

ETA Response to Draft Report

U.S. Department of Labor

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



OCT 12 2011

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

FROM: JANE OATES *Jane Oates*
Assistant Secretary

SUBJECT: OIG Draft Report No. 26-11-008-03-370,
"Management and Training Corporation Did Not Ensure Best Value in Awarding Sub-Contracts at the Clearfield Job Corps Center"

This memorandum responds to the subject draft audit report, dated September 23, 2011, Draft OIG Audit Report No. 26-11-008-03-370, *"Management and Training Corporation Did Not Ensure Best Value In Awarding Sub-Contracts at the Clearfield Job Corps Center."* 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 are advertised, evaluated, awarded, and costs supported as required by the FAR.

Response: Management accepts this recommendation in part.

Management and Training Corporation's (MTC) procurement policies minimally must meet the requirements of FAR Part 44.303 and FAR Part 52.244-5. MTC's Procurement Standard Operating Procedures (SOP) 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. MTC's Contractor Purchasing System was approved in 2010. A copy of the final report and approval memo are available upon request.

We consider this recommendation resolved.

OIG Recommendation 2: Repay questioned costs totaling \$2,813,773. 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 over \$25,000 / amount of questioned costs	Expenditures over \$3,000 / amount of questioned costs
(a) Sub-contract award not based on required responsibility checks FAR Subpart 44.202-2 (a) (7) and (11)	4 of 12 (33%) \$429,608	Not applicable
(b) Inadequate sole-source justification FAR Subpart 44.202-2(a) (5) and (8)	6 of 12 (50%) \$2,384,165	Sample: 16 of 41 (39%) \$77,866
(c) Invoice payments without a contracting instrument. FAR Subpart 44.202-2(a)(5) and FAR Subpart 44.202-2 (a) (9)	Not Applicable	10 expenditures (100%) \$144,428
Total.....\$3,036,067	10 of 12 (83%) \$2,813,773	16 of 41 (39%) \$77,866 and 10 of 10 (100%) \$144,428

- (a) We agree with the OIG in part. However, the OIG needs to clarify specifically what is meant by “award not based on required responsibility checks” as the items identified in the audit summary as responsibility checks are not responsibility matters but appear to be evaluation criteria or factors. The FAR requires that the contractor have a sound basis for awarding a contract to a responsible vendor.
- (b) We agree with the OIG. Contractors are required to prepare justifications or sole source awards and this must be documented in the file.
- (c) We disagree with the OIG. The audit summary report indicates the paid invoices lacked supporting documentation to validate the invoice and not that invoices were paid without a contracting vehicle. The OIG needs to clarify the description for item c in the table.

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 MTC 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 MTC to update SOPs to provide for regulatory and statutory oversight, rather than supervisory oversight.

We consider this recommendation resolved.

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

Response: Management accepts this recommendation in part.

OCM will ensure MTC complies with regulatory requirements. Further, OCM will work with OJC to provide tools to COTRs/Project Managers to assist in the monitoring of the purchasing practices of MTC at the Clearfield Job Corps Center.

We consider this recommendation resolved.

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

Response: Management accepts this recommendation in part.

MTC has an approved purchasing system; as such, the majority of MTC subcontracts do not require Contracting Officer (CO) approval prior to the contract's execution. However, OCM will provide additional tools to regional COs to ensure a thorough review of potential subcontracts and will require MTC to submit subcontract agreements for the Clearfield Job Corps Center to the Regional Contracting Officer. Further, OCM will modify the MTC CPSR

approval memo to reflect the exception for the Clearfield JCC subcontracts. The Regional CO's review of sub-contracts and purchase agreements will ensure: proper market research, advertisement, competition, basis of award, and cost/price analysis or comparison has been completed prior to granting approval to the contractor.

We consider this recommendation resolved.

Based upon the aforementioned responses, we anticipate the audit report's recommendations will be resolved and can be closed upon completion of the corrective action. OIG clarification will be reviewed to determine if resolutions need modification.

If you have questions concerning this document, please contact Linda K. Heartley, ETA's Head of the Contracting Activity, in the Office of Contracts Management at (202) 693-3404.

Cc: T. Michael Kerr, ASAM
Ed Hugler, OASAM
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MTC Response to Draft Report



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October 19, 2011

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Re: Response to Draft Audit Report – Audit of Clearfield Job Corps Center

Dear Mr. Armada:

Management & Training Corporation (MTC) appreciates the opportunity to respond to the September 2011 *Draft Audit Report* issued by the Office of Audit, Office of Inspector General (OIG), U.S. Department of Labor (DOL), regarding the Clearfield Jobs Corps Center ("Clearfield JCC"). You indicated that your audit objective was to determine "Did Clearfield award contracts and claim costs in accordance with the Federal Acquisition Regulations (FAR)?" As a preface to our comments and in reference to your audit objective as stated in the audit report, we want to make clear what our understanding is of the FAR. In general the FAR was written for and applies to government agencies.

BACKGROUND

The August 17, 2011 Statement of Fact (SOF) audit of Clearfield JCC, states that it examined whether the Clearfield JCC "award[ed] sub-contracts and claim[ed] costs in accordance with [the] FAR." The FAR provisions cited by the OIG in the SOF, however, do not apply to the awarding of subcontracts by Clearfield JCC. The OIG's assertion to the contrary is an astonishing and dramatic departure from well settled law and practice. From there the OIG changed citations for it next reports but has basically continued to try to follow the same premise.

