## Appendix D

## ETA Response to Draft Report

U.S. Department of Labor

Assistant Secretary for
Employment and Training
Washington, D.C. 20210

MEMORANDUM FOR: ELLIOT P. LEWIS
Assistant Inspector General for Audit

FROM: JANE OATES
Assistant Secretary

SUBJECT: OIG Draft Report No. 26-11-006-03-370,
*"Education and Training Resources Did Not Ensure Best Value in Awarding Sub-Contracts at the Oneonta Job Corps Center"*

This memorandum responds to the subject draft audit report, dated September 9, 2011, Draft OIG Audit Report No. 26-11-003-03-370, *"Education and Training Resources Did Not Ensure Best Value In Awarding Sub-Contracts."* We appreciate the opportunity to provide input to this draft audit report and reiterate that Job Corps center operators are not subject to all aspects of the Federal Acquisition Regulation (FAR), but are accountable to the 13 considerations identified in FAR Part 44.202-2, the subcontracting consent limitations identified in FAR 44.203, and an evaluation of contractor's purchasing system under FAR 44.303.

Our responses to the draft audit report's recommendations follow:

**OIG Recommendation 1:** Strengthen center SOPs pertaining to procurement. Revisions need to include the required documentation and evaluator signatures and the specific steps to ensure all sub-contracts and expenditures between $3,000 and $25,000 are advertised, evaluated, awarded, and costs supported as required by the FAR.

**Response**: Management accepts this recommendation in part.

Education and Training Resources' (ETR) procurement polices minimally must meet the requirements of FAR Part 44.303 and FAR Part 52.244-5. ETR's Procurement Standard Operating Procedures (SOPs) should be based on sound procurement principles such as ensuring the solicitation is clear, advertised, evaluated in a fair manner, and awarded at a fair and reasonable price. The ETA Office of Contracts Management (OCM) recently completed a Contractor Purchasing System Review of ETR corporate headquarters and visited the Hartford Job Corps Center (JCC). The draft report has been submitted to the cognizant Contracting Officer, which includes recommendations to improve ETR's procurement SOPs. A copy of the final report is available upon request. It is important to note that currently ETR does not have an approved purchasing system.

We consider this recommendation resolved.

**OIG Recommendation 2:** Repay questioned costs totaling $515,543. This includes ETA making a final determination as to the amount of excess funds paid by the contractor to be recovered while recognizing the value of goods and services received.

**Response**: Management accepts this recommendation in part.

The OIG computed questioned cost based upon the following findings. Our remarks are included with each finding below:

**Table 1: Instances of FAR non-compliance resulting in questioned costs**

| | FAR Non-compliance | Sub-contracts more than $25,000 / amount of questioned costs | Expenditures more than $3,000 / amount of questioned costs |
|---|---|---|---|
| a. | Sub-contract award not based on proper responsibility checks - FAR 44.202-2 (a) (7) and (11) and FAR 9.104-1, and adequate cost or price analysis 44.202.2 (a) (5) and (a) (8). | 6 of 6 (100%) $474,900 | Not Applicable |
| b. | Corporate contract award not based on proper responsibility checks - FAR 44.202-2 (a) (7) and (11) and FAR 9.104-1, and adequate cost or price analysis 44.202.2 (a) (5) and (a) (8). | 2 of 2 (100%) 40,643 | Not Applicable |
| c. | Inadequate sole source justification FAR 44.202-2 (a) (7) | Not Applicable | Sample: 5 of 30 (17%) $21,864 |
| | **Totals** **$537,407** | 8 of 8 (100%) $515,543 | Sample: 5 of 30 (17%) $21,864 |

a. OIG needs to clarify specifically what is meant by "award not based on proper responsibility checks." The FAR provides for the conduct of either cost/price analysis or comparison.
b. See response a.
c. Management agrees with the OIG's finding in this area. Sole source justifications must support the contractor's decision to make the sole source award.

We consider this recommendation resolved.

**OIG Recommendation 3:** Provide training as needed to ensure procurement staff is proficient on FAR requirements.

**Response:** Management accepts this recommendation.

All Job Corps center operators are required by the Job Corps Policy and Requirement Handbook (PRH) to provide a minimum of 5 hours of professional development training, appropriate to the work performed, to all center staff. OCM will ensure ETR provides appropriate procurement training to staff responsible for purchasing center items and awarding center support sub-contracts.

We consider this recommendation resolved.

**OIG Recommendation 4**: Develop procedures for providing and documenting supervisory oversight of center procurement.

**Response:** Management accepts this recommendation in part.

OCM will direct ETR to update SOPs to provide for regulatory and statutory oversight, rather than supervisory oversight.

We consider this recommendation resolved.

**OIG Recommendation 5**: ETA Strengthen procedures to ensure Oneonta JCC complies with the FAR when awarding sub-contracts and purchase orders and claiming related cost. This should include reviewing Oneonta JCC procurement activities for FAR compliance during on-site center assessments.

**Response:** Management accepts this recommendation in part.

OCM will ensure ETR complies with regulatory requirements. OCM conducted a Contractor Purchasing System Review of ETR corporate headquarters and the Hartford Job Corps Center in August 2011. The review identified several areas needing improvement which requires ETR to submit a corrective action plan and undergo a re-inspection prior to the Contracting Officer (CO) approving ETR's purchasing system. As ETR does not have an approved purchasing system, the majority of their sub-contract activity must receive CO approval prior to entering into contractual agreements on behalf of the Job Corps center operated. Further, OCM will work with OJC to provide tools to COTRs/Project Managers to assist in the monitoring of the purchasing practices of ETR.

We consider this recommendation resolved.

**OIG Recommendation 6**: Review all future Oneonta JCC sub-contracts for FAR compliance prior to approval.

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## Appendix E

## ETR Response to Draft Report

**Education & Training Resources**

October 13, 2011

Mr. Elliot P. Lewis
Assistant Inspector General for Audit
U.S. Department of Labor
Office of Inspector General
200 Constitution Avenue, N.W., Suite S-5512
Washington, DC 20210

**RE: ETR Response to Draft Audit Report**
**Draft Report No. 26-11-006-03-370**
**Performance Audit of ETR Sub-Contracting at the Oneonta Job Corps Center**

Dear Mr. Lewis:

Education & Training Resources (ETR) respectfully replies as follows to the September 29, 2011 Draft Audit Report by the Department of Labor (DOL) Office of Inspector General (OIG) regarding ETR's government contract with the DOL to operate the Oneonta Job Corps Center (Oneonta JCC):

After issuing numerous iterations of draft audit reports, and receiving multiple written responses from ETR, it is obvious that the OIG still seeks to impose upon ETR inapplicable Federal Acquisition Regulation (FAR) "requirements" based upon the fundamentally incorrect premise that DOL Job Corps contractors are required to award subcontracts in accordance with the same detailed FAR requirements that the government itself must observe when awarding prime contracts. Now this lengthy audit process is coming to an end and it is time for the OIG to face the reality that the Job Corps contractors are *not* currently subject to such requirements, neither pursuant to the FAR, nor by contractual flow-downs. Despite the many rounds of discussions, reports and responses throughout this audit, the OIG has yet to reach the proper resolution of abandoning its incorrect premise and acknowledging that FAR provisions which on their face only apply to the conduct of government agency officials and government contracting officers, in the absence of contract terms flowing down such provisions, ***do not apply*** to prime contractors, such as ETR, in their subcontracting practices.

ETR has reviewed and responded to a constantly evolving set of FAR provisions cited by OIG in its various draft report versions, none of which contain the requirements that the OIG wants and seeks to impose in this Audit. In this latest Draft Audit Report, the OIG continues to cite and rely on inapplicable FAR provisions, including new and different ones cited for the first time. Even if these provisions did apply to ETR (which they do not), this constitutes inadequate notice to ETR of the supposed real rules by which it must abide, and it is improper of the OIG to require that ETR should have been complying with these provisions, when the OIG itself only apparently discovered their "applicability" at this eleventh hour.

Clearly, it has become the OIG's goal somehow to construe these provisions that pertain to government officials contracting with prime contractors to apply to ETR's practices in selecting

**(This response is intended to be read and published in its entirety, including the Appendix.)**

and contracting with its subcontractors. To the extent that the OIG believes that such requirements *should* apply to prime contractors' interactions with their subcontractors, we would expect the OIG to recommend to DOL that its contracts contain express provisions for different subcontracting procedures, and that the DOL or the FAR Council adopt various amendments. We question whether adopting such recommendations would serve Job Corps or DOL interest, or the public interest, as they would substantially augment the contractors' allowable costs of compliance, thus adding to DOL's costs, without any corresponding benefit, as there is no evidence in this Audit even hinting that the DOL did not receive excellent value, and fair and reasonable prices, for the subcontracted services furnished by ETR in their management and operation of the Oneonta Job Corps Center. Regardless of whether the OIG may seek to change future contract provisions or amend the FAR, it is certainly unfair and inappropriate to find that ETR should be punished, when it has complied with its Oneonta contract and the FAR as *actually* written.

