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**Homeland
Security**

September 24, 2010

MEMORANDUM FOR: Tony Russell
Regional Administrator, FEMA Region VI

Tonda L. Hadley

FROM: Tonda L. Hadley, Director
Central Regional Office

SUBJECT: *Xavier University of Louisiana, Contracting*
FEMA Disaster Number 1603-DR-LA
Public Assistance Identification Number 071-020BC-00
Audit Report Number DD-10-19

We are currently auditing \$75.4 million of Federal Emergency Management Agency (FEMA) public assistance funds awarded to Xavier University of Louisiana (Xavier) for disaster recovery work related to Hurricane Katrina. The purpose of this memorandum is to advise you of an issue that requires your immediate attention. As discussed below, Xavier did not openly compete a \$50 million contract for its general contractor as required by federal regulations; and the contract contained prohibited cost-plus-percentage-of-cost provisions. Further, Xavier officials have not been forthcoming in advising us of all their contractual activities and just disclosed that they plan on awarding another prohibited cost-plus contract for a \$6.7 million project to the same contractor without competition.

We are conducting this audit under the authority of the *Inspector General Act of 1978*, as amended, and according to generally accepted government auditing standards. Our overall objective is to determine whether Xavier accounted for and expended FEMA public assistance funds according to federal regulations and FEMA guidelines. At the conclusion of our audit, we plan to issue our complete audit report including any additional findings and recommendations.

Finding A: Open and Free Competition

Xavier awarded a \$50 million contract to its general contractor without competition and, therefore, did not comply with federal contracting requirements for open and free competition.¹ Generally, open and free competition means that all responsible sources are allowed to compete for contracts.² As such, subgrantees must advertise contract solicitations publically when projects are federally funded. FEMA reinforces this requirement in its *Public Assistance Guide*.³

FEMA and the Louisiana Governor's Office of Homeland Security and Emergency Preparedness (GOHSEP) were aware that Xavier did not openly compete the contract for its initial emergency and restoration work. Further, they were aware that Xavier continued using this contract after it resumed academic operations in January 2006. Although exigent circumstances sometimes justify awarding contracts without competition, Xavier should have competed the contract as soon as classes resumed at the latest.⁴ Therefore, Xavier's continued use of the contract was not acceptable. Xavier incurred \$32.6 million in contract costs through January 2006. By the end of August 2008, the total had climbed to \$49.6 million.

Finding B: Cost-Plus-Percentage-of-Cost Contract

In addition to being non-competitive, the contract Xavier awarded to its general contractor contained cost-plus-percentage-of-cost provisions. Federal regulations at 2 CFR 215.44(c) specifically prohibit these types of contracts because they provide an incentive for the contractor to incur as much cost as possible. FEMA and GOHSEP were aware in early 2006 that this was a prohibited contract.

FEMA staff expressed concern about cost reasonableness, but did not require Xavier to cease using the prohibited contract and compete the remaining work. Rather, FEMA performed a cost analysis to determine cost reasonableness. However, FEMA's cost analysis was based on a questionable use of the Cost Estimating Format (CEF) because the majority of the work was emergency restorative work and was more than 50% complete. FEMA prepared CEFs to determine reasonableness of costs for the emergency (Category B) work performed by Xavier's general contractor. FEMA's standard operating procedure for CEFs clearly states that a project must be permanent restorative work (Categories C through G), be less than 50% complete, and not be for emergency work, such as large-scale debris removal operations.⁵

When we discussed these issues with FEMA officials, they said they recognize that the CEF is not typically used for emergency work, but that FEMA relies on data from commercially acceptable sources when preparing a CEF to establish a basis for reasonable costs for all work

¹ 2 CFR 215.43 "All procurement transactions shall be conducted in a manner to provide, to the maximum extent practical, open and free competition."

² FAR Subpart 2.101, *Definitions*

³ FEMA *Public Assistance Guide*, FEMA 322, October 1999, page 39

⁴ For example, 44 CFR 13.36(c)(1) and (d)(4)(i), which apply to state and local governments, require performance of procurement transactions in a manner providing full and open competition except under certain circumstances. One allowable circumstance is when there is a public exigency or emergency for the requirement that will not permit a delay resulting from competitive solicitation.