THE OIG's FAULTY PREMISE

The OIG's Report is based entirely on the faulty premise that MTC was required to comply with FAR requirements that do not exist. The OIG insists that MTC, as a government contractor awarding subcontracts, is subject to the same procedural requirements the FAR imposes on the government when it awards prime contracts. But, as pointed out by MTC and numerous other Job Corps Center operators, *this is not the law*. Because the OIG continues to set for itself an erroneous objective, it ends up with an insupportable and erroneous finding:

OIG Objective — Did MTC Clearfield award sub-contracts and claim costs in accordance with FAR?

OIG Finding — MTC Clearfield did not comply with specific sections of the FAR when awarding sub-contracts and purchase orders.¹

- MTC did not comply with specific sections of the FAR when awarding purchase orders to vendors for 16 of the 41 expenditures over \$3,000 statistically selected.
- MTC had not established a control environment, including procedures and oversight, to ensure compliance with specific sections of the FAR. Also, neither ETA contracting personnel nor Job Corps regional staff adequately monitored MTC Clearfield's procurement activities for compliance with contract-specific sections of the FAR.

According to the OIG, the FAR is applicable to MTC – as a contracted center operator – because its compliance is required by the PRH and by the MTC Clearfield contract.

It is true, as cited by the OIG, that MTC's contract to operate Clearfield states that "[t]he center shall establish systems to procure property, services, and supplies in a cost-efficient and environmentally-friendly manner in accordance with government policies. The contractor shall also establish systems to provide procedures for receipt and accountability of government-owned property, material, and supplies, in accordance with PRH 5.6." This quoted section, however, offers *nothing* to support the OIG's statement that "the FAR is applicable to contracted center operators because its compliance is required ... by the MTC Clearfield contract."

And, while it is also true, as cited by the OIG, that the PRH section 5.6 R1 states "Center operators and OA/CTS contractors shall follow all applicable procurement regulations, to include those contained in the FAR," there is, again, nothing in this statement that supports the OIG's position regarding which FAR provisions are "applicable" to Center operators' subcontracting activities and how such provisions are to be applied.

Against this paltry backdrop, the current OIG Report takes a giant leap and sets forth a new set of "[s]pecific FAR requirements for centers procuring supplies or services and claiming costs." The specific FAR sections upon which the OIG now relies are set out below in regular text. Curiously, the OIG omits portions of the cited FAR sections – the portions that appear below in bold italics – presumably because such sections undercut and render insupportable the position taken by the OIG here:

- FAR Subpart 52.244-5, *Competition in Subcontracting*
FAR Subpart 52.244-5 as prescribed in FAR Subpart 44.204(c) –
The Contractor shall select subcontractors (including suppliers) on a competitive basis to the maximum practical extent consistent with the objectives and requirements of the contract.
- FAR Part 44, *Subcontracting Policies and Procedures*

¹ The new Draft Report replaces the previously unidentified FAR provisions relied upon by the OIG in claiming MTC was non-compliant, with citations to Part 44.

FAR SUBPART 44.2 CONSENT TO SUBCONTRACTS²

44.202-2 Considerations.

(a) The contracting officer responsible for consent must, at a minimum review the request and supporting data and consider the following:

FAR Subpart 44.202-2(a)(5) – Obtain adequate price competition or properly justify its absence. [In fact, this section actually asks the C.O. to consider “*Was adequate price competition obtained or its absence properly justified?*”]

FAR Subpart 44.202-2(a)(7) and FAR Subpart 9.104-1 – Obtain a sound basis for selecting and determining the responsibility of the particular subcontractor, including past performance, technical requirements, and ability to comply with proposed performance and delivery schedules. [In fact, this section actually asks the C.O. to consider “*Does the contractor have a sound basis for selecting and determining the responsibility of the particular contractor?*” and makes no reference whatsoever to FAR 9.104-1].

FAR Subpart 44.202-2(a)(8) – Perform adequate cost or price analysis or price comparisons and obtain certified cost or pricing data and data other than certified cost or pricing data. [Again, this section actually asks the C.O. to consider “*Has the contractor performed adequate cost or price analysis or price comparisons and obtained certified cost or pricing data and data other than certified cost or pricing data?*”]

FAR Subpart 44.202(a)(9) – The proposed sub-contract type should be appropriate for the risks involved and be consistent with current policy. [And again, this section actually asks the contracting officer to consider “*Is the proposed subcontract type appropriate for the risks involved and consistent with current policy?*”]

FAR Subpart 44.202-2(a)(11) – Adequately and reasonably translate prime contract technical requirements into subcontract requirements. [And finally, again, this section actually asks the contracting officer to consider “*Has the contractor adequately and reasonably translated prime contract technical requirements into subcontract requirements?*”]

- FAR Subpart 52.216-7, *Allowable Cost and Payment*
Subpart 52.216-7(a) *Invoicing* (sub-paragraph 1) – The Government will make payments to the Contractor in accordance with FAR Subpart 31.2.
- FAR Subpart 31.2 *Contracts with Commercial Organization*

² It is critical to note that SUBPART 44.2 applies to situations where contracting officer consent to subcontracting is required. This is only true for a very small portion of MTC’s subcontracting activities.

Subpart 31.201-2 (d) *Determining Allowability* – 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, and are allocable to the contract. The contracting officer may disallow all or part of a claimed cost that is inadequately supported.

The new Draft Report continues to be based upon an entirely faulty premise regarding the application of the cited Federal Acquisition Regulations and, therefore, cannot stand.

THE FAR PROVISIONS CITED BY THE OIG DO NOT IMPOSE REQUIREMENTS ON MTC

FAR Subpart 52.244-5. A contractor such as MTC is required to select subcontractors on a competitive basis to the maximum *practical extent consistent with the objectives and requirements* of its contract. This section does not mandate full and open competition in all or even most instances, nor does it impose all or any of the requirements of Part 6 on contractors in terms of the available bases and/or justification for limited or non-competitive awards.