ETR unequivocally disagrees with the OIG's statement that "ETR told us that no sections of the FAR required their compliance because ETR was a private contractor and the FAR only applied to Federal agencies." (Draft Audit Report, p. 9.) Throughout this audit process, ETR has repeatedly pledged, and continues to pledge, both verbally and in writing, its commitment to abiding by *applicable* FAR requirements. Indeed, in ETR's response to the OIG's August 12, 2011 Statement of Facts (SOF) regarding the Oneonta JCC (ETR's first written response in the Oneonta JCC audit process), ETR specifically stated that "as a government contractor, ETR is committed to complying with all applicable FAR requirements and other applicable laws." See cover letter to August 19, 2011 Response to SOF. What ETR does take issue with, however, is the OIG's failure to identify any FAR provisions that are in fact *applicable* to ETR and with which ETR has not complied.

Repeatedly since last spring when this Audit first began, ETR has respectfully challenged the OIG to support the underlying premise of the Audit by directly identifying where in the FAR, or in ETR's contract with DOL, any of these alleged "requirements" can be found, and thus, applied to ETR/Oneonta as a test of contractual compliance. For a long time, in discussions with ETR, the OIG neither cited nor quoted *any* specific FAR provisions. Subsequently, after repeated urging by ETR, the OIG cited in its August 12, 2011 SOF at least seven (7) FAR provisions that supposedly applied to the ETR/Oneonta contract. In its response dated August 19, 2011, ETR had to prepare a detailed analysis that showed that each and every one of the seven supposedly applicable FARs cited by the OIG pertained *on its face* only to contract award decisions by the government Contracting Officer at the prime contract level, and not to subcontract award decisions by the prime contractor. Nor was a single one of them contractually flowed-down to ETR in ETR's prime contract for the management and operation of the Oneonta Job Corps Center. We note that the OIG took some heed of our analysis and for the most part discarded those inapplicable requirements in the Oneonta Discussion Draft Report it issued in September, 2011. However, the OIG merely replaced those inapplicable provisions with equally inapplicable provisions under FAR part 44.

**(This response is intended to be read and published in its entirety, including the Appendix.)**

**I. On Their Face, the OIG's Citations from FAR Part 44 Are Simply "Considerations" for the Contracting Officer to Review, Not Requirements for the Contractor as Alleged.**

In this newly revised Draft Audit Report, the OIG has completely withdrawn its previous reliance upon the seven (7) inapplicable FARs, and replacing them with citations (but no quotation) of four different and previously unmentioned FAR provisions under FAR part 44, namely *FAR 44.202-2(a)(5), (a)(7), (a)(8) and (a)(11)*, as the legal basis for its findings of "noncompliance." See Draft Audit Report at p. 6. Therefore, again in this response, ETR bears the burden and expense of having to explain the proper interpretation and application of these newly named and applied FAR citations: that they too do not impose any "requirements" on ETR, the contractor. Nor are they contractually flowed-down to ETR, any more than previously cited FARs were. Accordingly, after consultation with our counsel, we are providing a brief analysis and discussion of these newly-cited FAR sections, their background, and their inapplicability to the audited transactions here in our following response:

FAR Subpart 44.2 pertains to the circumstances in which a government prime contractor must "notify" the government's contracting officer of, and obtain the contracting officer's "consent" for, the prime contractor's award of certain types of subcontracts under certain conditions. This "consent" process, when applicable at all, is very generally defined. Thus, FAR Subpart 44.2 nowhere states comprehensively or specifically what is necessary and sufficient for a subcontract to obtain the government's consent. It contains only a very short list of circumstances in which consent shall not be granted, none of which are present here. FAR 44.203(b). Otherwise it states in general terms that the **contracting officer** "shall ensure that the proposed subcontract is appropriate for the risks involved and consistent with current policy and sound business judgment." FAR 44.202-1(b). Government consent to subcontracts, when required, is obviously intended to be a flexible, case-by-case process in which the contracting officer's discretion is respected and recognized as essential. The section cited now by the OIG, FAR 44.202-2(a), therefore, begins as follows: "The contracting officer responsible for consent must, at a minimum, review the request and supporting data **and consider the following:** …." The FAR goes on to list thirteen (13) questions among those to be "considered," four of which are cited by the OIG (Draft Audit, p. 6) as the basis of its specific findings, namely:

- (a)(5) ("Was adequate price competition obtained or its absence properly justified?);
- (a)(7) ("Does the contractor have a sound basis for selecting and determining the responsibility of the particular subcontractor?");
- (a)(8) ("Has the contractor performed adequate cost or price analysis or price comparisons and obtained certified cost or pricing data and data other than cost or pricing data"); and
- (a)(11) ("Has the contractor adequately and reasonably translated prime contract technical requirements into subcontract requirements?").

**Nowhere** does the FAR say that consent is to be denied, or granted, depending on the answers to any, some, or all of these questions, nor does it even say what the "right" answers (if any) would be in the case of a given procurement … presumably because which "considerations" are most

important, or even relevant at all, or if so, to what extent or weight, will depend on the particular subcontract under review, so there is no one "right" answer, or set of answers that fits all cases. Nevertheless, it is on the basis of these generalities, which the *government contracting officer* is simply to "*consider*," that the OIG now seeks to impose on the *contractor* various specific "requirements" alleged on page 6 of the Draft: a supposed requirement to award subcontracts "based on proper responsibility checks," a supposed requirement for "adequate cost or price analysis," a supposed requirement for "sole-source justification," and so on. All of these are familiar requirements in certain instances when the government awards a prime contract, or even for a subcontract when these top-level requirements have been flowed-down to lower levels (which is not the case here) … but it is not legally supported to contend that such requirements are imposed on a contractor's subcontract awards simply on the basis of a few generally-phrased questions concerning what a government contracting officer must "consider" when deciding whether to consent.

The very fact that it has taken until the eleventh hour (this Draft Report, at the end of a year-long audit process) for the OIG even to *find* these allegedly-applicable FAR sections, and then to transform their generally-phrased questions for contracting officer "consideration" into specifically-phrased contractor "requirements," confirms that it cannot be right, or appropriate, to find and demand that the contractor should somehow have known all about the detailed "requirements" allegedly embedded deeply within the generalities of FAR Part 44, and "complied" from Day One of its contract performance. It is further improper for the OIG then to "question," and extrapolate further, hundreds of thousands of dollars of costs based on alleged "requirements" so inscrutable that the auditors themselves had not discovered them until just a few weeks ago.

## II. Even When Properly Understood As Considerations for Contracting Officer "Consent," the FAR Part 44 Provisions Cited by the OIG Do Not Apply to Most of the Audited Transactions.

A further but basic point about "consent" under FAR 44.2: even if general "considerations" regarding consent to subcontracts could somehow provide the basis for inferring the alleged specific "requirements," the entire "consent" process does not even apply to most of these audited and questioned transactions in the first place.

The OIG incorrectly states that "due to ETR not having an approved purchasing system, all contracts awarded by the ETR Oneonta needed approval by the ETA contracting officer prior to the contract award." See Draft Audit Report at p. 9. This is incorrect. In the case of a contractor that does not have an "approved purchasing system" (ETR's current status), government consent to subcontracts is only required for the following types of subcontracts: cost-reimbursement, time-and-materials, labor-hour, or fixed-price that exceeds the "simplified acquisition threshold" ($150,000) or 5% of the total estimated cost of the prime contract (approximately $1 million). See FAR 44.201-1(b); FAR 52.244-2(d) (incorporated in ETR's prime contract to operate the Oneonta JCC, p. 50-52).

Most of the subcontracts (including the two All American Midwest subcontracts, the VIP Special Services Contract, and the five purchase orders) in these audit findings do not fall into any of these categories: they are typically too small in dollar amount and/or neither cost-plus, T&M, nor labor-hour. Hence, FAR 44.202-2 is not applicable to them, even if the considerations" for "consent" contained the alleged "requirements."

Even more fundamentally, a "subcontract" must be a "contract" in the first place. See FAR 44.101, definition of "subcontract." However, the two audit findings pertaining to corporate contracts here involve "BPAs" (blanket purchase agreements), which are not contracts themselves: they are just agreements that govern the terms of future potential contracts (*e.g.*, task orders or purchase orders that may be issued in accordance with the BPA). See FAR 16.703((a)(3) ("A basic ordering agreement is not a contract."); 16.702(a)(2) ("A basic agreement is not a contract."); *Crewzers Fire Crew Transport, Inc. v. United States,* US Court of Federal Claims No. 10-819C, January 28, 2011 at p. 13 (" It is well established that BPAs are not contracts."), citing numerous other cases, including *Modern Sys. Tech. Corp. v. United States,* 24, Cl. Ct.360, 362-63 (1991), *aff'd and adopted,* 979 F.2d 200, 202, 204 (Fed. Cir 1992) ("blanket pricing agreements" "do not create binding rights or obligations because they contain contract clauses that apply to future contracts between the parties"); and *Prod. Packaging,* ASBCA No. 53662, 03-2 BCA 32388 (ASBCA 2003) ("[A] BPA is nothing more than an agreement of terms by which the Government could purchase."). See also, FAR 2.101 (definition of contract: "mutually binding legal relationship obligating the seller to furnish the supplies or services … and the buyer to pay for them.").

