

**OASAM Response to Draft Report**

U.S. Department of Labor

Office of the Assistant Secretary  
for Administration and Management  
Washington, D.C. 20210



SEP 30 2014

MEMORANDUM FOR ELLIOT P. LEWIS

Assistant Inspector General for Audit

FROM:

  
EDWARD C. HUGLER  
Deputy Assistant Secretary for Operations

SUBJECT:

Management's Response to the Office of Inspector General Draft  
Report: Allegation of Wasteful Spending Related to Contract  
with Concepts, Draft Report No. 17-14-003-01-001

This memorandum responds to the above-referenced undated draft report. The stated primary objective of the audit was to determine if the Department properly awarded and administered task orders to Concepts for work related to the DOL Centennial.

At the outset, management acknowledges that any process can be improved and we will take appropriate corrective action to address the findings and recommendations outlined in the draft report. Management also acknowledges that the draft report incorporates a number of our earlier comments intended to improve accuracy. However, we think it is important to distinguish the audit findings in the report from incidents of procurement abuse, improperly awarded or improperly administered contracts—of which there is no evidence in this report.

As discussed previously, it is reasonable to anticipate that the readers of OIG audit reports often lack subject-matter expertise, including the complexities of government contracting. As such, to present a balanced report and not mislead those readers, all due diligence should be taken to present the information in a way that does not allow the uninitiated reader to get the impression of far greater risks or gravity than the facts actually warrant. Inasmuch as there is always room for improvement, we generally agree with the recommendations. However, there are several conclusions in the draft that we think are misleading and could leave the public with the impression that taxpayer dollars were misspent and/or that the contracting officer did not have the authority or the discretion to award and administer the contract as outlined in the report, when in fact there is no such evidence.

*Limited Competition.* Page 2 of the draft report states, “[a]lthough the use of an existing BPA is not prohibited by the FAR, OASAM’s use of the ODEP BPA to fulfill OPA’s requirements was not appropriate because of the restrictions placed on the experience of vendors who could be selected.” Management disagrees with the report’s conclusion that competition was inadequate.

Section 13.104 of the Federal Acquisition Regulation (FAR, Promoting competition) states that “the contracting officer must promote competition to the maximum extent “practicable” [*emphasis added*] to obtain supplies and services from the source whose offer is the most

advantageous to the Government, considering the administrative cost of the purchase.” The FAR does not require competition to the maximum extent “possible” and without giving any consideration to the administrative cost of the purchase.

In addition, the primary purpose of competition is to ensure price reasonableness for the services being delivered. The fact that the previous ODEP BPA used by OPA had already been subjected to competition three times is sufficient evidence that the contractor’s pricing was reasonable. First, the contractors that competed for the initial requirement were on GSA’s Federal Supply Schedule; therefore, GSA had subjected the contractor’s services to competition and found their pricing to be reasonable. Second, prior to awarding the original BPA for ODEP, the Department competed ODEP’s requirement among the contractors on the GSA schedule and found their pricing to be reasonable. Third, the Department competed the OPA requirement among the two ODEP BPA contractors who had previously been awarded the BPAs and found their pricing to be reasonable. The audit report does not contain a finding that the contractor’s pricing was unreasonable as there was no evidence to do so. Also, OPA confirms that it received the services needed to meet its requirements. Therefore, the statement on page 2 that “the Department was not able to ensure that it received the best value for what it was procuring or that it received what it paid for” is misleading.

*Use of a Previously-Competed BPA Already In Use Reduces Administrative and Duplicative Costs.* Pages 2 and 3 of the draft report focus on the need for greater competition of the OPA requirement. More specifically, on page 2 it states that “use of the ODEP BPA to fulfill OPA’s requirements was not appropriate because of the restrictions placed on the experience of vendors who could be selected.” However, FAR 13.303-1 states that the “blanket purchase agreement (BPA) is a simplified method of filling anticipated repetitive needs for supplies or services by establishing “charge accounts” with qualified sources of supply.” As you know, the Office of Procurement Services contracts for services for all DOL agencies, with the exception of BLS, MSHA, and ETA.<sup>1</sup> The FAR policies encourage federal agencies to buy smarter, decrease duplication, and reduce administrative costs to taxpayers. Satisfying the needs of several agencies through the use of one acquisition instrument that has already been competed promotes those principles, notwithstanding that the ODEP contract included additional requirements unique to ODEP. The BPA that was established earlier for ODEP, and eventually used by OPA for the Centennial project, also supports this policy.