FAR Subpart 44.2. FAR Subpart 44.2 does not impose specific requirements on MTC, nor are the contents of this Subpart contractually flowed-down to MTC. FAR Subpart 44.2 addresses the situation where a prime contractor is required to "notify" the contracting officer of, and obtain the contracting officer's "consent" to, the prime contractor's award of a particular subcontract or subcontracts. This "consent" process, where applicable, is very general. Said another way, FAR Subpart 44.2 does not specify requirements subcontracts must meet to obtain contracting officer consent, it sets forth "considerations". Government consent to subcontracts, when required, is clearly intended to be a flexible process in which the contracting officer has broad discretion.

FAR 44.202-2(a) begins as follows: "The contracting officer responsible for consent must, at a minimum, review the request and supporting data and *consider* the following: "(Emphasis added). The FAR goes on to list thirteen questions for the contracting officer to consider, five of which are cited by the OIG as the basis for its findings here, 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 certified cost or pricing data"; (a)(9) "Is the proposed subcontract type appropriate for the risks involved and consistent with current policy?"; 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. Yet on the basis of these general considerations the OIG now seeks to impose on contracted Job Corps Center operators a long list of new obligations.

Only 4 subcontracts (Professional Health Services only, based on the contract requirements) at Clearfield were subject to the FAR Part 44.2 "consent" requirements *imposed upon contracting officers*. And the files confirm that these were expressly consented to by the DOL contracting officer. There is no indication that the contracting officer did not "consider" all relevant factors in this process

and, even if there was, such failure to consider on the part of the contracting officer would not constitute non-compliance by MTC.³

FAR 9.104-1. The OIG also cites to FAR 9.104-1 as applicable to MTC's subcontracting activities. This provision sets forth general standards for determining whether a prospective contractor is responsible. The policy underlying this provision is found in FAR 9.103(b): "No purchase or award shall be made unless the *contracting officer* makes an affirmative determination of responsibility." As is the case with the cited consent provisions, FAR 9.104 applies to the *contracting officer's* selection of prime contractors. It does not suggest, let alone mandate, procedures that a prime contractors must follow in selecting its subcontractors. Nor was this FAR provision contractually flowed-down to MTC in its Clearfield contract.

FAR Subpart 52.216-7 & FAR Subpart 31.2. MTC objects to the OIG's methodology for determining the amount of questioned costs. The OIG questions the entire subcontract value of any subcontract awarded using procedures that it finds "noncompliant." This is wrong. In each instance cited in the audit, the Job Corps received valuable goods and or services in return for the payment made (through MTC) to the subcontractor. The hypothetical detriment to the Job Corps, if any, of MTC's theoretical "noncompliance" cannot and does not mean the Job Corps did not receive significant value from the subcontractor costs. Indeed the value of any alleged noncompliance, if such actually existed, would be at most a small fraction of the subcontract value.

THE OIG's REPORT CANNOT STAND

MTC opposes the OIG's draft findings, and the manner in which it has gone about reaching these findings. In this regard it is important to note that MTC was denied an exit conference regarding the OIG's proposed findings, allegedly because of the extent of disagreement between the parties. The existence of a strong difference of opinion on the issues central to the OIG's findings is a remarkable and particularly unacceptable reason for denying a contractor a conference.

MTC has taken all the necessary and appropriate steps to ensure that best value is received by the government in connection with its subcontracting activities for the operation of the Clearfield Job Corps Center. Accordingly, MTC disputes the OIG's findings, as well as the recommendation that MTC repay the questioned costs, particularly since the OIG questions MTC's subcontracting costs based upon "non-compliance with the FAR."

MTC has an approved purchasing system. Where such a system is required, Part 44.301 directs the contracting officer to "evaluate the efficiency and effectiveness with which the contractor spends Government funds and complies with Government policy when subcontracting" under such system. This evaluation looks at market research, degree of price competition, pricing policies and techniques, methods for evaluating subcontractor responsibility, CAS compliance and management, among other elements. The contracting officer does *not* require or examine whether a contractor conducts its subcontracting activities as an agency would be required to: in strict compliance with the FAR, *nor can the OIG.*

³ It is also important to note that MTC has thirteen (13) open annual purchase orders – basically blanket purchase agreements – at Clearfield. The "consent" process does not apply to these types of arrangements, unless they are for Professional Health Services. Nine of the 13 (the remaining four purchase orders are for Professional Health Services and contracting officer's consent was obtained) allegedly improper expenditures noted in the Draft Report are blanket purchase-type arrangements – agreements that cover future purchase orders that *may* be issued. These are not contracts. 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 FireCrew Transport, Inc. v. United States*, US Court of Federal Claims No.10-819C, January 28, 2011("It is well established that BPAs are not contracts").

The specific bases and support for MTC's opposition are set out below. Please note that much of what is contained in this Response has already been provided, in writing, to the OIG. Inexplicably, however, despite MTC's detailed and irrefutable support for almost every cost challenged by the OIG, the latest Draft Report contains the same or similar insupportable recitations and conclusions as the previous drafts. In other words, it appears the OIG has not taken into account any of the substantial and irrefutable material submitted to date by MTC. And, in those rare instances where such information has been taken into account, the current Draft Report simply raises new and equally insupportable grounds for challenging MTC's subcontracting activities and costs. Please note that MTC's prior filings are incorporated, by reference, in their entirety here.