Hence, even if the FAR Part 44.2 "consent" "considerations" could be the basis for specific requirements on a contractor, they would not apply to either of the BPAs audited here and questioned in cost, because BPAs are not even "contracts" to begin with.

Only the three professional medical subcontracts audited here were subject to FAR Part 44 "consent" … and the files confirm that *all* of these (specifically, Kathleen Bolger, Michael Meehan, and A.O. Fox Memorial Hospital) were duly and expressly consented to by the DOL contracting officer, and with multiple sign-offs from additional DOL personnel. There is no indication that the contracting officer did not "consider" all relevant factors in this process.

### III. On Its Face, FAR Part 9.104 Sets Forth Standards for the *Contracting Officer* to Make Responsibility Determinations, Not Requirements for the Contractor as Alleged.

The OIG also includes in its Draft Audit Report (at pages 6-9 and 15) another FAR provision which it misapplies: FAR part 9.104. Like the previous FAR provisions cited in the Oneonta SOF which the OIG has since discarded, FAR 9.104 on its face applies to the decision-making process of the *contracting officer*. FAR 9.103(b) specifies: "No purchase or award shall be made unless the *contracting officer* makes an affirmative determination of responsibility." (Emphasis added.) This section indicates that the responsibility determination standards set forth in part 9.104-1 are the criteria with which a contacting officer must evaluate a prospective prime

contractor, and not criteria applicable to a prime contractor, such as ETR, awarding a contract to a subcontractor. Nor was this FAR provision contractually flowed down to ETR in its prime contract with DOL.

Moreover, even if the standards set forth in 9.104-1 did impose requirements upon prime contractors for awarding contracts to subcontractors (which they do not), none of the standards listed pertain to the issues that the OIG has identified in its findings against ETR with respect to the Oneonta Draft Audit Report. See, e.g., 9.104-1(a) and (b): "To be determined responsible, a prospective contractor must – (a) Have adequate financial resources to perform the contract, or the ability to obtain them" or (b) "Be able to comply with the required or proposed delivery or performance schedule…." These are not the issues which the OIG has identified in its Draft Audit Report, or at any time throughout this audit process. Accordingly, this FAR provision does not impose any requirements upon ETR, and even if it did, the OIG has not actually alleged that ETR failed to comply with any such alleged "requirements."

**IV. The Other FAR Provisions Cited Do Not Support Any Adverse Findings Against ETR.**

The OIG also references FAR 52.216-7, Allowable Cost and Payment, for the statement that "The Government will make payments to the Contractor in accordance with FAR Subpart 31.2." See Draft Audit Report at p. 5. The OIG further cites FAR 31.202-2(d), Determining Allowability, which states that:

> A contractor is responsible for accounting for costs appropriately and for maintaining records, including supporting documentation, adequate to demonstrate that costs claimed have been incurred, are allocable to the contract, and comply with applicable cost principles in this subpart and agency supplements. The contracting officer may disallow all or part of a claimed cost that is inadequately supported.

The OIG does not assert any findings against ETR based on this provision. In fact, the OIG states the opposite: "Based on our testing, ETR Oneonta maintained documentation to support claimed costs had been incurred." See Draft Audit Report at p. 3. *I.e.*, *no* noncompliance was found.

In addition, the OIG further cites FAR 31.201-3(a) which states that: "A cost is reasonable if, in its nature and amount, it does not exceed that which would be incurred by a prudent person in the conduct of competitive business…No presumption of reasonableness shall be attached to the incurrence of costs by a contractor." The Draft Audit Report does not contain a single finding that any of the costs incurred by ETR are unreasonable.

Finally, with respect to FAR 52.244-5, ETR acknowledges that this clause is a term in its contract with DOL/ETA. However, this clause only requires that contractors select

subcontractors "on a competitive basis to the maximum practical extent consistent with the objectives and requirements of the contract." It does not set forth an absolute competition requirement, nor does it state that sole source procurements are unacceptable. In bid protests challenging government agencies' sole-source selections on the basis of alleged failure to meet maximum practical competition requirements, a variety of fact-specific rationales has been found by the Comptroller General to support sole-source decisions.[1] Here, ETR has provided documentation regarding the rational basis for each of its sole-source procurements. Accordingly, the OIG's reference to this FAR provision does not support any findings of non-compliance against ETR. Nor does the Audit identify any respect in which ETR failed to use competition to the "*maximum practical* extent."

**V. Disallowance of Subcontract Costs.**

In earlier responses to the OIG's draft reports, ETR explained that it is illogical to question the allowability of the entire subcontract value. We noted that the detriment suffered by the Job Corps if there had been a procedural noncompliance (*e.g.*, failure to conduct a price analysis; failure to provide allegedly required "sole source justification"; or failure to obtain consent to subcontract) obviously does not mean that Job Corps received no value for the services represented by that subcontractor cost. The OIG has acknowledged the validity of ETR's point by stating: "A final determination will be made by ETA as to the amount of excess funds paid by contractor to be recovered while recognizing the value of gods and services received." See Draft Audit Report at p. 2, footnote 1. We appreciate this acknowledgement on the part of the OIG. Once again, assuming that ETR committed some sort of procedural noncompliance (though it did not), we further note that the OIG has provided no indication that the Government suffered any actual detriment. To the extent that any disallowance was warranted, it would be *de minimis* in monetary amount.

***

In the Appendix attached to this letter, ETR responds in more detail regarding the specific transactions identified in the Draft Audit Report. To the extent that purely factual disagreements exist and given our previous draft response throughout this audit process, we have refrained from a longer response with additional exhibits. However, all supporting documents are available again to the OIG upon request.

[1] With regard to the requirement for maximum practical competition, agency decisions to procure sole source will be upheld if there is a reasonable or rational basis for them. *Winslow Associates*, 53 Comp. Gen. 478, 74-1 CPD 14, B-178740 (1974); *Winslow Associates*, B-178740, 75-1 CPD 283 (1975). In applying this principle, the Comptroller General's office has recognized that "noncompetitive awards may be made where the minimum needs of the government can be satisfied only by items or services which are unique; where time is of the essence and only one known source can meet the government's needs within the required timeframe; where only a single source can provide an item which must be compatible and interchangeable with existing equipment; and where only one firm could reasonably be expected to develop or produce a required item without undue technical risk." *Ampex Corporation*, B-191132, June 16, 1978, 78-1 CPD 439, 1978 U.S. Comp. Gen. LEXIS 2293, 20-22 (*internal citations omitted*).

**(This response is intended to be read and published in its entirety, including the Appendix.)**

We conclude these general remarks with the observation that the basic premise of this audit is unsound because the FAR does not contain any of the alleged "requirements" on which the OIG bases its adverse findings. Ever since this audit began the OIG has insisted that ETR, as a government contractor awarding subcontracts, is subject to the same procedural requirements that the FAR imposes on the government itself when it awards prime contracts to its own suppliers. In short, this OIG insistence is not consistent with the law. **We request that each of these Draft Audit findings adverse to ETR be withdrawn.**

Respectfully,

Brian Fox
President/CEO

Attachment(s) – 1
-Appendix

cc: Elliott P. Lewis, Assistant Inspector General for Audit
Michael Elliott, OIG Audit Manager
Linda Heartley, DOL/ETA/OCM Administrator
Edna Primrose, Job Corps National Director
Darlene Lucas, DOL/ETA Audit Liaison
Dennis Johnson, Job Corps Audit Liaison
William W. Thompson, ETA
Lisa L. Lahrman, ETA
Joe Semansky, Job Corps Regional Director-Boston
Tom Pendleton, Contracting Officer-Oneonta JCC

**(This response is intended to be read and published in its entirety, including the Appendix.)**

## APPENDIX

***Subcontracts Above $25,000 where [Alleged] FAR Noncompliance Resulted in Questioned Costs (Draft Audit Report, pages, 6-8 and 13.)***

***Subcontracts Managed by ETR/Oneonta:***

***Kathleen Bolger (Mental Health Services)*** (Draft Audit Report, p.6-7.): The OIG alleges that the award of this subcontract for mental health services for Job Cops students was not in compliance with the FAR, specifically FAR 44.202-2(a)(5) and (a)(8) for failure to perform a cost or price analysis, and under FAR 31.201-3(a) because there was allegedly "no way of knowing whether the cost incurred was fair and reasonable. The OIG also alleges noncompliance with FAR 44.202-2(a)(7) and (a)(11) and 9.104-1 because "the center did not develop a means of rating the bids and performing responsibility checks on past performance of the bidders." Finally, the OIG alleges noncompliance with FAR 44.201-1(b) because "the subcontract was not approved by the ETA Contracting Officer before being executed by ETR Oneonta and Ms. Bolger." The OIG's findings are in error because:

- The cited FAR sections on their face do not require the contractor to perform cost analysis or price analysis, develop a "means of rating," or perform "responsibility checks." They do not require the contractor to do anything. They simply require the government ***contracting officer*** (not the contractor), in a procurement where government "consent" to a subcontract is required, to **"*consider*"** various questions framed in general terms, such as whether the contractor performed "adequate price competition" or "cost or price analysis" ((a)(5) and (a)(8)), whether the contractor has a "sound basis" (undefined) for the subcontract award ((a)(7)) and whether the contractor has "reasonably translated" prime contract technical requirements to the subcontract ((a)(11)). The cited FAR sections do not make "consent" dependent on specific answers to the various questions for "consideration." Similarly, FAR 9.104-1 requires only that the *contracting officer* make an affirmative determination of responsibility, and does not impose any requirement on ETR to perform "responsibility" checks.