*The Need for an Acquisition Plan.* Page 3 of the draft report states “Federal Acquisition Regulation (FAR) 7.102 requires that agencies perform acquisition planning for all acquisitions in order to promote and provide for full and open competition (or to obtain competition to the maximum extent practicable).” However, the draft report leaves out a key phrase of that FAR provision. FAR 7.102 (a)(1) actually requires acquisition planning and market research but only “to the extent that commercial items suitable to meet the agency’s needs are not available....” In accordance with the FAR 2.101, the services provided by Concepts are considered to be commercial items<sup>2</sup> and were already available on the previously-competed DOL

<sup>1</sup> The Office of Procurement Services only procures information technology goods and services for ETA.

<sup>2</sup> In accordance with Section 2.101 of the FAR, “commercial items” are any item or service, other than real property, that is of a type customarily used by the general public or by non-governmental entities for purposes other than governmental purposes, and

contract for ODEP, notwithstanding that the ODEP contract included additional requirements unique to ODEP. Because the services were already available, further acquisition planning to acquire them was not required or necessary.

*Use of the Performance-Based Acquisition Techniques.* Page 5 of the draft report states that the FAR requires performance-based acquisitions to describe the required results expected and enable assessment of work performed against measurable performance standards to the maximum extent practicable.” In addition, it states “that the Department’s performance standards included in the statement of work used general terms such as “accuracy in draft content for documents” and “successful event coordination with other parties” but did not indicate more specific information such as the number of events to coordinate.”

Management agrees that the OPA contract was not a performance-based acquisition. Notwithstanding the performance-related wording in the performance work statement, this requirement was never meant to be a performance-based acquisition for the following reasons—

- First, the purpose of a performance-based contract is to obtain better performance or lower costs or both. In other words, things should work better and cost less. If it will not achieve these results, the administrative cost of doing so is considered prohibitive. Moreover, the pricing for the services being received had already been reduced from the GSA schedule pricing at the time of award. Therefore, a further reduction in cost was not a reasonable expectation.
- Second, basic to the concept of performance-based contracting is to adopt contracting specifications and procedures permitting the contractor to devise the most efficient and effective way to perform the work. Inasmuch as the services were commercial<sup>3</sup> in nature and the process for delivering them were not susceptible to being made significantly more efficient, performance-based contracting was inappropriate. The Department knew what it wanted, when and how it wanted the services to be provided and the contractor complied.
- Federal guidance dictates that care should be taken not to overly complicate service contracting by requiring the measurement of subsidiary aspects of performance unless the measurement is essential to the agency mission. More requirements mean more measurement which, in turn, means more costs. The potential savings of performance-based contracting should not be consumed by increased contracting and administrative costs.

For these reasons, it would have been inappropriate to make this less than \$120,000 (initially)<sup>4</sup> requirement a performance-based instrument. Performance-based contracting is useful under

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has been sold, leased, or licensed to the general public; or has been offered for sale, lease, or license to the general public. These are items or services that are readily available in the marketplace.

<sup>3</sup> See footnote 1.

<sup>4</sup> Although the initial contract award was made for less than \$120,000, the program office contends that it was satisfied with the services received and that its need for the contractor’s services increased above those initially anticipated. The draft audit report contains no evidence that the contractor’s pricing was unreasonable or that the Department was overcharged.

certain conditions, especially where the requirements are complex and the potential for cost overruns is significant. That was not the case in this instance.

*Responsibilities of the Contracting Officer and Contracting Officer's Representative are Separate and Distinct.* Page 6 of the draft report states that the contractor's performance was not properly monitored and that it "occurred because the Contracting Officer did not ensure that OPA sufficiently monitored the contractor's work to determine if the work met the performance standards identified in the task orders." The FAR requires that the contracting officer delegate a contracting officer's representative (COR) from the program office (i.e., OPA) to monitor the contractor's performance once a contract is awarded. The COR is responsible for inspecting the goods and services delivered to ensure that they comply with the terms and conditions of the contract, and if so, approve invoices received from the contractor for payment. Once the contracting officer has delegated these responsibilities to the COR, the COR informs the contracting officer if there are any issues with the contractor's services regarding timeliness of delivery, quantity, quality, improper invoicing, etc. OPA's COR, who regularly consulted with the OPA agency head, was satisfied with the services delivered by the contractor and certified as such by the approval and payment of all invoices received from the contractor. Therefore, there was no need for the COR to notify the contracting officer of any performance issues and no need for the contracting officer to intervene or take corrective action regarding oversight. The Department received the required services in accordance with the contract's terms and conditions. Therefore, the allegation that the contracting officer did not ensure that OPA sufficiently monitored the contractor's work to determine if the work met the performance standards identified in the task orders is misleading.

*Recommendations.* Notwithstanding the above clarifications, management accepts the proposed recommendations.

As always, we appreciate the opportunity to provide input and look forward to the continued collaboration with your office. If you have any questions or comments please contact me at (202) 693-4040 or have your staff contact Al Stewart, Procurement Executive, at Stewart.Milton@dol.gov or (202) 693-4028.

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