MTC Clearfield's Non-Compliance Resulted in More Than \$3 Million in Questioned Costs

OIG Finding - Sub-contracts Above \$25,000 Where Specific FAR Non-compliance Resulted in Questioned Costs

The following are examples cited by the OIG for the two different types of specific FAR non-compliance followed by MTC's response.

Cited Example 1 – Mathew Gardiner, M.D.

OIG Statement – Mathew Gardiner, M.D. Subcontract

Sub-contracts managed by MTC Clearfield – In 2010, Mathew Gardiner, M.D. was awarded a sub-contract with a base 2-year amount of \$68,800 to provide psychiatric services for Job Corps students. The contract also had three option years with an aggregate value for all five years of \$202,240. In awarding the initial sub-contract, MTC Clearfield requested bids on the FedBizOpps website and received one bid, from Mathew Gardiner.

MTC Clearfield did not comply with FAR Subparts 44.202-2(a)(7) and (8), and FAR Subpart 9.104-1 when awarding the sub-contract to Mathew Gardiner. MTC Clearfield did not perform a cost or price analysis in the absence of adequate cost competition. Additionally, MTC Clearfield did not develop or document an adequate basis for awarding the sub-contract. The sub-contract was for psychiatric services for the center students. As such, it was critical for MTC Clearfield to ensure its students received adequate psychiatric care by performing responsibility checks on the vendors based on the quality of services to be provided as well as cost. Possible responsibility checks for a physician include: experience and performance providing services to a diverse student population, ages 16-24; evidence of technical expertise; and evidence of performance on similar type contracts.

Although MTC Clearfield did list responsibility checks as criteria in the solicitation, there was no evidence it performed responsibility checks to provide assurance that Mathew Gardiner could satisfactorily perform the contract as required by FAR Subparts 44.202-2(a)(7) and FAR Subpart 9.104-1. In addition, MTC Clearfield did not perform or document cost or price analysis as required by FAR Subpart 44.202-2(a)(8). Such analysis to ensure fair pricing was critical because the center only received one bid. As such, MTC Clearfield could not ensure the sub-contract award resulted in best value to the government and adequate psychiatrist care for its students. We questioned the costs for the base 2-year period only and not the option years, or \$68,800.

MTC Response – Mathew Gardiner, M.D. Subcontract

MTC disagrees with this finding. The OIG cited FAR 9.104-1 as applicable to MTC's subcontracting activities. This provision sets forth general standards for determining whether a prospective contractor is responsible. The policy underlying this provision is found in FAR 9.103(b): "No purchase or award shall be made unless the *contracting officer* makes an affirmative determination of responsibility." As is the case with the cited consent provisions, FAR 9.104 applies to the *contracting officer's* selection of

prime contractors. It does not suggest, let alone mandate, procedures that a prime contractors must follow in selecting its subcontractors. Nor was this FAR provision contractually flowed-down to MTC in its Clearfield contract.

The contracting officer must review and consider FAR Subpart 44.202-2(a)(7) and FAR Subpart 44.202-2(a)(8) before providing consent to subcontracts. This contract was approved by MTC's Regional Contracting Officer and consent was obtained per FAR Subpart 44.2, "Consent to Subcontracts." There is nothing to indicate the contracting officer did not perform his or her requirements adequately although the OIG would imply otherwise. Again the items being cited are requirements of the contracting officer and not the contractor.

The responsibility checks MTC performed included a license, certificate of insurance, DEA License, and résumé showing experience as incumbent with an established past performance history of 5 years with the center. MTC also did an Excluded Parties List System (EPLS) check of this provider to verify that the provider was not on the government's debarred list. MTC followed our DOL approved Purchasing Policies/SOPs. These responsibility checks and EPLS verification were provided to the contracting officer for consideration during the consent evaluation process with this subcontract.

Vendor was identified as a provider in MTC's original Clearfield Job Corps Center operations proposal, which was reviewed and approved during the proposal process and incorporated into the prime contract.

The questioned cost of \$68,800 reflects the full 2-year period of the contract. However, actual costs for the audit period were \$40,400. Thus the questioned cost for this subcontract and other questioned costs on the additional subcontracts are substantially overstated.

Cited Example 2 – Adventures in Advertising

OIG Statement – Adventures in Advertising Subcontract

Sole-source sub-contracts awarded by MTC Clearfield – In 2010, Adventures in Advertising was awarded a base two-year, \$607,040 sub-contract to provide student clothing and career prep uniforms to Job Corps students. The contract had three option years with an aggregate value for all 5 years totaling \$1,517,600. In awarding the initial sub-contract, MTC Clearfield issued a sole-source award and did not competitively bid or advertise the sub-contract.

MTC Clearfield did not comply with the FAR when awarding the sub-contract to Adventures in Advertising because it did not provide adequate justification for sole-source procurement and it did not document a sound basis for the award as required by FAR Subpart 44.202-2(a)(7) and FAR Subpart 9.104-1. The sole-source justification records maintained by MTC Clearfield stated, "Only one responsible source for the needed supplies/services." However, the justification did not include substantive evidence that no other responsible party existed, that the center developed and used responsibility checks to ensure the vendor could satisfactorily complete the sub-contract, and that fair pricing was insured by performing cost or price analysis as required by FAR Subpart 44.202-2(a)(8). Therefore, MTC Clearfield had no assurance that the sub-contract represented the best value for the government. We questioned the cost for the base 2-year period of the contract, or \$607,040.