- The alleged requirements for the contractor to perform cost analysis or price analysis, develop a "means of rating," or perform "responsibility checks" do not exist anywhere else in the FAR, or in ETR's contract with DOL. The OIG has never been able to cite or quote any of these nonexistent FAR "requirements," despite our repeated requests throughout this Audit.

- The DOL contracting officer, in fact, reviewed the file for the Bolger subcontract and formally consented in writing to its award. The consent was also signed off by three other responsible government personnel. There is no evidence that any of these personnel did not carefully review and consider all required factors. On the contrary, in providing consent, the Contracting Officer's Technical Representative signed off and affirmed in writing that "price competition was obtained," "basis for selection is documented," "subcontractor is determined to be responsible," and "cost or price analysis was

conducted or price comparisons were obtained."

- This subcontract was administered by MTC, who was operations subcontractor to ETR at the time. With regard to the OIG's concern that the center did not obtain approval by a Job Corps Contracting Officer *before* awarding the subcontract to Ms. Bolger, the subcontract between Ms. Bolger and MTC (not ETR) was executed on 9/23/09. ETR presented the consent form to the Regional Job Corps Office on 10/12/09. The consent form was signed over two months later by the government Program Manager on 12/21/2009 and the government Contracting Specialist on 12/22/09 and then sent to and signed by the Contracting Officer, expressly providing an 11/1/09 effective date. Meanwhile, ETR was obligated to provide these critical services in accordance with its prime contract Statement of Work and PRH, even while awaiting the Contracting Officer's approval. See ETR's prime contract to operate the Oneonta JCC at page 7. Significantly, while the subcontract was being performed, DOL presumably had knowledge that ETR had engaged Ms. Bolger, effective 11/1/09, to perform these required and critical services.

- In fact, ETR's selection of Kathleen Bolger was reasonable, properly documented, and provided best value to the Job Corps. ETR advertised the subcontract procurement on FedBizOps and thereby obtained price comparisons. It received two responses, of which one was qualified to perform the required scope of work. ETR documented its price analysis in an Abstract of Bids documented in the file. The lower bidder was disqualified because he did not have the credentials that allowed him to order and manage medications. ETR noted in its documentation that the lower bidder, if selected, would be required to work with community health agencies to provide students with needed medication management, and that "this cost could become very extensive," thus addressing the reasonableness of the price pursuant to FAR 31.201-3(a). The documentation on file also noted Ms. Bolger's positive past performance, thus indicating her responsibility as a subcontractor. Documentation of the above has previously been provided to the OIG and continues to be available upon request.

- The OIG questions the entire amount ($72,000.00) of the subcontract based on these alleged procedural irregularities in the award. However, the Draft Audit Report also correctly observes that DOL/ETA's "final determination" of questioned costs must "recognize[e] the value of goods and services received." Draft at page 2, footnote 1. *I.e.*, even if there were a procedural noncompliance, which there is not, it would be improper to reward the government with a windfall of free subcontracted goods and services when there is no finding that Kathleen Bolger failed to perform any of the subcontracted work-scope.

***All American Midwest (painting of hallway and trim)*** (Draft Audit Report, p.6-8.): The OIG alleges that the award of this subcontract for hall and trim painting services was not in compliance with the FAR, specifically FAR 44.202-2(a)(5) and (a)(8) for failure to perform a cost or price analysis, and under FAR 31.201-3(a) because there was allegedly "no way of knowing whether the cost incurred was fair and reasonable. The OIG also alleges

noncompliance with FAR 44.202-2(a)(7) and (a)(11) and 9.104-1 because "the bids did not include any hourly cost information and the center did not document how the Davis Bacon hourly wage data was used to ensure fair and reasonable pricing" and because "there was no evidence that past performance was verified and assessed for all the bidders." Finally, the OIG alleges noncompliance with FAR 44.201-1(b) because "the subcontract was not approved by the ETA Contracting Officer before being executed by ETR Oneonta and All American Midwest." The OIG's findings are in error because:

- The cited FAR sections on their face do not require the contractor to perform cost analysis or price analysis, "include any hourly cost information," or verify and assess "past performance" for "all the bidders." They do not require the contractor to do anything. They simply require the government ***contracting officer*** (not the contractor), in a procurement where government "consent" to a subcontract is required, to ***"consider"*** various questions framed in general terms, such as whether the contractor performed "adequate price competition" or "cost or price analysis" ((a)(5) and (a)(8)), whether the contractor has a "sound basis" (undefined) for the subcontract award ((a)(7)) and whether the contractor has "reasonably translated" prime contract technical requirements to the subcontract ((a)(11)). The cited FAR sections do not make "consent" dependent on specific answers to the various questions for "consideration." Similarly, FAR 9.104-1 requires only that the *contracting officer* make an affirmative determination of responsibility, and does not impose any requirement on ETR to perform responsibility checks on past performance.

- The alleged requirements for the contractor to perform cost analysis or price analysis, "include any hourly cost information," or verify and assess "past performance" for "all the bidders," do not exist anywhere else in the FAR, or in ETR's contract with DOL. The OIG has never been able to cite or quote any of these nonexistent FAR "requirements," despite our repeated requests throughout this audit.

- The All American Midwest Contract for painting the hallway and trim is a firm fixed price contract, not a time and materials, cost-plus, or labor hours contract. Furthermore, the contract value is only $52,300 and is therefore not greater than the simplified acquisition threshold ($150,000) or more than 5% of the total contract value. Accordingly, consent is not required under FAR 52.244-2, Subcontracts Alternate I, set forth on pages 50-52 of ETR's prime contract with DOL to operate the Oneonta JCC.

- Notwithstanding that no consent was required to award this subcontract, it is incorrect for OIG to imply that the contract was fully executed before Government consent was obtained. The documentation in ETR's subcontract files show that the subcontract between All American Midwest and OJCA/ETR was dated and signed on 6/22/2010 by Acting Center Director, Fred Rowe (only); his signature is required prior to regional subcontract submission as part of the regional subcontract submission process and demonstrates only that the document had been vetted by the Center Director before it was forwarded to the appropriate DOL Regional personnel. *I.e.*, Mr. Rowe's signature on 6/22/10 did not constitute execution of the subcontract. The consent form was signed by

the Contracting Officer on 6/25/2010. The subcontract between OJCA/ETR and All American Midwest was fully executed on 7/1/2010, ***after*** the Contracting Officer's consent. The consent was also signed off by three other responsible government personnel. There is no evidence that any of these personnel did not carefully review and consider all required factors. On the contrary, in providing consent, the Contracting Officer's Technical Representative signed off and affirmed in writing that "price competition was obtained," "basis for selection is documented," "subcontractor is determined to be responsible," and "cost or price analysis was conducted or price comparisons were obtained."

- In fact, ETR's selection of All American Midwest for painting of hallway and trim was reasonable, properly documented, and provided best value to the Job Corps. ETR advertised the subcontract procurement on FedBizOps and in various newspapers. This solicitation and procurement detailed specific evaluation factors for the subcontract award (i.e. Certified, Bonded, Licensed, Fully Insured, Pre-Bid Conference Attendee), as well as required the specific type and brand of materials to be used. Once any offeror qualified under these factors, the primary variable was the price. At least five vendors submitted bids and ETR thereby obtained price comparisons. Applicable procurement procedures were applied, and the lowest, best value bidder was awarded this subcontract, thus addressing the reasonableness of the price per FAR 31.201-3(a). Documentation of the above has previously been provided to the OIG and continues to be available upon request.

- The OIG questions the entire amount ($52,300.00) of the subcontract based on these alleged procedural irregularities in the award. However, the Draft Audit Report also correctly observes that DOL/ETA's "final determination" of questioned costs must "recognize[e] the value of goods and services received." Draft at page 2, footnote 1. *I.e.*, even if there were a procedural noncompliance, which there is not, it would be improper to reward the government with a windfall of free subcontracted goods and services when there is no finding that All American Midwest failed to perform any of the subcontracted work-scope.

