainability plans focused on cost-effective projects and programs.

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APPENDIX B

Management's Comments

GSA

GSA Greater Southwest Region

January 4, 2011

MEMORANDUM FOR RODNEY J. HANSEN
REGIONAL INSPECTOR GENERAL FOR AUDITIING
GREATER SOUTHWEST REGION (JA-7)

THRU JUAN D. SALINAS
REGIONAL ADMINISTRATOR
GREATER SOUTHWEST REGION (7A)

FROM JAMES S. WELLER
REGIONAL COMMISSIONER
GREATER SOUTHWEST REGION (7P)

SUBJECT REVIEW OF THE GREATER SOUTHWEST REGION
PUBLIC BUILDING SERVICE
ENERGY SAVINGS PREFORMANCE CONTRACT
TASK ORDERS
REPORT NUMBER A100169

Thank you for the opportunity to review the subject report for a second time. We have reviewed your findings and will take appropriate corrective action.

This office would like to rescind our prior response dated November 23, 2010.

Thank you for your assistance. If you have any questions, please contact Bobby Davis, Acquisition Management Division Director, at 817-978-0193

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APPENDIX C

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