MTC Response – Adventures in Advertising Subcontract

MTC disagrees with this finding. The OIG cited FAR 9.104-1 as applicable to MTC's subcontracting activities. This provision sets forth general standards for determining whether a prospective contractor is responsible. The policy underlying this provision is found in FAR 9.103(b): "No purchase or award shall be made unless the *contracting officer* makes an affirmative determination of responsibility." As is the case with the cited consent provisions, FAR 9.104 applies to the *contracting officer's* selection of prime contractors. It does not suggest, let alone mandate, procedures that a prime contractors must

follow in selecting its subcontractors. Nor was this FAR provision contractually flowed-down to MTC in its Clearfield contract.

The contracting officer must review and consider FAR Subpart 44.202-2(a)(7) and FAR Subpart 44.202-2(a)(8) before providing consent to subcontracts. This contract was approved by MTC's Regional Contracting Officer and consent was obtained per FAR Subpart 44.2, "Consent to Subcontracts." There is nothing to indicate the contracting officer did not perform his or her requirements adequately although the OIG would imply otherwise. Again the items being cited are requirements of the contracting officer and not the contractor.

The provider is the incumbent with an established past performance history with the center. This was based upon previous competitive solicitation in which they were determined to be the only service provider that could meet the center's unique requirements for quantity and selection that accepts clothing vouchers from individual students. MTC also did an EPLS check of this provider to verify that the provider was not on the government's debarred list. These responsibility checks and EPLS verification were provided to the contracting officer for consideration during the consent evaluation process with this subcontract.

As the center has over 1,000 students, having a student clothing store on site has been identified as a best practice. Adventures in Advertising along with center management have identified the type of appropriate clothing the students can purchase. This on-site store reduces transportation and staffing costs as supervised off-site trips are no longer required.

The questioned cost of \$607,040 reflects the full 2-year period of the contract. However, actual costs for the audit period were \$274,729. Thus the questioned costs for this subcontract and other questioned costs on the additional subcontracts are substantially overstated.

Exhibit 1 of the OIG report included a summary of specific FAR non-compliance for each of the 10 subcontracts where OIG questioned costs. Included below is the summary with MTC's applicable responses.

Sub-Contracts with FAR Non-Compliance

Vendor Name	Amount of Contract*	Good or Service Provided	FAR Non-Compliance Issues
Adventures in Advertising	\$607,040	Clothing	<ul style="list-style-type: none"> Inadequate Sole Source Justification No evidence other vendors not available Responsibility checks not developed and used Cost or Price Analysis was not conducted or documented
<i>MTC Response:</i> See Cited Example 2 for Adventures in Advertising response on page 7			
Clark Finlinson, DDS	45,408	Dental	<ul style="list-style-type: none"> Basis for selection was not employed or documented

Vendor Name	Amount of Contract ^A	Good or Service Provided	FAR Non-Compliance Issues
<p><i>MTC Response:</i> Approved DOL consent form in file; bid abstract in file referencing three competitive bids; awarded to low bid which met selection criteria. This vendor is a small business. The responsibility checks MTC performed included a license, certificate of insurance, DEA License, and résumé showing experience as incumbent with an established successful past performance history of 9 years with the center. MTC also did an EPLS check of this provider to verify that the provider was not on the government's debarred list. These three competitive bids, small business classification, responsibility checks, and EPLS verification were provided to the contracting officer for consideration during the consent evaluation process with this subcontract.</p> <p>Vendor was identified as a provider in MTC's original Clearfield Job Corps Center operations proposal, which was reviewed and approved during the proposal process and incorporated into the prime contract.</p> <p>Actual contract costs for audit period were \$21,318.</p>			
Davis Applied Technology College – Off Center Training	701,794	Specialized Training	<ul style="list-style-type: none"> • Inadequate Sole Source Justification • No evidence other vendors not available • Responsibility checks not developed and used • Cost or Price Analysis was not conducted or documented
<p><i>MTC Response:</i> The center has a signed educational MOU agreement. Davis Applied Technology College (DATC), offers CNA, Manufacturing Technology, Small Engine Repair, and Composites training. DATC has partnered with the center to tailor programs to best meet the center's needs. As a public technical college, the prices are regulated by the state. DATC offers vocational training opportunities for selection by the students. This is an accredited college, and the students are able to obtain state resident tuition rates. This vendor has an established successful past performance history with the center. DATC is the closest college to the center. In fact, the DATC offers a nursing program adjacent to the center which allows the students to walk to class from the center, this saves both transportation and meal costs since the students can also return to the center for lunch.</p> <p>Vendor was identified as a provider in MTC's original Clearfield Job Corps Center operations proposal, which was reviewed and approved during the proposal process and incorporated into the prime contract.</p> <p>Actual contract costs for audit period were \$348,884. The center received \$19,400 in Pell grants to offset costs during the audit period.</p>			
Davis Applied Technology – Advanced Career Training	188,081	Specialized Training	<ul style="list-style-type: none"> • Inadequate Sole Source Justification • No evidence other vendors not available • Responsibility checks not developed and used • Cost or Price Analysis was not conducted or documented
<p><i>MTC Response:</i> See Davis Applied Technology College – Off Center Training response.</p>			
Diane E.H. Wilson, MD-P	254,150	Physician	<ul style="list-style-type: none"> • Basis for selection was not employed or documented
<p><i>MTC Response:</i> Approved DOL consent form in file; bid abstract in file referencing four competitive bids; awarded to best value based upon center management's interview of potential candidate (documented in file). This vendor is the incumbent and has 17 years of successful past performance history.</p> <p>Vendor was identified as a provider in MTC's original Clearfield Job Corps Center operations proposal, which was reviewed and approved during the proposal process and incorporated into the prime contract.</p> <p>Actual contract costs for audit period were \$130,951.</p>			