***All American Midwest (painting of dorm rooms)*** (Draft Audit Report, p.6, 13.): The OIG alleges that the award of this subcontract for dorm room painting services for was not in compliance with the FAR, specifically FAR 44.202-2(a)(5) and (a)(8) for failure to perform or document a cost or price analysis. The OIG also alleges noncompliance with FAR 44.202-2(a)(7) and (a)(11) and 9.104-1 because "the subcontract award was not based on proper responsibility checks" Finally, the OIG alleges noncompliance with FAR part 52 because "the contract [was] awarded prior to required consent of Contracting Officer." The OIG's findings are in error because:

- The cited FAR sections on their face do not require the contractor to perform cost analysis or price analysis or perform "responsibility checks." They do not require the contractor to do anything. They simply require the government ***contracting officer*** (not the contractor), in a procurement where government "consent" to a subcontract is

required, to ***"consider"*** various questions framed in general terms, such as whether the contractor performed "adequate price competition" or "cost or price analysis" ((a)(5) and (a)(8)), whether the contractor has a "sound basis" (undefined) for the subcontract award ((a)(7)) and whether the contractor has "reasonably translated" prime contract technical requirements to the subcontract ((a)(11)). The cited FAR sections do not make "consent" dependent on specific answers to the various questions for "consideration." Similarly, FAR 9.104-1 requires only that the *contracting officer* make an affirmative determination of responsibility, and does not impose any requirement on ETR to perform responsibility checks.

- The alleged requirements for the contractor to perform cost analysis or price analysis or perform "responsibility checks" do not exist anywhere else in the FAR, or in ETR's contract with DOL. The OIG has never been able to cite or quote any of these nonexistent FAR "requirements," despite our repeated requests throughout this audit.

- The All American Midwest Contract for painting the dorms is a firm fixed price contract, not a time and materials, cost-plus, or labor hours contract. Furthermore, the contract value is only $34,800 and is therefore not greater than the simplified acquisition threshold ($150,000) or more than 5% of the total contract value. Accordingly, consent is not required under the 52.244-2, Subcontracts Alternate I, set forth on pages 50-52 of ETR's prime contract with DOL to operate the Oneonta JCC.

- Notwithstanding that no consent was required to award this subcontract, it is incorrect for OIG to imply that the contract was fully executed before Government consent was obtained. The documentation in ETR's subcontract files shows that the subcontract between All American Midwest and OJCA/ETR was dated and signed on 5/28/2010 by Acting Center Director, Fred Rowe (only); his signature is required prior to regional subcontract submission as part of the regional subcontract submission process and demonstrates only that the document had been vetted by the Center Director before it was forwarded to the appropriate regional personnel. *I.e.*, Mr, Rowe's signature did not constitute execution of the subcontract. The consent form was signed by the contracting officer on 6/8/2010 and the subcontract between OJCA/ETR and All American Midwest was fully executed on 6/24/2010, ***after*** the Contracting Officer's consent. The consent was also signed off by three other responsible government personnel. There is no evidence that any of these personnel did not carefully review and consider all required factors. On the contrary, in providing consent, the Contracting Officer's Technical Representative signed off and affirmed in writing that "price competition was obtained," "basis for selection is documented," "subcontractor is determined to be responsible," and "cost or price analysis was conducted or price comparisons were obtained."

- In fact, ETR's selection of All American Midwest for painting of the dorms was reasonable, properly documented, and provided best value to the Job Corps. ETR advertised the subcontract procurement on FedBizOps and in various newspapers. This solicitation and procurement detailed specific evaluation factors (i.e. Certified, Bonded, Licensed, Fully Insured, Pre-Bid Conference Attendee), as well as required the specific

type and brand of materials to be used. Once any offeror qualified under these factors, the primary variable was the price. At least nine vendors submitted bids and ETR thereby obtained price comparisons. Applicable procurement procedures were applied, and the lowest, best value bidder was awarded this subcontract, thus addressing the reasonableness of the price per FAR 31.201-3(a). Documentation of the above has previously been provided to the OIG and continues to be available upon request.

- The OIG questions the entire amount ($34,800.00) of the subcontract based on these alleged procedural irregularities in the award. However, the Draft Audit Report also correctly observes that DOL/ETA's "final determination" of questioned costs must "recognize[e] the value of goods and services received." Draft at page 2, footnote 1. *I.e.*, even if there were a procedural noncompliance, which there is not, it would be improper to reward the government with a windfall of free subcontracted goods and services when there is no finding that All American Midwest failed to perform any of the subcontracted work-scope.

***VIP Special Services (dorm room cleaning)*** (Draft Audit Report, p.6, 13.): The OIG alleges that the award of this subcontract for dorm room cleaning services for was not in compliance with the FAR, specifically FAR 44.202-2(a)(5) and (a)(8) for failure to perform or document a cost or price analysis. The OIG also alleges noncompliance with FAR 44.202-2(a)(7) and (a)(11) and 9.104-1 because "the subcontract award was not based on proper responsibility checks" Finally, the OIG alleges noncompliance with FAR part 52 because "the contract [was] awarded prior to required consent of Contracting Officer." The OIG's findings are in error because:

- The cited FAR sections on their face do not require the contractor to perform cost analysis or price analysis or perform "responsibility checks." They do not require the contractor to do anything. They simply require the government ***contracting officer*** (not the contractor), in a procurement where government "consent" to a subcontract is required, to **"*consider*"** various questions framed in general terms, such as whether the contractor performed "adequate price competition" or "cost or price analysis" ((a)(5) and (a)(8)), whether the contractor has a "sound basis" (undefined) for the subcontract award ((a)(7)) and whether the contractor has "reasonably translated" prime contract technical requirements to the subcontract ((a)(11)). The cited FAR sections do not make "consent" dependent on specific answers to the various questions for "consideration." Similarly, FAR 9.104-1 requires only that the *contracting officer* make an affirmative determination of responsibility, and does not impose any requirement on ETR to perform responsibility checks.

- The alleged requirements for the contractor to perform cost analysis or price analysis or perform "responsibility checks" do not exist anywhere else in the FAR, or in ETR's contract with DOL. The OIG has never been able to cite or quote any of these nonexistent FAR "requirements," despite our repeated requests throughout this audit.

- The VIP Special Services contract for cleaning the dorms is a firm fixed price contract, not a time and materials, cost-plus, or labor hours contract. Furthermore, the contract

value is only $47,000 and is therefore not greater than the simplified acquisition threshold ($150,000) or more than 5% of the total contract value. Accordingly, consent is not required under the 52.244-2, Subcontracts Alternate I, set forth on pages 50-52 of ETR's prime contract with DOL to operate the Oneonta JCC.

- Notwithstanding that no consent was required to award this subcontract, it is incorrect for OIG to imply that the contract was fully executed before Government consent was obtained. The documentation in ETR's subcontract files shows that the subcontract between V.I.P. Special Services and OJCA/ETR was dated and signed on 6/30/2010 by Center Director, Steven Belk (only); his signature is required prior to regional subcontract submission as part of the regional subcontract submission process and demonstrates only that the document had been vetted by the center director before it was forwarded to the appropriate regional personnel. *I.e.*, Mr. Belk's signature did not constitute execution of the subcontract. The consent form was signed by the contracting officer on 7/8/2010, and the subcontract between OJCA/ETR and VIP Special Services was fully executed on 7/14/2010, ***after*** the Contracting Officer's consent. The consent was also signed off by three other responsible government personnel. There is no evidence that any of these personnel did not carefully review and consider all required factors. On the contrary, in providing consent, the Contracting Officer's Technical Representative signed off and affirmed in writing that "price competition was obtained," "basis for selection is documented," "subcontractor is determined to be responsible," and "cost or price analysis was conducted or price comparisons were obtained."

- In fact, ETR's selection of VIP Special Services for cleaning of the dorms was reasonable, properly documented, and provided best value to the Job Corps. ETR advertised the subcontract procurement on FedBizOps. This solicitation and procurement detailed specific evaluation factors (i.e. Certified, Bonded, Licensed, Fully Insured, Pre-Bid Conference Attendee), as well as required the specific type and brand of materials to be used. ETR received two bids, made price and qualification comparisons, and selected VIP Special Services as the bidder with the best value for the government. Per the Bid Abstract, the other bidder did not attend the mandatory pre-bid walk through, did not submit its bid within the advertised time frame, did not give a detailed bid as part of the requirement for the selection process, and also had past poor performance. VIP Special Services had the ability to complete this project within the specified time frame and was thus selected for its value. Documentation of the above has previously been provided to the OIG and continues to be available upon request.

- The OIG questions the entire amount ($47,000.00) of the subcontract based on these alleged procedural irregularities in the award. However, the Draft Audit Report also correctly observes that DOL/ETA's "final determination" of questioned costs must "recognize[e] the value of goods and services received." Draft at page 2, footnote 1. *I.e.*, even if there were a procedural noncompliance, which there is not, it would be improper to reward the government with a windfall of free subcontracted goods and services when there is no finding that All American Midwest failed to perform any of the subcontracted work-scope.