⁵ www.fema.gov

when necessary. However, a cost estimate prepared after a contractor completes the work gives little assurance of cost reasonableness and is no substitute for open and free competition to assure reasonable costs.

Also, as stated previously under Finding A, FEMA officials were aware that Xavier continued to use this contract after completing its initial emergency and restoration work. When we discussed the problems with this contract with FEMA and GOHSEP officials on September 13, and 14, 2010, respectively, we were under the impression that Xavier was still using the contract for current work, and that it was the only contract being used for FEMA-funded projects. However, as discussed in Finding C below, that was not the case.

Finding C: Remaining Work

In our September 14, 2010, exit conference with Xavier officials, we advised them that we planned to recommend to FEMA that Xavier stop using the non-competitive, cost-plus contract for current work. However, they informed us that they were no longer using the contract and had competitively awarded subsequent contracts. At that point, we requested that they provide us copies of all contracts for FEMA-funded projects along with related solicitation and award documents. GOHSEP officials, who were present at the meeting, requested copies as well.

On September 15, 2010, Xavier officials provided us with a packet of contract documents that indicated Xavier had solicited competitive bids for several projects with a combined estimated total cost of about \$10.4 million. However, they also admitted that they had awarded a non-competitive \$6.7 million contract for work to be performed on a student center. We requested a copy of the student center contract; and Xavier subsequently emailed us a copy of a draft contract. The draft contract contained prohibited cost-plus-percentage-of-cost provisions and showed the contractor to be the same general contractor discussed above in Findings A and B.

Xavier officials have been less than forthcoming in providing contract documentation we have been requesting for months. We requested a complete list of contracts with associated dollar values and projects in our initial audit notification letter to Xavier dated May 13, 2010, and again in our July 7, 2010, audit entrance conference. In a July 20, 2010, meeting, Xavier officials assured us that they had provided all contract documents related to FEMA work. At that point, Xavier had advised us of only one contract related to FEMA work, the same contract discussed in Findings A and B.

Conclusion

Without open and free competition, FEMA has little assurance that contract costs are reasonable. Open and free competition increases the number of available contracting sources and thereby increases the opportunity for obtaining reasonable pricing from the most qualified contractors. Open and free competition also helps discourage and prevent favoritism, collusion, fraud, waste, and abuse. Additionally, cost-plus-percentage-of-cost contracts provide a disincentive to save costs and are strictly prohibited by federal regulations. Therefore, FEMA and GOHSEP should take immediate steps to stop Xavier from using these types of contracts.

RECOMMENDATIONS

We recommend that the Regional Administrator, FEMA Region VI:

Recommendation #1: Require the Louisiana Governor's Office of Homeland Security and Emergency Preparedness to advise Xavier University of Louisiana that, to qualify for federal assistance, it must follow federal contracting regulations and that continued non-compliance with federal regulations will jeopardize its funding (Findings A and B).

Recommendation #2: Require the Louisiana Governor's Office of Homeland Security and Emergency Preparedness to advise Xavier University of Louisiana to immediately terminate all non-competitively awarded contracts and any contracts with prohibited cost-plus-percentage-of-cost provisions (Finding C).

DISCUSSION WITH MANAGEMENT AND AUDIT FOLLOW-UP

We discussed the interim results of our audit with FEMA, GOHSEP, and Xavier officials during our audit and have included their comments in this report as appropriate. We also provided written summaries of our interim findings and recommendations in advance to these officials and discussed them at exit conferences held with FEMA on September 13, 2010, and with GOSHEP and Xavier officials on September 14, 2010. FEMA and GOHSEP officials generally agreed with our findings and recommendations, while Xavier officials did not. Finding C in this report includes comments we received from Xavier officials during and after the exit conference.

Please advise this office by October 8, 2010, of the actions planned or taken, including target completion dates for any planned actions, to implement our recommendations. Should you have questions concerning this report, please contact me, or your staff may contact Paige Hamrick, Audit Manager, at (214) 436-5200.

cc: Interim Director, FEMA Louisiana Recovery Office
Audit Liaison, FEMA Louisiana Recovery Office
Audit Liaison, FEMA (Job Code G-10-043)
Audit Liaison, FEMA Region VI