Vendor Name	Amount of Contract*	Good or Service Provided	FAR Non-Compliance Issues
Hill AFB Pharmaceuticals	444,000	Pharmaceuticals	<ul style="list-style-type: none"> Inadequate Sole Source Justification
<p><i>MTC Response:</i> Approved DOL consent form in file. Hill Air Force Base is a federal government entity. An agreement with Hill Air Force Base is in the file for government pricing for the pharmaceuticals. Because MTC was purchasing from a government entity and receiving government pricing, MTC is not required to do further procurement procedures. MTC relied on Hill AFB's procurement procedures for acquiring said pharmaceutical supplies. Award amount was based on center's prior usage from this military inventory supplier, with consideration for student population changes.</p> <p>Actual contract costs for audit period were \$195,438.</p>			
Mathew J. Gardiner, MD	68,800	Psychiatric	<ul style="list-style-type: none"> Price competition was not obtained Basis for selection was not employed or documented Cost or Price Analysis was not conducted or documented
<p><i>MTC Response:</i> See Cited Example 1 for Mathew J. Gardiner, MD response on page 6</p>			
Mathew G. Thain, OD	61,250	Optometry	<ul style="list-style-type: none"> Basis for selection was not employed or documented
<p><i>MTC Response:</i> Approved DOL consent form in file; bid abstract in file referencing three competitive bids; awarded to low bid which met selection criteria. This vendor is a small business. The responsibility checks MTC performed included a license, certificate of insurance, DEA License, and résumé showing experience as incumbent with an established successful past performance history of 6 years with the center. MTC also did an EPLS check of this provider to verify that the provider was not on the government's debarred list. These three competitive bids, small business classification, responsibility checks, and EPLS verification were provided to the contracting officer for consideration during the consent evaluation process with this subcontract.</p> <p>Vendor was identified as a provider in MTC's original Clearfield Job Corps Center operations proposal, which was reviewed and approved during the proposal process and incorporated into the prime contract.</p> <p>Actual contract costs for audit period were \$31,169.</p>			
Weber State University	75,750	Specialized Training	<ul style="list-style-type: none"> Inadequate Sole Source Justification No evidence other vendors not available Responsibility checks not developed and used Cost or Price Analysis was not conducted or documented
<p><i>MTC Response:</i> The center has a signed educational MOU agreement. As a public college, the prices are regulated and subsidized by the state of Utah. Weber State University offers advanced academic and vocational opportunities for selection by the students. This is an accredited university, and the students are able to obtain state resident tuition rates. This site provides programs that other local community colleges and universities do not. This vendor has an established successful past performance history with the center.</p> <p>Vendor was identified as a provider in MTC's original Clearfield Job Corps Center operations proposal, which was reviewed and approved during the proposal process and incorporated into the prime contract.</p> <p>Actual contract costs for audit period were \$59,022. The center received \$8,663 in Pell grants to offset costs during the audit period.</p>			

Vendor Name	Amount of Contract*	Good or Service Provided	FAR Non-Compliance Issues
Davis Hospital and Medical Center	367,500	Emergency Medical	<ul style="list-style-type: none"> • Inadequate Sole Source Justification • No evidence other vendors not available • Responsibility checks not developed and used • Cost or Price Analysis was not conducted or documented
<p><i>MTC Response:</i> The center has a signed MOU agreement which provides 75% of billed costs. This hospital is the closest facility for emergency medical services to the center. The file indicates that no other hospital within 25 miles would offer a discount from their billed charges. This vendor has an established successful past performance history with the center.</p> <p>Vendor was identified as a provider in MTC’s original Clearfield Job Corps Center operations proposal, which was reviewed and approved during the proposal process and incorporated into the prime contract.</p> <p>Actual contract costs for audit period were \$97,806.</p>			
Total	\$2,813,773		
* The “Amount of Contract” column reflects base year amounts only and not option-year amounts.			

FAR subpart 44.2 pertains to instances the contractor should obtain consent for certain subcontracts. In Clearfield JCC’s case, the center contract only requires consent by the contracting officer for Professional Health Services. In each circumstance where consent was required, the center did receive such consent. The contracting officer is to *consider* each of the FAR citations listed by the OIG in granting their consent. There is nothing that we are aware of that would indicate that consideration was not utilized in such award.

For the other contracts where consent is not required, we have indicated the support and justification for each award. It does not appear that any of these items were looked at by the OIG at the time of the center visit by the OIG or at the time the center responded to the statement of facts issued by the OIG with supporting backup. In fact, the only thing that changed in any of the reports issued by the OIG was the various FAR clauses they indicated were applicable in the audit. Each time the OIG continued to try to support requirements of the FAR which contractors are not subject to.

MTC strongly disagrees with these OIG findings as evidenced by the information discussed above. Additionally, overall each of the subcontracts above that have been questioned provides the best value for the government.

OIG Finding - Some Invoice Payments Lacked Adequate Supporting Documentation

As required by FAR Subpart 31.201-2, MTC Clearfield did not always obtain required supporting documentation prior to payment for 3 of the 12 sub-contracts we reviewed. For two physician sub-contracts, documentation required by the contract to support billed hours was not obtained and reviewed prior to payment. The two doctors billed hours that were not supported totaled \$140,979 and \$21,318, respectively. For the third sub-contract, a comparison of the receiving reports and related invoices indicated that \$2,844 was paid for pharmaceutical supplies that were not received. In total, \$165,141 in payments lacked adequate supporting documentation. These costs were already included in the \$2.8 million we questioned because the sub-contracts were improperly awarded.