**(This response is intended to be read and published in its entirety, including the Appendix.)**

***Michael Meehan (Dental Services)*** (Draft Audit Report, p.6, 13.): The OIG alleges that the award of this subcontract for dental services for the JCC students was not in compliance with the FAR, specifically FAR 44.202-2(a)(5) and (a)(8) for failure to perform or document a cost or price analysis. The OIG also alleges noncompliance with FAR 44.202-2(a)(7) and (a)(11) and 9.104-1 because "the subcontract award was not based on proper responsibility checks" Finally, the OIG alleges noncompliance with FAR part 52 because "the contract [was] awarded prior to required consent of Contracting Officer." The OIG's findings are in error because:

- The cited FAR sections on their face do not require the contractor to perform cost analysis or price analysis or perform "responsibility checks." They do not require the contractor to do anything. They simply require the government ***contracting officer*** (not the contractor), in a procurement where government "consent" to a subcontract is required, to ***"consider"*** various questions framed in general terms, such as whether the contractor performed "adequate price competition" or "cost or price analysis" ((a)(5) and (a)(8)), whether the contractor has a "sound basis" (undefined) for the subcontract award ((a)(7)) and whether the contractor has "reasonably translated" prime contract technical requirements to the subcontract ((a)(11)). The cited FAR sections do not make "consent" dependent on specific answers to the various questions for "consideration." Similarly, FAR 9.104-1 requires only that the *contracting officer* make an affirmative determination of responsibility, and does not impose any requirement on ETR to perform responsibility checks.

- The alleged requirements for the contractor to perform cost analysis or price analysis or perform "responsibility checks" do not exist anywhere else in the FAR, or in ETR's contract with DOL. The OIG has never been able to cite or quote any of these nonexistent FAR "requirements," despite our repeated requests throughout this audit.

- The DOL contracting officer, in fact, reviewed the file for the Meehan subcontract and formally consented in writing to its award. The consent was also signed off by three other responsible government personnel. There is no evidence that any of these personnel did not carefully review and consider all required factors. On the contrary, in providing consent, the Contracting Officer's Technical Representative signed off and affirmed in writing that "price competition was obtained," "basis for selection is documented," "subcontractor is determined to be responsible," and "cost or price analysis was conducted or price comparisons were obtained."

- This subcontract was administered by MTC, who was operations subcontractor to ETR at the time. With regard to the OIG's concern that the center did not obtain approval by a Job Corps Contracting Officer *before* awarding the subcontract to Dr. Meehan, the subcontract between Dr. Meehan and MTC (not ETR) was executed on 9/25/09. ETR presented the consent form to the Regional Job Corps Office on 10/12/09. The consent form was signed by the government Program Manager on 12/21/2009 and the government Contracting Specialist on 12/22/09 and then sent to and signed by the Contracting Officer on 1/12/10, expressly providing an 11/1/09 effective date.

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Meanwhile, ETR was obligated to provide these critical services even while awaiting the Contracting Officer's approval. Pursuant to the Job Corps Policies and Requirements Handbook ("PRH") section 6.10, ETR is required to provide certain dental services to students (who enroll at the Center on a weekly basis) within 48 hours of enrollment. Significantly, while the subcontract was being performed, DOL presumably had knowledge that ETR had engaged Dr. Meehan, effective 11/1/09, to perform these required and critical services.

- In fact, ETR's selection of Michael Meehan for dental services was reasonable, properly documented, and provided best value to the Job Corps. ETR advertised the subcontract procurement on FedBizOps. Dr. Meehan's bid was the only response and was a qualified bid. MTC performed market research to determine reasonableness of cost. Documentation of the above has previously been provided to the OIG and continues to be available upon request.

- The OIG questions the entire amount ($108,800.00) of the subcontract based on these alleged procedural irregularities in the award. However, the Draft Audit Report also correctly observes that DOL/ETA's "final determination" of questioned costs must "recognize[e] the value of goods and services received." Draft at page 2, footnote 1. *I.e.*, even if there were a procedural noncompliance, which there is not, it would be improper to reward the government with a windfall of free subcontracted goods and services when there is no finding that Michael Meehan failed to perform any of the subcontracted work-scope.

***A.O. Fox Memorial Hospital (Physician Services)*** (Draft Audit Report, p.6, 13.): The OIG alleges that the award of his subcontract for physician services for the JCC students was not in compliance with the FAR, specifically FAR 44.202-2(a)(5) and (a)(8) for failure to perform or document a cost or price analysis. The OIG also alleges noncompliance with FAR 44.202-2(a)(7) and (a)(11) and 9.104-1 because "the subcontract award was not based on proper responsibility checks" Finally, the OIG alleges noncompliance with FAR part 52 because "the contract [was] awarded prior to required consent of Contracting Officer." The OIG's findings are in error because:

- The cited FAR sections on their face do not require the contractor to perform cost analysis or price analysis or perform "responsibility checks." They do not require the contractor to do anything. They simply require the government ***contracting officer*** (not the contractor), in a procurement where government "consent" to a subcontract is required, to **"*consider*"** various questions framed in general terms, such as whether the contractor performed "adequate price competition" or "cost or price analysis" ((a)(5) and (a)(8)), whether the contractor has a "sound basis" (undefined) for the subcontract award ((a)(7)) and whether the contractor has "reasonably translated" prime contract technical requirements to the subcontract ((a)(11)). The cited FAR sections do not make "consent" dependent on specific answers to the various questions for "consideration." Similarly, FAR 9.104-1 requires only that the *contracting officer* make an affirmative determination

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of responsibility, and does not impose any requirement on ETR to perform responsibility checks.

- The alleged requirements for the contractor to perform cost analysis or price analysis or perform "responsibility checks" do not exist anywhere else in the FAR, or in ETR's contract with DOL. The OIG has never been able to cite or quote any of these nonexistent FAR "requirements," despite our repeated requests throughout this audit.

- The DOL contracting officer, in fact, reviewed the file for the A.O. Fox Memorial Hospital subcontract and formally consented in writing to its award. The consent was also signed off by three other responsible government personnel. There is no evidence that any of these personnel did not carefully review and consider all required factors. On the contrary, in providing consent, the Contracting Officer's Technical Representative signed off and affirmed in writing that "price competition was obtained," "basis for selection is documented," "subcontractor is determined to be responsible," and "cost or price analysis was conducted or price comparisons were obtained."

- This subcontract was administered by MTC, who was operations subcontractor to ETR at the time. With regard to the OIG's concern that the center did not obtain approval by a Job Corps Contracting Officer *before* awarding the subcontract to A.O. Fox Memorial Hospital, the subcontract between A.O. Fox and MTC (not ETR) was executed on 10/13/09. ETR presented the consent form to the Regional Job Corps Office on 10/27/09. The consent form was signed by the government Program Manager on 12/21/2009 and the government Contracting Specialist on 12/22/09 and then sent to and signed by the Contracting Officer on 1/7/10, expressly providing an 11/109 effective date. Meanwhile, ETR was obligated to provide these critical services even while awaiting the Contracting Officer's approval. Pursuant to the Job Corps Policies and Requirements Handbook ("PRH") section 6.10, ETR is required to provide certain medical services to students (who enroll at the Center on a weekly basis) within 48 hours of enrollment. Significantly, while the subcontract was being performed, DOL presumably had knowledge that ETR had engaged A.O. Fox Hospital, effective 11/1/09, to perform these required and critical services.

- In fact, ETR's selection of A.O. Fox Memorial Hospital for physician services was reasonable, properly documented, and provided best value to the Job Corps. ETR advertised the subcontract procurement on FedBizOps. A.O. Fox's bid was the only response. MTC attempted to circulate the solicitation directly to multiple potential offerors and also performed market research to determine reasonableness of cost. Documentation of the above has previously been provided to the OIG and continues to be available upon request.

- The OIG questions the entire amount ($160,000.00) of the subcontract based on these alleged procedural irregularities in the award. However, the Draft Audit Report also correctly observes that DOL/ETA's "final determination" of questioned costs must "recognize[e] the value of goods and services received." Draft at page 2, footnote 1. *I.e.,*

even if there were a procedural noncompliance, which there is not, it would be improper to reward the government with a windfall of free subcontracted goods and services when there is no finding that A.O. Fox Memorial Hospital failed to perform any of the subcontracted work-scope.