MTC Response:

MTC disagrees with this finding. This finding indicates that three of the subcontracts did not have adequate documentation to support invoice payments. Two of those subcontracts relate to medical services. The SOF stated “timesheets, as required by the contract, were not used to support billed medical hours (Finlinson and Wilson)”. The subcontract paragraph on invoicing is as follows: The contractor shall submit to MTC, on a monthly basis, an invoice for services provided during the covered billing period.

The invoice shall include, at a minimum:

- Breakdown of hours worked
- Date(s) services provided
- Hourly rate for individual services, extended unit price and total
- Invoice number and date

The finding originally stated timesheets are required. We disagreed with this finding as there is no specific requirement for timesheets. After further discussion with the auditor it was indicated that timesheets are implied. This is an interpretation of the auditor and not a requirement of the subcontract. Each invoice includes a breakdown of hours worked; the date or range of dates the services were provided; the hourly rate for the individual services with extended unit price and total; and invoice number and date. The current finding now eliminates the word timesheets and does not indicate what support was missing but just generically refers to “documentation required by the contract”. All documentation required by the subcontract supporting the services was obtained. For internal control purposes the center maintains logs of students who receive medical services. The invoices are approved by the medical support staff that validate the time and services performed. There is definitely adequate documentation to support these payments. We disagree with this finding.

The third subcontract that was questioned was for Hill AFB Pharmaceuticals, in which the SOF stated “documentation did not support payments made”. After further discussion with the Clearfield JCC Accounting Manager, she indicated that there were times that the matching of invoices to receiving documents was not performed until after the payment of the invoice. This was corrected prior to the end of fieldwork of the OIG audit team.

OIG Finding - Expenditures over \$3,000 that Resulted in Questioned Costs

The OIG cites the following as examples of the center’s inadequate sole-source justifications:

Cited Example 1 – Network Consulting Service

OIG Statement – Network Consulting Service

MTC Clearfield sole sourced a purchase of software maintenance from the vendor Network Consulting Service. Justification for the sole-source purchase was documented as the vendor being the only responsible source for the needed supplies. However, the justification did not include sufficient evidence that no other responsible party existed as required by FAR Subpart 44.202-2(a)(5); that the center developed and used responsibility checks to ensure the vendor could satisfactorily deliver the goods or services as required by FAR Subpart 44.202-2(a)(7); or that cost or price analysis was performed to ensure fair pricing as required by FAR Subpart 44.202-2(a)(8). As such, we questioned the \$15,851 paid for the software maintenance.

MTC Response – Network Consulting Service

MTC disagrees with this finding. Again the FAR clauses being cited are requirements of the contracting officer and not the contractor. The contracting officer must review and consider FAR

Subpart 44.202-2(a)(5), (7) and (8) before providing consent to subcontracts. Due to the type of this purchase and the fact that MTC has a Contractor's Purchasing System Review (CPSR) certification, the contracting officer is not required to provide consent. However, during the CPSR process when the contracting officer evaluated MTC's Purchasing Policies and Procedures, the contracting officer considered the FAR Subpart 44.202-2 and deemed MTC's Purchasing Policies and Procedures acceptable and therefore approved them.

This purchase is for an existing software package. This represents an annual license and maintenance fee with the original software supplier. High performance has been maintained throughout the time period.

Cited Example 2 – Jostens, Inc.

OIG Statement – Jostens, Inc.

On two occasions, MTC Clearfield sole sourced purchases of graduation supplies from the vendor Jostens Inc. Justifications for the two sole-source purchases were not documented as required by FAR Subpart 44.202-2(a)(5). As such, we questioned the \$14,183 paid for the two purchases of graduation supplies.

MTC Response – Jostens, Inc.

MTC disagrees with this finding. Again the FAR clause being cited is requirements of the contracting officer and not the contractor. The contracting officer must review and consider FAR Subpart 44.202-2(a)(5) before providing consent to subcontracts. Due to the type of this purchase and the fact that MTC has a Contractor's Purchasing System Review (CPSR) certification, the contracting officer is not required to provide consent. However, during the CPSR process when the contracting officer evaluated MTC's Purchasing Policies and Procedures, the contracting officer considered the FAR Subpart 44.202-2 and deemed MTC's Purchasing Policies and Procedures acceptable and therefore approved them.

The expenses identified by OIG consist of costs for the prior prime Clearfield JCC operations contract and outside (non-contract) funding from Davis County School District. The vendor has been used for graduation supplies due to quality of service and contract. Diplomas and covers have the center logo and custom design which would require extra die and setup fees to purchase elsewhere.

MTC Overall Response to Questioned Costs over \$3,000

The vast majority of the OIG's sample is made of up individualized checks for multiple invoices on each check. Each invoice is then broken down into individual purchases. These invoices, for example, consist of multiple students' college tuition or individual persons to fill temporary staffing positions. Each of these individual purchases is well under the OIG's \$3,000 threshold.

New OIG Finding (not included in the original Statement of Facts)

In addition, during our audit scope period of April 1, 2010, to March 31, 2011, we reviewed 10 expenditures representing payments made to Salt Lake Community College that were not included in our statistical sample. MTC Clearfield paid a total of \$144,428 for those 10 expenditures, but could not justify why the expenditures were paid without a sub-contract or purchase orders. The 10 expenditures represented procurement of educational services and a contracting solicitation involving a sub-contract or purchase order that should have been advertised and awarded before the payments were made. In accordance with FAR Subpart 44.202-2(a)(7) and FAR Subpart 9.104-1, MTC should have conducted fair and open competition and awarded a purchasing instrument appropriate to the circumstances, or properly justified sole-source

procurement. As of April 1, 2011, MTC Clearfield awarded a sub-contract to Salt Lake Community College to provide educational services, which provides validation of what MTC Clearfield should have done to precede the 10 expenditure payments made during our audit scope period.