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***BPAs Managed by ETR:***

***Staples*** (Draft Audit Report, pages 6, 8): The OIG alleges that ETR (through the services of its consultant Above The Standards Procurement Group) was in noncompliance with the FAR (specifically FAR 44.202-2(a)(5),(7), (8) and (11) and subpart 9.104-1; see chart on page 6 of the Draft Audit Report) when it awarded this Blanket Purchasing Agreement (BPA) for office supplies to Staples. Allegedly, the noncompliances were: failure to "perform a cost or price analysis," failure to "develop a means of rating the bids," and failure to perform "responsibility checks on past performance of the bidders." The OIG Draft Audit Report also says, without evidence, that "the consultant's ongoing relationship with Staples indicated that it was not a fair and open competition." The OIG is in error because:

- The cited FAR sections on their face do not require the contractor to "perform a cost or price analysis," to develop a "means of rating" bids, or to perform "responsibility checks on past performance of the bidders." They do not require the contractor to do anything. They simply require the government ***contracting officer*** (not the contractor), in a case where government "consent" to a subcontract is required (and it is *not* required in the case of a BPA), to ***"consider"*** various questions framed in general terms, such as whether the contractor performed "adequate price competition" or "cost or price analysis" ((a)(5) and (a)(8)), whether the contractor has a "sound basis" (undefined) for the subcontract award ((a)(7)) and whether the contractor has "reasonably translated" prime contract technical requirements to the subcontract ((a)(11)). The cited FAR sections do not make "consent" dependent on specific answers to the various questions for "consideration." Similarly, FAR 9.104-1 requires only that the *contracting officer* make an affirmative determination of responsibility, and does not impose any requirement on ETR to perform responsibility checks on past performance. The alleged requirements for the contractor to "perform a cost or price analysis," to develop a "means of rating" bids, or to perform "responsibility checks on past performance of the bidders" do not exist anywhere else in the FAR, or in ETR's contract with DOL. The OIG has never been able to cite or quote any of these nonexistent alleged "requirements," despite our repeated requests throughout this audit.

- Even if "considerations" for "consent" by the contracting officer equaled a "requirement" on the contractor, which they do not, there is no requirement that the government consent to a BPA in the first place, hence FAR Subpart 44.2 is totally inapplicable to this transaction. A BPA is not a contract in the first place, and hence not a subcontract. It is just an agreement specifying provisions that will apply to future potential contracts (purchase orders, and so on), if there are any in the future. See discussion and authorities cited in our cover letter. Hence, even when understood as questions for the contracting officer's "consideration," FAR 44.202-2(a)(5), (7), (8) and (11) are inapplicable here.

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- The OIG provides no evidence for its false suggestion that the "consultant's ongoing relationship with Staples indicated that it was not a fair and open competition." The only rationale given by the OIG is that Staples is one of the consultant's "premier vendors." This is not evidence that it was not a fair and open competition. On its face, it simply shows that Staples has a successful record of past performance with the consultant, *i.e.*, an obvious factor supporting the selection of Staples for this BPA.

- In fact, the selection of Staples was reasonable, properly documented, and provides best value to the Job Corps. Staples was the low bidder. Several evaluation factors were listed in the solicitation: "service, past history, pricing, commitment of company and representative, cost, and solutions." The selection process was highly competitive: 14 bidders were solicited and 5 submitted bids. ETR made price comparisons amongst these bidders. The BPA protects ETR and the Job Corps by reserving ETR the freedom to cease purchasing from Staples if its products or prices cease to be competitive. The reasonableness of the selection of Staples has been confirmed by the auditors having identified zero unallowable or unreasonable office supply costs in this audit, and therefore the selection meets the requirements of FAR 31.201-3(2). The OIG questions all of the costs ultimately charged for office supplies ($23,351 as of the audit date) pursuant to the Staples BPA. But the OIG also correctly recognizes that any disallowance must take into account the value of goods and services received by the Job Corp, so as not to award the government a windfall of free goods and services on account of a procedural noncompliance. See Draft Audit Report at page 2, footnote 1.

***A-Z Solutions*** (Draft Audit Report, pages 6, 15): As with Staples, the OIG alleges that ETR (through the services of its consultant Above The Standards Procurement Group) was in noncompliance with the FAR (specifically FAR 44.202-2(a)(5),(7), (8) and (11) and subpart 9.104-1; see chart on page 6 of the Draft Audit Report) when it awarded this Blanket Purchasing Agreement (BPA) for janitorial services to A-Z Solutions. Allegedly, the noncompliances were: failure to "perform a cost or price analysis," failure to "develop a means of rating the bids," and failure to perform "responsibility checks on past performance of the bidders." As with Staples, the OIG Draft Audit Report also says, without evidence, that "the consultant's ongoing relationship with A-Z Solutions indicated that it was not a fair and open competition." The OIG is in error because:

- The cited FAR sections on their face do not require the contractor to "perform a cost or price analysis," to develop a "means of rating" bids, or to perform "responsibility checks on past performance of the bidders." They do not require the contractor to do anything. They simply require the government ***contracting officer*** (not the contractor), in a case where government "consent" to a subcontract is required (and it is *not* required in the case of a BPA), to **"*consider*"** various questions framed in general terms, such as whether the contractor performed "adequate price competition" or "cost or price analysis" ((a)(5) and (a)(8)), whether the contractor has a "sound basis" (undefined) for the subcontract award ((a)(7)) and whether the contractor has "reasonably translated" prime contract technical requirements to the subcontract ((a)(11)). The cited FAR sections do not make

"consent" dependent on specific answers to the various questions for "consideration." Similarly, FAR 9.104-1 requires only that the *contracting officer* make an affirmative determination of responsibility, and does not impose any requirement on ETR to perform responsibility checks on past performance. The alleged requirements for the contractor to "perform a cost or price analysis," to develop a "means of rating" bids, or to perform "responsibility checks on past performance of the bidders" do not exist anywhere else in the FAR, or in ETR's contract with DOL. The OIG has never been able to cite or quote any of these nonexistent alleged "requirements," despite our repeated requests throughout this audit.

- Even if "considerations" for "consent" by the contracting officer equaled a "requirement" on the contractor, which they do not, there is no requirement that the government consent to a BPA in the first place, hence FAR Subpart 44.2 is totally inapplicable to this transaction. A BPA is not a contract in the first place, and hence not a subcontract. It is just an agreement specifying provisions that will apply to future potential contracts (purchase orders, and so on), if there are any in the future. See discussion and authorities cited in our cover letter. Hence, even when understood as questions for the contracting officer's "consideration," FAR 44.202-2(a)(5), (7), (8) and (11) are inapplicable here.

- The OIG provides no evidence for its false suggestion that the "consultant's ongoing relationship with A-Z Solutions indicated that it was not a fair and open competition." The only rationale given by the OIG is that A-Z Solutions is one of the consultant's "premier vendors." This is not evidence that it was not a fair and open competition. On its face, it simply shows that A-Z Solutions has a successful record of past performance with the consultant, *i.e.*, an obvious factor supporting the selection of A-Z Solutions for this BPA.

- In fact, the selection of A-Z Solutions was reasonable, properly documented, and provides best value to the Job Corps. The selection process was highly competitive: 17 bidders were solicited, and 10 submitted bids. Evaluation factors were listed in the solicitation: "service, past history, pricing, commitment of company and representative, cost, and solutions." ETR made price comparisons amongst these bidders. A-Z Solutions was the second-lowest bidder but was judged to provide the best value, all factors considered. A-Z's pricing was within reasonable range of the low bidder's pricing, and A-Z is a Service Disabled Veteran Owned Small Business. There is no FAR requirement to select the lowest bidder for this BPA. The terms of the BPA protect ETR and the Job Corps by reserving ETR the freedom to cease ordering from A-Z if its products or prices cease to be competitive. The reasonableness of the selection of A-Z has been confirmed by the fact that the auditors found no unreasonable or unallowable janitorial supply costs billed in this audit, and therefore the selection meets the requirements of FAR 31.201-3(2). The OIG questions all of the costs ultimately charged for janitorial supplies ($17,292.00 as of the audit date). But the OIG also correctly recognizes that any disallowance must take into account the value of goods and services received by the Job Corps, so as not to award the government a windfall of free

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goods and services on account of a procedural noncompliance. See Draft Audit Report at page 2, footnote 1.

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***Expenditures Over $3,000 That Resulted In Questioned Costs.***

***Allegation of Inadequate Sole-Source Justification (5 expenditures)***

(Draft Audit Report, page 9): The OIG alleges that ETR did not properly justify five sole-source purchases, including purchases of an exit door alarm, floor tile/rubber mats, rental of construction equipment, rental of equipment for a day event, and class rings. For each of these transactions, the OIG states that:

> the justification did not include sufficient evidence that no other responsible party existed, that the center develop and used responsibility checks (FAR Subparts 44.202-2(a)(7) and (11) and Subpart 9.104-1) to ensure that the vendor could satisfactorily deliver the goods or services, and that cost or price analysis was performed to ensure fair and reasonable pricing (FAR Subparts 44.202-2(a)(5) and (a)(8), and Subpart 31.201-3(a)).

The OIG further alleges that these transactions violated Subpart 52.244-5(a). The OIG is wrong because:

- The cited FAR sections (FAR Subparts 44.202-2(a)(5), (7), (8) and (11) and Subpart 9.104-1) on their face do not require the contractor to perform cost analysis or price analysis or perform "responsibility checks." They do not require the contractor to do anything. They simply require the government ***contracting officer*** (not the contractor), in a procurement where government "consent" to a subcontract is required, to ***"consider"*** various questions framed in general terms, such as whether the contractor performed "adequate price competition" or "cost or price analysis" ((a)(5) and (a)(8)), whether the contractor has a "sound basis" (undefined) for the subcontract award ((a)(7)) and whether the contractor has "reasonably translated" prime contract technical requirements to the subcontract ((a)(11)). The cited FAR sections do not make "consent" dependent on specific answers to the various questions for "consideration." Similarly, FAR 9.104-1 requires only that the *contracting officer* make an affirmative determination of responsibility of the prime contractor, and does not impose any requirement on ETR to perform responsibility checks on subcontractors. Nor are there any such requirements anywhere else in the FAR or in ETR's contract with DOL. The OIG has never identified any, despite our repeated requests throughout this Audit.

- Even as a matter of "considerations" for the contracting officer to ask about in a case where "consent to subcontract" is required, there is no requirement for the contracting officer to consent to these five expenditures in the first place. Consent is only required if the subcontract is cost-reimbursement, time-and-materials, labor-hour, or fixed price

under the "simplified acquisition threshold" ($150,000) or 5% of the prime contract price. None of these criteria are met here. The five expenditures at issue are priced in terms of fixed prices for specific services, all of which are under $150,000. Hence, FAR Subpart 44.2 is entirely inapplicable here.

- The selection of each of these five vendors was reasonable pursuant to FAR 31.201-3(a) and provided best value to the government, as fully explained and documented in earlier stages of this Audit, and as restated here below:

  - **Greatmats:** Check #137960, $5,864.45 for flooring/rubber mats: The flooring product that was installed was identified as the desired product at the Center and was required to finish the rehabilitation of the specific recreational area. The product was under a patent by Greatmats. Thus, Greatmats was **the only supplier capable of offering the unique product which the center required** to meet its need for a student Dance Floor/ Exercise Studio. Accordingly, Greatmats was identified and treated as a Sole Source subcontractor. Documentation of the Sole Source Justification was provided to the OIG in response to the SOF and remains available upon request.

  - **J. Hubner:** Check #133599, $5,140.00 for fire safety hardware/exit door alarm: J. Hubner, at the time of the procurement in question, was the Fire Safety Systems subcontractor of record. The firm's integrated involvement which substantiates the sole source status is as follows: (1) J. Hubner had unique knowledge of the mixed Fire Safety Hardware which was presently being utilized on the center and did manage the maintenance and upkeep of the system; (2) J. Hubner had discovered substandard Fire Safety System wiring runs during maintenance and then mapped the wiring and corrected the issues, bringing the Center in line with current code; and (3) Due to the factors mentioned above, **J. Hubner possessed a unique firsthand knowledge that could benefit the center directly in terms of safety and time.** Because of these factors, J. Hubner was considered a Sole Source subcontractor, as relates to the procurement. Documentation of the Sole Source Justification was provided to the OIG in response to the SOF and remains available upon request.

  - **Monroe Tractor:** Check #132882, $3,806.25 for equipment rental: Monroe Tractor was the vendor of record who provided OJCA/ETR with Heavy Equipment (which was already on center during the time period in question). Another procurement process would have resulted in a substantial duplication of cost to the Government under the Oneonta JCA's cost-plus contract, none of which could be expected to be recovered through competition. Nor would the Government have had an opportunity to recover associated processing fees as well as subsequent equipment delivery and pick-up charges, which would have resulted from a new full procurement. Accordingly, ETR's sole-source selection was **reasonable** and saved costs for the government. The equipment was already on Center and so deemed to be eligible for Sole Source procurement.

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Documentation of the Sole Source Justification was provided to the OIG in response to the SOF and remains available upon request.

- **Zolnier LLP:** Check #132205, $3553.55 for class rings: Zolnier was the vendor of record who provided OJCA/ETR with Student Class Rings for bench marks including graduation. The result from a new full procurement would not have presented the Government with an opportunity to recover costs such as design and set-up fees under the Oneonta JCA cost-plus contract. Accordingly, ETR's sole-source selection was **reasonable** and saved costs for the government. This vendor had a strong history of performance and due to time limitations on production of product, the Center deemed this vendor to be eligible for sole source procurement. Documentation of the Sole Source Justification was provided to the OIG in response to the SOF and remains available upon request.

- **Five Star Sound:** Check #139502, $3500.00 for a sound system: Five Star Sound is the only local vendor that has a strong history of good performance and can satisfy the wide ranging sound solution needs of the Center throughout the year. It is the **only local vendor that could satisfy all aspects of the Center's entertainment needs**. As such, Five Star Sound has been determined to be a sole source for sound needs. Documentation of the Sole Source Justification was provided to the OIG in response to the SOF and remains available upon request.

- Finally, FAR 52.244-5 only requires that contractors select subcontractors "on a competitive basis to the maximum practical extent consistent with the objectives and requirements of the contract." It does not set forth an absolute competition requirement, nor does it state that sole source procurements are unacceptable. See discussion of case authority in accompanying cover letter. As set forth above, with respect to each of these five expenditures, ETR has explained and documented the reasonable basis for its sole-source procurement. *Winslow Associates*, 53 Comp. Gen. 478, 74-1 CPD 14, B-178740 (1974); *Winslow Associates*, B-178740, 75-1 CPD 283 (1975). Specifically, ETR has shown:
  1. that the Center's/government's interest's could only be satisfied by items or services which are unique, *e.g.*, subcontracts issued to J. Hubner and Greatmats.
  2. that only a single source can provide an item which must be compatible and interchangeable with existing equipment, *e.g.*, subcontracts issued to Greatmats and Five Star Sound;
  3. that time is of the essence and only one known source can meet the Center's/government's needs within the required timeframe, *e.g.*, subcontract issued to Zolnier; and,
  4. that increased efficiency and costs savings to the Government justified the sole source procurement, *e.g.*, subcontracts issued to Monroe Tractor and Zolnier.

Accordingly, ETR has sufficiently provided justification and rationale for each sole source procurement. *See Ampex Corporation*, B-191132, June 16, 1978, 78-1 CPD 439, 1978 U.S. Comp. Gen. LEXIS 2293, 20-22 (*internal citations omitted*).

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- The OIG has found no evidence and made no finding that the services provided by these five vendors failed to provide the required value to the Job Corps at a reasonable price. Again, therefore, to disallow the entire questioned amount, which is equivalent to the entire subcontract values, would provide the government a windfall of free services on account of an alleged procedural irregularity. That would be improper, as the Draft Audit Report acknowledges (page 2, footnote 1).

- Despite our requests for clarification regarding statistical extrapolation in response to a prior draft, the Draft Audit report provides no meaningful explanation or justification for increasing the amount of questioned costs for these five expenditures from $21,864 to $73,402. The only information that the OIG provides is that based on its "statistical sample," alleged noncompliances resulted in a range "between $20,120 and $73,402, in improperly awarded purchase orders." The OIG then states that it selected $73,402 (the very high end of the range of statistically extrapolated sample costs) to include in its questioned costs. See Draft Audit Report at page 9. The auditors state they have "95 percent" confidence for this inference but do not explain: how their "statistical sample" was selected, why they believe it to be representative of the larger universe, and the basis for the high "confidence" level. The auditors correctly require that ETR substantiate its own claimed allowable costs. By the same token, the OIG's own substantiation for its "sampling" methodology must also be provided and has not been.

***Alleged "Weak Control Environment."***

The OIG alleges that "ETR/Oneonta had not established a control environment, including procedures and oversight, to ensure compliance with FAR." Draft Audit Report at page 9. ETR disputes this allegation.

In fact, ETR has a robust control environment of procedure and oversight for FAR compliance, which has been shared with and explained to the OIG auditors through the lengthy audit period. As a fundamental point in response and with all due respect, the OIG auditors must ensure that they are themselves correctly understanding the "FAR compliance requirements" they are attempting to invoke within this Draft Audit Report. In the case of this Audit, the OIG has failed to identify any FAR, or contractual provisions, which support the alleged "requirements" that supposedly have not been complied with … despite ETR's repeated requests and explanations, at considerable expense to this small business. This should not have been necessary.

As a small business contractor, the OIG has forced ETR to spend tens of thousands of dollars to defend and legally correct this Audit Report before it is published and reported to Congress. As stated in its own Semi-Annual Reports to Congress, the purpose of the OIG is to assess and promote the effectiveness, efficiency, economy, and integrity of DOL's programs and operations. Regrettably, ETR firmly contends that this OIG Audit scope of work was based on an incorrect premise (supposed required FAR compliance criteria), and should have been properly and legally vetted within the OIG and DOL Solicitors Office beforehand. Unfortunately, the unnecessary costs incurred by ETR to defend this ineffective and inefficient audit could have been directed to creating new private sector positions within the Job Corps Program.

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