MTC Response:

This finding was not included in the Statement of Facts or the previous discussion drafts issued by the OIG. Therefore no previous discussion was available until the final draft of this report.

MTC disagrees with this finding. The OIG cited FAR 9.104-1 as applicable to MTC's subcontracting activities. This provision sets forth general standards for determining whether a prospective contractor is responsible. The policy underlying this provision is found in FAR 9.103(b): "No purchase or award shall be made unless the *contracting officer* makes an affirmative determination of responsibility." As is the case with the cited consent provisions, FAR 9.104 applies to the *contracting officer's* selection of prime contractors. It does not suggest, let alone mandate, procedures that a prime contractors must follow in selecting its subcontractors. Nor was this FAR provision contractually flowed-down to MTC in its Clearfield contract.

The contracting officer must review and consider FAR Subpart 44.202-2(a)(7) before providing consent to subcontracts. This contract was approved by MTC's Regional Contracting Officer and consent was obtained per FAR Subpart 44.2, "Consent to Subcontracts." There is nothing to indicate the contracting officer did not perform his or her requirements adequately although the OIG would imply otherwise. Again the items being cited are requirements of the contracting officer and not the contractor.

The center has a signed educational MOU agreement from 2003, which automatically renewed until cancelled, which covered the 10 expenditure payments made during the audit period. As a public college, the prices are regulated by the state. Salt Lake Community College offers advanced academic and vocational training opportunities for selection by the students. This is an accredited community college, and the students are able to obtain state resident tuition rates. This community college provides programs that other local community colleges do not. This vendor has an established successful past performance history with the center.

Vendor was identified as a provider in MTC's original Clearfield Job Corps Center operations proposal, which was reviewed and approved during the proposal process and incorporated into the prime contract.

The center received \$103,934 in Pell grants to offset costs during the audit period.

OIG Statement: FAR Non-Compliance Caused By Weak Control Environment

MTC's Response

MTC takes exception to the assertion that "FAR Non-Compliance Caused by Weak Control Environment." The OIG asserts these conditions occurred because MTC Clearfield had not established a control environment, including procedures and oversight, to ensure compliance with "FAR 52.244-5 for selecting sub-contracts on a competitive basis." According to FAR Subpart 52.244-5, the contractor shall select subcontractors (including suppliers) on a "competitive basis to the maximum practical extent consistent with the objectives and requirements of the contract." A contractor such as MTC is required to select subcontractors on a competitive basis to the maximum *practical extent consistent* with the *objectives and requirements* of its contract. This section does not mandate full and open competition in all or even most instances, nor does it impose all or any of the requirements of Part 6 on contractors in terms of the available bases and/or justification for limited or non-competitive awards. The OIG's assertion infers mandatory compliance instead of to *maximum practical extent*, as provided in the FAR.

The examples cited by the OIG as deficiencies in the 2005 CPSR report were corrected and approval of such CPSR was obtained from the contracting officer. The policies and procedures MTC has put in place do not mandate compliance with the entire FAR, like a government agency. MTC's policies and procedures that were approved through the CPSR process by the contracting office. MTC's approved subcontracting policies and procedures were never intended to meet agency FAR requirements, but were established to comply with contractor requirements and insure a strong control environment.

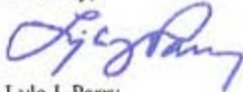
There are controls in place to ensure the government receives best value and procurements are based on the policies and procedures in place. Sole source documentation has been an area where MTC continues to modify and improve its policies and procedures. At the end of 2010, the policy was changed to have all sole source justifications over \$5,000 be reviewed by the Corporate Director of Procurement and approved by the Corporate Senior Vice President. Based on additional procurement desk audit findings, the Director of Corporate Procurement provided sole source training at the August, 2011 Finance Conference for the center Finance and Administration Directors and Buyers. Additionally, MTC is revising current Purchasing Policy 13.10 to state that "Sole source purchases between \$3,000 and \$5,000 must be submitted for corporate review". The center has not always documented this to the standard of the FAR, however, a contractor is not required to adhere to the FAR as a whole. We have generally complied with our policies and procedures. MTC performs reviews of the controls in place, assessments and continually train their staff for improvements and compliance in the procurement area. Having said this, MTC Clearfield does have a very strong control environment.

CONCLUSION

The OIG is strong, albeit misguided, in its belief that DOL Job Corps contractors should be required to award subcontracts in accordance with the same detailed FAR requirements that the Government itself must observe when awarding prime contracts. This may be the OIG's understanding and belief, but it is not the law.

The OIG auditors have been respectful in their discussions with MTC, yet unyielding in their mission to apply certain sections of the FAR to Job Corps contractors as though they were government agencies. It has also been disappointing to see the OIG deny MTC a right to an exit conference and ignore entirely the *extensive* factual input provided by MTC regarding the various items identified in the audit. In the end, MTC is baffled by OIG's insistence on its "findings" regardless of whether such "findings" have any factual or legal support. It is discouraging, at best, to see an important government audit function performed in such a misguided and wasteful manner. The OIG's Report is erroneous and prejudicial. MTC requests that such Report be withdrawn.

Sincerely,



Lyle J. Parry
Sr. Vice President, CFO

cc: Scott Marquardt, MTC
Dean Hoffman, MTC
Jessica Joiner, Clearfield JCC
Alvin Edwards, OIG DOL
Lindsay Simmons, Jackson Kelly PLLC